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The Universal Protection of Human Rights

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Introductory Thoughts About the Universal Protection of Human Rights

Péter Kovács

ABSTRACT

The introductory article gives a short overview of the historical evolution of the international acceptance of human rights. Signing first treaties about freedom of religion, states progressively made commitments on minority protection, citizenship issues, humanitarian law, labour law and following the trauma of World War Two, they also accepted that each human possesses inalienable rights. From this perspective, one of the greatest achievements of the 20th century international law-making is the recognition of human rights as well as ensuring their appropriate procedural guarantees. The article highlights the main fruits of the universal standard setting, the different treaty based and charter-based monitoring bodies and their activities.

KEY WORDS

Human rights, United Nations, conventions, monitoring, national implementation

One of the greatest achievements of the 20th century international law-making is the recognition of human rights, i.e. the legal guarantees enjoyed by human beings, who are their titular possessors and not only their indirect beneficiaries through the implementation of rules obliging states.[1] The success of the notion of human rights – advocated first by philosophers as presented in detail in our book by Aleksander Stępkowski[2] – goes hand in hand with the development of international humanitarian law and the criminalisation of different methods and means of warfare. (See e.g. the ban of the 2nd Lateran Council on the use of crossbows between Christian armies (1139) and the *habeas corpus* in the Magna Charta (1215) or the similar rule of '*no arrest without judicial decision*' (concerning the nobles whether powerful or simple) in the Hungarian Golden Bull (1222).

Although historical international law embraced conventions and treaties offering a certain limited freedom of religion (like the '*Cujus regio, eius religio!*' principle in the Holy Roman Empire, Augsburg, 1555) or the capitulation treaties between the Ottoman Empire and some European powers about free Christian worship in Constantinople and in some merchant cities around, these engagements were imposed

1 For a detailed overview of the history and the present of international human rights see e.g.: Shelton, 2013; Sicilianos, 2024.

2 See in particular: Stępkowski, 2026, pp. 63–102.

Péter Kovács (2026) 'Introductory Thoughts About the Universal Protection of Human Rights' in Kovács, P., Béres, N. (eds.) *The Universal Protection Of Human Rights*. Miskolc–Budapest: Central European Academic Publishing, pp. 15–29. https://doi.org/10.71009/2026.pknb.uphr_0

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on states and could not be invoked by individuals before the local judiciary or public administration. The non-observation of these commitments was eventually sanctioned by war if the protecting state wanted to fight; however, the alleged violation was often used as a pretext for a planned and prepared armed intervention serving territorial ambitions.

On the other hand, the religious tolerance dispositions of some treaties could also serve the aim of what we nowadays call "minority protection", especially when a certain religion was attached predominantly to a certain ethnicity.[3] Peace treaties recognising a kind of self-government to such communities can be considered as an example of such an endeavour.

The prohibition of slavery and slave trade, which appeared first in bilateral (1817, 1818, 1827 etc.), then also in multilateral treaties (1841, 1885, 1890), where Great Britain was a contracting party, contributed to the recognition of the equal dignity of human beings. Although the peace treaties of the former central powers, as well as some treaties contracted with the League of Nations contained detailed material and procedural rules for the protection of religious, ethnic or linguistic minorities on international level, the emergence of the Nazi ideology in Germany shortly after World War I and the Stalinist policy in the Soviet-Union were manifestly running against the extension of the protecting function of international law and the appeasement policy as well as the non-intervention doctrine definitely contributed to the progressive buildup of the Hitlerian machinery of genocide.

On the other hand, as a kind of reaction to the success of the Bolshevik revolution and some similar but failed attempts in other countries, a rather comprehensive network of international conventions was elaborated during the "*interbellum*" within the International Labour Organization. These conventions protected people against forced labour, and they tried to save children, women from dangerous working conditions threatening their health and fertility. Under the auspices of the League of Nations, a certain sectorial type of treaty-making activity was launched e.g. for asylum seekers (1922, 1924, 1926, 1928, 1933) or in favour of the nationality of the married woman (1930), i.e. her consent was required in contrast with the former automatism to follow the husband's status.

It was after the victory of the Allies over the Axis and as a reaction to the shock caused by the tragedy of the Holocaust that governments expressed their readiness to pay enhanced attention to the recognition of human rights., as inherent rights of individuals and not only as a simple obligation imposed on states. Beside the material aspects (i.e. on the formulation of the content of these rights), this metamorphosis had an effect on the procedural aspects (i.e. the legal guarantees of their implementation) as well.

The importance of the respect of human rights is emphasised in the Charter of the United Nations at several points, mostly in connection with the functions of the

3 See in particular: Šmigová, 2026, pp. 31–62.

main organs, without, however, detailing their content, except for the principle of non-discrimination.

> '(....) to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women (...)'[4] '(...) to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; (...)'[5],'promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. (...)'[6], '(...) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. (....)'[7], '(...) promoting respect for, and observance of, human rights and fundamental freedoms for all (...)'[8], '(...) the promotion of human rights, (...)'[9], '(...) to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, (...)'.[10]

The catalogue of human rights was adopted in 1948 by the General Assembly under the title the *Universal Declaration of Human Rights.* The preparatory and drafting work[11] under the leadership of Eleanore Roosevelt and René Cassin (presented in our book in depth by Irine Kurdadze and Eka Siradze[12] and also covered *per tangentem* by Tanja Karakamisheva-Jovanovska,[13] Grega Strban and Katarina Kogej[14] is of enormous importance not only because of the rather precise formulation of the rights but also because of the considerable delay with which the promised international treaty was finally elaborated. This had the unexpected but truly positive consequence that despite the *prima facie* non-binding character of the Declaration adopted originally as a resolution of the General Assembly, this instrument was progressively recognised not only by academics but also by several governments, the International Court of

4 UN Charter, Preamble.
5 Ibid., Art. 1 (3).
6 Ibid., Art. 13 (1)(b).
7 Ibid., Art. 55 (c).
8 Ibid., Art. 62 (2).
9 Ibid., Art. 68.
10 Ibid., Art. 76 (c).
11 For a short recapitulation of the main positions, see e.g.: Charlesworth, 1948, paras. 4–12.
12 See in particular: Kurdadze and Siradze, 2026, pp. 149–192.
13 See in particular: Karakamisheva-Jovanovska, 2026, pp. 221–260.
14 See in particular: Strban and Kogej, 2026, pp. 261–300.

Justice[15] and the International Criminal Court[16] as the *quasi* authentic interpretation of the Charter or as a norm already enjoying a customary law character.[17]

Adopted only in 1966, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights reflect on the one hand, the almost universal consent about the materialisation of the detailed content of the rights in the Universal Declaration of Human Rights. On the other hand, it also shows the division of the states concerning their national implementation and the monitoring on an international level. The confrontation between the liberal perception of state sovereignty and its perception by the Soviet bloc (analysed by Irine Kurdadze and Eka Siradze[18]), which overemphasised its "eternity" and untouchability, resulted in the setting up of a monitoring system where the basic commitment is reduced to the regular submission of national reports, while tougher commitments (interstate claims or individual claims) are optional. (See the reasons in the book in the contributions by Tanja Karakamisheva-Jovanovska,[19] Grega Strban, Katarina Kogej,[20] Bartlomej Oreziak[21] and Katarína Šmigová[22]). It has to be emphasised, however, that their national constitutional background also prevented several western or liberal states from accepting the optional (or facultative) dispositions.

Many countries formerly belonging to the Soviet bloc were ready to accept the optional forms of monitoring when they succeeded to change their political regime in 1989/1990.[23]

15 'Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights. (...)'. United States Diplomatic and Consular Staff in Tehran (*United States of America v. Iran*), Judgment of 24 May 1980, ICJ Reports1980, para. 91, p. 42.

16 '185. The Chamber accepts that the right to reparations is a well-established and basic human right that is enshrined in universal and regional human rights treaties, 372 and in other international instruments (...) These international instruments, as well as certain significant human rights reports, have provided guidance to the Chamber in establishing the present principles.' (The footnote 372 above begins as follows: '372 See Article 8 of the Universal Declaration of Human Rights which contains provisions relating to the right of every individual to an "effective remedy" for acts violating fundamental rights; (...)'). *The Prosecutor v. Thomas Lubanga Dyilo*, Decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06-2904 07-08-2012, para. 185, pp. 66.

17 Kurdadze and Siradze, 2026, op. cit.

18 Ibid., op. cit.

19 Karakamisheva-Jovanovska, 2026, op. cit.

20 Strban and Kogej, 2026, op. cit.

21 See in particular: Oreziak, 2026, pp. 499–552.

22 Šmigová, 2026, op. cit.

23 As of 2025, the individual complaints within the ICCPR accepted from the region by Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Czechia, Estonia, Georgia, Hungary, Kazakhstan, Latvia, Lithuania, Montenegro, North Macedonia, Poland, Moldova, Romania, Russia, Serbia, Slovakia, Slovenia, Tajikistan, Turkmenistan and Ukraine.
The individual complaints within the CERD are accepted by Azerbaijan, Bulgaria, Czechia, Estonia, Georgia, Hungary, Kazakhstan, Montenegro, North Macedonia, Poland, Moldova, Romania, Russia, Serbia, Slovakia, Slovenia and Ukraine.

Although the separation of the civil and political rights from the economic, social and cultural rights can be well defended from the point of view of the corresponding obligations of states (i.e. a costless abstention from violation *versus* a budgetary and institutional intervention in favour of the realisation), this dichotomy is not an absolute truth. Free elections belong to the group of political rights but in a good number of cases, the national budget should cover at least a certain part of the costs in order to diminish the inherent disadvantage of smaller political parties. The realisation of a fair trial cannot go without legal education, new technics and smart devices or translation costs, assistance by a legal counsel, eventually to be granted in case of insolvency by the state. On the other hand, some aspects of the economic, social and cultural rights can be secured without budgetary implications. (e.g. non-discrimination in access to studies, equal pay for equal work, etc.)

Following the qualification of the two above types of rules as belonging to the first and to the second generation of human rights (see on this Tanja Karakamisheva-Jovanovska[24], Grega Strban and Katarina Kogej[25]), the dismantling of the colonial system and the birth of sovereign countries in the so called third world led to the introduction of the notion of the third generation of human rights, partly emphasising the right to peace, the right to development and the right to healthy environment, partly pointing out to the need of a certain intercommunity, interregional and global solidarity when achieving these rights, conceived as the precondition of the genuine promotion of human rights.[26]

Inspired by the Soviet approach advocating that the realisation of the economic, social and cultural rights is the precondition of the realisation of the civil and political rights, adepts of a branch of the academia in certain Muslim countries put that the realisation of both groups of rights should be granted within the limits that are still compatible with the Islamic religion. This approach is often in collision with the principle of securing equal rights without gender-based discrimination or with the right of privacy and freedom of belief and religion. The arguments developed therefore are generally similar to those of the late "*cultural relativism*" (see Aleksander Stępkowski's article)[27] and the question often emerges whether this is not only a fundamentalist minority of the given religion who would like to impose their own interpretation of religion-conform behaviour to the majority of believers.

It should be emphasised that while *restrictive* human rights protection proclaimed on a regional or on religious basis is hardly compatible with the universality of human rights, there is no legal, ethical or moral problem when a regional institutional approach gives more protection and is more efficacious than the universal one. Neither is it a problem, of course, when the regional approach only repeats the same commitments that have already been adopted on a universal level.

24 Karakamisheva-Jovanovska, 2026, op. cit.
25 Strban and Kogej, 2026, op. cit.
26 Šmigová, 2026, op. cit.
27 Stępkowski, 2026, op. cit.

In addition to the Universal Declaration and the Covenants, a wide network of sectoral human rights conventions were adopted under the auspices of the United Nations Organization. The main part of these sectoral conventions is linked to different aspects of the prohibition of discrimination[28] (see the chapter written by András Bethlendi,[29] Mario Vinković[30]) and torture[31] (analysed by Martin Faix and Petr Stejskal[32]) or the special protection of vulnerable people such as children[33] (covered by Márta Benyusz[34]), people with disabilities[35] (treated by Igor Milinković[36]), refugees and asylum seekers[37] (see Nóra Béres's contribution[38]), or migrant workers[39] (presented by Filip Bojić[40]).

Among the specialised agencies of the United Nations, the human rights protecting standard setting of the UNESCO and of the ILO is worth mentioning.

Under the auspices of the United Nations Educational, Scientific and Cultural Organization, governments adopted a convention against discrimination in education[41]. The International Labour Organization also continued its law-making to protect workers by preparing conventions and monitoring their implementation e.g. in the field of health,[42] age,[43] equality as well as non-discrimination[44] and trade unions.[45]

Acquisition and loss of citizenship are closely related to human rights especially when intertwined with racial or sexual discriminatory aspects. The United Nations[46]

28 International Convention on the Elimination of All Forms of Racial Discrimination (1965), Convention on the Elimination of All Forms of Discrimination against Women (1979).
29 See in particular: Bethlendi, 2026, pp. 301–336.
30 See in particular: Vinković, 2026, pp. 337–366.
31 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1984).
32 See in particular: Faix and Stejskal, 2026, pp. 367–400.
33 Convention on the Rights of the Child (1989).
34 See in particular: Benyusz, 2026, pp. 401–430.
35 International Convention on the Rights of Persons with Disabilities (2006).
36 See in particular: Milinković, 2026, pp. 465–498.
37 Convention Relating to the Status of Refugees (1951).
38 See in particular: Béres, 2026, pp. 193–220.
39 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990).
40 See in particular: Bojić, 2026, pp. 431–464.
41 Convention against Discrimination in Education (1960).
42 Occupational Safety and Health Convention, 1981 (No. 155), Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187).
43 Minimum Age Convention, 1973 (No. 138), Worst Forms of Child Labour Convention, 1999 (No. 182).
44 Equal Remuneration Convention, 1951 (No. 100), Discrimination (Employment and Occupation) Convention, 1958 (No. 111).
45 Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Right to Organise and Collective Bargaining Convention, 1949 (No. 98).
46 Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality (1963), Convention on the Nationality of Married Women (1957), Convention relating to the Status of Stateless Persons (1954), Convention on the Reduction of Statelessness (1961).

followed the direction shown by the League of Nations[47] and although the acquisition is facilitated, the LoN and UN conventions still see dual nationality as an institution that is to be avoided in contrast with the current permissive European and South-American approaches,[48] which consider it as a phenomenon interlinked with migration, immigration and regard it as something that can be adequately regulated with due respect to the states' sovereignty.

The extension of the universal protection of human rights is going ahead with the penalisation of the most serious crimes committed against individuals, ethnics or communities[49] and with the limitation of means and methods of warfare and the extension of the protection of the victims of armed conflicts in international humanitarian law.

The monitoring of the commitments of the sectoral human rights conventions was drafted in an optional (or facultative) style; contracting parties, who should submit periodical reports about the implementation of the given convention, can also accept the option of the institution of inter-state complaint and individual complaint. This possibility is generally included either in the main text as a facultative disposition or in an optional protocol. The examination of the reports and complaints is entrusted to monitoring committees whose members should be chosen from among the candidates proposed by the contracting parties respecting professionalism, geographic and gender equilibrium. The committees, whose members should act in their individual capacity, issue analysing reports that do not generally have a legally binding character but contain statements about the compatibility of national rules and practice with the commitments of the given convention. The committees may also issue recommendations concerning the settlement of an interstate dispute or the material content of an individual complaint.

Similarities and differences within the functioning of the complaint system are examined in the articles written by Tanja Karakamisheva-Jovanovska,[50] Grega Strban and Katarina Kogej,[51] András Bethlendi,[52] Márta Benyusz,[53] Filip Bojić,[54] Igor Milinković.[55]

There are two interesting phenomena that should be given thought.

The first is what several monitoring committees ultimately realised, i.e. that several "*general comments*" (*conclusions générales)* can be drawn from the evaluations

47 Convention on Certain Questions Relating to the Conflict of Nationality Laws (1930).
48 European Convention on Nationality (1997) adopted under the auspices of the Council of Europe; Kovács, 2014, pp. 3–14; Kovács, 2018.
49 Convention on the Prevention and Punishment of the Crime of Genocide (1948), International Convention on the Suppression and Punishment of the Crime of Apartheid (1973), Statute of the International Criminal Court (1998).
50 Karakamisheva-Jovanovska, 2026, op. cit.
51 Strban and Kogej, 2026, op. cit.
52 Bethlendi, 2026, op. cit.
53 Benyusz, 2026, op. cit.
54 Bojić, 2026, op. cit.
55 Milinković, 2026, op. cit.

of the many state reports or even concerning the facultative commitments. These guidelines facilitate the coherent international interpretation and bring the genuine content of the convention closer to interested people, government officials, politicians, NGO-s and the academia. These "*general comments*" can be considered as the *quasi* authentic interpretation of the conventional rules – pending their attachment to the conventional text, the general cohesion of governmental opinions in the submitted reports as well as the *de facto* acceptance in the practice – and they may be useful for governmental experts and policy makers in the preparation of their future reports as well as in the harmonisation of the national legislation with the contracted obligations.[56] Although committees have no explicit competence to issue these "*general comments*", governments do not contest them and they are a huge benefit for the academia.

The second phenomenon is the progressive involvement of the International Court of Justice into the monitoring.

While sectoral human rights conventions do not attribute any monitoring role to the International Court of Justice, the recent jurisprudence of the ICJ gives the impression that the World Court does not exclude its own involvement if its jurisdiction can be established on the basis of a bilateral convention on friendship and cooperation containing a clause promising to refer their eventual bilateral dispute to the International Court of Justice (Article 36 (1)[57] of the Statute of the ICJ) or in the hypothesis of corresponding unilateral declarations recognising the jurisdiction of the Court as compulsory (Article 36 (2)[58] of the Statute of the ICJ).

So far, the International Court of Justice has dealt with these possibilities mostly only during the preliminary phases (preliminary objections) (see *Georgia v. Russia*,[59]

56 Alston, 2001, pp. 763–776; Takata and Hamamoto, 2023, paras. 57–66; The Purpose and Use of UN Treaty Body General Comments.

57 ICJ, Statute, Art. 36 (1) The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

58 ICJ, Statute, Art. 36 (2) The states Parties to the present Statute may at any time declare that they recognise as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: the interpretation of a treaty; any question of international law; the existence of any fact which, if established, would constitute a breach of an international obligation; the nature or extent of the reparation to be made for the breach of an international obligation.

59 Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia v. Russian Federation*) Judgement of 1 April 2011, ICJ Reports, 2011, para. 113, p. 120. 'The Court concludes that (...) the day on which Georgia submitted its Application, there was a dispute between Georgia and the Russian Federation about the latter's compliance with its obligations under CERD as invoked by Georgia in this case'.

Azerbaijan v. Armenia[60] *and Armenia v. Azerbaijan*,[61] *Canada and The Netherlands v. Syria*[62]) and it pronounced rarely *in merito* (see *Ukraine v. Russia* (2024)[63] and the advisory opinion about *Israel and the Palestinian Territory* (2024)[64]). It seems – and the academia largely attribute this tendency to the legacy of judge Augusto Cançado Trindade (recently passed away) – that the International Court of Justice should be taken into account when examining the status of the monitoring of the human rights conventions of the United Nations.

The different forms of the *charter based human rights* protection activity must also be taken into consideration beside the *treaty based human rights protection* of the United Nations as it is pointed out by István Lakatos.[65]

This roots back to the length of the preparation and ratification procedure of the two Covenants that finally entered into force only in 1976. In 1970, when seeing the growing number of communications about alarming human rights violations in a number of countries, it was decided to mandate the Sub-Commission on the Promotion and Protection of Human Rights – belonging to the Commission on Human Rights – to review 'situations which reveal a consistent pattern of violations of human

60 Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Azerbaijan v. Armenia*), Order of 7 December 2021 and Judgement of 21 November 2024, ICJ Reports 2021, paras. 51–52, pp. 424–425 and ICJ Reports 2024, paras. 90–91.

61 Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Armenia v. Azerbaijan*), order of 7 December 2021 and Judgement of 21 November 2024, ICJ Reports 2021, paras. 58–59, p. 382 and ICJ Reports 2024. paras. 70, 72, 74.

62 'In light of the foregoing, the Court concludes that, *prima facie*, it has jurisdiction pursuant to art. 30, para. 1 of the Convention against Torture to entertain the case to the extent that the dispute between the Parties relates to the interpretation or application of the Convention.' Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (*Canada and the Netherlands v. Syrian Arab Republic*), Order of 16 November 2023, para. 47, p. 602.

63 Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (*Ukraine v. Russian Federation*), Judgement of 31 January 2024, ICJ Reports, 2024, paras. 217, 221, 242, 391, 392, pp. 165–167, 173, 209. See in the operative part of the judgement: 'The Court (...) Finds that the Russian Federation, by the way in which it has implemented its educational system in Crimea after 2014 with regard to school education in the Ukrainian language, has violated its obligations under art. 2, para. 1 (a), and 5 (e) (v) of the International Convention on the Elimination of Racial Discrimination; (...)' para. 404, p. 212.

64 '220. On the basis of the evidence before it, the Court considers that Israel's planning policy in relation to the issuance of building permits, and its practice of property demolition for lack of a building permit, constitutes differential treatment of Palestinians in the enjoyment of their right to be protected from arbitrary or unlawful interference with privacy, family and home, as guaranteed under art. 17, para. 1, of the ICCPR.' '229. The Court observes that Israel's legislation and measures impose and serve to maintain a near-complete separation in the West Bank and East Jerusalem between the settler and Palestinian communities. For this reason, the Court considers that Israel's legislation and measures constitute a breach of art. 3 of CERD.' Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, ICJ Reports 2024, paras. 220, 229.

65 See in particular: Lakatos, 2026, pp. 103–148; see also: Kurdadze and Siradze, 2026, pp. 149–192.

rights' and to prepare recommendations to the Economic and Social Council. Based on the experiences acquired through these reports, the next step forward was made by the successive Secretary Generals when they appointed special rapporteurs on certain "situations" or certain countries where massive human rights violations were revealed in numerous verified and truthful communications.

In 2006, the system underwent reforms partly in response to the criticism regarding the composition of the Commission on Human Rights. Critics argued that the principle of the equitable geographic representation in an intergovernmental led to the inclusion of several governments with poor records on human rights. Another permanent criticism concerned the choice of the situations and the targeted countries. The reform abolished the Commission on Human Rights and its competences were transferred to the newly established Human Rights Council, where, in spite of the fact that it is an intergovernmental body, the 47 members should be individually devoted to the protection of human rights and during the election, the candidate's government's attachment to human rights should also be taken into consideration together with the equitable geographical representation.

In order to calm down critics pointing at a kind of political selectivity in the choice of situations, the reform introduced the Universal Periodic Review,[66] which relates to all UN Member States who should submit in every 4,5 years a general report about the status and the challenges of human rights in their respective countries to the Human Rights Council. The Human Rights Council is entitled to have hearings and to issue recommendations, which are rather well followed, i.e. in 76%.[67]

Despite the aims of the reform, powerful states still criticise the composition and the selection of "situations" when they feel bias and the never-ending character of ongoing procedures is also under fire. Currently, the United States of America does not participate in the Human Rights Council and its participation in the UNESCO is also under review.[68]

Last but not least, the importance of the activity of some other specialised institutions should be emphasised. Beside the already mentioned UNESCO and ILO, the International Bank for Reconstruction and Development (IBRD) should be paid tribute for organising and financing human rights outreach and capacity-building programs in developing or civil war torn countries and for playing an essential role in setting up and financing disarmament, demobilisation and reintegration programmes (DDR) for child soldiers. In the latter one, the United Nations Children's Fund (UNICEF) also plays an important role, i.e. in the planning and the supervision of the local partners.

The articles of the book contain manifold interesting analyses written by Central European academics with a special regard to Central and Eastern European cases

66 Office of the United Nations High Commissioner for Human Rights, 2024.
67 Ibid., p. 5.
68 White House, 2025.

brought before UN authorities.[69] They not only provide the opportunity of getting access to up to date information about the current tendencies and functioning of the human rights protection activity of the United Nations but they also bring the results of scholarly research in our region into limelight.

69 See in particular: Oreziak, 2026, pp. 499–552; Vinković, 2026, pp. 337–366; Karakamisheva-Jovanovska, 2026, pp. 221–260; Bethlendi, 2026, pp. 301–336; Faix and Stejskal, 2026, pp. 367–400; Kurdadze and Siradze, 2026, pp. 149–192; Milinković, 2026, pp. 465–498.

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| Chapter 1 |

The History of Human Rights Law: Generations of Human Rights

Katarína Šmigová

ABSTRACT

This chapter provides a study of the historical evolution and conceptual framework of international human rights law. It begins by defining human rights as universal and inalienable entitlements rooted in human dignity, before tracing their philosophical and legal development from ancient times through national milestones like the Cyrus Cylinder, the Magna Carta, the English Bill of Rights, and revolutionary documents from France and the United States. The chapter then explores the transformation of national-level protections into a structured international system following World War II, primarily under the umbrella of the United Nations. The second part of the study aims to classify human rights into four generations: first-generation civil and political rights; second-generation economic, social, and cultural rights; third-generation collective or solidarity rights; and the emerging fourth-generation addressing the challenges of digital technology, artificial intelligence, and biotechnology. Throughout, this chapter emphasises the indivisibility, interdependence, and universality of all human rights. It concludes by underlining the ongoing necessity to adapt human rights law to contemporary technological and societal developments while maintaining its foundational principles of liberty, equality, and human dignity.

KEYWORDS

history of human rights law, generations of human rights

1. Introduction

For the purposes of this chapter, human rights refer to the fundamental rights and freedoms inherent to all individuals, recognised as such within the framework of international treaties, declarations, and customary international law. Human rights, as a socio-legal concept, form the foundation upon which modern international law is built,[1] with the purpose of protecting the dignity and well-being of all individuals, regardless of their nationality, race, religion, or other distinguishing factors. This concept, which draws upon various philosophical, political, and legal theories, plays

1 Forsythe, 2006, pp. 29 et seq.

Katarína Šmigová (2026) 'The History of Human Rights Law: Generations of Human Rights' in Kovács, P., Béres, N. (eds.) *The Universal Protection Of Human Rights*. Miskolc–Budapest: Central European Academic Publishing, pp. 31–62. https://doi.org/10.71009/2026.pknb.uphr_1

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a pivotal role in the implementation and development of international relations, often shaping policies, laws, and interactions between states.

Human rights are typically divided into three main generations, each corresponding to different historical contexts and values. The first generation of human rights, primarily advocated by developed nations, consists of civil and political rights, which include freedoms such as the right to life, liberty, freedom of speech, and the right to vote. These rights have been markedly influenced by the values of individualism, democracy, and personal autonomy. The evolution of these rights has focussed on limiting government intervention in individual freedoms and safeguarding citizens from state overreach.

The second generation of human rights, favoured by many developing countries, is composed of economic, social, and cultural rights, which include, for example, the right to work, the right to education, and the right to an adequate standard of living. These rights require a more proactive state role, obligating governments to ensure that their citizens have access to basic social services and equal opportunities to participate in society.

The third generation of human rights, often championed by countries in the Third World[2] includes solidarity rights such as the right to self-determination, the right to development, and the right to a healthy environment. These rights are collective in nature, reflecting the interconnectedness of individuals within societies and the global community. Solidarity rights emphasise the idea that individual rights cannot be fully realised without addressing broader social, economic, and environmental concerns that affect the entire international community.

In addition to these three generations, discussions have emerged around the fourth generation of human rights, which concerns issues arising from technological revolution and globalisation. This generation may include rights related to the human genome, biotechnology, ethical implications of artificial intelligence, and other emerging technologies. The rise of digital platforms, and global communication has introduced new challenges and opportunities for human rights, necessitating the expansion of legal frameworks to address these issues.

Despite the distinctions among these generations of human rights, it is essential to recognise that all human rights are inherently indivisible, interdependent, and interrelated.[3] This interdependency reflects the complexity of human rights as a comprehensive system aimed at ensuring the dignity and well-being of all individuals. Attempts to prioritise one generation of rights over another undermines the holistic nature of human rights and risks creating inequalities in their protection and enforcement.

Moreover, although it might be argued that the human rights framework reflects an "imperialist" agenda, where so-called Western states exert their influence over

2 David, Sladký and Zbořil, 2008, p. 246.

3 Preamble to the Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights on 25 June 1993, para. 8.

the global community, or that the universality of human rights undermines local customs or traditions, this universality of human rights remains a core principle, as it transcends cultural, political, and historical differences.[4] If human rights were solely based on the politics or culture of individual states, they would lose their universal character and would be reduced to a set of regionally contingent privileges rather than fundamental rights guaranteed to all individuals.[5] In this regard, the UN Human Rights Committee has affirmed that the rights enshrined in the International Covenant on Civil and Political Rights (ICCPR), are inherent to individuals living within the territory of state parties. This implies that human rights protection is comprehensively applicable regardless of changes in government or the potential dissolution of a state.[6]

The area of international law specifically focusing on the protection of human rights is known as international human rights law.[7] This field of law differs from the natural law area, despite sharing its foundation in the recognition of inherent human dignity.[8] Whereas natural law points out that human rights exist independently of government recognition, positive law, which is the basis of international human rights law, requires the consent and recognition of states to enforce human rights protection. This consent is typically formalised through the ratification of treaties and the acceptance of international legal norms that establish obligations for states toward individuals within their jurisdiction.

It is important to distinguish between the philosophical concept of human rights and the legal framework of human rights law. The natural and philosophical understanding of human rights asserts that all humans possess these rights by virtue of their humanity and intrinsic dignity. In addition, human rights law is a set of legal obligations that states must adhere to in both domestic and international contexts. As has already been pointed out, these obligations are defined through treaties which provide the mechanisms for individuals to seek protection and redress for claimed violations of their rights. To be understood properly, these obligations do not constitute the rights of an individual as such, rather they constitute the positive legal obligations of a state concerning protection of these rights.

A useful illustration of this distinction can be found in the right to life. While the right to life is inherent in every individual by virtue of their existence and human dignity, the legal entitlement to protection of this right depends on the state's recognition of relevant international agreements and their implementation within national legal systems.[9] For example, a state may be obligated to protect the right to life under the ICCPR, provided it has ratified the treaty and enshrined its principles within

4 Freeman, 2002, p. 172.
5 Higgins, 1994, p. 96.
6 See: General comment of the UN Human Rights Committee No. 26 on Continuity of Obligations of State Parties to the Covenant on Civil and Political Rights, para. 4.
7 Brownlie, 2008, p. 554.
8 Douzinas, 2000, pp. 23 et seq.
9 See e.g.: Donnelly, 2003, pp. 7 et seq.

domestic law. International treaties, therefore, serve as a bridge between the philosophical concept of human rights and the legal mechanisms that ensure their protection. This approach is specific in its acknowledgement that all human beings are born free and equal in dignity and rights, and therefore a state is called upon to protect them.[10] This liberty and equality is also a red line throughout the whole chapter: how has been the concept of liberty and equality developed throughout the human history and how has it been specified during specific phases of this development?

The aim of this chapter is not to analyse different human rights international treaties[11] but to explore in context key historical milestones in the development of human rights law and to provide an overview of the different generations of human rights. By examining the evolution of human rights, this chapter will look at the challenges and opportunities for their protection in a rapidly changing global context. The chapter will also emphasise the importance of maintaining the universal, indivisible, and interdependent nature of human rights as we face the complexities of the 21st century.

1.1. Predecessors of International Human Rights Protection System

The establishment of the United Nations is a milestone for the international protection of human rights, but it does not mark the first steps in the protection of the rights of an individual. Before the Second World War, international law was already familiar with the concept of diplomatic protection, the protection of minorities, the protection of aliens or the protection of victims of armed conflicts. However, the status of nationals was understood as a domestic matter, i.e. a matter of national jurisdiction of sovereign States.[12] The importance of the determination and development of international human rights protection after the establishment of the United Nations integrated the previous ad-hoc response of the international community to the status of aliens, the slave trade, the status of workers and other groups or individuals into a coherent system at a universal level that could affect every individual. Nevertheless, the internationalisation of the protection system does not change the fact that the essential actor in the protection of human rights – whether at international, regional or national level – remains the state. National authorities have the primary responsibility for the protection of human rights; the role of the UN and other organisations is secondary and subsidiary. It was also at a national level where the predecessors of the current system of the protection of international human rights might be found and looked into in more details to understand the positive law importance and influence within the current international legal framework.

Before the creation of an international framework, the protection of human rights was predominantly seen as a national matter. Many of the principles that guide today's human rights laws evolved through legal and political struggles within states,

10 Cf. Art. 1 of the Universal Declaration of Human Rights, UN GA res. 217 A, 10 December 1948.
11 Azud, 2003, p. 222.
12 Harris, 2004, p. 654.

where human rights protection systems were developed in response to oppression, injustice, and demand for basic freedoms. These predecessors set the foundation for the broader, universal human rights framework that exists today.

It is usually Magna Carta that is presented as the first predecessor among all predecessors of the international human rights protection system. However, it was in 539 B. C. when the first document was adopted that declared that all people had the right to choose their own religion and established racial equality.[13] Moreover, it also involved the protection of such rights as liberty and security and freedom of movement.[14] Since it was recorded on a baked-clay cylinder and announced by Cyrus the Great, the first king of ancient Persia, it is known as Cyrus Cylinder.[15] Cyrus the Great was a conqueror of the city of Babylon after which he freed the slaves, i.e. he made them free according to the law, and he allowed them to then choose their own religion. This declaration of slaves being free from their sovereign as the basis of a human rights concept travelled from here to India, Greece and Rome, where the natural law concept arose.[16] However, it took several years for the rights of individuals to be accepted as rights standing on their own, and not only derived from the will of a sovereign. This is why the concept is perceived as a predecessor of today's human rights concept.

A very influential predecessor to modern human rights protection is the Magna Carta, a charter of liberties that was prepared by the subjects of an English king. During his rule, King John of England had violated several traditions and rules, and the Magna Carta was a political and legal settlement granting liberties by the Crown to the Church, freemen and cities of the kingdom.[17] This settlement was achieved in 1215 and confirmed later several times. The Magna Carta was not a human rights document in the modern sense, but it marked a significant shift in the concept of individual rights *vis-à-vis* the authority of the state, represented by the King as the Sovereign. The Magna Carta placed limits on the powers of the monarchy and established the principle that no one, not even the king, was above the law. Within its 63 clauses it introduced important rights such as the right to a fair trial, protection from arbitrary imprisonment, and protection from excessive taxes without representation.[18] These rights were not awarded to all individuals however, the concept of free and equal at least among the nobility was introduced.[19] It was the momentum that marked the late medieval Magna Carta as one of the most important documents in the history of human rights law. Although the Magna Carta applied initially only to a limited group of barons and their heirs, its principles became fundamental to the development of constitutional law and justice systems in many countries. Moreover, over time, these

13 For more information, see: The Background of Human Rights.
14 Quansah, 2008, p. 488.
15 The Background of Human Rights, op. cit.
16 Ibid.
17 Arlidge and Judge, 2014, p. 21.
18 Ishay, 1997, pp. 57–59.
19 Ibid.

rights were expanded to include the populations of several countries, the document is therefore often regarded as a critical predecessor to the international protection of human rights based on the rule of law.

Since the issue of sovereignty and its limits, based on the contract between a sovereign and individuals was a matter of the philosophical thinking of several English philosophers in the late 17th century, it is not surprising that another significant predecessor to the modern human rights protection system was born also in England. After the Petition of Rights in 1628 that established certain rights for specific subjects, and was based on the work of John Locke,[20] the English Bill of Rights was sent in 1689 to a new monarch, named William of Orange, who was to replace James II of England who had forfeited the throne mainly for religious reasons. The Bill of Rights established the supremacy of Parliament over the monarchy and laid out specific rights for individuals, particularly in limiting the power of the Crown. Among its provisions, there were guarantees for the freedom of speech in Parliament, protection from cruel and unusual punishment, and the right to petition the government. The Bill of Rights established the constitutional monarchy in England and ensured that the government could not operate outside the law. It is therefore considered a milestone when ensuring individuals their rights independently from the sovereigns who were given power by God not by themselves as had been previously understood. Consequently, the English Bill of Rights was fundamental in shaping democratic governance and the protection of individual rights in Britain and its colonies. It directly influenced the framing of similar documents in other countries, particularly the United States of America (USA), where its principles were echoed in the Bill of Rights that is an appendix to the U.S. Constitution.

In the USA, the American Declaration of Independence dated 1776 and the United States Bill of Rights dated 1791 are two crucial documents in the development of human rights at a national, and consequently an international level. The Declaration of Independence, drafted by Thomas Jefferson, was revolutionary in asserting that all men are created equal and endowed with certain unalienable rights, including life, liberty, and the pursuit of happiness.[21] This declaration set a powerful precedent in the articulation of natural rights and the idea that legitimate governments are established to protect these rights.

Following the American Revolution, the United States Constitution was adopted in 1787, and the Bill of Rights was added to it in 1791. The Bill of Rights, consisting of the first ten amendments to the Constitution, enshrined essential civil liberties, including the freedom of speech, religion, and assembly, as well as protection against unreasonable searches, seizures, and self-incrimination. It also established the right to a fair trial, due process, and protection from cruel and unusual punishment. These rights became fundamental to the American legal system and have influenced

20 Schwoerer, 1990, pp. 533 et seq.

21 For more information, see: https://www.archives.gov/founding-docs/declaration (Accessed: 20 June 2024).

constitutional human rights protection worldwide. The American Bill of Rights, although only legally binding within the United States, has inspired many other nations to adopt similar rights in their own constitutions. Moreover, the language and structure of the Bill of Rights laid the groundwork for international human rights documents that would emerge in the 20th century, especially through the work of Eleanor Roosevelt, who was a Chairperson of the Commission on Human Rights that prepared the text of the Universal Declaration of Human Rights.[22]

Till we get to the international level itself, it is very important to point out another document adopted at the national level that is considered a predecessor of modern international human rights law, namely the French Declaration of the Rights of Man and of the Citizen, adopted in 1789 during the French Revolution. Based on the principles of liberty, equality, and fraternity,[23] the Declaration was a powerful assertion of the rights of individuals *vis-à-vis* the monarch as a sovereign and its rule. It declared that 'men are born and remain free and equal in rights' and established civil liberties such as freedom of speech, freedom of religion, and the right to property.[24] The French Declaration also emphasised the principle that sovereignty resides in the people rather than in the monarchy, an idea that would resonate in subsequent democratic movements across Europe and beyond. Its influence has extended to numerous countries, and its ideals inspired later documents such as the Universal Declaration of Human Rights, during the preparation of which prof. René Cassin, influenced by the French approach to human rights, cooperated with Eleanor Roosvelt and was awarded the Nobel Prize for his struggle to ensure the rights of man as stipulated in the United Nations Declaration of Human Rights.[25]

Throughout the 19th century, many countries adopted written constitutions that included protections for individual rights and freedoms. For example in Europe, the German Empire Constitution of 1871 guaranteed certain civil rights, though these were limited in scope when compared to modern human rights standards; the limits were framed especially by the German citizenship.[26] Similarly, in America, the Mexican Constitution of 1857 enshrined civil liberties such as the freedom of speech, assembly, and religion, as well as protection from arbitrary arrest and the right to a fair trial.[27] There have been many various attempts to spread the concept of human rights from the perspective that was introduced above and despite various cultural approaches, the inherent value of each human being has finally been recognised.[28] Furthermore, gradually all state constitutions have reflected a growing recognition

22 For more information, see: https://www.un.org/en/about-us/udhr/drafters-of-the-declaration (Accessed: 20 June 2024).
23 This slogan is considered a motto for identification of different generations of human rights, see hereinafter: Šmigová, 2026, pp. 48–57 (the subchapter 1.3.).
24 For more information, see: https://www.elysee.fr/en/french-presidency/the-declaration-of-the-rights-of-man-and-of-the-citizen (Accessed: 20 June 2024).
25 To understand the background of the whole process, see his Nobel Lecture.
26 Art. 3 of the Constitution of the German Empire (April 16, 1871).
27 For more information, see: Britannica, latest modification in 2026.
28 Gozzi, 2021, pp. 187–214.

of the need for formalised legal protections for an individual's rights, as well as the role of the state in upholding these rights. The gradual constitutionalisation of rights in various national systems has laid the groundwork for the later development of international human rights law.

Before getting to the establishment of the international human rights protection system itself, it would be important to present two separate movements that have been influenced by the inherent value of every individual. Firstly, the abolition of slavery. Slavery as such exists in sharp contradiction with the concept of human rights in its essence. Slaves are neither free nor equal with others. This is why the abolitionist movements of the 18th and the 19th centuries marked a significant milestone in the development of human rights at a national level. While the practice of slavery had existed for millennia, the gradual focus on human dignity and equality led to growing calls for the abolition of slavery. In countries like the United Kingdom and the United States, abolitionist movements gained momentum that culminated in the adoption of milestone legislation such as the British Slavery Abolition Act of 1833, and the Thirteenth Amendment to the U.S. Constitution in 1865, both of which outlawed slavery. These legal acts represent a profound recognition of the inherent rights and dignity of all individuals, regardless of race. It marked the beginning of the modern human rights movement and set the stage for further advancements in the recognition and protection of civil rights for marginalised groups.

Secondly, the movement initiated by Henry Dunant that led to the creation of modern international humanitarian law should be discussed here. In terms of the development of individual legal areas, international humanitarian law was the first to develop, since the basic rules and principles of the so-called law of armed conflict were already established in antiquity if international custom is considered,[29] and the First Geneva Convention adopted in 1864 is considered the first international treaty that set up obligations to provide care without discrimination to wounded and sick military personnel. The origins of the modern international human rights law only date back to the period after the Second World War. On the other hand, in contrast to international humanitarian law, where there is no specific protection provided by an institutional framework established and functioning at an international level, there is a well-established institutional framework at both the universal and regional international levels for the protection of human rights. Ultimately however, although the state is still the primary subject of obligations in both these areas, one can see also within the development of the minority rights protection system after World War I, that absence of institutional control at international level usually mean that protection system functioning less efficiently.

The last selected milestone in the development of human rights law from the perspective of its predecessors is the developments in the early 20th century. This is very specific, since when compared to the previous milestones, it already includes both national and international levels and their interaction. The horrors of World War

29 Cryer, 2010, p. 267.

I and the atrocities committed during the conflict highlighted the need for stronger protections of human rights at both national and international levels. The Treaty of Versailles that was adopted following World War I in 1919 and the establishment of the League of Nations reflected the international community's first efforts to address human rights violations, particularly in relation to the rights of minorities.[30] The established system aimed to protect ethnic, religious, and linguistic minorities, primarily in newly formed or restructured states in Eastern Europe and the Balkans, following the break-up of the Austro-Hungarian Empire, and the Ottoman Empire respectively. The Treaty of Versailles and subsequent treaties, such as those of Saint-Germain and Trianon, imposed obligations on countries like Poland, Czechoslovakia, and Hungary to safeguard the rights of their minority populations. These treaties included provisions for equal treatment, non-discrimination, and the right for minorities to use their language and practice their religion. The League of Nations played a crucial role in monitoring the implementation of these obligations, creating the mechanisms for minorities to petition the League if they believed their rights were being violated. However, the minority protection system faced several challenges, including limited enforcement powers and the reluctance of some states to fully comply with their treaty obligations.[31] Furthermore, tensions between national sovereignty and international oversight often undermined the system's effectiveness. While the system did not prevent the rise of nationalism and ethnic conflicts in Europe, it laid an important groundwork for later human rights protections. It was considered important for the international community since otherwise it could cause a threat to international peace and security.[32] Moreover, it was even pointed out by the Permanent Court of International Justice, a judicial body of the League of Nations, that the idea underlying the treaties for the protection of minorities was to secure for minorities the possibility of living peaceably alongside that population and cooperating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs.[33] The minorities protection system thus had two functions: to assure respect for the special rights of minorities, and to prevent discrimination against them in case they were not nationals of the respective state that had jurisdiction over them.[34] Equality and liberty were thus the principles that also governed the minorities protection system after World War I, and are considered a cornerstone of the international human rights protection system established after World War II.

30 So-called Little Treaty of Versailles, the treaty with Poland, became a model for 13 minority treaties.
31 Rosting, 1923, pp. 641 et seq.
32 Zyberi, 2013, pp. 327 et seq.
33 Minority Schools in Albania, PCIJ Series A/B (1935), No. 64, 17.
34 Cf. Advisory Opinion given by the Court on 10 September 10 1923 on certain questions relating to settlers of German origin in the territory ceded by Germany to Poland, PCIJ Series B (1923), No. 6, p. 25.

1.2. Establishment of the International Human Rights Law

It is notable and generally common for international law to develop following those phases of the history of humankind that involve revolutions or rather, using the language of international law, armed conflicts. The establishment of modern international human rights law is linked to World War II, when German nationals were treated by Germany in an unacceptable, inhuman way that was required to be dealt with by the international community. Efforts to prevent future wars were a driving force in establishing an international organisation that would unite the strength and power of all its member states to maintain international peace and security.[35]

According to the Preamble to the UN Charter, the protection of human rights is both a means and an end to achieving other goals. At the same time, the new concept of human rights after World War II emphasised the belief that respect for human rights is closely linked to the maintenance and safeguarding of international peace and security.[36] Therefore, it can be submitted that the objective stated in the UN Preamble is a kind of "constitutive" principle for the actions of every UN body:

> 'We, the people of the United Nations (...) determined (...) to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small... and for this end, to practice tolerance and live together in peace with one another as good neighbours, to unite our strength to maintain international peace and security(...)'.

The universal system of human rights protection under the auspices of the United Nations has several levels and dimensions. It consists of both institutions and mechanisms established by the UN Charter, and institutions and mechanisms established by human rights treaties adopted under the umbrella of the UN.

From the perspective of a systematic approach, this part of the chapter will firstly deal with the main bodies of the United Nations that are explicitly mentioned in the UN Charter, and later with the specialised organisations that are explicitly referred to in the UN Charter, and finally with the bodies whose existence can be directly inferred from the UN Charter.

When the UN Charter was adopted, an international organisation was established whose aim was a political one, i.e. to maintain international peace and security, to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, to achieve international co-operation in solving international problems of different character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction towards race, sex, language, or religion; and to be a centre for harmonising the

35 Cf. the Preamble of the UN Charter.
36 Potočný and Ondřej, 2003, p. 78.

actions of nations in the attainment of these common ends.[37] Nevertheless, people understood that the newly established organisation was to ensure the protection of their rights. It was realised by a first step, namely the adoption of the Universal Declaration of Human Rights, a milestone that gave birth to modern international human rights law and continues to evolve into other documents.[38] Although not legally binding as such, world leaders decided to complement the UN Charter with a road map to guarantee the rights of every individual everywhere. The document they considered, and which would later become the Universal Declaration of Human Rights, was taken up at the first session of the General Assembly in 1946 and adopted during the General Assembly session on 10th December 1948.[39]

Since this monograph devotes a separate chapter to this landmark document of international human rights law, from an historical point of view it is important to point out that although nowadays the human rights perspective is considered in any decision UN takes, it has not always been the case. Nevertheless, the protection of human rights is present in decision taking by any of the UN main bodies. Each of these (the General Assembly, the Security Council, the Economic and Social Council, the Secretariat, the Trusteeship Council, and the International Court of Justice) plays an indispensable role in the UN's objective of promoting respect for human rights.

Despite the political challenges posed by a forum such as the UN General Assembly, it is a body that also serves as a forum for human rights debates. It has coordinated human rights activities in relation to, for example, decolonisation, apartheid policies, dictatorial regimes in Africa, and enforced disappearances in Latin America. The UN General Assembly cooperates with the other principal bodies of the UN as well as with specialised organisations and the UN Human Rights Council.[40] It is also the body to which the human rights committees send their annual reports. Art. 13 of the UN Charter explicitly gives the UN General Assembly the task, in relation to human rights, of initiating studies and making recommendations with a view to facilitating the realisation of human rights and fundamental freedoms for all without distinction of race, sex, language or religion.

The UN Security Council, which is primarily responsible for the maintenance of international peace and security, deals with the issue of the protection of human rights in a rather reactive manner, in relation to the most serious human rights violations. This is evidenced by its resolutions on situations in, for example, South Africa, Namibia, Syria, Somalia and the Middle East. A particular step in relation to

37 See: Art. 1 of the Preamble of the UN Charter.
38 Rivera, 2024, p. 4.
39 For more information, see: https://www.un.org/en/about-us/udhr/history-of-the-declaration (Accessed: 20 June 2024).
40 Human Rights Council was established by the General Assembly resolution 60/251 from 15 March 2006.

the protection of human rights by the UN Security Council was the creation of *ad-hoc* international criminal tribunals for the former Yugoslavia and Rwanda.[41]

Under the UN Charter, the UN Economic and Social Council was envisaged as the operational centre for human rights matters. This is evidenced by as many as three articles of the UN Charter, out of a total of seven articles of the UN Charter relating to human rights, which are found in the chapter on the status of the UN Economic and Social Council. The UN Economic and Social Council is empowered to 'make and initiate studies and reports'.[42] From this mandate, the UN Economic and Social Council created the UN Commission on Human Rights to implement the UN's Human Rights Strategy. Today, the direct involvement of the UN Economic and Social Council in the implementation of UN human rights policy has been radically reduced, as the Commission on Human Rights has been replaced by the UN Human Rights Council, which reports directly to the UN General Assembly.[43]

The UN Secretariat is involved in human rights issues through the Office of the High Commissioner for Human Rights (hereinafter referred to as the 'OHCHR'), which is part of the UN Secretariat. The OHCHR is the personification of the UN's human rights policy and primarily provides administrative support to the Human Rights Committees and the Human Rights Council. Moreover, it conducts good offices for governments to focus on fulfilling their human rights obligations.

Although the International Court of Justice only resolves disputes between States and its opinion can only be requested by UN organs and UN specialised agencies, it has also addressed human rights issues in its own decisions, e.g. in its opinions Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory (2004), or Legal Consequences for States in the Matter of the Continued Presence of South Africa in Namibia, despite the Relevant UN Security Council Resolution 276 (1970),[44] or Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (1951). Examples of its judgments are the Barcelona Traction case (1970), the Iranian Hostages case (1980), and the LaGrand (2001), Avena (2004) and Diallo (2010) cases. All these decisions have helped to articulate more precisely the content of obligations concerning human rights protection at an international level.

Apart from the UN main bodies, since the establishment of the United Nations, several specialised organisations have affiliated themselves to this universal organisation through cooperation agreements. Their focus is narrower than the general human rights protection of the UN as such. The areas of focus of these expert organisations

41 UN SC res 827 (1993) of 25 May 1993 for the ICTY, UN SC res 955 (1994) of 8 November 1994 for the ICTR.

42 See: Art. 62 of the UN Charter.

43 For more information, see the chapter upon human rights protection in the UN.

44 In this case the International Court of Justice explicitly stated that the UN Charter imposes legal obligations on member states regarding human rights. Therefore, in relation to Art. 2(7) of the UN Charter on the exclusion of interference in matters which fall substantially within the internal competence of States, the UN organs reject States' claims of interference in their domestic affairs when the matter concerns the protection of human rights.

are for example, health (The World Health Organisation, WHO), culture (The United Nations Educational, Scientific and Cultural Organisation, UNESCO), agriculture (The Food and Agriculture Organisation, FAO), working conditions (The International Labour Organisation, ILO), children's welfare (The United Nations Children's Fund, known until 1953 as the United Nations International Children's Emergency Fund, UNICEF), etc.). On the part of the United Nations, space for such cooperation has been created by Articles 57 and 63 of the UN Charter.

Although the primary role of specialised human rights organisations may be questioned in relation to their institutional system or material focus, their activities nevertheless form part of an integral system of human rights protection. For example, the International Labour Organisation, which focuses on the protection of labour rights, is unique not only because it was founded before the UN itself in 1919, and only became a UN-affiliated organisation in 1946, but above all because its bodies are composed based on a tripartite system of representatives of workers, employers and governments. The ILO oversees the implementation of over 100 treaties and several other recommendations, and in carrying out its functions it not only uses diplomatic negotiations and expert reviews but has also set up a complaints system to achieve the effective protection of its standards.[45]

It would be incomplete to list the expert organisations affiliated to the United Nations without mentioning the International Monetary Fund and the World Bank Group. The mandates of these institutions do not cover the issue of an effective strategy for the protection of human rights; rather, they focus on other aspects of their work in the economic sphere.[46] Over time, however, both institutions have had to recognise the important human rights aspect in the exercise of their functions. Both the World Bank and the International Monetary Fund now stress the importance of poverty reduction in their programmes and call for the implementation of the principles of good governance. For example, the World Bank set up an independent panel of experts to review complaints concerning human rights implications in its projects.[47]

Apart from the UN main bodies and specialised organisations, it is important to mention another UN Charter based body, namely the UN Human Rights Council. Established in 2010, the Human Rights Council (HRC) is a relatively young body in the UN system for the promotion and protection of human rights. However, the Council did not start out without any predecessor. As has already been pointed out, the establishment of the UN apparently signified for many individuals the notion that they would finally be able to claim their rights.[48] However, this interstate organisation was not empowered by its members to address complaints of human rights violations directly. Nevertheless, under art. 68 of the UN Charter, which empowered the UN

45 For more information about the complaint procedure, see: the ILO Constitution, Arts. 26–34.
46 For more information, see e.g: Skogly, 1999, p. 231.
47 See, for example: the mandate of the Panel of Independent Experts on its 10th anniversary from 1 October 2012 and the established follower with the B-Ready Project.
48 Cf. Jankuv, 2006, p. 51.

Economic and Social Council to set up commissions for the promotion of human rights, the Commission on Human Rights was established in 1946. The Commission was originally tasked to draw up a catalogue of human rights and a proposed mechanism for their protection, which it accomplished by drafting the Universal Declaration of Human Rights, and then later by drafting the International Covenant on Civil and Political Rights, and the Optional Protocol to the Covenant (both adopted in 1966), and the International Covenant on Economic, Cultural and Social Rights (also adopted in 1966). Over time however, it has acquired broader powers through resolutions of the Economic and Social Council, especially through ECOSOC Resolution 1235 of 1967 that allowed the Human Rights Commission to address situations of gross and systematic human rights violations through public inquiries and through the ECOSOC Resolution 1503 of 1970 that empowered the Commission to deal with complaints by individuals or groups against systematic and massive human rights violations, through a private and confidential procedure conducted in writing.[49] In addition to these procedures, the Commission also created thematic mechanisms, namely Special Rapporteurs and Working Groups, which either dealt with a specific area, such as torture, child trafficking, or were responsible for a specific state, such as North Korea.

The withdrawal of the Commission on Human Rights in 2006 was coupled with the establishment of the aforementioned Human Rights Council, which unlike the Commission, falls directly under the UN General Assembly. In its first year, the Council was mandated, *inter alia*, to evaluate and, where necessary, improve and rationalise the tasks of the previous Commission, including the complaints and investigations mechanism and special mechanisms. The biggest change was the introduction of the so-called Universal Periodic Review (UPR), which introduced regular monitoring for all UN Member States. The Council has also maintained the existence of specific independent experts, whether appointed to monitor a specific topic or to monitor the situation in a specific country.[50] Although it is still true that the Council is an intergovernmental body, it is desirable that it should be a forum of experts and not of representatives of States, and that it should therefore avoid the mistakes that were most often blamed on its predecessor, the Commission, and that it should be a forum for real solutions from the UN side for the protection of human rights.

The very nature of the Universal Declaration of Human Rights and the international community's focus on creating a genuine system of human rights protection has made the adoption of legally binding norms a foregone conclusion. However, due to growing tensions between the Eastern and Western blocs, this was not realised until 1966, although the Commission on Human Rights had already fully accomplished its task back in 1954, when it submitted the texts of the proposed covenants to the UN General Assembly. In addition to the International Covenant on Civil and Political Rights (1966), and the International Covenant on Economic, Social and Cultural Rights

49 For more information, see the chapter upon Human Rights protection in UN.

50 For more information, see the website of the UN Human Rights Council within the website of the UN High Commissioner for Human Rights.

(1966), which was entered into force in 1976, the following international agreements form the basis of the treaty system for the protection of human rights at the United Nations: the Convention on the Elimination of All Forms of Racial Discrimination (hereinafter: the CERD, adopted in 1965, and in force since 1969); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter: the CAT, adopted in 1984, and in force since 1987); the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter: the CEDAW, adopted in 1979, and in force since 1981); the Convention on the Rights of the Child (hereinafter: the CRC, adopted in 1989, and in force since 1990); the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (hereinafter: the CMW, adopted in 1990, and in force since 2003); the Convention on the Rights of Persons with Disabilities (hereinafter: the CRPD, adopted in 2006, and in force since 2008); the Convention for the Protection of All Persons from Enforced Disappearance (hereinafter: the CED, adopted in 2006, and in force since 2010).

The above-mentioned documents were preceded by a declaration adopted by the UN General Assembly in the form of a resolution. Such a soft-law document reflects the international community's attitude to the issue and in most cases implies the adoption of a legally binding international treaty.

This limited selection of the above-mentioned treaties is justified by the existence of the bodies established by them to oversee the implementation of the obligations imposed on the individual contracting parties by the specific treaties. However, in addition to the above-mentioned treaties, other international treaties relevant to the protection of human rights have been adopted at the United Nations, although no special committees have been established because of them: the Convention on the Prevention and Punishment of the Crime of Genocide (adopted in 1948, and in force since 1951); the Convention on the Suppression and Punishment of the Crime of Apartheid (adopted in 1973, and in force since 1976); Conventions relating to slavery, e.g. the Additional Protocol on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956).

However, these conventions are specific in that they regulate *jus cogens* norms.[51] They constitute a special form of human rights protection in such a way that they require state parties to prosecute persons suspected of committing genocide or apartheid.

Although there is much overlap between the above treaties that have given rise to the special committees (and human rights are inherently indivisible anyway), each of these treaties focuses on a specific set of rights, or on a specific group of protected subjects.

The history of human rights law might be seen from a broader perspective: firstly, there was a phase of generalisation that awarded internationalisation, and that

51 The prohibition of genocide to be *ius cogens* was expressed by the International Court of Justice, for example, in its Advisory Opinion on Reservations to the Genocide Convention of 28 May 1951, ICJ Reports 1951, pp. 15 et seq.

followed the constitutionalisation of human rights at a national level. This phase was initiated by the adoption of the UN Charter and the related Universal Declaration of Human Rights. When the human rights concept implemented itself at international level, generalisation was at stake, i.e. the focus on *every* individual was the main approach of the adaptation of the principles of equality and liberty. This is one of the reasons why the International Bill of Human Rights consists of the Universal Declaration of Human Rights and two already mentioned Covenants, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. They concerned all human beings. However, the following development is proof of the necessity of the international community to focus on some specific groups, such as children and women, and some specific realities, such as the prohibition of racial discrimination and torture. Treaties dealing with the status of specific groups (women, children, migrant workers, persons with disabilities) focus on the rights whose protection of those individuals in question is most needed to achieve the development and the protection of their human dignity. At this point, the phase of specialisation has thus been realised.

While the core UN human rights treaties create the normative foundation of international human rights law, a deeper legal analysis points out important limitations and ongoing debates regarding their scope, enforcement, and interpretive evolution. Separate adoption of the Covenants in 1966 has represented the division of rights into two categories: civil-political and socio-economic.[52] This dichotomy has been heavily criticised for implying a hierarchy of rights, with civil and political rights perceived as immediately enforceable and socio-economic rights viewed as progressively realisable and less justiciable. However, subsequent jurisprudence, especially by the UN Committee on Economic, Social and Cultural Rights, has sought to reinterpret the ICESCR as imposing meaningful obligations, including minimum core standards.[53]

Other effective implementation challenges have also been formulated towards treaties such as the CEDAW, CERD, and CRC that advance protection for vulnerable groups. In particular the CEDAW's approach to cultural relativism has generated scholarly debate.[54] By contrast the CRPD represents a shift toward rights-based approaches, while on the other hand it also raises complicated questions about state capacity and resource allocation, mostly in developing states. Moreover, even the CAT and CED treaties that are notable for their non-derogable norms challenge issues regarding state responsibility, extraterritorial application, or the non-refoulement obligations, especially in relation to the issue of state security.[55]

These universal human rights treaties have formed a very special legal area. They have created legally binding norms; however, their actual implementation depends heavily on state cooperation, interpretive practices of treaty bodies, and the evolving

52 Craven, 1995, p. 9.
53 International Committee on Economic, Social and Cultural Rights, general comment No. 3, 1990, para. 10.
54 Faturoti, 2016.
55 Goold and Lazarus, 2019, especially Chapters 2, 7, 11, 19.

dialogue between international law and domestic legal systems. This dialogue varies in different regions of the world which has resulted in establishing regional human rights protection systems that also play a very important role in promoting, protecting, and developing international human rights law. Although the aim of this book is to consider the universal protection of human rights, it is also necessary to mention these regional systems that not only complement the universal framework but also adapt it to specific cultural, political, and legal traditions of the respective regions.

The three most developed regional human rights systems are those in Europe, the Americas, and Africa. Being similar to the UN-based system, each of these regional systems has emerged out of its own historical context, often shaped by post-war development, decolonisation processes, and regional conflicts, and each proves to be sign of the recognition that while universal principles are fundamental, their implementation must often be localised in order to be effective.

Firstly, the European human rights system, under the Council of Europe, represents the most institutionalised and judicialized regional human rights mechanism. The European Convention on Human Rights (ECHR) established the European Court of Human Rights (ECtHR), which remains one of the few international courts with the competence to issue binding judgments on states in cases brought forward by individuals. Originally functioning along with the European Commission on Human Rights, this model was revolutionary since for the first time in history, individuals were given the right to bring complaints against their own states before an international tribunal. The jurisdiction of the ECtHR obligatory for all the members of the Council of Europe has resulted in a system that might be considered as a victim of its own success due to its case load.[56] However, this system has adopted landmark decisions e.g. on freedom of expression,[57] freedom of religion[58] and the right to a fair trial.[59] Moreover, it has also created interpretative approaches to protected rights, such as the positive obligations of a state, and the margin of appreciation or evolving interpretation.[60] The Council of Europe has also adopted other conventions relevant to human rights, such as the European Social Charter or the Framework Convention for the Protection of National Minorities. Although these instruments are less judicial in character than the ECHR, they provide crucial substantive protection and support regional human rights engagement in Europe.

Secondly, in the Americas, the Organisation of American States (OAS) has established a regional human rights system built around the American Declaration of the Rights and Duties of Man (1948), and the American Convention on Human Rights (1969).

56 Search within its database of decision.
57 See more detailed factsheet at: https://www.coe.int/en/web/human-rights-convention/expression1 (Accessed: 20 June 2024).
58 See more detailed factsheet at: https://www.coe.int/en/web/human-rights-convention/conscience1 (Accessed: 20 June 2024).
59 See more detailed factsheet at: https://www.coe.int/en/web/human-rights-convention/justice1 (Accessed: 20 June 2024).
60 McBride, 2021.

The Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR) are the principal organs overseeing the application of human rights in the region, although the judgments of the IACtHR are binding only on states that have accepted its jurisdiction. Despite this, they have had a broader persuasive authority globally, including within UN treaty bodies, especially in the areas of indigenous rights and enforced disappearances.[61]

Thirdly, the African regional system, operating under the African Union (originally under the Organisation of African Unity), is rooted in the African Charter on Human and Peoples' Rights (1981) which adopts a unique approach, emphasising not only individual rights but also peoples' rights and duties. It is grounded in African legal traditions and recognises collective entitlements such as the right to development and the right to a satisfactory environment. The African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights play central roles in interpreting and enforcing the charter under which they have issued important decisions e.g. on indigenous rights.[62]

The African system demonstrates a broader normative approach to human rights, embedding socio-economic, cultural, and environmental concerns from its establishment, which is an aspect that was only incorporated in other systems later. Its scope has influenced the development of soft-law instruments at the UN level, such as declarations on the rights of indigenous peoples, and the right to development.[63]

Apart from these three main systems, other regional initiatives have also emerged. The Arab Charter on Human Rights, adopted under the League of Arab States, and the ASEAN Human Rights Declaration, adopted by the Association of Southeast Asian Nations, represent efforts to formulate human rights standards in their respective regions. While often criticised for weak enforcement mechanisms and vague formulations, their existence nonetheless affirms a global consensus on the value of human rights protection.[64]

1.3. Generations of Human Rights

The concept of human rights has developed fundamentally over time as societies have advanced and new challenges have emerged. One way of understanding this development is through the generations of the human rights framework, which divides the development of rights into distinct phases, each corresponding to the social and historical context under which they arose. Another way of understanding the concept of human rights generations depends on the extent of state involvement to achieve the realisation of particular rights. Typically, human rights are categorised into three

61 See the landmark decision in *Velásquez Rodríguez v. Honduraz* case on enforced disappearances adopted by the Inter-American Court of Human Rights on 29 July 1988.
62 *African Commission on Human and Peoples' Rights v. Republic of Kenya* (Application No. 006/2012), judgment on merits adopted by the African Court on Human and Peoples' Rights on 26 May 2017.
63 Declaration on the Right to Development, General Assembly resolution 41/128 adopted on 4 December 1986.
64 Davies, 2014, pp. 107–129.

main generations, although some scholars and theorists have begun discussing a potential fourth generation.[65] Each generation represents a different aspect of human dignity and protection, reflecting shifting priorities and values as universal dynamics change.

This subchapter aims to provide an analysis of the three classical generations of human rights and the emerging fourth generation, analysing their historical origins, philosophical foundations, and practical implications of these generations in both national and international contexts. After having presented basic milestones from a historical perspective, it is easier to summarise the historical aspects of the division of the human rights into three generations.

This classical division of human rights was first introduced by a French lawyer of Czech origin, Karel Vašák, at the International Institute of Human Rights in Strasbourg during his inaugural lecture at the 10th session of the institute,[66] and later captured in writing in the UNESCO Courier.[67] Although there have been many critics of this division, it is generally acknowledged that it is of a practical nature.[68] A very good approach to understanding this division is by materialised in the slogan of the French Revolution – Liberty, Equality, Fraternity – a methodology that was used by Karel Vašák himself when reframing the context of three human rights generations.[69]

1.3.1. First-Generation Human Rights

The first generation of human rights, also known as civil and political rights, encompasses those freedoms that are essential for individual autonomy and participation in the public life. These rights are typically considered "negative rights" because they require states to refrain from interfering in the individual's freedoms, rather than demanding active intervention by the state. The origin of these rights can be traced back to the political revolutions of the 18th century, as has already discussed above in the historical background subchapter, in particular to the American and the French revolution. The notion of liberty is seen only by a negative approach from the state, since the state is required "only" to respect the rights of individuals, and to let them be free and enjoy their liberty.[70]

The philosophical roots of first-generation rights are closely tied to the works of philosophers such as John Locke (Second Treatises on Government),[71] Thomas Hobbes

65 See e.g. : Perepolkin et al., 2021, pp. 91 et seq.
66 Wellman, 2000, p. 639.
67 Vašák, 1977, pp. 29–32.
68 See some examples in Domaradzki, Khvostova and Pupovac, 2019, p. 424.
69 Jensen, 2017.
70 This negative approach has been later accomplished by so-called positive obligations of a State to create effective legislative framework that would protect and promote enjoyment of first-generation rights also vis-a-vis other individuals and also in case when a claimed violation has occurred to investigate it. For more information about the duty to respect, protect and ensure, see e.g.: Ramcharan, 2011, pp. 123 et seq.
71 Locke, 1690.

(Leviathan),[72] and Jean-Jacques Rousseau (Social Contract).[73] These philosophers emphasised the importance of individual liberty, natural rights, and social contract as foundational to legitimate governance. John Locke's theory of natural rights, including the right to life, liberty, and property, became fundamental in shaping our modern understanding of civil and political rights. Locke argued that these rights are inalienable and inherent to all individuals by virtue of their humanity, and that the role of government is to protect them, not to infringe upon them.[74]

First-generation human rights include a wide array of civil liberties and political freedoms, such as the right to life, the right to liberty and the security of person, the right to a fair trial, freedom of speech, freedom of assembly and association, and the right to vote and to be elected.

The principles of civil and political rights have been enshrined in numerous international legal instruments, especially in the International Covenant on Civil and Political Rights. One of the manifestations of the Cold War was the acceptance of the ICCPR, mostly by Western states. Nevertheless, even after the Fall of the Berlin Wall, and despite the widespread recognition of first-generation rights, challenges to their full realisation are still present in many parts of the world, e.g. in the form of authoritarian regimes. Moreover, even in democratic countries, challenges such as surveillance, discrimination, and the erosion of privacy rights continue to pose significant threats to civil and political rights.

1.3.2. Second-Generation Human Rights

If compared to the first-generation, the second generation of human rights was mostly welcomed by the Eastern Bloc. These are often referred to as economic, social, and cultural rights. This generation reflects a shift in focus from individual freedoms to a broader social and economic well-being. These rights are sometimes described as "positive rights" because they require active intervention from the state to provide certain services and to ensure basic standards of living for individuals. Second-generation rights have emerged in response to the recognition that political freedoms alone are insufficient if people lack the means to live with dignity.[75]

The development of second-generation human rights is closely linked to the rise of the socialist and labour movements in the 19th and early 20th centuries when equality was emphasised to achieve the full enjoyment of first-generation rights.[76] The call for the redistribution of wealth and resources as a means to achieving social

72 Hobbes, 1660.
73 Rousseau, 1762.
74 Przetacznik, 1978, pp. 195–216.
75 Inter-American of Human Rights in its decision *The "Street Children" Case (Villagrán Morales et al.).* Judgment of November 19, 1999. Series C No. 63 pointed out that evidence showed that street children detained arbitrarily were victims of aggravated violations of their rights, both because they did not enjoy the minimum conditions for a decent life and because the state not only did not provide them with these minimum conditions, but also arbitrarily deprived them of their liberty.
76 Cf. Steiner, Alston and Goodman, 2008, p. 269.

justice was then at stake. These ideas, combined with the growing influence of trade unions and social welfare advocates, led to the demand for rights that would address the material conditions of life, particularly for the working class.

The era after World War II also played a crucial role in the development of second-generation rights, as the devastation caused by the war led to widespread poverty. In this context, the establishment of the United Nations and the adoption of the Universal Declaration of Human Rights were considered a significant step towards recognising economic, social, and cultural rights as fundamental human rights. Despite the fact that originally the International Covenant on Economic, Social and Cultural Rights did not establish its own Committee, it was the Economic and Social Council that created a body to monitor the implementation of these rights.[77] As the established Committee has already held, second-generation rights are human rights as are other generations of rights. They are not rights of future; they belong to every individual already and at the time of being. These rights focus on ensuring that all individuals have access to the resources and opportunities necessary for a decent quality of life. Some of them are as follows: the right to work, the right to education, and the right to an adequate standard of living.

Second-generation human rights are, at the international level, mostly covered by the International Covenant on Economic, Social and Cultural Rights which obligates state parties to take progressive measures to ensure the full realisation of economic, social, and cultural rights. It is true though that the realisation of these rights remains a significant challenge for many countries, particularly in the Global South, even in the case of such a right as that to an education. On the other hand, the universal recognition of second-generation rights has contributed to their development through the adoption of international aid programs, and policies aimed at poverty reduction and equitable development. They are aimed at the achievement of at least an equitable if not equal access to various resources.

1.3.3. Third-Generation Human Rights

When referring to the third generation of human rights, one often uses a term of solidarity or collective rights which indicates the last part of the slogan: Liberté, Egalité, Fraternité. Fraternity involves sharing; solidarity rights emerged in the latter half of the 20th century as a response to issues that crossed national borders. These rights reflect the idea that individual rights cannot be fully realised without addressing broader social, environmental, and economic conditions that affect entire communities and nations. Solidarity rights are considered as "collective rights" because they pertain not just to individuals, but to groups of people or even to humanity as a whole.

The development of third-generation rights is closely tied to the process of decolonisation in the mid-20th century, and the emergence of newly independent states in Africa, Asia, and Latin America in the 1960s and 1970s. These decolonised states

77 ECOSOC Resolution 1985/17 of 28 May 1985.

emphasised the need for a more equitable international order that would address issues of poverty, and related inequalities between nations. In this context, third-generation rights were seen as essential in promoting justice and cooperation among states together and creating an international community.

Apart from the right to peace, the right to a healthy environment, the right to sustainable development, the right to self-determination is usually referred to since it granted colonised peoples the right to freely determine their political status and pursue their economic, social, and cultural development. This right is also a proof that the division of rights according to their legal inclusion into the Covenants is not always helpful since the right to self-determination is contained in both Covenants.[78]

As for the other third-generation rights at an international legally binding level, their recognition has been more contentious than the recognition of first- and second-generation rights.[79] Although there are various universal declarations, such as the Declaration of the Right to Development,[80] or the Rio Declaration on Environment and Development,[81] they have not been codified in binding international treaties at a universal level in the same way that civil, political, economic, social and cultural rights have been. One of the reasons for this situation might be that third-generation rights usually require significant changes to the international legal framework. For example, the right to development might imply that wealthier states have a responsibility to assist poorer countries in achieving sustainable development, a concept that has brought discussions over issues of sovereignty, responsibility, and resource and debt allocation.[82] Nevertheless, despite these challenges, the concept of third-generation rights has already been rooted in the concept of human rights, particularly in the context of global issues such as the need for environmental protection.[83]

1.3.4. Fourth-Generation Human Rights

Finally, as the world moves deeper into the 21st century, some scholars and human rights advocates have begun discussing the possibility of a fourth generation of human rights which would address the new challenges caused by rapid technological advancements. While the fourth generation of human rights is still an emerging concept, it usually considers rights related to digital privacy and data protection, rights to the access to internet, and the ethical implications of new technologies in the cases of artificial intelligence and biotechnology.[84] These four areas have been selected because of the challenges they have brought to the scene of the international

78 See: Art. 1 of the ICCPR and the ICESCR.
79 Some of the third-generation rights are incorporated into a regional international treaty: African Charter on Human and Peoples' Rights. See e.g.: Evans and Murray, 2008, p. 1.
80 General Assembly Resolution 41/128 from 4 December 1986.
81 Report of the UN Conference on Environment and Development A/CONF.151/26 (Vol. I) from 12 August 1992.
82 See e.g.: UK Debt Relief (Developing Countries) Act 2010.
83 See e.g.: Anton and Shelton, 2011.
84 Some argue that also reproductive and sexual rights are a part of the fourth generation of human rights. See e.g.: Barabash, 2024, pp. 13 et seq.

framework of human rights protection. The first two, the right to privacy and the the right to information, might be considered as a part of first-generation rights. Nevertheless, there are different aspects that must be analysed when talking about these rights in relation to the use of technologies. As for biotechnology and the use of artificial intelligence, one must analyse the same aspect: impact of technologies on a human being while keeping in mind the aim of the human rights protection framework, i.e. the fact that the fourth generation of human rights should focus on ensuring that individuals and their rights are continuously protected in the digital age and that new technologies are used in ways that reflect human dignity, i.e. respecting the liberty and equality of individual beings, and fraternity within the human community. Nevertheless, if compared to the first three generations of human rights, the fourth one provides more questions than answers and claims.

Although these fourth-generation rights are still in the early stages of their development, there has already been a growing recognition of the need for legal frameworks that address these specific challenges of the digital age. The well-known General Data Protection Regulation (GDPR) adopted by the European Union in 2016,[85] the AI Act[86] adopted by the European Union in 2024, and the Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law adopted by the Council of Europe 2024,[87] are probably the best examples of legal instruments trying to protect individuals' rights in the digital era.[88]

Not all fourth-generation rights are entirely new however, extensions of existing rights require reinterpretation, taking into consideration advances in technology.[89] Nevertheless, these not so new rights might be considered a part of the previous human rights generations: the best example is the right to privacy that originally belongs to the first-generation rights. However, because of increased interaction within digital platforms, vast amounts of personal data are collected, processed, and stored by governments and corporations. The rise of big data analytics has enabled unprecedented analysis of human behaviour, often without individuals' informed consent.[90] This raises significant concerns about the right to privacy.

In general, it has to be specifically emphasised that there are differences between the right to privacy if compared to the right to privacy in the digital age, especially concerning the issue of neither space nor time limitation (i.e. the fact that in a digital world, information published online is made public worldwide, incomparably quicker than is ever possible in the "real", physical world).[91] Nevertheless, these factual differences have no consequence on the legal protection requirements of examined rights

85 Regulation (EU) 2016/679.
86 Regulation (EU) 2024/1689.
87 Council of Europe Treaty Series No. 225, this treaty is in July 2025 not legally binding yet.
88 For others, such as Oviedo Convention, EU Charter on Fundamental Rights, see: Herdegen, 2023, pp. 57 et seq.
89 Sartor, 2020, pp. 705–719.
90 Zuboff, 2019, pp. 18, 23.
91 Cf. European Court of Human Rights, *Delfi v. Estonia*, 16 June 2015, No. 64569/09, para. 65.

as has been confirmed also by the Recommendation of the Committee of Ministers according to which the obligation of the member States to secure for everyone within their jurisdiction the human rights and fundamental freedoms enshrined in the Convention involves the assurance that existing human rights apply equally offline and online.[92] It means that the content of the right to privacy offline is the same as that of the right to privacy online.

However, a consent that is required nowadays, e.g. to gain access to most social media, might be considered in opposition to a truly valid consent according to the GDPR.[93] Although it might be given in a good faith, there are several conditions that need to be met.[94] Nevertheless, they are usually fulfilled only in a theory by ticking to agree to terms and conditions. However, by automatically ticking, people do not check whether the organisation asking for their consent does not require a consent to the processing of unnecessary personal data, data that is not necessary to provide searched service. Moreover, people online usually do not check the identity of the organisation processing their data, and purposes for which they are being processed, as well as the possibility to withdraw the given consent. They often give their consent also for profiling and even for their data being transferred to third countries that are not within the GDPR's application.[95] This raises the question as to whether such an act could be considered as an operation based on informed consent.

Apart from the right to privacy, the right to the access to information must be reinterpreted due to technical advancements. The internet has revolutionised the way people communicate and access information. Alternatively, it has also given rise to new challenges related to censorship and disinformation campaigns. On the one hand, social media platforms have democratised access to information, allowing individuals to share their views worldwide. On the other hand, these platforms have become fruitful grounds for the spread of misinformation leading to calls for greater regulation.[96]

Technical advancements are also responsible for the challenge of the so-called internet or digital divide that indicates the gap between individuals, and between countries as well, in their access to and use of the internet and digital technologies. This divide reflects disparities in the ability to participate in the digital world, creating therefore further inequalities in the access to information, education, economic opportunities, and even social engagement. This inequality in the access to the internet has been influenced by several factors, including an infrastructural, economic, and social lack of support which has given rise to insurmountable obstacles, e.g. for

92 Recommendation CM/Rec (2014)6 of the Committee of Ministers to Member States on a Guide to human rights for Internet users (adopted by the Committee of Ministers on 16 April 2014 at the 1197th meeting of the Ministers' Deputies).
93 See: GDPR, Art. 5.
94 See e.g.: Guidelines on Consent under Regulation 2016/679.
95 Custers, 2013, pp. 437 et seq.
96 Bradshaw and Howard, 2019.

the effective realisation of the right to education.[97] Moreover, without addressing the internet divide, economic inequality between countries will probably increase. That is why access to internet might be considered a part of third-generation rights, since it requires a combination of policy interventions, technological innovations, and international cooperation, especially in relation to supressed groups.[98] However, because of the cause of this phenomenon, it has been selected here as an example of fourth-generation rights.

If compared to the previous rights selected as examples of the fourth-generation rights, the impact of technologies has been extremely present in challenges posed by artificial intelligence (AI),[99] especially in relation to the issue of informed consent. Many AI systems, particularly those based on machine learning, operate as "black boxes," where even their developers may not fully understand how they arrive at specific outcomes.[100] This lack of transparency can undermine an individuals' autonomy, as people may not be able to challenge or contest decisions made by AI systems that impact their lives which has been in stark contradiction with the overall aim of the establishment and development of human rights protection systems based on the protection of the very concept of an individual being independent and equal.[101] Human beings have fought for their collective freedom, but it seems that they wrested power from an absolute sovereign in antiquity, only to fall under the control of an automatic system of the evaluation of online information. This contradiction is not only designed to make us understand that AI is a good servant but a bad master. One must remember that the use of AI and its algorithms in decision-making processes has often been trained on historical data, which may contain biases related e.g. to race.[102] It means that even unintentionally, AI systems can be a reason that biased decisions can be made that disproportionately affect marginalised groups.[103]

For example, research has shown that AI systems used in police systems often target minority communities, leading to disproportionate arrests and incarceration rates.[104] This and similar examples point out the need for the regulation of AI systems to ensure that they do not violate individuals' rights to equality and non-discrimination. In response to these concerns, some scholars have called for the adoption of algorithmic accountability frameworks since accountability should not be transferred to machines.[105]

97 UNESCO, 2020, Global Education Monitoring Report: Inclusion and Education.
98 Hilbert, 2011, pp. 479–489.
99 The term of an artificial intelligence is used although it is not intelligent as such, it is just able to use all the human inputs, i.e. all the results of the human experience in an unimaginably quick way.
100 Pasquale, 2015.
101 Sartor, 2020, pp. 711 et seq.
102 Gravett, 2021, pp. 31 et seq.
103 Eubanks, 2018.
104 Narayan, 2023, p. 10.
105 Brożek, 2023, p. 403.

Finally, as for the examples of the fourth-generation rights, advancements in biotechnology, such as gene editing and reproductive technologies, also raise ethical concerns about autonomy, equality and informed consent. This is the usual example that this author provides when talking about fourth-generation rights. One can talk about the right to privacy, the right to information and the right to non-arbitrary decisions of any system, also by interpreting other generations of human rights while focusing on informed consent, yet, when technologies such as Clustered Regularly Interspaced Short Palindromic Repeats (CRISPR) allow for the precise editing of the human genome, this gives rise to technology's direct influence on the human genome, being the fundamental building blocks of the essence of a human being. The question arises, as to whether it has any radical influence on human beings and their rights. On the one hand, there is a potentially high chance to eradicate genetic diseases. On the other hand, these technologies also raise questions about the ethics of genetic manipulation and the potential for eugenics.[106] Ensuring that individuals have the right to make informed decisions about their own bodies, without coercion or manipulation, is a key challenge in the digital age.

Technological advancements in biotechnology and genetic engineering have largely influenced our understanding of the human genome and the use of unprecedented possibilities for medical treatments and disease prevention. Nevertheless, these technologies also present a significant challenge because of potential threats they give to the integrity of the human genome.

Researchers have already achieved significant breakthroughs in somatic gene editing, where DNA changes are made to non-reproductive cells, affecting only the individual and not their descendants. This form of gene therapy has shown promise in treating a range of genetic disorders. For example, CRISPR has been successfully used in clinical trials to treat patients with sickle cell anaemia by modifying the defective gene that causes the disease.[107]

However, while somatic gene editing raises only fewer ethical concerns, the potential for germline editing, i.e. altering the DNA of reproductive cells, which can be passed on to future generations, has provoked more widespread discussion. Germline editing could potentially eliminate hereditary diseases from entire family lines, but it also carries risks, including unintended mutations and unknown long-term effects on the human genome. The biggest challenges include off-target mutations, such as immunogenicity,[108] genetic inequality, and even the potential to practise eugenics.[109]

106 Council of Europe, DH-BIO/INF (2019) 13, Committee on Bioethics, Ethical and social perspectives on the use of gene editing in humans. Short report based on the report 'Overview of ethical and social issues of human gene editing as raised by policy documents' Howard and Niemiec (2019), 1 October 2020, p. 5.

107 Frangoul et al., 2020.

108 Adli, 2018, p. 10.

109 Council of Europe (DH-BIO), Ethical and social perspectives on the use of gene editing in humans, DH-BIO/INF(2019)13, 1 October 2020, p. 5.

The long-term effects of editing the human genome are still not well covered. Genetic changes introduced today may have unforeseen consequences for future generations, potentially causing new diseases or even deteriorating existing genetic weaknesses. This possibility also raises serious ethical issues about justice and fairness in the distribution of technological benefits. The creation of a genetically enhanced class could lead to new forms of discrimination or even social stratification based on genetic traits. Such inequalities would undermine the principle of human dignity, even possibly creating a society in which people are valued not for their intrinsic worth of being human and having inherent human dignity but for their genetically engineered abilities.

Despite all these challenges, on the one hand, there is no global thrive for consensus on the regulation of gene editing from the perspective of individual states. On the other hand, international organisations such as the World Health Organisation (WHO) have called for a framework for germline editing and established the Expert Advisory Committee on Developing Global Standards for Governance and Oversight of Human Genome Editing in 2018. In 2021 this committee recommended the regulation of genome editing or even moratoria until international guidelines were established.[110] Nevertheless, there have been scholars claiming that moratorium as such does not solve the challenge and calling for an informed adaptive consensus.[111] To sum up this subchapter, while the potential for curing genetic diseases and improving human health is undeniable thanks to technological advancements, the ethical and social challenges posed by technologies must not be overlooked. Safeguarding the human genome requires a careful balance between scientific progress and the protection of human rights.

2. Conclusion

To summarise the whole chapter, it is important to point out that before the establishment of the international human rights protection system, numerous national-level frameworks laid the foundation for what would later become universal human rights norms. From the Cyrus Cylinder through to the Magna Carta, and to the American and French revolutionary documents, these national systems played a crucial role in the development of the principles of liberty and equality that underpin contemporary human rights law. The expansion of constitutional rights throughout the 19th and early 20th centuries, the abolitionist movement, and respect for the sick and wounded during armed conflicts have contributed to an ever-growing recognition of the need for formal legal protections for individuals' rights at an international level. These attempts have been of crucial importance in the process of shaping the modern concept of human rights, which gained international recognition through institutions

110 WHO Expert Advisory Committee, 2021, p. 33.
111 Kaan et al., 2021, pp. 1 et seq.

such as the League of Nations in the area of minority rights protection systems, and more successfully through the United Nations and treaties adopted under its umbrella, such as the International Covenants. The lessons from these predecessors remain relevant even today, as they remind us of the importance of both national and international efforts in the ongoing struggle to protect human rights. Throughout the history of human rights law, the principles of equality and liberty have driven the development of this whole domain.

An analysis of generations of the human rights framework from an historical perspective provides a useful means to understanding the historical background of human right laws and their development. From the individual freedoms of the first and second generation through to the collective rights of the third generation, and to the emerging rights of the fourth generation influenced by technological advancements, human rights have expanded to address the changing needs of individuals and societies. While each generation of rights reflects a different aspect of human dignity, they are all interconnected and interdependent, underscoring the need for a common approach to human rights protection.

Nevertheless, the technological impact is very specific and currently undergoing strong momentum. During the whole process of human rights protection system development, the protection of human rights has had to remain the primary goal of all the efforts. Currently, this includes protecting individuals from unwarranted data collection, and the misuse of personal information in the digital sphere. Moreover, it aims at the protection of the right to access of information in relation to the internet, i.e. it includes resources available online. Furthermore, it concerns the right to protection from the potential harmful effects of AI technologies, such as arbitrary decisions because of a discriminatory data basis. Finally, the impact of technology on the human genome presents both possibilities and risks. Gene-editing technologies such as CRISPR have the potential to cure genetic diseases, but they also raise serious ethical concerns about off-target effects and genetic inequality, and maybe even the resurgence of eugenics.

Because of the principle of equality, the available benefits from scientific progress have to be ensured for everybody: it is important to ensure that all individuals have access to the benefits of new technologies and innovations, whilst also protecting them from any potential risks.

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| Chapter 2 |

Philosophical Framework for Human Rights Law and Their Development

Aleksander Stępkowski

ABSTRACT

The chapter provides analysis of the concept of human rights considered as the rights of a subject (subjective rights). It describes its emergence in 17 c. as well as further development of the construction, explaining why it is dubious to attribute emergence of rights in ancient times or in Middle Ages. Controversy between naturalistic and positivistic approach towards human rights is also discussed and explained along with the theory of will and that of interest.

The chapter proposes to consider human rights as legal description of conditions considered to be necessary for development and flourishing of human being, providing it is understood as individual. This anthropological reservation is of fundamental importance as the philosophical concept of man determines the way we understand conditions enabling human life and development; hence it determines identity of the rights' concept as well as course of its evolution. Contemporary postmodern transgressions in this respect are also addressed, and it is discussed if the controversial developments of human rights, are to be considered as minor deviations from the generally sound idea, or should they be attributed to intrinsic deficiency of that concept, rising doubts as to the correctness of individualistic anthropology.

KEYWORDS

human rights, subjective rights, natural rights, legal rights, theory of will, theory of interest, person, non-human person

1. The Concept of Human Rights: Why It Is So Important?

The concept of the "human rights" is present everywhere in the contemporary public discourse and more broadly in the contemporary intellectual culture. The term is naturally central for law but even more important for politics. As well, it is greatly discussed in philosophical discourse. However, when speaking about human rights we are addressing a more fundamental question about conditions that enable human beings to lead satisfactory lives. Satisfactory, means the life which continuously makes human life better – enables human development and flourishing. This most

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basic human need might be described in different terms using different words. The term 'human rights' is one of the linguistic ways to describe conditions considered as necessary for continuing human life and development. It is important to understand this linguistic dimension of the issue at stake, as the language of rights is not so much about describing real things (the rights) but rather the way people think about social conditions considered as necessary for them to lead satisfactory lives. It is necessary here to emphasise that the issue of making peoples' life satisfactory is a central one for politics. Therefore, even if the aim of the chapter is to speak about the law, it must be realised, that the subject is strictly political, even if approached from a legal perspective, or – perhaps, better stated – described in legal terms.

1.1. Diversity of Perspectives for Rights – An Overview

Rights by no means should be reduced only to their legal dimension but are central to any kind of reflection about and conceptualisation of the social life. This is basically a political concept deeply rooted in anthropology and ethics. On each of those levels it has its specific expression. Therefore, when someone says, 'I have a right to do something' or 'I have right to be treated' in a certain way, this oftentimes means that actually the law does not provide me with what I claim to 'have the right to'. Furthermore, the law that does not provide me with what 'I have a right to' is believed to be deficient in justice until it will finally provide me with what I claim to 'have a right to'.

This peculiarity of the rights-talk (attributing right to what is actually not granted by the law but is desired by a subject) stems from the simple fact that the importance of the rights category far exceeds a legal dimension. The concept of "human rights" describes in legal terms what one desires in social life from different levels of analysis. The language of rights is first used in philosophy (anthropology and ethics) in order to describe in an abstract way, conditions necessary for man to be able to continue his existence. This philosophical perspective then starts to inspire political discourse that aims at transformation of the existing (and somehow deficient) social reality towards what is considered as desired conditions of social life. This political discourse is materialised in adoption of various political declarations of rights, but the real aim is to transcend this political dimension. This transgression takes effect through instruments of legal enforcement that transform politically declared rights into legal rights enforceable in courts, by means of statutory instruments. Affirmation of human rights through political action made the individualistic ethical agenda the driving force of social life.

It must be emphasised, that enforceability of rights is of key-importance for the idea of subjective rights (rights of a subject). Implementation of certain rights in the legal system does not end their operation at the philosophical or political levels of public discourse. Implementation amounts to normative description, and each description implies differentiation of some reality from its surroundings. However, each legal delimitation always amounts to limitation. Therefore, the operation of an original ethical idea, when confronted with its specific implementation into a

normative text, is still important and inspires ongoing development – be it legislative or judicial.

Moreover, also at the legal level, rights vary in nature depending on where they are located within the legal system. In the hierarchical structure of legal systems, constitutional rights[1] that result from constitutional regulations are placed at the top. These can be enforced through constitutional review, as performed by constitutional courts. Below these constitutionally protected subjective rights are legal rights created by statutory instruments, the source of public or private legal relationships and the rights resulting from them. These public and private legal rights are protected in administrative courts (as public rights) or in common courts (as private rights). This modern nation-state perspective must, however, be supplemented with the legal rights resulting from procedural regulations (administrative or judicial) as the operation of legal procedures, dedicated for the sake of rights enforcement, creates a concurrent legal perspective with a system of distinct interests, which are legally protected within the framework of legal procedures. This dimension is seldom discussed why analysing of the concept of *rights*; however, it must not be overlooked, but rather always kept in mind.

Distinguishing between different levels of the legal system upon which rights have been operating, those qualified as fundamental are often understood as a bundle of simple rights pertaining to a legal entity that describe its relationships with other legal entities. A distinction is made in this context between a subjective right (the bundle) and simple legal rights (entitlements), in which the latter are considered to be single fibres within the bundle. Each specific (simple) right is intended to realize or to protect a specific aspect of a complex subjective right, i.e. a specific interest of a given subject.[2] This way of thinking about rights has emerged within the process of moving constitutional rights from the level of political postulates to the level of a legal system upon which they became enforceable in courts. In this way, the fundamental rights which were declared in constitutions, originally as unenforceable political principles, began to be enforceable in the constitutional court. In this context, a subjective character of a right emphasises not only its complexity but also its legal enforceability. Constitutional rights (also called fundamental rights) are more general and ethically oriented than simple rights (entitlements) protected at a statutory level.

Robert Alexy, based on his theory of fundamental rights, has called the bundle a "*prima facie* right", which has the character of a principle (understood in a specific way as described by Alexy himself), whereas a simple right, being a statutory protected fibre in the bundle of the subjective right, is described by him as "a

1 The constitutional rights are often called fundamental, as constitution is the "fundamental law". Oftentimes however, the reason for this is to escape – trouble-some – adjective "human" in relation to rights granted to legal persons. Moreover, contemporary the notion of fundamental rights is also popular as it can encompass, without obvious confusion, concept of the rights of non-human person, attributed to some of animals.

2 Brzozowski, Krzywoń and Wiącek, 2018, p. 22.

definitive right" having the normative character of a rule (again, according to Alexy's understanding).[3]

In fact, both of these categories (general bundle of *prima facie* right and specific fibres of definitive right) are subjective rights, i.e. they belong to a subject, but they are identified and protected in a way envisaging the specificity of a given level of a legal system upon which they are enforceable. Constitutional rights (also called fundamental rights i.e. rights granted by the fundamental law – German *Grundgesetz*) are more general and ethically oriented than simple rights (entitlements) which protect specific interests that the general fundamental right consists of, at statutory level.[4] They are specified according to the number of specific interests that are to be protected by virtue of the protection of the general fundamental right. At this statutory level, however, rights are still described in general and abstract terms. Based on such general and abstract statutory provisions, the particular interests of a concrete subject are determined by concrete administrative decisions addressed to specific subjects or by means of a specific private contract that involve its parties.

One more important remark in this context is, that if we find the description of a right in terms of the bundle and fibres, it means, that the description has been made in terms of the *Interest Theory*. However, if the description of a right is done in terms of a sphere of freedom, or a sphere within which an individual can legitimately impose his or her will on others, it means that the description was formulated in terms of the *Theory of Will*, which was the original one. Both theories, their origin and specificity, will be discussed later.

Notwithstanding the logical order of the description of different categories of rights within a hierarchical context of a legal system, any historical description should be in the opposite direction. In the beginning, private rights were enforceable in common courts (at the bottom of the hierarchy, in contemporary thought, and later in administrative courts (for public rights). Conceptualisation and protection of rights on this lower level of the system preceded the protection of fundamental rights in constitutional courts, which in most countries were established but after World War II, notwithstanding that the first of them were established in Central Europe just before the war.[5]

However, the process of the development of social life based on the individualistic anthropology is characterised by the gradual displacement of sovereignty into higher levels of social life. One of the stages of this process resulted in the emergence of the centralised modern nation-state. However, after the crystallisation of the modern parliamentary states, a quest towards creation of new supranational political structures

3 See: Alexy, 2002, pp. 197–200. For his distinction between Principles and Rules, see: Ibid., pp. 44–47.

4 However, instead of statutory concretisation, the same effect might be achieved also by means of a constitutional judgement, which provides concrete protection to a specific interest falling within the scope of the situation protected by a constitutional Principle (the *prima facie* right i.e. the bundle). See: Alexy, 2002, p. 60.

5 Lewandowski, 2020, pp. 11–30.

have emerged.[6] This process was in its important part justified by the need for the creation of supranational warranties for individuals against the states in which they are the citizens. In this way, human rights exceeded the framework of the modern nation-state and became an important factor of postmodern supranational political structures and international authorities (including courts) dedicated for the enforcement of human rights protection against modern nation-states. These structures constitute important components of the postmodern political structures emerging on the supranational level.

In each of these diverse contexts, the rights operating there have their specificity, including specificity of the enforcement mechanism.

1.2. Intellectual Identity of Rights

As already mentioned, when speaking about rights, we are dealing with a specific linguistic way of describing conditions that are considered by the people to be necessary for them to lead satisfactory life. Therefore, rights are basically a political issue. However, if we looked at classical ancient philosophers and their political theories, it would be vain to look for some theories of rights. Instead, they developed concepts and the language to discuss the issue of conditions for satisfactory life, describing the latter in terms of common good and justice, not that of the rights.

It must therefore be asked, what makes some authors address the issue of a happy social life with the term common good, rather than with the concept of rights? The reason lies in the different anthropology that underpins our concept of social life.

The term "human rights" describes conditions necessary for human life, development and flourishing if we understand man as an individual. If, however, we understand the human being not as an asocial individual but as a creature endowed with a social nature and thus living naturally in community (not needing to create it out of autonomous decisions taken by individuals), then we describe those conditions necessary for human development in terms of the common good. Since the chapter is about rights, I am not going to develop a parallel explanation about the common good, but it is worthwhile and important to mention this counterpoint since we are much more willing to understand a just social life in terms of rights, rather than in terms of the common good. This indicates that individualistic anthropology is the default theory for our contemporary Western World.

1.3. Should the Society Be Just or Free?

Human rights are most often understood as a foundation for a just social life. At first glance, it seems perfectly true, however, upon a deeper perspective, the association is not so obvious. Human rights tend much more to the idea of freedom than that of justice. The latter category – when considered in the context of individualistic anthropology – is not understood as a category *per se* but rather as the contingent effect of efficient protection of individual freedoms of members of society. This precedence of

6 Stępkowski, 2025, p. 64.

freedom before justice is important here, as the primary practical obstacle to individual freedom stems from social life i.e. from the necessary (some would add: "natural") cohabitation with others. Those "others" next to whom we live (our neighbours) limit our space of freedom. Those social determinants might be considered as something natural (a requirement of justice) but if we accept individualistic anthropology, then much more often those social determinants are considered as social coercion associated with a kind of injustice.

Here we arrive at the point, where the idea of human rights starts to provoke problems. At some point, human rights appear to be too unsocial and detrimental (if not destructive) to social life. Therefore, we admire *human rights* as promising a social life that respects our freedom, however, at the same time we are afraid that they might become an efficient instrument of social disintegration.

This demonstrates again that the very concept of the rights is inherently rooted in individualistic anthropology, being in fact its ethical or legal (depending on the context) manifestation. The anthropological question here is at the very centre of our dilemma. The answer to the question about human identity – are we social beings or unsocial individuals? – will determine all intellectual culture and social institutions.

It might be presented as a question about the competitive precedence between two basic categories for social life: freedom or justice. What was first? Either justice is first and determines the way we understand freedom, or freedom is first and determines the way justice is to be understood. If we accept the earlier position, than we understand social life as focused on the achievement of common good. If, however, we prefer the latter position, then we understand that the main goal for social life is to protect human rights.

The first option presupposes the social nature of the man; the second one, presupposes an individualistic human nature. The first one is the basis of pre-modern intellectual culture (thus Plato and Aristotle were not teaching about rights), the second one is the foundation of modern and subsequently post-modern intellectual culture. For the first approach, virtue was meant to achieve a just social life; for the second, right allows achievement of social cohabitation respecting individual freedoms.

Speaking from an abstract conceptual perspective, there is no third-compromising way. We must choose between either a social and community driven anthropology considering justice as the foundation of social life, or an individualistic anthropology considering freedom as the foundation. The promise of a third way in this respect is to propose a kind of communicative strategy allowing temporal mitigation of dysfunctions resulting from the implementation of the individualistic anthropology pertaining to social life.

1.4. The Concept of the Human Rights

Considering all that has been stated so far, we can conclude that human rights are about legal protection of the human ability to seek happiness with individual free choices. In other words, the *notion of human rights describes in legal terms the conditions for development and flourishing of human being understood as individual*. Moreover,

the rights presuppose, that those conditions for human development and flourishing are to be ultimately enforceable with legal means. Therefore, making human rights enforceable with legal means achieves perfection and destiny of rights.

2. Emergence and Early Development of the Concept of Rights

The concept of rights appeared in a mature form, in the middle of the 17th century by assigning a specific philosophical and political content – determined by modern intellectual categories – to the Latin term *ius*. This inspired academic writers to think as if the concept of "right" resulted from the historical development of the Roman law categories. This was however misleading[7] despite being popular.[8] In fact, the concept of rights emerged as an effect of the systematic development of individualistic anthropology considered as an intellectual foundation for modern political theory. First it was invented in political discourse that subsequently inspired modern legal science with the concept of rights at its centre. The said process was long-lasting, and it can be traced in the development of the meaning that has been attributed to the Latin term "*ius*" and its relation to the other Latin term – the "*lex*".

Mature demonstration of the concept of *the right* (which in continental European writings is qualified with the adjective "subjective" to emphasize its unbreakable relationship with an autonomous individual i.e. will-driven subject), appeared in the writings of Thomas Hobbes. He introduced a precise dichotomous distinction within our understanding of normative phenomena distinguishing between subjective and objective meaning of the law. The first meaning, relating to an autonomous subject, Hobbes reserved the term "right" (*ius*), and for the second meaning – relating to objective legal rule – he reserved the term "law" (*lex*). In this way he broke the traditional connection in European legal jurisprudence that had been sustained between *ius* and the category of justice (*iustitia*). Through this operation, and from the beginning of the modern era, the term "right" (*ius*) has become a legal way of expressing the ethical category of freedom (*libertas*). Moreover, this meaning as determined by the Thomas Hobbes is still valid in the Western legal culture. The term *ius/jus* is attributed with some natural law content having much in common with freedom, whereas the term *lex* is to be understood in terms of statutory enactment associated with rigidity of positive law and legal deficiencies resulting from the same.

7 Eminent public law professor Franciszek Longchamps, directly blamed for this intellectual fallacy the pandectists (lawyers adapting texts of Roman law for use in the conditions of modern society) – otherwise excellent school of legal thought – which led many good lawyers to 'think that the notion of subjective right derives in a straight line from Roman law'. See: Longchamps, 1961, pp. 108–109.

8 See: Opałek, 1957, pp. 111–112; Levy, 1951, pp. 202–203; see also: Kolańczyk, 2001, p. 117; Scholtens, 1958, pp. 163–169; Coing, 1982, pp. 241–264; Merkwa, 2018, pp. 23–153.

2.1. How the Concept Was Set by the Hobbes

According to Hobbes, man was to be understood as an individual, whose humanity could only manifest in a state of moral equality and absolute freedom from any social relations which deform his natural inclinations. Individualist anthropology does not allow one to start political theory with the constatation of social life but first requires one to explain the reasons why people decided to live in common. After all, according to this assumption, it is not the community that constitutes the natural environment for man, but a situation in which equal people live in absolute freedom unfettered by any social relationship.

In this way, the individualist anthropology is introduced into political philosophy through the construction of a pre-social condition of man, referred to as the "state of nature". The reasons and the mode in which human beings abandoned this pre-social state of existence were supposed to explain the nature of political power and the proper way it functions.[9] In practice, on the other hand, they were to constitute a critique of the existing political order, containing a revolutionary call for its fundamental reconstruction (destruction of the old society and the building of a new one upon the novel intellectual grounds).[10]

Hobbes consistently portrayed the pre-social condition as a situation in which man enjoys absolute freedom and reveals his true asocial nature. For Hobbes human nature is by no means the cause and the reason for the social life, but the cause of conflicts that lead to war of all against all.[11] Therefore, the state of nature – being the condition in which human nature finds its full expression – is a state of permanent war between individuals enjoying unlimited (natural) freedom. People therefore decide to form a political community in order to set limits to this natural freedom so that its exercise cannot lead to war. These limits are set by the sovereign, whose will is the law that constitutes the only criterion of right and wrong in human society.[12]

9 Locke, 1824, § 4, pp. 131–132: 'To understand political power right, and derive it from its original, we must consider, what state all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions and persons, as they think fit, (...). A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another'.

10 Stępkowski, 2025, pp. 64–68.

11 Leviathan, 13, 6: 'in the nature of man, we find three principal causes of quarrel. First, competition; secondly, diffidence; thirdly, glory. (...) 8. Hereby it is manifest that during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war as is of every man against every man.' Hobbes, 2008, pp. 83, 84.

12 Leviathan, 6, 7: '(...) these words of good, evil, and contemptible are ever used with relation to the person that useth them: there being nothing simply and absolutely so; nor any common rule of good and evil to be taken from the nature of the objects themselves; but from the person of the man, where there is no Commonwealth; or, in a Commonwealth, from the person that representeth it' (souvereign *scilicet).* Hobbes, 2008, p. 35.

Thus, positive law becomes the only foundation of ethics.[13] The law laid down by the sovereign thus sets the limits within which people can enjoy their natural freedom without the risk of unleashing a war of each against each.

What is important in the current context, is that Hobbes described man's natural freedom in legal terms, referring to it as *jus naturale* (right of nature).[14] He also precisely distinguished the term right of nature (natural entitlement, or subjective right) from the concept of *lex naturalis* (law of nature). In the state of nature, an individual's freedom is not limited in any way other than by the physical strength of the individual concerned. Thus, the sphere of this freedom extends so long as one does not encounter an obstacle which cannot be overcome. In social life, on the other hand, a subjective right is a sphere of freedom whose limits are set by legal (statutory) rules creating others' obligation not to interfere into this sphere. A subjective right is thus a substitute for natural freedom, created for individuals by the sovereign. Statutory law – absent in the state of nature – enables peaceful coexistence between people. However, this artificial legal order is only possible due to the sovereign – the lawgiver empowered by the individuals to exercise the power stemming from their natural freedom in order to set universally binding, coercive rules for the members of the given society. The sphere delimited by positive law (*lex*), within which man can continue to enjoy his individual freedom, is precisely that of "subjective right" (*ius*) though no-longer natural but granted by the lawgiver. It is the sphere within which the individual might be considered fully sovereign.[15] Hobbes thus formulated the classical concept of individual freedom, according to which what is not forbidden by positive law (*lex*) belongs to a sphere (*ius*), which is free from external coercion. In this sphere, as it had been in the state of nature, individuals can act, guided solely by their own will.

Hobbes thus made a distinction, crucial for modern legal science, between subjective right and objective law. He did this by describing the former with the term

13 Leviathan, 29, 6: '(...) every private man is judge of good and evil actions. This is true in the condition of mere nature, where there are no civil laws; and also, under civil government in such cases as are not determined by the law. But otherwise, it is manifest that the measure of good and evil actions is the civil law; and the judge the legislator, who is always representative of the Commonwealth.' Hobbes, 2008, p. 214.

14 Leviathan, 14, 1: 'The right of nature, which writers commonly call jus naturale, is the liberty each man hath to use his own power as he will himself for the preservation of his own nature; that is to say, of his own life; and consequently, of doing anything which, in his own judgement and reason, he shall conceive to be the aptest means thereunto.' Hobbes, 2008, p. 86.

15 Leviathan, 21, 5–6: 'But as men, for the attaining of peace and conservation of themselves thereby, have made an artificial man, which we call a Commonwealth; so also, have they made artificial chains, called civil laws, (...) In relation to these bonds only it is that I am to speak now of the liberty of subjects. For seeing there is no Commonwealth in the world wherein there be rules enough set down for the regulating of all the actions and words of men (as being a thing impossible): it followeth necessarily that in all kinds of actions, by the laws pretermitted, men have the liberty of doing what their own reasons shall suggest for the most profitable to themselves. 6. (...) The liberty of a subject lieth therefore only in those things which, in regulating their actions, the sovereign hath pretermitted.' Hobbes, 2008, p. 141.

ius (right) and the latter with *lex* (law). More precisely, what was done here was not so much to distinguish but to oppose the meanings of these words. For while Hobbes understood the term *ius* to mean "individual liberty", he identified the term *lex* with coercion originating from an enacted rule of conduct constituting a specific duty. Thus, he recognised that the terms *ius* and *lex* stand in the same relation as the notions of "freedom" and "duty".[16] Both the equivocation of *ius* with freedom and its opposition to *lex,*[17] quickly spread in philosophy, becoming a kind of universal philosophical and legal idiom, commencing in the 17th century. We find it both with Spinoza[18] then the representatives of the Enlightenment school of the law of nature[19] and finally with Immanuel Kant,[20] who made it an enduring element of German idealism.[21]

It was German idealist philosophy that was central to the development of the theoretical notion of subjective right in modern legal theory. Kantian transcendental idealism viewed human "freedom" mainly through the prism of an autonomous

16 Leviathan, 14, 3: 'For though they that speak of this subject use to confound jus and lex, right and law, yet they ought to be distinguished, because right consisteth in liberty to do, or to forbear; whereas law determineth and bindeth to one of them: so that law and right differ as much as obligation and liberty, which in one and the same matter are inconsistent.' Hobbes, 2008, p. 86. This passage refers to the state of nature, but mutatis mutandis perfectly applies to the social life.

17 As it seems, Hobbes was the proper author of this semantic juxtaposition of the two terms. The strangeness of such a juxtaposition before Hobbes, is witnessed by his polemic against Sir Edward Coke, to whom such a juxtaposition was alien, what Hobbes makes the subject of ironic remarks. (Hobbes, 1971, p. 73; See also: Letwin, 2005, p. 97). It is also worth noting that the Hobbesian distinction was meticulously continued in that current of English legal thought which was rooted in the Hobbesian tradition and linked directly to Jeremy Bentham and his followers. The dominant current, however, which was a continuation of the common law tradition, was still insensitive to this distinction. This can be clearly seen in the – otherwise not very precise – account by Opałek, K. who erroneously considered John Austin's position to be representative for English law. (Opałek, 1957, pp. 56–57).

18 'Per ius enim civile privatum nihil aliud intelligere posumus, quam uniuscuisque libertatem ad esse in suo statu conservandum, quae edictis summae potestatis determinatur, solaque eiusdem auctoritate defenditur.' See: Spinosa, 1846, XVI § 40, p. 214. For more about influence of Hobbes on Spinosa see: Borucka-Arctwowa, 1957, pp. 36–44, 78.

19 Puffendorff, 1688, Lib. I cap. VI. § 3: 'Cum enim homo illa omnia potestatem agendi habeas, que à viribus suis naturalisés proficisci posant, nisi que per legem prohibetur; inde usus loquindi fert, ut quae legis alicujus specie non interdicuntur, ex illa lege eadem agendi jus esse dicatur. Igitur in hoc quizem significatu jus ad libertatem pertinet: lex vero vinculum aliquod notation, quo libertas naturales constringitur.' For Hobbes' influence on Pufendorf, see: Borucka-Arctwowa, 1957, pp. 271–273. The same distinction between lex and jus is applied also by Christian Wolff. However, it is much more distinction, than juxtaposition. See: Wolff, 1750, §39, p. 20: 'Lex dicitur regula, juxta quam actiones nostras determinare obligamur.'; § 46, p. 24: 'Facultas ista, seu potentia moralis agendi dicitur Jus.'

20 Immanuel Kant differentiated between 'Der Rechte als systematischer Lehre' which has clearly objective character, and 'Der Rechte als (moralischer) Vermögen Andere zu verpflichten', which is precisely the subjective right. Each of those perspectives for Law is divided by Kant into its natural (primary) and social (secondary) dimensions. Kant, 1870, pp. 39–40.

21 As for German idealists, see: Opałek, 1957, pp. 163–165. It is worth quoting his conclusion from p. 165 '(...) Hegel presents the concept of subjective rights understood in terms of freedom inherent to human being – similar to that of Kant or Fichte'.

will by which the individual can impose obligations on other persons. This ability to impose obligation on others was what Kant called the "notion of right".[22]

Inevitably, the subjective right also became part of the construction of the "legal relationship" (*Rechtsverhältnis*), which was used to describe social relations, in philosophical terms,[23] and later, in legal terms. Hence, the German *Rechtslehre* (the *usus modernus pandectarum*) treated the *right* so understood as the "essence of the legal relationship".[24] Thus, in addition to the concept of subjective right as a "sphere of freedom," closely related to the concept of autonomous *will* (or the binding force of the will)[25] came to be used as a description of the subjective right.[26] This approach came to be known as the "will theory", according to which, a subjective right is a "force of will" (*Willensmacht*) granted to an individual by the legal order (the system of objective legal rules).[27]

22 'Freiheit (Unabhängigkeit von eines Anderen nöthigender Willkür), sofern sie mit jede andere Freiheit nach einem allgemeinen Gesetz zusammen bestehen kann, ist dieses einzige, ursprüngliche, jedem Menschen kraft seiner Menschheit zustehende Recht. ' Kant, 1870, p. 40; Kant, 1870, p. 42: '(...) unsere eigene Freiheit (von der alle moralischen Gesetze, mithin auch alle Rechte sowohl als Pflichten ausgehen) nur durch den moralischen Imperativ, welcher ein pflichtgebietender Satz ist, aus welchem nachher das Vermögen, andere zu verpflichten, d. i. der Begriff des Rechts, entwickelt werden kann'.

23 Kant explained the term legal relationship in the following way: 'Der Begriff des Rechts, sofern er sich auf eine ihm correspondirende Verbindlichkeit bezieht, (d. i. der moralische Begriff desselben) betrifft erstlich nur das äußere und zwar praktische Verhältnis einer Person gegen eine andere, sofern ihre Handlungen als Facta aufeinander (unmittelbar oder mittelbar) Einfluß haben können. ' Kant, 1870, p. 31. For similar in this respect position by Fichte, see: Opałek, 1957, pp. 154–156; Nowak-Juchacz, 2002, pp. 216–217.

24 'Das Wesen des Rechtsverhältnisses wurde bestimmt als ein Gebiet unabhängiger Herrschaft des individuellen Willens' This sphere in which the individual will reigns independently is precisely the subjective right, as Savigny wrote about in his system a little earlier. '(...) der einzelnen Personzustehende Macht: ein Gebiet, worin ihr Wille herrscht, und mit unsrer Einstimmung herrscht. Diese Macht nennen wir ein Recht dieser Person, gleichbedeutend mit Befugniß: Manche nennem es das Recht im subjektiven Sinn. ' Savigny, 1840, pp. 7, 334.

25 The same says the Savigny's disciple Puchta: 'Vergmöge der Freiheit ist der Mensch subject des Rechts. Seine Freiheit ist das Fundament des Rechts, alle Rechtsverhältnisse sind ein Ausfluß derselben'. Puchta, 1875, p. 6.

26 'Die Regel, wodurch jene Gränze und durch sie dieser freye Raum bestimmt wird, is das Recht', Savigny, 1840, p. 332. Georg Puchta described relationship between law in objective and subjective (right) sense, in the following way: 'Wir gebrachen das Wort Recht für den allgemeinen Willen, den Willen der Gesammtheit (...) Recht ist also hier eine Rechtsvorschrift (...) Das Wort Recht wird aber auch gebraucht für den Willen des Einzelnen, sofern er jenem allgemeinen Willen entschpricht, für die Herrschaft oder Macht (...), die der Person über einen Gegenstand gegeben ist.' Puchta, 1875, p. 8. Cursus der Institutionen, cit., Intellectual dependence of German jurists from idealistic philosophy is well known. For Savigny, see: Kiefner, 1969, pp. 3 ff. About the dependence in understanding category of "right" in terms of "liberty". See pp. 8–10. About Puchta's dependence from Kant and Fichte see: Opałek, 1957, pp. 161–162.

27 'Recht (Recht im subjectiven Sinn), subjectives Recht) ist eine von der Rechtsordnung (Recht im objectiven Sinn, objectives Recht) verliehene Willensmacht oder Willensvorschrift concreten Inhalts'. Windscheid, 1875, § 37, p. 91.

This definition demonstrates an important transformation in the way subjective right was perceived. Suddenly, the notion of the right is fully contingent to the notion of the law understood in a positivistic way as a system of statutory rules.

2.2. The "Subjective Rights" as Granted by the Legislation

The theories inspired by German idealistic philosophy that made the free *will* of the individual the core of the concept of subjective right, had one fundamental shortcoming. They were *a priori* theoretical constructs deliberately detached from the empirical world. Kant himself stipulated that he built his theory upon a view of man understood in terms of *homo noumenon* – a personality independent of physical properties, in which only the human capacity for freedom is essential.[28] Hence, the theoretical approaches based upon Kantian or Fichtean philosophical constructs completely disregarded the possibility that the subject of rights might be a person who could not use his or her will alone, such as children or persons mentally handicapped. This difficulty was however identified, and subsequently, inspired efforts to eliminate or at least marginalise the notion of the will in the concept of right. Instead of basing it on the categories of the "will" or "power" of the will, it came to be associated with the concept of an "interest" i.e. an "advantage", or a favourable situation, provided to the rights bearer. Thus, on the basis of German pandectistic jurisprudence (*Pandektenwissenschaft*), Rudolph Jhering proposed to completely eliminate the "will component" from the definition of right by formulating a "theory of interest", according to which the right (*subjektives Recht*) was to be understood as the "legally protected interest".[29]

Jhering did not succeed in the complete elimination of the component of "will", its "power" or "authority", from the concept of right. However, he permanently introduced the concept of *interest* into the concept of right. This is reflected in considering the concept of "interest" as the purpose for which the individual has been endowed by the legal order with the "power" or "authority of the will."[30] Jhering's theory of interest thus effected an extremely important qualitative change in continental legal science. For it made the subjective right not a primary (inherent, natural) category, but secondary (contingent) upon legislation. Jhering stipulated that statutory law, which is

28 '(...) in der Lehre von den Pflichten der Mensch nach der Eigenschaft seines Freiheitsvermögens, welches ganz übersinnlich ist, also auch bloß nach seiner Menschheit, als von physischen Bestimmungen unabhängiger Persönlichkeit, (homo noumenon) vorgestellt werden kann und soll, zu den Unterschieden von eben demselben, aber als mit jenen Bestimmungen behafteten Subject, dem Menschen (homo phaenomenon)' Kant, 1870, p. 42.

29 'der Wille ist nicht der Zweck und die bewegende Kraft der Rechte; der Willens- und Machtbegriff ist nich in Stande, das praktische Verständnis der Rechte zu erschließen', Jhering, 1954, § 60, p. 339.

30 Regelsberger, 1893, § 14, p. 74: '(...) rechtlich anerkanten und geschützte Interessen- und Machtkreise: das sind die Rechte der Einzelnen, die subjektiven Rechte.'; See also: Merkel, 1885, § 159, p. 88: 'Das subjektive Recht ist dem Gesagten zufolge ebenso wie objektive Recht Macht, und zwar eine Macht, welche um bestimmter – vom objektiven Rechte vorausgesetzter – Interessen willen verliehen und ihnen gemäß als ein Werkzeug für ihre Befriedigung gestaltet ist.'; Particularly worth of emphasise is theory by Roman Longchamps de Bérier. See: Longchamps de Bérier, 1911, pp. 75–131, in particular, pp. 96–102.

supposed to guarantee individual interests, cannot be an arbitrary will of the legislator, but constitutes the recognition of a claim immanent in every human being.[31] In practice, however, these elevated reservations by no means changed the fact that the concept of subjective right become a category fully contingent upon statutory law.

This evolution must be considered against the background of the general development of legal thought in the nineteenth century, when natural-law thinking was replaced by utilitarian paradigm. Eighteenth-century language of natural law, criticising the old (premodern) social order, was an excellent instrument of political critique,[32] especially of the ancient *ius commune*. However, as liberal ideas succeeded and modern law was implemented through legislation, positive law began to be considered no longer as an obstacle to this modern political agenda but rather understood as an instrument for its implementation. Hence, positive law became *de facto* a guarantee for natural rights, and the antinomy between positive law and natural law that had been dominating 18th century political writings,[33] the opposition between natural law and positive law has been replaced by a distinction between "subjective rights" and the "objective law" that constitutes them. Contemporary, confrontation of the concepts of *ius* and *lex* express the tension between statutory provisions (*lex*) and the just law, associated with the superior natural order (*ius*).[34]

The philosophical roots of such a concept of *subjective rights,* again, goes back to Vasquez and Grotius, who had inspired Hobbes. The author of Leviathan emphasised that the law enacted by a contractually created sovereign, allow man to know 'what goods he could enjoy and what actions he could perform'. Statutory law was the sole criterion of what was correct and therefore legitimate in the behaviour of citizens.[35] Thus, the positive law is the source of what was considered the essence and symbol of

31 'Nicht eines Künftigen, sondern eines Gegenwärtigen wegen haben jene Personen ihr Recht, nich wegen willkürlicher Laune des Gesetzgebers, sondern in Anerkennung des Anspruchs, den jedes menschliche Wesen auf seiner Stirn trägt. ' Jhering, 1954, § 60, p. 312.

32 Borucka-Arctwowa, 1957, p. 15.

33 Cf. Berkowitz, 2005, pp. ix-xviii. See also: Fletcher, 2002, pp. 15–16.

34 It is clearly described in Opałek, 1957, pp. 148–150. See also: Jakimowicz, 2002, pp. 31–32. This phenomenon is reflected in a very interesting way in the process, gradually taking place over the course of the 19th century, of the gradual equivocation of the Latin term *lex* and its equivalents in European languages with the modern concept of law understood in terms of legislative act of parliament. On the ground of the German legal science, the process is clearly demonstrated by the J. Bluntschli, who in the middle of the 19th century, still distinguished between three meanings of the term "Gesetz", the first of which meant all legal norms, including customary ones, the second of which already associated it only with the positive law, while the strictest meaning was to mean only an act of parliament: 'Im eigentlichen Sinne versteht man unter Gesetz nur die von der obersten gesetzgebunden Gewalt, dem Gesetzgebungskörper, mit höchster stattlicher Autorität ausgerüstete dauernde Rechtsregel und Rechtsinstitution.' Bluntschli, 1868, pp. 545–546 – quotation from the p. 456; See also Zakrzewski, 1959, p. 18.

35 Leviathan, 26, 3: 'Civil law, is to every subject those rules which the Commonwealth hath commanded him, by word, writing, or other sufficient sign of the will, to make use of for the distinction of right and wrong; that is to say, of that is contrary and what is not contrary to the rule'. Hobbes, 2008, p. 176.

individual independence: property.[36] The position taken by the Hobbes was continued in England by Jeremy Bentham, whose views on the matter are referred to by Herbert Hart as the "theory of benefit".[37]

As is well known, Bentham believed that the task of the state was to ensure the greatest possible happiness for the greatest possible number of people. The main means of achieving this, alongside state education, was legislation.[38] Bentham is in this respect a faithful follower of Hobbes,[39] whose ideas he assimilated largely through the French hedonists, namely Helvetius.[40]

As already demonstrated, according to this theory, state legislation is considered as being a necessary condition for social life. Hence, according to Bentham, the duties that the sovereign imposes on individuals, almost always[41] imply a certain benefit for others. This benefit, as derived from positive law, constitutes precisely a right ("right correlative to duty") to certain "benefits" from those obliged ("an enforced service" negative or positive, for the benefit of others). These benefits may be positive, but oftentimes they will be "negative benefits", constituting liberty-rights. Such liberty-rights, according to Bentham, will be, for example, all the "benefits" that people obtain as a result of the operation of criminal laws prohibiting commission of crimes, and thus indirectly protecting people from becoming victims. Thus, every positive

36 Leviathan, 18, 10: '(...) to the sovereignty [is annexed] the whole power of prescribing the rules whereby every man may know what goods he may enjoy, and what actions he may do, without being molested by any of his fellow subjects: and this is it men call propriety. For before constitution of sovereign power, as hath already been shown, all men had right to all things, which necessarily causeth war: and therefore, this propriety, being necessary to peace, and depending on sovereign power, is the act of that power, in order to the public peace. These rules of propriety (or *meum* and *tuum*) and of good, evil, lawful, and unlawful in the actions of subjects are the civil laws.' Hobbes, 2008, p. 119.

37 Hart, 1982, pp. 164–170.

38 '(...) the art of legislation (which may be considered as one branch of the science of jurisprudence) teaches how a multitude of men, composing a community, may be disposed to pursue that course which upon the whole is the most conductive to the happiness of the whole community, by means of motives to be applied by the legislator'; Bentham, 1823, pp. 255–256.

39 Leviathan, 30, 1: 'The Office of the sovereign, (be it a monarch or an assembly,) consistent in the end for which he was trusted with the sovereign power, namely the procuration of the safety of the people, to which he is obliged by the law of nature, ... But by safety here is not meant a bare preservation, but also all other contentment of life, which every man by lawful industry, without danger or hurt to the Commonwealth, shall acquire to himself. And this is intended should be done, (...) 2. (...) by a general providence, contained in public instruction, both of doctrine and example; and in the making and executing of good laws.' Hobbes, 2008, p. 222.

40 Helvétius, 1777, pp. 298–300, Chapter VIII and XI in particular. On Helvetius being the link between Hobbes and Bentham, see: Tatarkiewicz, 1997, pp. 148–149.

41 Bentham pointed to two exceptions when duties imposed on individuals do not at the same time imply benefits for others. These are, first, so-called "self-regarding duties" that prohibit things that would bring harm or detriment to the very individual to whom the duty applies. The second category consists of duties that the legislature has imposed contrary to the principle of utility i.e. those that do not benefit anyone. He calls them "ascetic" or "useful to no one". He believes that they have always been too numerous in the history of mankind and should obviously cease to exist. See: Hart, 1982, p. 168.

law provision carries with it some kind of benefit, thereby creating an entitlement for the individual, by safeguarding a particular interest of the individual.

Such a concept raises number of serious objections.[42] By way of correction, Rudolf von Jhering emphasizes that not every law protecting *de facto* certain interests creates a subjective right.[43] To a large extent, these differences already resulted from the distinct approaches in the legal scholarship of the two authors. Jhering focused on private law issues, whereas Bentham was mainly concerned with criminal law. Hence, accepting an essentially utilitarian point of view, Jhering's concept of the subjective right (individual interest protected by positive law), granted status of a subjective right only to situations specific to civil law, i.e. those in which the enforcement of the subjective right by means of appropriate legal procedures were left to the initiative of a specific rights-holder.[44]

However, it is worth noting that the apparent exaggeration that leads Bentham to consider every manifestation of individual freedom as the exercise of subjective rights is due to the intellectual consistency with which he developed the Hobbesian paradigm. In this context only positive law determines subjective status of an individual.[45] Since the (natural) freedom of the individual in the state, identified as subjective right, spans a sphere not covered by positive law regulation,[46] its scope does indeed depend directly on the content of the sovereign's legislative decision.

42 For critique see: Hart, 1982, pp. 171–188, particularly pp. 172–173. In Germany, similar position to Bentham's took Bernard Windscheid who was criticised in this respect by the A. Baumgartem and Hans Kelsen. See: Kelsen, 1936, p. 315; Opałek, 1957, pp. 28–29.

43 'Nicht jedes Gesetz, welches ein Interesse schüzt, verschaft dem Interessenten ein Recht im subjektiven Sinn, d.h. einen Rechtsanspruch auf Gewährung dieses Schutzes. (...) Polizei- und Kriminalgesezen, sie schutzen uns, aber nicht in Form eines uns zustehenden Rechts'. Jhering, 1954, § 61, pp. 351–352.

44 'Die Behauptung würde richtig sein, wenn das Recht im subjektiven Sinn an die Voraussttzung einer dem Berechtigten zum Zwecke der Behauptung desselben zur Verfügung gestellten Privatsklage geknüpft wäre (...) Das Kriterium derselben besteht nach römischem Recht in der Klage, d.h. in der Anrufung des zur Gerährung dieses Schutzes verpflichteten Zivilrichters. Sonach läßt sich das Recht definiren als Sebstschutz des Interesses. ' Jhering, 1954, pp. 352–353.

45 This subjective status primarily concerns the extent of individual freedom, the nature of which in the social state Hobbes described as follows *Leviathan*, II, 21, 6: 'The liberty of a subject lieth therefore only in those things which, in regulating their actions, the sovereign hath praetermitted: such as is the liberty to buy, and sell, and otherwise contract with one another; to choose their own abode, their own diet, their own trade of life, and institute their children as they themselves think fit; and the like.' Hobbes, 2008, p. 141. It should also be stressed that this vision was by no means purely theoretical. It found its practical expression, for example, in the Napoleonic Code, in the form of the institution of "civil death" see: Sójka-Zielińska, 2007, p. 90.

46 Leviathan, 21, 18: 'The greatest liberty of subjects depends on the silence of the law: (...) In cases where the sovereign has prescribed no rule, there the subject hath the liberty to do, or forbear, according to his own discretion. And therefore, such liberty is in some places more, and in some less; and in some times more, in other times less, according as they that have the sovereignty shall think most convenient.' Hobbes, 2008, p. 146.

3. Between Naturalistic and Positivistic Paradigms of Rights

The evolution in understanding rights as outlined above, shows a clear shift from a natural law position to a positivistic one. However, this evolution does not yet resolve the dispute concerning the identity of subjective rights that exists between legal naturalists and positivists.

That the disfunctions of legal positivism allowed the proponents of the original naturalistic paradigm to insist on its restatement, despite the positivist position appears to be a logical consequence of the naturalistic one. Moreover, the very connection between Hobbes and the introduction of the concept of rights might also provoke disagreement. While the notion of *right* is properly regarded as a trademark of the liberal tradition, Hobbes usually (though incorrectly) is not included into it, being considered as an apologist for absolutism hostile to the liberal tradition. Hence, there is a clear tendency in the academic writings to weaken Hobbes' links with the notion of rights[47] associating the concept instead with Locke. However, more careful analysis demonstrates that Locke did not substantially change Hobbes' concept. He only hid its unpopular features in a rhetorical disguise creating the illusion of its radical opposition to the one described in the Leviathan. However, the entire novelty of Locke's philosophy in relation to that by Hobbes can be easily reduced to a superficial change in the literary narrative creating but a persuasive (though not real) impression of Locke's opposition to Hobbes.

Locke promoted the concept of natural rights (*property* understood in a specifically broad way[48]) as existing prior to the social life, and as such, not created by political authority. According to Locke, individuals, by entering into a social contract, did not relinquish their natural rights, but strengthened them.[49] The same conviction can later be found among French Economists,[50] and subsequently, in Article 2 of the French Declaration of the Rights of Man and Citizen.[51]

47 It was clearly stated by the Freeden, 1991, p. 12. 'Hobbes developed what are now considered to be important component of the notion of rights, but he is not part of the humanist tradition that placed rights-discourse firmly within emerging liberal thought'. Similarly, Hobbes's contribution is clearly downplayed in Freeman, 1994, p. 387, note 94.

48 Locke, 1824, § 123 p. 204: '(...) man is willing to join in society (...) for the mutual preservation of their lives, liberties and estates, which I call by the general name, property.'

49 Locke, 1824, § 131, p. 206. 'But though men, when they enter into society, give up the equality, liberty, and executive power they had in the state of nature, into the hands of the society, (...) yet it being only with an intention in every one the better to preserve himself, his liberty and property; (for no rational creature can be supposed to change his condition with an intention to be worse).'

50 *'Lorsqu'ils entreront en société, et qu'ils feront entre eux des conventions pour leur avantage réciproque, ils augmenteront donc la jouissance de leur droit naturel; et ils s'assureront même la pleine étendue de cette jouissance*', Quesnay, 1888, p. 368.

51 Article II: '*Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'Homme.*'

The misleading characterization of Locke's narrative is perfectly demonstrated when one considers the quality of the state of nature he described. Locke insists, that 'The state of nature is to be governed by the law of nature which is binding upon every one', while

> 'Reason, which is this law, teaches the whole human race, if the latter is willing to be advised by it, that since all are equal and independent, no one ought to inflict damage on another one's life, health, liberty or property'.[52]

In this way, Locke suggested that originally people had been living peacefully and (having property) prosperously. Meanwhile, when explaining reasons for abandoning these natural peaceful conditions, Locke must acknowledge that in fact, situation is opposite and resemble very much state of war as described by the Hobbes.[53] Locke must admit, that

> 'though the law of nature be plain and intelligible to all rational creatures; yet men being biassed by their interest, as well as ignorant for want of studying it, are not apt to allow of it as a law binding to them in the application of it to their particular cases'.[54]

Thus, Locke implicitly conceded Hobbes' point, according to which the laws of nature (*leges naturales*) are only in force when individuals are secured by the political

52 Locke, 1824, § 6, p. 133: 'The state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions'. Elsewhere, however, Locke, in describing the state of nature in which natural law was to apply, that it 'lacks an established, standardised, known law, formed and accepted by universal consent, such as to be the measure of right and wrong.' (Locke, § 124, p. 204; cf. *Leviathan*, 6, 7). Thus, while recognising the necessity of such a written measure of good and evil, Locke implicitly acknowledges that human reason is nevertheless incapable of recognising "good" on its own. What is good must be politically determined, by a decision of the legislature. This argument, explaining the reasons for abandoning of the state of nature, clearly contradicts the earlier quoted description of the state of nature. Moreover, the conviction that people are incapable of distinguishing in common between good and evil justifies the need for state. There is no discrepancy between Locke and Hobbes in this respect.

53 *Leviathan*, 13, 8: '(...) during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war as is of every man against every man. For war consisteth not in battle only, or the act of fighting, but in a tract of time, wherein the will to contend by battle is sufficiently known: and therefore, the notion of time is to be considered in the nature of war'. Hobbes, 2008, p. 84.

54 Locke, 1824, § 124, p. 204. Elsewhere, Locke again acknowledges that in practice people do not obey the law of nature at all. See: Locke, 1824, §128, p. 205: '(...) And were it not for the corruption and vitiousness of degenerate men, there would be no need of any other; no necessity that men should separate from this great and natural community'.

authority.[55] Therefore, Locke must admit that in the state of nature no one obeys the principles of natural equity and justice. Thus, the state of nature, being the state of freedom, is also full of fears and continual dangers,[56] which Hobbes would call the (state of) war. Locke, therefore, must ultimately admit that in the pre-social state of nature man cannot lead a happy life,[57] and for this reason hastens to escape the original war 'under the protection of the laws established by the government'.[58] Notwithstanding the fact that Locke wrote somewhat differently at the beginning of the second treatise, he must admit in the course of his argument that the state of nature lacks established laws '*by which every one may know what is his*'. Thus, the positive law appears to be necessary for individual enjoyment of proprietary rights, which were depicted as if they were a pre-social phenomenon.

> 'To this end "it is that men give up all their natural power to the society which they enter into, and the community put the legislative power into such hands as they think fit, with this trust, that they shall be governed by declared laws,

55 See: *Leviathan*, 15, 3: Among these laws of nature, not binding in the pre-state, Hobbes includes both: moral guidance (precepts of justice, benevolence, kindness, generosity, the use of repression only for corrective purposes, and prohibitions on insult, pride, arrogance) and rules for the distribution of resources in the community (the necessity of the common use of things that cannot be separated; rules for the acquisition of goods by primogeniture or appropriation) but also procedural rules for the settlement of disputes (binding force of judgements, guarantees for arbitrators, guarantees for the impartiality of judges, and rules for witnesses). Hobbes, 2008, pp. 95–96.

56 Locke, § 123, p. 204: 'for all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very unsecure. This makes him willing to quit a condition, which, however free, is full of fears and continual dangers.' The significance of Locke's explanations in §123 of his Second Treatise for the proper reading of §6 is most often overlooked as if it was believed that the latter fully describe Locke's state of nature. See: Stawrowski, 2006, p. 250 (note 103).

57 This must be acknowledged also by François Quesnay in his treatise '*Le droit naturel*'. He was significantly influenced by Locke in presenting essentially identical position, although, in a manner peculiar to the Physiocrats placing greater emphasis on economic issues. While initially he argued against the Hobbesian position, insisting (p. 367) that 'dans l'état de pure nature, les hommes pressés de satisfaire à leurs besoins, chacun par ses recherches, ne perdront pas leur temps à se livrer inutilement entre eux une guerre qui n'apporterait que de l'obstacle à leurs occupations nécessaires pour pouvoir à leur subsistance'; However, in the course of further deliberations, he has to take a completely different position, actually identical to the Hobbesian. Thus, he states (p. 372) that 'les hommes dans l'état de multitude, où la communication entre eux est inévitable, et où cependant il n'y aurait pas encore de lois positives qui les réunissent en société sous l'autorité d'une puissance souveraine, et qui les assujettissent à une forme de gouvernement, il faut les envisager comme des peuplades de sauvages dans des déserts, qui y vivraient des productions naturelles du territoire, ou qui s'exposeraient par nécessité aux dangers du brigandage, s'ils pouvaient faire des excursions chez des nations où il y aurait des richesses à piller; car dans cet état ils ne pourraient se procurer des richesses par l'agriculture, ni par les pâturages des troupeaux, parce qu'il n'y aurait pas de puissance tutélaire pour leur en assurer la propriété.'; Quesnay, 1888, pp. 367, 372.

58 Locke, § 127, p. 205.

> or else their peace, quiet, and property will still be at the same uncertainty, as it was in the state of nature".'[59]

Despite Locke's promotion of the thesis regarding the pre-social and pre-political origin of rights, ultimately, he had to accept (although in an obscure way) the position taken by Hobbes, according to which human rights might only exist in practice when due to protection provided by statutory law.[60] Consequently, Locke must acknowledge that state-created positive laws are necessary for the people, so that they know about the extent of their property rights.[61] Hence, the property rights exist only in society and only by virtue of the positive laws of the community.[62]

The same position is taken by other philosophers that design the modern social philosophy, like Rousseau. The Geneva philosopher emphasised that entering the

59 Locke, § 136, p. 211: '(...) To avoid these inconveniences, which disorder men's properties in the state of nature, men unite into societies, that they may have the united strength of the whole society to secure and defend their properties, and may have standing rules to bound it, by which everyone may know what is his. To this end it is that men give up all their natural power to the society which they enter into, and the community put the legislative power into such hands as they think fit, with this trust, that they shall be governed by declared laws, or else their peace, quiet, and property will still be at the same uncertainty, as it was in the state of nature'. Zbigniew Rau points out, in truth, that in another earlier passage in the second treatise (§ 129) Locke states that in the social contract man gives up his natural liberty only so far as the self-preservation of man and society requires it (Rau, 1992, p. LXV), but a little further on (§ 131), Locke's argument indicates that the decision as to what this self-preservation requires depends solely on the discretion of the legislature.

60 The same conclusion reaches François Quesnay saying that: 'le droit naturel de chaque homme s'étend à raison de ce que l'on s'attache à l'observation des meilleures lois possibles qui constituent l'ordre le plus avantageux aux hommes réunis en société. Ces lois ne restreignent point la liberté de l'homme, qui fait partie de son droit naturel; car les avantages de ces lois suprêmes sont manifestement l'objet du meilleur choix de la liberté. L'homme ne peut se refuser raisonnablement à l'obéissance, qu'il doit à ces lois; autrement sa liberté ne serait qu'une liberté nuisible à lui-même et aux autres'. Quesnay, 1888, p. 377.

61 Locke, § 136, p. 211: 'To avoid these inconveniences, which disorder men's properties in the state of nature, men unite into societies, that they may have the united strength of the whole society to secure and defend their properties, and may have standing rules to bound it, by which every one may know what is his (emphasise added – A.S.). To this end it is that men give up all their natural power to the society (emphasise added – A.S.) which they enter into, and the community put the legislative power into such hands as they think fit, with this trust, that they shall be governed by declared laws, or else their peace, quiet, and property will still be at the same uncertainty, as it was in the state of nature.'

62 Locke, § 138, p. 213: 'Men therefore in society having property, they have such a right to the goods, which by the law of the community are theirs (emphasise added – A.S.), that no body hath a right to take their substance or any part of it from them, without their own consent: without this they have no property at all; for I have truly no property in that, which another can by right take from me, when he pleases, against my consent.'

society requires giving up natural condition of men (his natural liberty) without any reservation and it is an indispensable condition for establishment of the society.[63]

Similar position – obviously inspired by Rousseau – took Immanuel Kant. According to this philosopher, 'positivistic character of subjective rights derives already from the very definition of the *civic* or *legal* state (*Rechtliche Zustand*), which encompass conditions that must be fulfilled so that anyone could exercise his rights'.[64] Hence, rights can only exist (be exercised) by virtue of law created by state. This follows from the very idea of the state of nature as understood in rational terms that individuals operating in this state could never be protected from the violence of others. This was because each individual living in the state of nature has the right to do what seems right and good to that person, and not to rely on the opinion of others. Hence, the necessity of leaving the state of nature, in which everyone is guided by his own opinion, and entering the "civic state", 'in which, what must be considered the property of each individual is legally assigned and secured to him by a sufficient force, which is not his own, but commonly accepted external force'[65] exercised by the public authority according to statutory provisions. Therefore, the rights of the individual ('the property of each individual subject') are created and effectively assigned only by the sovereign and they do not result from nature. Kant makes this even clearer when, considering land ownership as the archetype of all other property. He states that any right must originate from the sovereign as the supreme owner (*dominus territorii*) in the state.[66] Confusion about the natural character of rights stems from the need for property which is naturally inherent in every human being. This need for property,

63 According to Rousseau, the content of the social contract is so determined by its very nature that the slightest modification would make it vain and ineffective; so that Rousseau believed there is only one possible construction of such a contract. Its key provision required alienation of each associate, together with all his rights, to the whole community (*l'aliénation totale de chaque associé avec tous ses droits à toute la communauté*). Rousseau emphasise that the alienation must be without reserve so that to make the union as perfect as it can be (*l'aliénation se faisant sans réserve, l'union est aussi parfaite qu'elle peut l'être*) otherwise; the state of nature would continue, and the association would necessarily become inoperative or tyrannical. See: Rousseau, 1792, pp. 23–24.

64 Kant, 1870, § 41. p. 121: 'Der rechtliche Zustand ist dasjenige Verhältniß der Menschen unter einander, welches die Bedingungen enthält, unter denen allein jeder seines Rechts theilhaftig werden kann.'

65 Kant, 1870, § 44, pp. 150–151: 'Man müsse aus dem Naturzustande, (...) herausgehen und sich mit allen anderen ... dahin vereinigen, (...) in einen Zustand treten, darin jedem das, was für das Seine anerkannt werden soll, gesetzlich bestimmt und durch hinreichende Macht (die nicht die seinige, sondern eine äußere ist) zu Theil wird, d. i. er solle vor allen Dingen in einen bürgerlichen Zustand treten.' See also: Kant, 1870, § 8, pp. 61–62.

66 Kant, 1870, B, p. 164: '(...) Da der Boden die oberste Bedingung ist, unter der allein es möglich ist, äußere Sachen als das Seine zu haben, deren möglicher Besitz und Gebrauch das erste erwerbliche Recht ausmacht, so wird von dem Souverän, als Landesherren, besser als Obereigenthümer (dominus territorii, alles solche Recht abgeleitet werden müssen. (...) Dieses Obereigenthum ist aber nur eine Idee des bürgerlichen Vereins, um die nothwendige Vereinigung des Privateigenthums aller im Volk unter einem öffentlichen allgemeinen Besitzer zu Bestimmung des besonderen Eigenthums nicht nach Grundsätzen der Aggregation (die von den Theilen zum Ganzen empirisch fortschreitet, sondern dem nothwendigen formalen Princip der Eintheilung (Division des Bodens) nach Rechtsbegriffen vorstellig zu machen.'

however, could only by satisfied by the positive laws and not in the *state of nature*. Therefore, in the state of nature, the possible is only factual, provisional possession of goods and not the propriety rights,[67] as there are no legal conditions for an individual to become an owner.

3.1. The Unity of the Individualistic Paradigm

The foregoing arguments have attempted to demonstrate that, on the ground of the philosophical tradition promoting individualistic anthropology, the exercise of subjective rights is only possible in the "civic state" due to positive law. It appears that not only Hobbes, but also Locke, Rousseau and Kant acknowledge that subjective rights of individuals were created by the will of the sovereign and not by the operation of the law of nature. The state of nature demonstrates the individual's need for private property, which can be addressed and satisfied through escaping the state of nature.[68] Therefore, the situation of the individual in the civic state is radically new, contrary to the Lockean narrative, about the general persistence of the natural condition of man in the society, which is only slightly emended with the provision of the legal protection of natural rights. Kant discussed the issue and emphasised that by abandoning the state of nature, individuals surrender not part – as Locke tried to suggest – but all of their original freedom, gaining instead a freedom dependent upon positive law.[69] According to Kant, having been influenced by Rousseau,[70] people completely lose their previous natural subjective status and acquire a completely new subjective status as citizens.

An excellent illustration of this inseparable unity occurring between the Hobbesian and Lockean approaches to subjective rights is provided in Article 4 of the 1789 French Declaration of the Rights of Man and Citizen. This provision, while considering rights as natural (following the narrative by Locke and Quesnay), at the same time emphasises the necessity of their limits and acknowledge, that the only legitimate limitations of those (allegedly) natural rights are those provided by

67 See: Kant, 1870, § 15, pp. 72–75, and also § 44, p. 151.

68 Kant, 1870, § 8, p. 62: '(...) Wenn es rechtlich möglich sein muß, einen äußeren Gegenstand als das Seine zu haben: so muß es auch dem Subject erlaubt sein, jeden Anderen, mit dem es zum Streit des Mein und Dein über ein solches Object kommt, zu nöthigen, mit ihm zusammen in eine bürgerliche Verfassung zu treten.'

69 Kant, 1870, § 47, p. 155: '(...) man kann nicht sagen: der Staat, der Mensch im Staate habe einen Theil seiner angebornen äußeren Freiheit einem Zwecke aufgeopfert, sondern er hat die wilde, gesetzlose Freiheit gänzlich verlassen, um seine Freiheit überhaupt in einer gesetzlichen Abhängigkeit, d. i. in einem rechtlichen Zustande, unvermindert wieder zu finden.'

70 '(...) l'homme perd par le contrat social, c'est sa liberté naturelle et un droit illimité à tout ce qui le tente et qu'il peut atteindre; ce qu'il gagne, c'est la liberté civile & la propriété de tout ce qu'il possède', Rousseau, 1792, p. 31.

statutory provisions.[71] Thus rights, despite being believed to be natural, have their substance and identity determined by statutory law,[72] thus making them a creation of the sovereign.

Indeed, if one begins the analysis of social life by accepting the thesis that man is by nature a free and equal individual endowed with natural rights, then it is necessary to explain the reasons why people live not individual, but collective lives. This, in turn, necessarily leads to the conclusion that the real substance of those (allegedly) "natural rights" can only be provided by the positive law. Thus, viewing social and political life as an artificial convention set by autonomous individuals, must inevitably lead to the conclusion that the subjective status of the individual in social life is entirely determined by positive law alone. Therefore, Jeremy Bentham was right, when he ironically stated that the right can only be the child of the law, while the "natural right" is the son who never had a father.[73]

3.2. Importance of the Natural Law Paradigm for Individualistic Legal Theory

The above conclusion about rights as originating from positive, not natural law, urge one to ask: whether the naturalistic position in respect to law is a simple fallacy that should be abandoned in the name of intellectual honesty? However, a simple rejection of the naturalistic thesis must be properly allocated within the general framework of the liberal legal theory. In order to do so, it seems worthwhile to pay closer attention to the classical liberal approach as represented by one of the classics of legal positivism – Herbert Hart.

He is worth recalling in the present context for at least two reasons. Firstly, because having been a classical proponent of the twentieth-century legal positivism, he argued for the non-positivistic (moral) character of the rights that define the subjectivity of the individual. Secondly, Hart's argument substantially is the same as that presented by Kant, nearly two centuries earlier, which is something basic for modern legal theory.

In one of his classical texts,[74] Hart argued that if there are any rights at all, which are not derived from positive law, there must be at least one: the equal right of all people to be free. Hart stipulates, however, that he does not claim this right to be "absolute". He recognises its extra-positive (natural) character because it is not

71 Article IV: 'La liberté consiste à pouvoir faire tout ce qui ne nuit pas à autrui : ainsi, l'exercice des droits naturels de chaque homme n'a de bornes que celles qui assurent aux autres Membres de la Société la jouissance de ces mêmes droits. Ces bornes ne peuvent être déterminées que par la Loi'.

72 In the context of the contemporary Polish constitutional law, this paradox was emphasised by Tuleja; 'If the legal norms enacted by the legislature (...) determine the scope of individual freedom, it is in fact the legislature that determines its content', Tuleja, 2003, p. 137.

73 'Right is with me the child of law: (...) natural right is a son that never had a father.'; Elsewhere, Bentham writes even more unceremoniously: 'Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, – nonsense upon stilts.' Bentham, 1839, pp. 501, 523.

74 Hart, 1955, pp. 175–191. Reprinted in the collection: Waldron, 1984, pp. 77–90 which will be quoted in this text.

created by any human act, and all human beings have this right simply because they are human beings, not because they are members of a particular society or occupy a particular position in relation to others.[75] There is no need for a detailed analysis of the Hart's position in this chapter. It seems sufficient to indicate that his conclusion concerning freedom as the natural right of man, is identical to the conclusion of Immanuel Kant, who also claimed that from the very fact of being human flows the only fundamental right of everyone to freedom.[76] Moreover, it also corresponded with his understanding of *homo noumenon* – to be considered later.

What is characteristic about these analyses, as well as those regarding Hobbes and Locke, is that they seek to explain the phenomenon of the social life of human beings, whose essential feature is freedom. Hence, in the seventeenth century, human beings so conceived were placed in a "state of nature". Hart, on the other hand, states that by "all human beings" he means any adult human being capable of choice.[77] This proviso is again superimposed on Kant's proviso requiring to take into consideration when discussing social life only fully autonomous person without any physical limitations, called *homo noumenon*.[78] Clearly, it must be said at once that this anthropological vision probably does not describe man in a truthful way.[79] However, the issue of the correctness of the premises on which the liberal theory of the state was based, notwithstanding its fundamental importance, is beyond the scope of the present discussion.

What is relevant here, is the conclusion that the naturalistic identity of rights is an expression of that very simplified anthropological concept that underpinned modern social philosophy. It was this concept that guided philosophers in their search for

75 Ibid., pp. 77–78.

76 See: Kant, 1870, p. 40; 'Das angeborne Recht ist nur ein einziges. Freiheit (Unabhängigkeit von eines Anderen nöthigender Willkür), sofern sie mit jedes Anderen Freiheit nach einem allgemeinen Gesetz zusammen bestehen kann.'

77 Hart, 1955, p. 77. Therefore, his theory of rights is labelled as the "theory of choice". See: Freeden, 1991, p. 44; Waldron, 1984, p. 9.

78 *Kant, 1870, p. 42;* 'Da in der Lehre von den Pflichten der Mensch nach der Eigenschaft seines Freiheitsvermögens, welches ganz übersinnlich ist, also auch bloß nach seiner Menschheit, als von physischen Bestimmungen unabhängiger Persönlichkeit, (homo noumenon).'

79 This is clearly expressed by Kant, when he denies numerous categories of people the status of citizenship (Kant, 1870 § 46, pp. 152–153). Although he asserts that this exclusion 'is not at all at odds with the freedom and equality of these persons as human beings' (Diese Abhängigkeit von dem Willen Anderer und Ungleichheit ist gleichwohl keinesweges der Freiheit und Gleichheit derselben als Menschen, given that civic community is only established between free and autonomous (selbständig) people who consequently acquire civic status ('das Attribut der bürgerlichen Selbstständigkeit, seine Existenz und Erhaltung nicht der Willkür eines Anderen im Volke, sondern seinen eigenen Rechten und Kräften als Glied des gemeinen Wesens verdanken zu können, folglich die bürgerliche Persönlichkeit, in Rechtsangelegenheiten durch keinen Anderen vorgestellt werden zu dürfen.'). There is thus an important link between citizenship status and the ability to acquire private property. Thus, the Kantian exclusion of a number of categories of persons from citizenship status does not merely deny these persons political rights but denies them the general capacity to become subjects of law, including the very possibility of acquiring property rights!

a new understanding of social reality in the 17th and 18th centuries. Conceiving of man as rational, free and equal, unconditioned by interpersonal relations, they explained the nature of social life through a mythical vision of a pre-social life, where no social conventions yet existed and man could be imagined in the purest form, not constrained by any social interaction considered most often in terms of coercion. This individualistic anthropological assumption was thus the axiom upon which a new conceptualisation of social life was designed, and all modern (as well as postmodern) political philosophy has been founded. It is also difficult to deny those authors, who point to the fundamental paradox of this modern social philosophy, as founding social life upon fundamentally unsocial principle such as natural rights.[80]

The relevance of this naturalistic perception of subjective rights, however, is not limited to the realm of the "founding myth". Although people have abandoned the state of nature and their natural status when they decided to start common life under the rule of statutory law, the positive laws are supposed to create conditions for individuals to live as free and equal as possible. This, however, was inclined, again, to a vision of the pre-social original condition of man. In this way, anthropology based on freedom and equality express the ideal goal-point towards which the social order should aim. The individualist anthropological assumption thus not only explains the reason for social order, but at the same time constitutes an ideal *telos* (an asymptotic point of destination), which determines further development of the political order.[81] In this ideal vision, at the same time, the state should provide the individual with full natural freedom and complete security. Moreover, the development of the institutions of the liberal rule of law seems to confirm this contentious inner tendency included in the liberal democracy. For these reasons, on the grounds of the liberal theory of law, it is impossible to eliminate the naturalistic (ethical) paradigm from the perception of rights. It has run always concurrently to reflections on individuals as subjects of

80 See: Loughlin, 2004, p. 130; Manent, 1977, p. 11.

81 Kant has expressed exactly the same thought when stating that the spirit of the original social contract imposes upon the authority so created fundamental perpetual obligation to conform the way of exercising its power with this fundamental idea of freedom. So even if this power cannot do so at once, it is obliged to make continuous and gradual changes aimed at bringing this government into conformity with the only lawful constitution, namely, the constitution of a pure republic... By this "pure republic", Kant meant practical realization of the theoretical premises of the authority established by means of a social contract. Hence, this "pure republic" has 'a primordial (rational) form which alone recognizes freedom as the principle, or even the condition, of all coercion indispensable to the legal constitution of the state in the proper sense'. Kant, 1870, § 52, p. 184: '(...) der Geist jenes ursprünglichen Vertrages (anima pacti originarii) enthält die Verbindlichkeit der constituirenden Gewalt, die Regierungsart jener Idee angemessen zu machen und so sie, wenn es nicht auf einmal geschehen kann, allmählich und continuirlich dahin zu verändern, daß sie mit der einzig rechtmäßigen Verfassung, nämlich der einer reinen Republik, ihrer Wirkung nach zusammenstimme, und jene alte empirische (statutarische) Formen, welche bloß die Unterthänigkeit des Volks zu bewirken dienten, sich in die ursprüngliche (rationale) auflösen, welche allein die Freiheit zum Princip, ja zur Bedingung alles Zwanges macht, der zu einer rechtlichen Verfassung im eigentlichen Sinne des Staats erforderlich ist und dahin auch dem Buchstaben nach endlich führen wird.'

law, providing inspiration for the political quest towards reform of positive law as determined by this liberal attitude.[82] It is positive law (in the meaning of the regulations supported by the public authority – be it statutory or judicial), however, and not natural law, which will be the only legitimate determinant of the subjective status of an individual in the social life.[83] And this status of an individual – the entity that is equal to others and free from others – is the leading idea which determines ongoing development of the rights concept.

4. Further Evolution of the *Rights* Concept in the Western Legal Culture

The shift in the conceptualisation of subjective rights towards the theory of interest, in the early 20 century resulted in abandoning the concept of natural rights, and in considering the rights of individual as an effect of the operation of statutory enactments. The situation has changed after the two World Wars, which clearly revealed the crisis of the modern social project and inspired one to look for natural sources of justice. It turned out that a democratic legitimacy of the legislative power does not properly secure respect for the rights of individuals. Protection as provided by positive law might not only appear to be ineffective in achieving this goal but might also constitute a primary threat to rights.

The reaction to this situation was the creation of constitutional courts that were granted with the power of reviewing statutory enactments in conformity with fundamental rights. Constitutional review has transformed political charters of fundamental rights, as contained in the texts of national constitutions, into normative texts that have legal effect in constitutional courts.

On the other hand, the same identification of the modern nation-states as the primary threat to human rights, resulted also in the creation of supranational (postmodern) political structures. One of the primary reasons explaining their creation, existence and development, was – apart from securing global peace – the protection of human rights.[84] This process also resulted in the transformation of fundamental legal and political concepts. The rule of law began to be increasingly perceived as a limitation to the modern concept of popular sovereignty considered as a fundamental principle undergirding the authority of the modern nation-state.[85] Both these phenomena – creation of the constitutional courts and establishment of the supranational institutional system, have shrunken authority of the modern nation-state based

82 Loughlin, 2004, p. 124.
83 See: Tuleja, 2003, pp. 137–141.
84 Universal Declaration of Human Rights, Preamble: 'The General Assembly, proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, (…) shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.'
85 Puppinck, 2018, pp. 18–30.

on the idea of the human rights protection. These phenomena also reflect crisis of modern categories and the occurrence of post-modern transgression.

Constitutional courts have taken control of the legislative activity of parliaments (hardly acceptable in terms of modern political theory) to perform functions analogous to those of administrative courts, however, not in relation to executive power, but to legislative power.[86] Within European legal culture, human rights, which for a long time were originally considered as political categories, were transformed and rendered legal and enforceable in the constitutional courts. Moreover, a considerable number of fundamental rights, which used to be just human rights (including the right to property, the right to a fair trial, or the prohibition of discrimination), were also applied to legal persons – thus not to human beings – as fundamental rights (no-longer human rights). Looking from theoretical perspective, this process consisted in a transition in the understanding of fundamental rights from the will theory to the interest theory.[87] Also, the judicial decisions of national constitutional courts started began to refer to the case law of the international system of human rights protection. This is an important phenomenon since the constitutional courts – despite their very weak democratic legitimacy – are empowered to repeal laws adopted by democratic parliaments. In this context, reference to the case law of the international human rights tribunals means providing these courts with additional quasi-political and quasi-legal legitimacy.[88] This is particularly important because most of the constitutional courts' decisions refer to constitutional provisions that are usually very general and vague. Hence, the constitutional courts rely more on the content of their own earlier judicial decisions than on the content of the constitutional text.

As it was already pointed out, the emergence and the development of the constitutional courts paralleled the creation of supranational institutions that claimed to protect human rights. In the linguistic rhetoric dimension, this new stage of development is also characterised by the novel linguistic disguise for individualistic anthropology, precisely that of *personalism*, whereby the rights of individuals became the rights of the person.

This shift in terminology was a kind of "image warming" that attracted Roman Catholic Christians to the human rights project.[89] The important inspiration for the construction of an international system of human rights protection after World War II were personalistic concepts by Jacques Maritain. He treated the international protection of human rights as a moral system that allowed the establishment of a rational global rule of law order to safeguard against the possible arbitrariness of nation-states. The common good in the global dimension was to be affirmed by means of limiting the sovereignty of a state.[90] A symbolic inauguration of this political project was the adoption in the 1948 Universal Declaration of Human Rights, and the 1966 covenants:

86 For more see: Stępkowski, 2010, pp. 159–163.
87 Stępkowski, 2013, pp. 122–126.
88 Safjan, 2006, p. 9; Granat, 2003, pp. 235–236.
89 Stępkowski, 2023, pp. 132 ff.
90 Puppinck, 2018, pp. 20, 31–33.

the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social, and Cultural* Rights (ICESC). At the same time, regional human rights protection systems began to be established. In Europe, these included the Council of Europe and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR 1950) with the Court thereby established. These international systems, which clearly manifested the tendency to set a gradual domination over the modern sovereign nation-state, constituted the institutional backbone for the postmodern stage of the development of human rights, in which the systematic radicalization of individualism occurred and resulted in the rapid proliferation of newly invented rights. This postmodern process is often labelled as the "revolution of rights," and leads to erosion of the sovereignty of modern nation-states, justified as protection of the equality and freedom of individuals with legal instruments, the most important of which, are those dealing with rights. This process also demonstrated its true nature leading to absolute autonomisation of the individual. The progress of the "human rights" (still valid as a label, but increasingly anachronical) became incorporated into the idea of human progress itself, an autonomous and lofty moral justification of postmodern politics.[91]

The diversity and inconsistency of these new rights resulted in attempts to provide a new articulation such as the famous distinction between the three generations of rights, proposed by Karel Vašák.[92] According to this classification, the first generation consists of "classical" or traditional civil and political liberties; the second encompasses social and cultural rights; whereas the third provides for so called "solidarity rights". The third is not precisely conceptualized and includes vague diverging concepts such as the right to development, the right to a healthy and ecologically balanced environment, or the right to world heritage. Despite the elevated rhetorical and the global resonance to this threefold division, it was soundly criticised,[93] and substantial doubts were raised as to whether it was even a useful categorisation.[94] The vagueness of the third-generation rights resulted from their identity of being, in fact, policy directives, rhetorically clothed in "rights talk". It allowed, however, for the inclusion of even the most dubious political agendas to be clothed as brave efforts towards protection of some newly invented human rights. The "rights clothing" provides social support for such political agendas.

This proliferation of rights is heavily enhanced by the international human rights bodies (including courts). They enjoy considerable authority as international institutions, while avoiding, however, at the same time, any real social control. Based on these features, they broadened systematically the scope of their jurisdiction and

91 'Ce " progrès des droits de l'homme"(...) C'est le progrès de la libération de l'individu : le progrès contre les inégalités et les discriminations à corriger, contre les traditions et les croyances à dissoudre dans la rationalité. Chaque développement des droits de l'homme, chaque nouveau droit réaliserait un progrès de la condition humaine'. Puppinck, 2018, p. 259.
92 Vašák, 1997, pp. 29–32.
93 Pocar, 2015, pp. 43–53.
94 Domaradzki, et al., 2019, pp. 423–443.

elaborated an evolutionary method of interpretation of international law,[95] without relevant social control. With time, these tribunals' own judicial decisions became normative, instead of the international treaties that had created them, and thereby determined their jurisdiction. The same applied *mutatis mutandis* to national constitutional courts.

Judicial decisions of the European Court of Human Rights (ECtHR) regarding freedom of expression can be used as an example of the practical application of human rights in order to bring about social change. According to the famous principle that protects free speech, as written in *Handyside v. the United Kingdom* (1976), which has been referred to in several hundred subsequent rulings, freedom of expression applies

> 'not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"'.[96]

In this way, under the label of protecting free speech, the ECtHR made itself a protector of opinions that intentionally attack the existing social norms. The beneficiaries of such guarantees of human rights are radical social movements that can freely shock or offend in the name of the freedom of expression. The social mainstream or non-radical groups never or rarely feel the need to resort to such measures.

Another example of the real function of human rights as an instrument of profound social change is the ECtHR's case law on Article 8 of the ECHR that protects private and family life. For a long time, this provision of the Convention was considered as not interfering with the criminalisation of homosexual practices.[97] With time, however, it started to be considered as protecting homosexual practices on the basis of privacy[98] and thereby imposed an obligation to treat them equally to the sexual intercourse between a man and a woman.[99] Finally, it became qualified as an aspect of family life, leading subsequently to the creation of the right to homosexual marriage.[100]

This example demonstrates very well the role that human rights protection played in changing the perception of regularity and irregularity of human behaviour as well as the identity of basic social structures (family or marriage). This, in turn, permits an insight – by no means obvious or unambiguous – into the identity of rights. This

95 Soloch, 2015, pp. 117–142.
96 *Handyside v. the United Kingdom* (Application No. 5493/72) of 7 December 1976, § 49.
97 *W.B. v. Germany* Application No. 104/55 (European Court of Human Rights, decision of 17 December 1955); *X. v. UK* Application No. 7215/75 (European Court of Human Rights, decision of 7 July 1977). For more, see: Puppinck, 2018, p. 112 and further reading in note 3.
98 *Dudgeon v. UK* (Application No. 7525/76) of 22 October 1982.
99 *L. and V. v. Austria* (Application No. 39392/98, 39829/98) and *S.L. v. Austria* (Application no. 45330/99) of 9 December 2003.
100 *Villanatos v. Greece* (Application No. 29381/09) of 7 November 2013; See also: Puppinck, 2015, pp. 161–171.

ambiguity, although appearing as somehow mysterious and confusing, in fact, is the expression of the very essence of human rights, the next topic, discussed infra.

5. The Declared v. Real Function of Human Rights

Usually, human rights are presented as instruments for the protection of an individual and his/her autonomy, thereby resulting in the stabilisation of social relations. Moreover, human rights are supposed to protect the weak, from abuse of the strong. However, despite those spontaneous associations, the immanently individualistic character of rights operating in social life disintegrates the existing social structure into an atomised one promoting progressive individualization. Each existing social structure, by its very existence, creates specific limitations for the desires of every individual. These limits can easily be presented as an instance of social coercion, if not oppression. In this way, human rights no longer focus on a universal understanding of the conditions necessary for human development but on the protection of groups (or just individuals) that challenge existing social structures and norms, arguing that the social order constitutes a threat for their autonomy. Thus, rights inspire long-term social, political, and legal processes that are aimed at the progressive autonomisation of individuals.

This is confirmed when we look at the rights-focused politics from a historical perspective. From the very beginning, the enforcement of rights led to radical reconstructions of the existing social order. It is easier to understand, when we realise that even the politics inspired by the early meaning of rights based on the concept of the law of nature and affirmation of the so-called "natural order", was focused on the moral critique of the social order existing in the 17th or 18th centuries, described as irrational and oppressive to the individual. In fact, early-modern declarations of natural rights aimed at destroying the premodern (community-based) social order and replacing it with the modern one, based on individualistic anthropology.

A good example of this ambiguous character of rights is the typical first-generation right, i.e. the right to property that was included in the famous triple slogan of the French Revolution (*liberté, égalité, propriété*). Despite its superficial perception as stabilising and protective, in fact it was not intended to protect the existing social structure of feudal ownership. To the contrary, it aimed at overturning it completely and re-establishing a new model of property, based on new principles (and new owners) as individual private property. From this perspective, the natural human right to property as advocated by Locke and others, was by no means protective – it was a strictly revolutionary slogan aimed at the fundamental change of the existing structure of ownership. Presentation of property as a natural right of an individualistic and pre-social character was directed against the social system that functioned at that time, and which reserved land ownership for the nobility. Beneficiary of the feudal proprietary system was the large family rather than the individual. In the context of the controversy between liberals and democrats (socialists) that took place

half a century later, the proprietary postulate from 1789 appeared to be conservative and therefore was replaced from the mentioned revolutionary slogan with that of *fraternité*, which demonstrated egalitarian shift in the mid-19 century political process.

Therefore, the rights, as expressed in the solemn political declarations of rights, became also the main tool of social modernisation for liberal and democratic politics. Even when the rights became integrated into the modern social institutions in the 19th century, and thus their revolutionary potential weakened, by no means vanished. It has been continuously manifested in the operation of the modern institutions to disintegrate traditional social structures. Rights became an institutionalised system of social change. This paradox interplays between the image of rights as providing for protective stabilisation and their real function resulting in social destabilisation, is by no means surprising if we consider some deeper intellectual features of the modernisation process, discussed infra.

5.1. Contradictory Character of Modern Intellectual Categories

In order to understand the destabilising effects of the rights concept for social life one important aspect of the modern intellectual categories must be considered. Modern intellectual culture is based on a contradiction which provides a specific inner dynamism. This contradiction found its fullest expression in the Hegelian dialectics based on the interaction between thesis and antithesis resulting in synthesis which subsequently become new thesis to be contradicted with new antithesis. This intellectual scheme manifests in social dimension as a permanent social change (be it considered evolution or revolution). However, it must be understood, that Hegel did not invent this. Rather, he conceptualised this feature of the modern intellectual culture based on his concept of dialectics rooted in deeper and earlier theological premises.[101] In fact, it is inherent in the modern intellectual culture and already manifested in the writings of modern philosophers prior to Hegel. If we look at the explanation of the reasons for which people had left the state of nature (a literary description of human nature) it will appear that people were unable to live in this natural state – so, living according to a non-social human nature was destructive to man. Therefore, man must deny his (non-social) nature entering the social contract to preserve his existence.

101 In fact, Hegel – being a consequent idealist, thus considering the "idea" or "notion" as the proper being – understood the very essence of the "idea" as "self-differentiating" (*sich zu unterscheiden*) and thus constituting inner self-contradiction. See: Hegel, 1911; Zusätze § 139, p. 321. 'Gedanken (...) welcher nach einem Grunde und nach einer Notwenigkeit verlangt und im Positiven das Negative als selbst wurzelnd auffassen will. (...) der Begriff, oder konkreter gesprochen, die Idee, hat wesentlich das an sich, sich zu unterscheiden und sich negativ zu setzen. Bleibt man bloß beim Positiven, d.h. beim rein Guten stehen, das gut in seiner Ursprünglichkeit sein soll, so ist dies eine leere Bestimmung des Verstandes, der solch Abstraktes und Einseitiges festhält und dadurch, daß er die Frage stellt, dieselbe eben zu einer schwierigen erhebt. Von dem Standpunkte aber des Begriffes aus wird die Positivität so aufgefaßt, daß sie Tätigkeit und Unterscheidung ihrer von sich selbst ist. Das Böse hat also, wie das Gute im Willen seinen Ursprung, und der Wille ist in seinem Begriffe sowohl gut als böse. Der natürliche Wille ist na sich der Wiederspruch.'

This manifests fundamental contradiction included in the individualistic anthropology – living according to human nature (so understood) appears for man to be self-destructive.

This fundamental contradiction finds its expression also in the structure of right. The right, according to wide-spread Hobbesian approach, is the space of freedom determined by coercion provided by statutory law. Thus, it is legitimate to say that subjective right so understood is a composition of freedom and coercion, hence it is based on a contradiction. The same contradiction manifests in the competitive and concurring concepts of rights referring either to naturalistic or positivistic perspectives.

For this very reason, the previously mentioned revolutionary face of rights did by no means disappear, when the concept of rights became implemented as fundamental to modern legal theory. On the one hand, rights granted by the statutory regulations became the construction of the modern social institutions. On the other hand, however, rights in their naturalistic dimension – that requires broadening of the individual autonomy – provided legitimisation for the social critique demanding reconstruction of the existing social order. Moreover, the critical dimension of the rights concept, as providing for social change, is the main one, and the one that determines social development. In this way, the rights-focused modern legal culture has institutionalised ongoing social reconstruction (whether evolutionary or revolutionary) within the framework of the dialectical process that affirms individualistic anthropology.

5.2. The Contradiction in Action

Formal abolition of the feudal system, despite being inspired by the rhetoric of natural rights of man, in fact, did very little to guarantee the freedom and equality of people. Early modernisation of social life was limited to private law and affirmed equality and freedom within the framework of the principle of freedom of contract. Despite (perhaps because of) the absence of the feudal social hierarchy, this led to the emergence of dramatic economic and social inequalities known from the 19th century literature of Dickens, Zola, Hugo or Balzac and others. The legal equality and autonomy of will, as reflected in the principle of freedom of contract, created factual dependency and inequalities comparable to, if not greater than, those of the feudal system, based, as it was, on a formal hierarchy.

Those unprecedented inequalities became the reasons for gradual restrictions imposed on the freedom of contract to protect the weaker of the contractual parties. Gradual departure from the freedom of contract started with the protection of the rights of workers in the late 19th century and continued with the protection of the rights of consumers in the late 20th and early 21st centuries. Laws aimed at correcting modern dysfunctions, however, have proved unsatisfactory in providing protection of equality and freedom (the rights). This led to postmodern transgression, concluding that the reasons for human alienation were not the social structures or economic conditions of life, but man himself and his human identity.

5.3. Beyond Human Identity Towards Posthumanism

Postmodern intellectual culture leads to the conclusion that it is precisely the human identity that prevents man from being truly free and equal (having one's rights protected). Consequently, whereas modern legislation tended to protect human rights through transformation of the social conditions of human life in order to make him free and equal, postmodern legislation, in order to achieve this objective, aims at transforming man himself. Contemporary, rights are gradually becoming the instrument for gradual liberation of an individual from his or her human identity. The advancement of human rights inspires a process by which humanity becomes aware of the limitations that prevent it from achieving full freedom and equality. It also paves the way for overcoming these alienating obstacles.[102] The question, however, remains: whether this quest for total liberation and equality will culminate in a "final solution" (*Endlösung*) for man?

The most spectacular manifestation of this postmodern approach is the political movement to liberate man from sex as represented by the radical feminism and the LGBT political movement. Protection of the progressively understood rights of woman or the rights of sexual minorities is in fact directed towards liberation of man from his sexual identity. This quest began by substituting "sex" with "gender" – an ersatz of sex understood in terms of a social (cultural) construct and not that of natural feature of man. Human sexuality has been transformed into "gender identity," which has subsequently enabled, a politically driven, multidimensional deconstruction of it. The goal of deconstructive policies is to deprive sexual identity of any social importance. The great promise behind this political process is to enable social justice by means of replacing men and women with people of an indeterminate gender identity.[103]

Unexpectedly, this process has been supported by the post Second World War personalistic shift in the individualistic anthropology. The notion of the person appeared (somehow unexpectedly) to be sexually undetermined. The association of legal protection (based upon the concept of rights) with the status of person (not necessary with the status of human being), inspired a divergent development in understanding rights. On the one hand, the concept of the person was understood in terms of the Kantian *homo noumenon*, thus an independent entity capable of making free decisions irrespectively of its physical properties. This allowed one to speak about human relationships irrespective of human sexual identity and the binary distinction between man and woman. Moreover, the theological notion of the "person" – when

102 This tendency inimical to human identity within the progressive development of human rights concept is very well described by Grègor Puppinck in his excellent monograph on human rights: 'Ce "progrès des droits de l'homme"n'est pas seulement celui de leur reconnaissance et application universelle et effective à travers le monde dont parlait la Déclaration universelle. Il est aussi celui de leur contenu. Ces progrès consistent en le processus par lequel l'humanité prendre connaissance de ses propres aliénations et entreprendre des s'en libérer par l'affirmation des droits nouveaux'. Puppinck, 2018, p. 259.

103 Okin, 1989, p. 171: 'Just future would be one without gender. In its social structures and practices, one's sex would have no more relevance than one's eye colour or the length of one's toes. No assumptions would be made about "male" or "female" roles.'

used in the social and political context – allowed for a more inclusive description of the social structures. This led to changes in the meaning of marriage and family based no-longer upon the union of man and woman, but on the union of two persons (although, one might anticipate progressive development as to the number of persons involved). As a result, Western legal culture by using the concept of the "rights of person" tends to replace marriage, understood as a lifelong union of man and woman, with a kind of contractual cohabitation between different persons of an unspecified sex, of an indeterminate number,[104] and – in the predictable future – including those of a non-human identity. Indeed, the concept of person has led to thinking about the rights-holder as one without a sexual identity and a human identity, at all. In the end, the progressive development of rights tends to extend beyond human beings.

5.4. Posthuman Rights

Historically, attributing legal protection in terms of rights to non-human entities, started early in relation to organizational units that had been granted – as legal *persons* – with the status of distinct rights-holders. In contemporary society, a similar – though much more transgressive process – is taking place regarding animals. For some people, it might be confusing, nevertheless, it is consistent with the inner logic of an individualistic social project promoting equality and freedom.[105] This development has become possible with the transgressive breakthrough concerning the conceptual understanding of person, where for a long time, the term "human being" was used as synonym, in legal settings. Certainly, an exception was made for the legal personality of organisational units, but it was considered rather, in terms of the useful legal fiction not affecting the proper meaning of the notion of person.

In contemporary thought, however, the concept of *person* has come to be regarded as a reason to grant legal protection. To this end, the concept has been applied to animals by recognising that they are non-human persons.[106] To achieve this effect, Christian theology has been instrumentalised, as the theological concept of person – understood in terms of a distinct rational substance – has been applied not only to

104 Otter, 2015, pp. 1977–2046.

105 Singer, 1995, pp. 173–174, 'While acknowledging the acceptance of basic principle of equality among all human beings as progressive step, (...) idea of human equality still left most sentient creatures outside the charmed circle. If we are now able to see that the fact that a human being belongs to a different race is not a good reason for giving less consideration to the interests of that being, then why (...) should the fact that a being belongs to a different species be a good reason for doing so? The animal liberation movement demanded that we go beyond a speciesist morality and give equal consideration to the interests of all beings who can feel pleasure or pain, irrespectively of species'.

106 Singer, 1995, p. 182: '(...) the term "person" is no mere descriptive label. It carries with it a certain moral standing. (...) once we recognise a nonhuman animal as a person, we will soon begin to attribute basic rights to animal.' For more detailed account see: Stępkowski, 2014, pp. 98–99.

humans, but also to God and angels.[107] Previously, the Instrumental use of the term *person* was mentioned in the context of "purifying" man of its sexual identity following the Kantian idealistic anthropology associated with the – previously mentioned – notion of *homo noumenon*. This time, however, the shift in the understanding of the *person* was associated with radical materialism (based on atheism). This led to ascribing the quality of the *person,* so understood, to 'an organism possessing the concept of self as a continuing subject of experiences and other mental states, which believes that it is itself such a continuing entity'.[108] In this way, personhood has been associated with the concept of "self-awareness" manifested by the desire to live and make plans for the future. What is essential for the *person,* so understood, is the capacity to envisage one's own future existence.[109] In such a way, fundamental rights (*rights of person* rather than the *human rights*) were attributed to those living entities (including individuals of the species *Homo sapiens*, but without equating a *human being* with a *person*) characterised by certain psychological and physical properties attributed to the artificial understanding of the *person*. Since, such personifying properties could be attributed – at least to some extent – to some of the animals (non-humans), the notion of *person* so understood was attributed also to them. Moreover, no longer are all members of the human species considered as *persons* deserving legal protection, but only those who possess these personifying properties.[110]

Soon, this radical academic theory influenced jurisprudence. On the one hand it denied or created doubt as to the legitimacy of granting protection to humans at the early (prenatal) stage of their development.[111] On the other hand, however, it allowed the extension of rights protection to some animals, which were qualified as *non-human persons*. This transgressive posthuman attitude appeared in the jurisprudence of the South American courts and resulted in the judgement of the Constitutional Court of Ecuador of 2022, which officially granted to the Mona Estrellita monkey,

107 '(...) *at hominis dicimus esse personam, dicimus Dei, dicimus angeli*', see: Boethius, 1918, p. 84. Peter Singer emphasised this in his *Rethinking Life and Death*: Singer, 1995, pp. 180–181. For wider context of transposing theological meaning of the person on the anthropological and ethical level, see: Stępkowski, 2023, pp. 134–142.

108 Tooley, 1972, p. 44.

109 Singer, 1995, p. 197.

110 Ibid., p. 206: 'Not all members of the species Homo sapiens are persons, and not all persons are members of the species Homo sapiens.'

111 *Vo v. France* (Application No. 53924/00) 8 July 2004, § 84: 'the Court observes that there is no consensus on the nature and status of the embryo and/or foetus (...). At best, it may be regarded as common ground between States that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person (emphasis added – A.S.) – enjoying protection under the civil law, (...) require protection in the name of human dignity, without making it a "person" with the "right to life" for the purposes of Article 2.'

legal protection originally reserved to humans.[112] For the moment, this judgment is the most spectacular illustration of the transgressive posthumanist turn to subjective rights that has occurred in contemporary jurisprudence. Given the intellectual condition of contemporary Western culture, however, it seems that further development of constitutional and international jurisprudence in this posthumanist direction will be difficult to prevent. Hence, contemporary legal culture seems to be approaching a profound intellectual shift from the protection of the *human* to the protection of the *person* – not necessarily having any human identity. A predictable development might also extend this tendency to recognise "environmental rights" attributed to trees or other plants.

6. Conclusion

The Chapter demonstrated the emergence and ongoing development of the intellectual (including legal) construction of human rights, or more broadly – the concept of subjective rights (rights of the subject). Primary focus was given to the philosophical background of the concept of rights, which determines its identity and direction of its development. It attempted to demonstrate, how the Western legal culture has changed due to the centrality of rights concept. The paper aimed at explaining the reasons behind, the – oftentimes surprising or even astonishing – development of the notion of rights. However, this surprising course of development, when confronted with reality of social life, is by no means accidental. It is coherent with general intellectual identity of the concept of right.

A proposal was made to consider the *concept of rights as describing in legal terms conditions for development and flourishing of a human being understood as an individual*. Thus, if the main goal of rights is to make an individual as autonomous as possible, then contemporary developments must not be considered as a deviation from an otherwise sound idea of human rights, which can and must be rectified and purified of its exaggerations or errors. Contemporary developments in this respect are by no means a deviation – but rather the consequences that flow from the individualistic nature of the rights concept. Indeed, the trouble-some direction in which the concept of human rights has been developing, requires one to ask, whether the individualistic anthropology upon which all modern and postmodern social institutions have been founded, is the correct one? However, if individualistic anthropology is wrong, what kind of anthropology is correct?

112 Mona Estrellita caso No. 253-20-JH de 27 Janvier 2022 no 75: 'El Derecho en la modernidad ha estado caracterizado por un marcado antropocentrismo, en razón del cual se ha considerado al ser humano como el centro de toda expresión jurídica. Este enfoque ha estado acompañado de un evidente especismo por medio del cual el ser humano ha ido negando, en mayor o menor medida, la valoración y protección de los animales y otras especies de la Naturaleza'. It should be added that this passage was explicitly inspired by the Peter Singer's writings.

Having said that, we must be aware, that we live in a social reality, which has been already determined for a long time by individualism, thus the concept of rights is imposed upon us by the intellectual culture, in which we live, and by which, we are bound. Moreover, as a matter of principle, human rights address real social needs, also because we do not have alternative legal means to address the same. However, no one should be consoled by the fact that the worrisome progressive development of rights affects a relatively small section of society. It is by no means a good reason for optimism, as these problematic developments will inevitably expand over time. Therefore, thinking about an alternative to rights-thinking and rights-language is of utmost importance. Nevertheless, we have to be aware, that such an alternative must not be imposed by some ambitious legislative reforms. The key for change lies in the intellectual culture and the understanding of anthropology, which has been accepted and interiorized by society. Hence, the first step in looking for an alternative is to realise the problematic nature of individualism and to start thinking about man in terms of being endowed with a social nature, whose very existence and development depends on community, not autonomy. This might reveal an alternative framework of providing conditions for satisfactory life, development and human flourishing, that would be based on the principle of the common good and justice, instead of rights and legality. The first change, however, must be in our thinking and perception of social life, which is always determined by the intellectual culture. By no means, can the change be introduced by some innovative legislation, as the very concept of modern legislation is already founded upon individualism.

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| Chapter 3 |

Human Rights Protection in the UN: A General and Institutional Overview (The Former Commission on Human Rights, Human Rights Council, High Commissioner for Human Rights, the International Court of Justice and the Protection of Human Rights)

István Lakatos

ABSTRACT

This chapter provides an overview of the role of human rights within the UN Charter, in view of the political motivations of the organisation's founders. In connection with the creation of the United Nations, it also explores the human rights vision of renowned French jurist René Cassin, particularly his concept of "limited sovereignty." The majority of the chapter is dedicated to a detailed analysis of the work of the UN's most prominent intergovernmental human rights body, the Human Rights Council, which replaced the Commission on Human Rights in 2006. Understanding the Human Rights Council's work is challenging without first exploring the context of the Commission on Human Rights, its predecessor, and its operation during the Cold War. Given the critical role of the UN High Commissioner for Human Rights since 1994 in supporting the UN human rights system, the chapter outlines the establishment and function of the High Commissioner's mandate, highlighting the main political characteristics of the nine High Commissioners to date. The final section addresses a less frequently discussed topic: the human rights aspects of the International Court of Justice's work.

KEYWORDS

UN Human Rights Council, UN Commission on Human Rights, UN High Commissioner for Human Rights, International Court of Justice, René Cassin, UN Charter

1. The Protection of Human Rights Provided under the UN Charter

There were high hopes that human rights would be prominently features in the outcome document of the 1944 Dumbarton Oaks Conference, which served as the draft for the UN Charter. Unfortunately, these expectations were not realised, as the

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draft included only an "incidental reference" to human rights. This limited reference was a result of the Russian and British delegations refusal to agree to anything more substantial. 'The emphasis was on determining the relations between large and small states and the rules to govern their representation and voting in various governing bodies. There was a tendency to avoid the problem of human rights.'[1]

At the same time, President Franklin D. Roosevelt enlisted foreign affairs experts to assist the US State Department Delegation during the San Francisco Conference, which was tasked with drafting the United Nations Charter. As a result, 42 American NGOs were invited to send a consultant to the US delegation. Prior to the conference, the American Jewish Committee commissioned renowned British scholar Hersch Lauterpacht to prepare a study titled *An International Bill of the Rights of Man*. This led to a declaration signed by over 1,300 distinguished Americans advocating for an International Bill of Rights. As the deadline for submitting amendments to the Charter approached, a small group of American NGOs drafted a memorandum for the US delegation, which included four specific proposals: adding human rights as a purpose of the organisation, incorporating respect for human rights into the principles section of the Charter, adding human rights to the General Assembly's functions, and ensuring the mention of the Commission on Human Rights in the Charter. Ultimately, Washington reached an agreement with the other members of the "Big Four" (Britain, the Soviet Union, and China) to propose amendments that aligned with the spirit of the consultants' suggestions. In conclusion, the inclusion of human rights in the UN Charter and their formal recognition as a legitimate international concern was largely the result of effective NGO advocacy.[2]

Despite the eventual inclusion of human rights in the UN Charter, the document is not primarily focused on human rights. Nevertheless, it contains nine provisions that explicitly or implicitly refer to them. Among the eight direct references, the first appears in the second paragraph of the *Preamble,* where the peoples of the United Nations reaffirm their 'faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women(...)'.

The aim of the Preamble is to explain the philosophy and purpose of the whole Charter, so the pivotal role of human rights in the Preamble accords a great significance to this issue, acknowledged by the international community. The inclusion of human rights in the Preamble is symbolic and aspirational. It frames the entire Charter with a normative commitment to human dignity and equality, but it does not in itself impose binding obligations. Nevertheless, its rhetorical force shaped the post-1945 international consensus on the moral centrality of human rights in global governance.

The second explicit reference appears in Article 1(3), which defines one of the core purposes of the UN as 'to achieve international co-operation (...) in promoting and

1 Cohen, 1949, pp. 430–431.
2 Gaer, 2020, p. 2.

encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'.

This provision is significant in that it introduces the principle of universality of human rights and explicitly links human rights to non-discrimination.[3] It represents the first articulation in international treaty law of the notion that human rights are not confined to national jurisdictions but are a matter of international concern. However, the article remains programmatic rather than prescriptive, lacking enforcement mechanisms or detailed obligations.

Article 13(1)(b) outlines one of the functions of the General Assembly, namely to 'initiate studies and make recommendations for the purpose of (...) assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'.

This article provides the General Assembly with a soft-law mechanism to shape the human rights agenda, through studies and recommendations. It reinforces the UN's role as a norm entrepreneur, yet it does not empower the Assembly to impose binding legal obligations on states, underscoring the consultative and cooperative nature of early UN human rights action.

Article 55, in the context of international economic and social cooperation, states that the United Nations shall promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'.

Article 55 is a cornerstone in articulating the link between peace, development, and human rights. By tying the promotion of human rights to the broader goal of international stability, the article anticipates the idea that rights are integral to peace-building. Yet, its effectiveness depends on state cooperation, which was deliberately left voluntary, as evidenced by the wording of the related Article 56, where Member States merely "pledge" to cooperate toward this goal. While this appears to be a commitment, the term "pledge" is non-binding and lacks any mechanism for accountability or review. It reflects the political compromise at San Francisco: to recognise human rights as an international goal while avoiding direct intervention in domestic affairs.

Article 62(2) grants the Economic and Social Council (ECOSOC) the authority to 'make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all'. This article institutionalises human rights as part of the UN's economic and social agenda, empowering ECOSOC to play a coordination role. It laid the groundwork for later institutional development, but again, the Council's role is recommendatory, not supervisory.

From a practical standpoint, Article 68 is one of the most consequential human rights provisions, as it authorises ECOSOC to 'set up commissions (...) for the promotion of human rights'. Based on this article, the Commission on Human Rights was established in 1946.

3 Zakariah, 2017, p. 186.

Article 68 has had enduring institutional consequences. It allowed for the creation of the Commission (and later, the Human Rights Council), thus facilitating the development of a UN human rights architecture. It demonstrates how a procedural provision can have transformative long-term effects, even if it was not framed as a substantive human rights guarantee.

The final explicit reference is found in Article 76(c), related to the UN Trusteeship System, which lists among its basic objectives: 'to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'.

This article applies human rights language to non-self-governing territories, reflecting the growing discourse of self-determination and the gradual shift toward decolonisation. However, it also exposes the paradox of colonial powers overseeing trusteeships while committing to human rights, highlighting the tension between imperial interests and universalist ideals.

In addition to these explicit references, the Charter contains several implicit references to human rights. Article 8, for example, provides that the UN 'shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality (...)'. Though not framed in human rights terms, Article 8 affirms the principle of gender equality in UN staffing and participation, offering an early recognition of equal access to public service as a right-like guarantee.

Article 10 allows the General Assembly to 'discuss any questions or matters within the scope of the present Charter,' thereby enabling deliberation on human rights issues. This article outlines the role of the United Nations General Assembly (UNGA) as a global forum for debates on human rights, despite lacking enforcement authority. The broad scope of its mandate has made it possible for the Assembly to serve as a platform for naming and shaming and norm diffusion throughout the Cold War and beyond.

Finally, Article 2(7), which states that 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state,' reveals the Charter's most fundamental constraint regarding human rights. Article 2(7) reflects the principle of state sovereignty and constitutes a significant legal and political limitation on UN human rights action. Although exceptions exist in cases of threats to peace under Article 39, this safeguard has historically been invoked cautiously. The Charter thus reflects a delicate balance between the protection of state sovereignty and the promotion of universal rights – a tension that remains central to international human rights law today.

1.1. Conclusion

In conclusion, the UN Charter laid the foundational framework for the development of international human rights norms but stopped short of defining or enforcing them. The references to human rights are mostly declaratory, designed to express international ideals without constraining state sovereignty. In light of the post-WWII context and the composition of the founding members – including colonial powers

and states with poor domestic rights records – this was a strategic compromise.[4] Nonetheless, these initial provisions became the legal and political springboard for later developments, including the Universal Declaration of Human Rights and the core human rights treaties. The Charter's human rights clauses must be understood both as reflective of their time and as generative norms that catalysed the evolution of modern human rights law.

In summing up the discussion on the legal (obligatory) nature of the human rights provisions in the UN Charter, it can be stated that while Article 2(7) effectively limits the enforceability of these provisions by prohibiting interference in matters essentially within the domestic jurisdiction of states, positive human rights obligations can nevertheless be inferred from Articles 55(c) and 56. These articles reflect a commitment by Member States to cooperate with the United Nations in promoting universal respect for, and observance of, human rights and fundamental freedoms.

At the time of the Charter's adoption, the drafters clearly prioritised the principle of state sovereignty, agreeing that any external interference in the domestic affairs of a state would be inadmissible under international law.[5] This foundational compromise explains the cautious and often inconsistent approach that Member States have taken toward human rights in the Charter's early implementation. As a result, the human rights-related provisions of the Charter remained broad in scope and focused more on the promotion of human rights than on their protection or enforcement.

Notably, key parts of the Charter – particularly Chapters VI and VII, which deal with the peaceful settlement of disputes and enforcement measures – contain no explicit reference to human rights.[6] This omission underscores the limited role human rights played in the operational mechanisms of international peace and security at that time.

However, the Charter's repeated references to human rights – especially in the Preamble and Articles 1, 55, and 56 – undeniably elevated the normative status of human rights in international law. Over time, these provisions helped shift human rights from a purely domestic concern to a matter of legitimate international interest, laying the foundation for the development of a legally binding international human rights framework under the auspices of the United Nations, including instruments such as the Universal Declaration of Human Rights and the core UN human rights treaties.

4 Ibid., p. 193.
5 Ibid., p. 196.
6 Schrijver, 2007, p. 82.

2. René Cassin's Concept and Vision about the International Protection of Human Rights

The emergence of the modern concept of human rights cannot be discussed without acknowledging René Cassin, the renowned French jurist and co-author of the Universal Declaration of Human Rights. In 1968, he was awarded the Nobel Peace Prize 'for his struggle to ensure the rights of man as outlined in the UN Declaration'.[7] Cassin proposed the creation of a position of an Attorney-General for Human Rights,[8] which could have been a precursor to the role of the UN High Commissioner for Human Rights. He also believed the Commission on Human Rights should have the authority to investigate individual complaints. His proposal suggested that individuals or states dissatisfied with the outcome of a petition to the Commission could appeal to the Court of Human Rights, with the Attorney-General assisting the complainant.[9] However, at the time, the international community was not ready to embrace such innovations.

Cassin's concept on human rights was already influenced by different intellectual circles in the 1920s. He started to work in the League of Nations in 1924 and became part of a team of jurists that formulated far-reaching critique about the original concept of absolute state sovereignty. There were two main platforms, the University Institute of Advanced International Studies in Geneva and the Hague Academy of International Law, where the above-mentioned experts criticised the current concept of state sovereignty, which completely ignored the individuals. Their idea was a "limited sovereignty", or a "sovereignty limited by international law".[10] He put together the right of domicile and the right of nationality, claiming that nationality is not the only and primary bond among members of a nation. To put domicile over nationality is one of the main tools to defend vulnerable groups from nationalist movements. He was of the view that 'the principle of nationality has exhausted its beneficial effects and has become a germ of doctrines destructive to the international community and oppressive to the individual'.[11] In light of the Nazi aggression and the Soviet war in Finland, he started to use the term of "the Leviathan state". He believed that the only viable way to address this phenomenon was for the Allies to engage in war for the defence of human rights. That was one of the main reasons to propose the creation of a "Universal declaration of the rights of the human person".[12] In conclusion, René Cassin was convinced that it was the problem of sovereignty which was one of the main causes of the failure of the League of Nations, and therefore there was a

7 See more: The Nobel Peace Prize [Online]. Available at: https://www.nobelprize.org/prizes/peace/1968/summary/ (Accessed: 10 June 2025).
8 Thérien and Joly, 2014, p. 389.
9 Hobbins, 2001, p. 41.
10 Winter and Prost, 2013, pp. 222–224.
11 Ibid., p. 226.
12 Ibid., p. 227.

need to create the constraints for state power. Not surprisingly, the term "state" only appears three times in the Universal Declaration of Human Rights as it focuses on the inherent rights we all share.

3. The Former United Nations Commission on Human Rights

3.1. Establishment of the United Nations Commission on Human Rights

In line with Article 68 of the UN Charter,[13] ECOSOC established a preparatory committee composed of nine highly qualified and experienced individuals, led by Eleanor Roosevelt, a former First Lady and prominent human rights advocate.[14] As the U.S. representative, Roosevelt served as the chair of the Commission on Human Rights (CHR) for its first six years.[15] René Cassin was also member of that preparatory committee. Considering the tension between the international promotion and protection of human rights, as outlined in Article 1(3) of the UN Charter,[16] and the principle of national sovereignty, emphasised in Article 2(7),[17] the preparatory committee recommended that the CHR be composed of independent experts rather than governmental representatives.[18] Unsurprisingly, states did not accept this recommendation. Instead, the CHR was established as an intergovernmental body through ECOSOC Resolution 5(I), adopted on February 16, 1946.[19] The reluctance of certain key actors to support a body composed of independent experts was "understandable" given the totalitarian regime of the Soviet Union, racial issues in the United States, and the colonial question in the United Kingdom.[20] Due to these political considerations, the CHR was initially not granted any investigative authority, nor the ability to receive or review communications from individuals. This changed, at least partially, in 1947 when ECOSOC acknowledged its authority to receive communications. However, Resolution 75 (V)

13 Art. 68 of the UN Charter: 'The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions.'
14 Lauren, 2007, p. 310.
15 Boyle, 2009, p. 22.
16 Art. 1(3) of the UN Charter: 'The Purposes of the United Nations are: (...) 3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.'
17 Art. 2(7) of the UN Charter: 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.'
18 Lauren, 2007, p. 314.
19 Sunga, 2009, p. 170.
20 Forsythe and Park, 2008, p. 3.

emphasised that the CHR had 'no power to take any action in regard to any complaints concerning human rights'.[21]

For an objective evaluation of the CHR's overall performance, it is important to recognise that before 1945, human rights – aside from labour and minority rights – were not regarded as a "legitimate matter of international legal concern".[22] However, the atrocities of World War II and the Holocaust made it evident that the policy of absolute sovereignty could not persist, and human rights could no longer be solely a matter of domestic political considerations.

In 1946, ECOSOC established the CHR under its supervision. Initially composed of 18 Member States, it became the first universal intergovernmental human rights body. As UN membership expanded, the CHR grew to 21 members by 1962, to 32 by 1967, and to 43 by 1980, eventually reaching its final size of 53 in 1992.[23] However, the Secretariat did not expand accordingly, and the annual session remained at its originally designated length of six weeks.[24]

3.2. First Two Decades of Standards-Setting

Between 1947 and 1967, the CHR was largely influenced by Western States and their allies, with no sub-Saharan African representation until 1964.[25] During this period, the CHR prioritised setting human rights standards rather than overseeing individual states' policies. Its primary and most significant task was drafting an International Bill of Rights, envisioned as a three-part framework: a declaration of rights, a legally binding convention, and the creation of implementation and enforcement mechanisms.[26] However, this plan was stalled due to international disagreements over the "role of international bodies in implementation".[27] In just two years, the CHR made its most significant contribution to the international promotion and protection of human rights by drafting the Universal Declaration of Human Rights (UDHR). This document became the first pillar of the International Bill of Rights, serving as a non-binding declaration of the human rights recognised by the international community at the time. It was notable that the drafters of the UDHR succeeded in creating a text that was adopted on December 10, 1948, with 48 votes in favour and 8 abstentions. The lack of "no" votes indicated a strong international consensus in support of the Declaration.

The first legally binding human rights treaty, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which was also drafted by the CHR, was adopted by the United Nations General Assembly (UNGA) in 1965.[28] This was followed a year later by the adoption of two key human rights treaties: the

21 Sunga, 2009, pp. 170–171.
22 Ibid., p. 170.
23 Freedman, 2013, p. 84.
24 Ibid., p. 15.
25 Boyle, 2009, p. 22.
26 Lauren, 2007, pp. 315–316.
27 Mertus, 2009, p. 52.
28 Lauren, 2007, p. 319.

International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).[29] Initially, the UNGA tasked the CHR with drafting a single document encompassing civil, political, economic, social, and cultural rights. However, in 1951, after the CHR submitted a report with 73 draft articles, ECOSOC recommended that the UNGA reconsider its decision to combine all rights into one treaty. The UNGA was deeply divided on this issue, and a compromise was finally reached with a vote of 29 to 25, with 4 abstentions, to separate civil and political rights from economic, social, and cultural rights.[30] This decision stemmed from the divergent views of states, with some advocating for the primacy of civil and political rights, while others supported the priority of economic, social, and cultural rights. The resulting two treaties allowed states to accede to just one of them.[31] During this period, often referred to by some experts as the "era of inaction" due to the lack of authority to address individual complaints, the CHR viewed itself more as a technical body than a political one.[32] Additionally, three other legally binding treaties drafted by the CHR are worth mentioning: the International Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (1984), the Convention on the Rights of the Child (1989), and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990). It is also important to note that the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was negotiated and drafted outside the CHR.[33]

The high expectations placed on the CHR were reflected in the fact that between 1947 and 1957, it received nearly 65,000 individual petitions. This number continued to rise over time, sometimes reaching as many as 20,000 petitions annually.[34] Petitioners sought assistance in response to human rights violations by their governments and urged the application of the human rights provisions in the Charter to their situations.[35] However, many members of the CHR were concerned about the potential for public criticism from their own citizens in the international spotlight. As a result, they instructed their delegations to assert that the CHR had no authority to take action on these complaints.[36]

3.3. Country Situations and Thematic Special Procedures

The creation of the Special Committee on the Policies of Apartheid by the UNGA in 1961 served as a significant source of inspiration for the CHR, as this committee was

29 Although ECOSOC already submitted the two drafts to the UNGA in 1954, they were not adopted till 1966.
30 Shelton, 2008, p. 18.
31 Mertus, 2009, p. 52.
32 Gutter, 2007, p. 96.
33 Forsythe and Park, 2008, p. 5.
34 Buergenthal, 2001, p. 78.
35 Lauren, 2007, pp. 314–315.
36 Ibid., p. 315.

also empowered to review communications.[37] In a similar vein, ECOSOC Resolution 1235(XLII) of June 6, 1967, followed this model by granting the CHR and the Sub-Commission on the Prevention of Discrimination and Protection of Human Rights the authority 'to examine information relevant to gross violations of human rights and fundamental freedoms, as exemplified by the policy of apartheid as practiced in the Republic of South Africa and in the territory of South West Africa [...]'[38] There were debates among Member States whether this reference intended to 'limit the procedure to human rights abuses in South Africa or whether this was merely an illustration of a situation where the Commission should act'.[39] The efforts by those states that wanted to 'restrict the reach of the 1235 procedure' failed, making it possible to apply to any human rights violations.[40] The expanded mandate of the CHR was quickly put to use after its adoption, with Arab states utilising it to condemn Israel for its occupation of certain Arab territories during the Six-Day War.[41] Resolution 1235 was also invoked in October 1967 to address the human rights situations in Greece and Haiti.[42] One of the key impacts of Resolution 1235 was that it allowed the CHR to hold annual debates on human rights violations in any Member State, laying the foundation for the creation of country-specific Special Rapporteurs.[43] In 1967, the CHR established an ad hoc Working Group on South Africa with the mandate to investigate and report on human rights violations occurring in the country.[44]

A significant development took place in 1970 when ECOSOC adopted Resolution 1503 (XLVIII)[45], granting the Sub-Commission the authority to appoint a working group to investigate communications related to specific allegations of human rights violations. A key aspect of this procedure was its strict confidentiality until the investigations were completed. Once the investigations were concluded, the CHR could choose to publicise the findings and take action under the 1235 procedure.[46] This resolution, in conjunction with ECOSOC Resolution 1235, enabled the CHR to move beyond merely setting human rights standards. It played a crucial role in establishing the CHR as the leading global forum for addressing urgent human rights issues.[47]

37 Sunga, 2009, p. 171.
38 ECOSOC Resolution 1235 (XLII). Question of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid, in all countries, with particular reference to colonial and other dependent countries and territories. Adopted by ECOSOC on 6 June 1967 [Online]. Available at: http://hrlibrary.umn.edu/procedures/1235.html (Accessed: 10 June 2025).
39 Cowell, 2019, p. 77.
40 Mertus, 2009, p. 54.
41 Wheeler, 1999, pp. 75–76.
42 Cowell, 2019, p. 77.
43 Subedi, 2011, p. 206.
44 Boyle, 2009, p. 25.
45 ECOSOC Resolution 1503 (XLVIII) on the Procedure for dealing with communications relating to violations of human rights and fundamental freedoms [Online]. Available at: http://hrlibrary.umn.edu/procedures/1503.html (Accessed: 10 June 2025).
46 Wheeler, 1999, pp. 75–76.
47 Sunga, 2009, p. 172.

The first individual country-specific Special Rapporteur was appointed in 1979, regarding the human rights situation in Chile 'after Pinochet overthrew the democratically elected Allende government in 1974'.[48] This was followed by subsequent appointments in the early 1980s related to the human rights situations in El Salvador, Equatorial Guinea, Bolivia, and Guatemala, and in 1984 regarding Afghanistan and Iran.[49]

The first thematic mandate was the Working Group on Enforced or Involuntary Disappearances, created by CHR Resolution 20 on February 29, 1980.[50] While it initially addressed the situation in Argentina, the issue-oriented approach provided a less confrontational way to tackle the problem.[51] The first individual thematic mandate, focusing on extrajudicial, summary, or arbitrary executions, was established in 1982, followed by the appointment of a Special Rapporteur on torture in 1985.[52] This second mandate applied to all states, regardless of their ratification of the ICCPR or UNCAT.

By the end of the CHR's mandate in June 2006, there were 28 thematic[53] mandates and 13 country-specific[54] mandates. This number was even higher in 1998, with 53 mandates, but by 2006, some country-specific mandates had been terminated, and several thematic mandates had been combined.[55] This rapid and significant increase in the number of special procedures was primarily a result of CHR's flexible nature and its ability to address emerging challenges promptly, unlike the treaty-based system.[56] However, this flexibility also led to an ad hoc approach. Mandates were created through resolutions adopted by the CHR majority, often drafted in vague terms, allowing mandate holders considerable freedom to determine their own working methods.[57] Until the 1990s, most special procedures focused on civil and political rights. However, by 2006, many mechanisms and mandates were addressing economic and social rights, including the right to adequate housing, the right to food,

48 Subedi, 2011, p. 207.
49 Ibid.
50 Tomuschat, 2007, p. 28.
51 Gutter, 2007, p. 98.
52 Tomuschat, 2007, p. 28.
53 Enforced or involuntary disappearances (established in 1980), extrajudicial, summary or arbitrary executions (1982), torture (1985), freedom of religion or belief (1986), sale of children, child prostitution and child pornography (1990), arbitrary detention (1991), freedom of opinion and expression (1993), racism, racial discrimination (1993), independence of judges and lawyers (1994), violence against women (1994), toxic wastes (1995), right to education (1998), extreme poverty (1998), migrants (1999), right to food (2000), adequate housing (2000), human rights defenders (2000), economic reform policies and foreign debt (2000), indigenous people (2001), people of African descent (2002), physical and mental health (2002), internally displaced persons (2004), trafficking in persons (2004), mercenaries (2005), minority issues (2005), international solidarity (2005), countering terrorism (2005), and transnational corporations (2005).
54 Myanmar (in operation since 1992), Cambodia (1993), Palestinian Occupied Territories (1993), Somalia (1993), Haiti (1995), Cuba (2002), Liberia (2003), Belarus (2004), Burundi (2004), DPRK (2004), Democratic Republic of the Congo (2004), Sudan (2005) and Uzbekistan (2005).
55 Sunga, 2009, p. 173.
56 Subedi, 2011, p. 225.
57 Domínguez-Redondo, 2017, p. 36.

the right to education, the issue of human rights and extreme poverty, and the right to health, among others.[58]

The World Conference on Human Rights, held in Vienna in 1993, had a significant impact on the special procedures system in two key ways. It marked the first time that various mandate holders gathered to discuss matters of shared interest. Additionally, it was at this conference that the decision was made to establish the position of High Commissioner for Human Rights, transforming the UN Centre for Human Rights into the Office of the High Commissioner for Human Rights (OHCHR) and providing the secretarial support for the special procedures.[59]

Unfortunately, cooperation with mandate holders, particularly those focusing on specific countries, was not always straightforward. For instance, Cuba, Belarus, and Sudan refused to cooperate with the Special Rapporteur assigned to examine the human rights situation in their countries. These nations did not permit Special Rapporteurs to enter their territory, forcing them to gather information from outside the country.[60]

3.4. Assessment of the Work of the Commission on Human Rights

The CHR had a relatively weak mandate, shaped by the political considerations of UN Member States, and was sometimes referred to by certain experts as a "moral talk shop".[61] During its early years (1947–1967), the body was largely dominated by Western States and focused primarily on setting standards. No Chair of the CHR during this period came from the Eastern Bloc, and African countries had minimal participation.[62] The CHR's role in supervision began to take shape during its second phase (1967–1979), following the adoption of ECOSOC Resolutions 1235 and 1503. In the subsequent period (1979–1991), CHR members worked to strengthen its policy oversight functions, despite the political constraints of the Cold War. The early years of the post-Cold War period saw near-consensus resolutions, but by its final years (2001–2006), inter-regional tensions intensified, leading to the eventual replacement of the CHR by the Human Rights Council (HRC).[63]

In his study on the period between 1955 and 1985, Jack Donnelly noted that nearly 30% of the CHR's meeting time was spent on discussing civil and political rights, while social and cultural rights accounted for only 5.5% of the time. However, these figures take on a different perspective when considering that almost half of the 30% dedicated to civil and political rights was focused on racial discrimination, which was the top priority for the Third World during this period, alongside the issue of the right to self-determination (10%).[64]

58 Sunga, 2009, p. 173.
59 Gutter, 2007, pp. 99–100.
60 Tomuschat, 2007, p. 29.
61 Forsythe and Park, 2008, p. 4.
62 Boyle, 2009, p. 26.
63 Forsythe and Park, 2008, p. 4.
64 Donnelly, 1988, p. 279.

Economic and social rights began to be discussed only after 1965, and even if we accept the argument that their implementation may be gradual, this still doesn't fully explain their minimal presence on the CHR agenda. Donnelly argued that part of the reason for this was that developing countries had much to conceal regarding their performance on economic and social rights, as not all the issues could be attributed solely to external factors.[65]

Donnelly was absolutely correct in pointing out that while Israel committed significant human rights violations, these were certainly not the most severe. There were numerous countries in Africa, Asia, and Latin America – along with members of the Soviet Bloc – that faced similar human rights issues, yet were never singled out by any CHR resolution. The most apparent bias in addressing country situations was that only three states – South Africa, Israel, and Chile – received a separate agenda item both in the CHR and in the Third Committee.[66]

According to Donnelly's survey, Africa was nearly entirely absent from critical discussions during this period. Asia and the Middle East received somewhat more attention, with the human rights situations in Afghanistan, Iran, Kampuchea, and East Timor being addressed. However, the human rights situations in Vietnam, North and South Korea, and the Philippines were notably absent from the CHR's discussions. Donnelly believed that Latin America received the most balanced treatment among all regions, with resolutions concerning Bolivia, El Salvador, Guatemala, and Nicaragua. However, the exclusion of Argentina, Cuba, and Uruguay from this list is particularly striking.[67]

Frederick Cowell effectively highlighted the significant role that the campaign against apartheid played in driving institutional changes, enabling the CHR to investigate human rights violations in various countries.[68] Ron Wheeler's important work on the CHR's targeted resolutions reveals that, prior to 1982, specific country situations could not be discussed publicly until the confidential procedures had been completed.[69] Over the 16-year period (1982–1997) he studied, the CHR reviewed 1,216 draft resolutions. Of these, 1,196 were passed, 3 failed, and in 17 cases, the CHR either voted to take "no action" or suspended the debate. Of the resolutions, 68% were thematic and did not address specific human rights violations in individual countries. During this period, 391 draft resolutions focused on human rights violations committed by specific actors. The number of targeted resolutions steadily increased from 1982 to 1997. Only three country-specific drafts – concerning the USA, China, and Nigeria in 1995 – were not adopted.[70] The list of adopted targeted resolutions clearly shows that

65 Ibid., p. 281.
66 Ibid., pp. 290–292. One of six main committees at the UNGA, dealing with human rights, humanitarian affairs and social matters.
67 Donnelly, 1988 p. 293.
68 Cowell, 2019, p. 69.
69 Wheeler, 1999, pp. 75–76.
70 Ibid., pp. 78–81.

they mainly focused on a few "regional outcasts" like South Africa and Israel, as well as other unpopular regimes such as Guatemala, Iran, and Iraq.

Wheeler highlighted the regional imbalances in the targeted countries during the period from 1982 to 1997, when 294 resolutions – representing 76% of the total – named African, Asian, and Latin American states. This was unsurprising, as the most severe human rights violations occurred in these regions, with the resolutions mainly focusing on civil and political rights, which were often lacking in many Third World countries. Without the large number of resolutions addressing the human rights situations in Israel and South Africa, the percentage for Asia would drop from 44% to 20%, and for Africa, it would decrease from 35% to 17%.[71] Interestingly, no African members of the CHR – except for the targeted countries – voted against the 66 resolutions concerning the human rights situations of other African states (such as Equatorial Guinea, Western Sahara, Rwanda, Nigeria, Burundi, and Angola). This was likely due to the soft and moderate language used in these initiatives, which were designed to garner the support of African states.

Between 1982 and 1997, 63 CHR resolutions focused on the human rights situation in seven Latin American countries (Bolivia, Chile, Cuba, El Salvador, Guatemala, Haiti, and Paraguay). While most of these resolutions were co-sponsored or occasionally even drafted by Latin American states, major players such as Mexico and Brazil were notably absent from the drafts, similar to the situation in other regions.[72]

The CHR rarely targeted West Asian states, excluding resolutions on Israel. During the examined period, only 10 resolutions were adopted, with 9 focusing on Iraq and the tenth on Cyprus. In South and East Asia, only a few countries were named in CHR resolutions: Sri Lanka, Afghanistan, Iran, Vietnam, Cambodia, Myanmar, and Indonesia.[73]

Wheeler's survey reveals that no resolutions were adopted concerning the human rights situation in Western European states, with a few exceptions. One notable case involved Portugal being held partially responsible for human rights violations in East Timor. Additionally, there were a few resolutions condemning certain Western States for providing aid to South Africa. Although the situation in Northern Ireland was discussed, it never became the subject of a resolution. The USA was targeted five times, mostly implicitly, in resolutions addressing its strategic cooperation with Israel or its military actions in Panama and Grenada. Two resolutions specifically accused the USA of racism and other systematic human rights violations. The first was blocked by a no-action motion, and the second was defeated by a wide margin.[74]

In Eastern Europe, the first country to be named in a CHR resolution was Poland in 1982 and 1983 due to the implementation of martial law measures. Albania followed with seven resolutions between 1988 and 1994. Romania was the focus of

71 Ibid., pp. 86–88.
72 Ibid., pp. 88–89.
73 Ibid., p. 89.
74 Ibid., pp. 90–91.

five resolutions between 1989 and 1993. After that, the former Yugoslavia became a regular topic on the CHR's agenda, with ten resolutions passed between 1993 and 1997. The Soviet Union was condemned in several resolutions for its intervention in Afghanistan, and there were multiple attempts to condemn its policies in Chechnya. However, no resolution on the Chechnya issue was ever adopted.[75]

Altogether 37 states (including Croatia and Bosnia-Herzegovina separately) were targeted by the CHR during this period, which indicated a substantial improvement compared to the previous period when only Israel and South Africa were highlighted.[76]

Steven Seligman analysed the post-Cold War period of the CHR and the early years of the HRC, focusing on country-specific resolutions. His study of 330 resolutions concerning 34 different states, adopted by the CHR between 1992 and 2005, revealed that democratic states were more inclined to support resolutions targeting countries other than Israel. He also found that Western democracies were more willing to back targeted resolutions than non-Western democracies. As expected, non-democratic states were the least supportive of country-specific resolutions. However, Seligman noted that, contrary to expectations, democracies did not show more support for resolutions condemning Israel than non-democracies.[77] He concluded that the CHR was often used by states to defend allies and criticise adversaries, with resolutions on Israel typically drafted in a "one-sided manner," while resolutions on other countries, such as Sudan, were framed to minimise criticism.[78] The disproportionate focus on Israel was highlighted by the fact that, during the examined period, 24% of country-specific resolutions targeted Israel.

3.5. The Road to the Downfall of the UN Commission on Human Rights

Many critics overlook the fact that the CHR operated for sixty years, striving to advance the international human rights agenda despite the challenging constraints of the Cold War era. It is no surprise that in 1945[79] then U.S. Secretary of State Edward Stettinius regarded the establishment of the CHR as one of the greatest accomplishments of the San Francisco Conference.[80]

Before examining the key factors that led to the CHR's decline in credibility, it is important to acknowledge that no other UN body has done more to involve civil society representatives in international human rights diplomacy[81] – a legacy that fortunately continues under the HRC. Despite these contributions, the CHR faced mounting criticism in its final years. The first clear indication of these concerns emerged in 2004[82]

75 Ibid., pp. 91–92.
76 Ibid., p. 98.
77 Seligman, 2011, p. 538.
78 Ibid., p. 538.
79 United Nations, n.d.
80 Lauren, 2007, p. 310.
81 Ibid., p. 324.
82 Scannella and Splinter, 2007, p. 42.

with the UN Secretary-General's High-level Panel on Threats, Challenges, and Change report, *A More Secure World: Our Shared Responsibility*,[83] followed by Kofi Annan's 2005 response, *In Larger Freedom: Towards Development, Security, and Human Rights for All*.[84]

The process that ultimately led to the replacement of the CHR by the HRC had begun several years earlier. A key turning point came in May 2001 when the United States lost its seat on the CHR. That year, four candidate countries competed for three available seats allocated to the WEOG, with three European countries and the US in contention.[85] A majority of developing countries favoured the European candidates over the US. When Washington regained its seat in 2003, it launched an active campaign against the election of states with poor human rights records to the Commission. That same year, despite US opposition, the CHR elected Libya's Ambassador as its chair, rejecting Washington's objections in a formal vote.[86]

With the end of the Cold War, the political vacuum was quickly filled by regional confrontations, replacing the previous East-West divide. As the CHR's membership expanded, so did its agenda, leading to an increase in country-specific initiatives. This, in turn, contributed to the growing politicisation of its work. The Commission faced mounting criticism for applying double standards when assessing the human rights situations of UN Member States.[87] Procedural disputes became increasingly prevalent, with the frequent use of the "no action motion" – a tactic employed by influential states like China to prevent discussions on certain country situations. Although there were efforts to introduce fundamental reforms, only moderate adjustments to the CHR's agenda and working methods were ultimately agreed upon by Member States.

Although NGOs had unique privileges within the CHR, they increasingly voiced criticism against the Commission for failing to address key human rights issues due to the application of double standards. Many countries also expressed concern that human rights issues related to the P5 – the five permanent members of the UN Security Council (the United States, China, Russia, the United Kingdom, and France) – such as the situations in Tibet, Chechnya, or Guantánamo, were never placed on the CHR's agenda. Kofi Annan referred to this growing issue as a "credibility deficit".[88]

This credibility deficit was also partly due to the fact that many countries with poor human rights records sought membership in the Commission to shield themselves from international scrutiny. With the loose membership criteria, securing twenty-eight votes within the fifty-four-member ECOSOC was a relatively easy task.[89]

83 United Nations, 2004.
84 UN Secretary-General, 2005.
85 WEOG – Western European and Others Group of States.
86 Boyle, 2009, p. 27.
87 Spohr, 2010, p. 173.
88 Terlingen, 2007, p. 169.
89 Davies, 2010, p. 452.

Kofi Annan explicitly stated that the excessive politicisation and selective approach of the CHR had eroded its credibility, negatively affecting the overall reputation of the UN. Consequently, he proposed the establishment of a new body, the HRC.[90]

In conclusion, the international community initiated preparations to replace the CHR with a new body, aiming to extend meeting durations, enhance membership composition, improve responsiveness to emerging crises between sessions, and elevate the body's status.[91] The goal was to overcome the selectivity, politicisation, and double standards that had plagued the CHR.[92] The political decision to establish the HRC as its successor was made at the World Summit in September 2005.[93]

4. United Nations Human Rights Council

4.1. The Establishment of the UN Human Rights Council and its Comparison with the Commission on Human Rights

After challenging negotiations, the UN General Assembly successfully adopted Resolution 60/251, establishing the HRC.[94] However, the international community failed to reach a consensus on the framework for the UN's primary human rights body. While three countries – Belarus, Venezuela, and Iran – abstained, the resolution faced opposition from the United States, Israel, the Marshall Islands, and Palau. Despite this, it was ultimately approved on 15 March 2006 with 170 votes in favour.[95]

The key differences between the HRC and its predecessor, the CHR, are as follows: a) the HRC holds a higher status within the UN compared to the CHR. While the CHR functioned as a committee under ECOSOC, the HRC was established as a subsidiary body of the UNGA; b) the HRC has 47 Member States, whereas the CHR had 53. This decline in membership was accompanied by a shift in regional representation, favouring countries from the Global South; c) HRC members are not eligible for immediate re-election after serving two consecutive terms; d) unlike the CHR, where members were elected by a majority within ECOSOC (54 members), HRC members are elected by a majority of the entire UNGA, which currently consists of 193 Member States; e) in cases of serious and systematic violations, the UNGA can suspend the membership of an HRC member by a two-thirds majority of the countries present and voting; f) while no formal membership criteria are in place for the HRC, elections take into account candidates' contributions to the promotion and protection of human rights and their voluntary commitments in this area; g) the number and duration of sessions have increased. The CHR held a single six-week session annually, whereas the HRC convenes at least three sessions per year, including one main session, lasting

90 Ramhani-Ocara, 2006, p. 15.
91 Ibid., p. 16.
92 Landolt and Woo, 2017, p. 407.
93 Warbick, 2006, p. 697.
94 UN General Assembly, 2006.
95 Spohr, 2010, p. 176.

a minimum of ten weeks; h) unlike the CHR, where fifty percent of members were required to call an extraordinary session, the HRC can do so with just one-third of its members; i) the Universal Periodic Review (UPR) is a prominent new mechanism of the HRC, under which the human rights situation of all UN Member States is reviewed every four and a half years (originally every four years). All elected HRC members must undergo this review during their term; j) the former Sub-Commission on the Promotion and Protection of Human Rights has been replaced by the Advisory Committee; k) a new complaints mechanism has been established, replacing the previous 1503 procedure.

4.2. A Critical Review of the Human Rights Council's Activities and Some of Its Institutions

4.2.1. Membership, Regional Groups, Voluntary Commitments, Extraordinary Sessions, Agenda, Status of the Council

In its 2004 report, the High-Level Panel recommended replacing the CHR with the Human Rights Council, suggesting that the new body should have universal membership and serve as the primary body under the UN Charter, rather than continuing as a functional committee of ECOSOC. The Panel's objective was to address the criticisms of the CHR's composition, which had been increasingly voiced in its later years, and to prevent potential disputes over membership criteria.[96] While Kofi Annan agreed with the Panel's assessment, he advocated for a smaller body, either as the main UN organ or as a subsidiary body of the UNGA.[97] Annan envisioned the HRC as a "society of the committed", consisting of members dedicated to achieving higher human rights standards. He proposed a smaller body, closer in size to the Security Council's fifteen members, rather than the CHR's fifty-three.[98]

Washington strongly supported this proposal, particularly endorsing the Secretary General's suggestion that HRC members should be elected by the UNGA with a two-thirds majority (currently requiring 128 votes in favour).[99] The United States, along with EU Member States, also backed the idea that countries subject to Security Council measures under Chapter VII of the UN Charter[100] for human rights violations or terrorist activities should be excluded from membership.[101] The magnitude of the body's membership sparked extensive debate among Member States. While many agreed that a smaller body would be more effective, they also felt it would lack sufficient representation.[102] As Conall Mallory pointed out, strict membership criteria

96 Freedman, 2013, pp. 44–45.
97 Spohr, 2010, p. 175.
98 Warbick, 2006, p. 700.
99 Boyle, 2009, p. 30.
100 UN Charter Chapter VII 'Procedure in cases of threat to the peace, breach of the peace and acts of aggression.'
101 Mallory, 2013, p. 22.
102 Warbick, 2006, p. 700.

could have led to an underrepresented body, both geographically and in terms of the diverse religious, political, and cultural backgrounds of its members.[103]

The issue of universal membership was also considered by Member States to prevent the over-politicisation of the body. However, the majority ultimately did not support this approach, as many diplomats viewed it as a potential duplication of the Third Committee of the UNGA, which already addresses human rights issues.[104]

In the final compromise, the new body is slightly smaller, with forty-seven members instead of fifty-three, and candidates are elected by a simple majority of the UNGA (currently ninety-seven out of one hundred and ninety-three votes). To maintain proportional geographical representation, the majority of seats (twenty-six out of forty-seven) were allocated to the African and Asia-Pacific Groups. The African Group received thirteen seats (27.6%), down from fifteen, while the Asia-Pacific Group saw an increase from twelve to thirteen seats (27.6%). The influence of the Western European and Others Group (WEOG) was reduced from ten seats to seven (14.8%). The Eastern European Group (EEG) gained one additional seat, increasing from five to six (12.7%), while the Latin American and Caribbean Group (GRULAC) lost three seats, decreasing from eleven to eight (17%).

The HRC became a subsidiary body of the UNGA, which did not require any amendments to the UN Charter.[105] While countries committed to human rights worked hard during negotiations to make the Human Rights Council one of the main bodies of the United Nations, alongside the General Assembly, the Security Council, the Trusteeship Council,[106] the International Court of Justice, the Secretariat, and the Economic and Social Council, Member States were unwilling to engage in lengthy drafting negotiations, which could take years and require a two-thirds majority for a Charter revision. There was a consensus that such a process would require a comprehensive revision. The five amendments made to the Charter so far have primarily expanded the membership of certain bodies (such as the Security Council [SC] and the UN Economic and Social Council [ECOSOC]). Achieving the status of a principal organ would have been a significant advancement for human rights diplomacy, addressing the fact that human rights issues were not adequately emphasised in the original UN Charter. However, over the past few decades, the importance of human rights has increased, and they are now a central focus of foreign policy for all nations. In fact, the previous Commission on Human Rights had a more significant political role in the organisation and in international relations than either the Trusteeship Council or the Economic and Social Council.

According to the founding resolution, candidate countries are expected to uphold the highest standards in the protection and promotion of human rights. They must fully cooperate with the HRC and undergo the UPR process as part of their membership.

103 Mallory, 2013, p. 10.
104 Freedman, 2013, p. 48.
105 Schrijver, 2007, p. 87.
106 Today, the Guardianship Council exists only on paper. It was suspended in November 1994, following Palau's independence.

The Member States responsible for electing them should consider their contributions to human rights protection and promotion, as well as the voluntary commitments they make during their candidacy.[107] In recent years, however, many countries have only made vague statements of good intentions, and some governments have stopped updating their previous commitments altogether. In fact, Uganda, for the first time in 2010, did not even submit any voluntary commitments with its candidacy.[108] Early on in the HRC's activities, there were instances where expectations regarding the human rights performance of candidate countries had a deterrent effect. For example, Sudan and Zimbabwe were discouraged from standing for election, and Iran and Belarus eventually withdrew their candidacies after realising that their poor human rights records would prevent their election.[109]

Human rights standards become ineffective when there is no competition among Member States to enter the HRC. This was a problem with the CHR and, unfortunately, the HRC has also struggled with this issue, except for its first year and a few other instances. The so-called "clean slate" phenomenon, where a regional group nominates exactly as many candidates as it is entitled to, leaves the UNGA with no other choice but to elect all the nominated candidates. In 2006, all regional groups nominated more candidates than the number of seats available, resulting in sixty-five nominations for forty-seven seats.[110] Unfortunately, this competition has largely disappeared since then. In 2018, for example, there were exactly eighteen nominations for eighteen seats.[111]

While the situation improved slightly in 2019, with seventeen countries nominated for fourteen spots, there was still no competition in the African Group and WEOG.[112] The "clean slate" voting system, combined with secrecy, has negatively impacted the composition of the HRC, reducing the significance of voluntary human rights commitments. Many decisions are now driven by trade, regional, or political alliances rather than a country's human rights record.[113] The only way to change this "clean slate" situation is to encourage more countries that prioritise human rights to run for HRC membership. However, in some regions, smaller countries are hesitant to take the initiative, as it could be seen as a diplomatically unfriendly move towards their larger, more influential neighbours.

The decision that an HRC member cannot be nominated for re-election after two consecutive terms was undoubtedly a positive step. Additionally, the provision allowing for the suspension of a member that commits significant and systematic

107 Ramcharan, 2015, p. 2.
108 Mallory, 2013, pp. 24–25.
109 Ibid., p. 26.
110 Ibid., p. 30.
111 See: HRC elections 2018 [Online]. Available at: https://www.un.org/en/ga/73/meetings/elections/hrc.shtml (Accessed: 10 June 2025).
112 See: HRC elections 2019 [Online]. Available at: https://www.un.org/en/ga/74/meetings/elections/hrc.shtml (Accessed: 10 June 2025).
113 Mallory, 2013, p. 30.

human rights violations during their tenure by a two-thirds majority vote in the UNGA was an important safeguard.[114] Despite the high threshold required for suspension, the HRC decided in March 2011 to suspend Libya's membership. It was noteworthy that the proposal for suspension was presented to the UNGA by Lebanon, a member of the OIC (Organization of Islamic Cooperation, formerly the Organization of the Islamic Conference), with support from Mauritius representing the African Group.[115] The second such instance occurred on April 7, 2022, when the UN General Assembly adopted a resolution calling for Russia's suspension from the Human Rights Council. The resolution passed with a two-thirds majority of the voting members (excluding abstentions), with 93 countries in favour and 24 against.[116]

According to UNGA resolution 60/251, the HRC is required to meet at least three times a year for a minimum of ten weeks, compared to the six weeks allocated to the CHR. This change facilitates a more effective and thorough response to global human rights issues.[117] Additionally, the new rules regarding extraordinary sessions will allow the HRC to better address exceptional human rights situations, provided these provisions are utilised appropriately. These adjustments have positively influenced the WEOG's support for the HRC, compensating for the reduction in their representation compared to the CHR.[118]

The impact of the eased conditions for convening special sessions was substantial, as thirty-six special sessions were held between 2006 and 2024. From the outset, it was evident that the OIC was using this mechanism to exert pressure on Israel, with nine sessions focusing on the human rights situation in the occupied Palestinian territories. The Syrian crisis followed closely, with five sessions dedicated to it. Myanmar/Burma's human rights situation was the focus of three special sessions. Other special sessions addressed various crises, including those in South Sudan, Sudan, Iran, Ukraine due to Russian aggression, Burundi, Afghanistan, Boko Haram, Islamic State, Central African Republic, Libya, Côte d'Ivoire, Haiti, Ethiopia, Sri Lanka, the global economic and financial crises, the Democratic Republic of Congo, the world food situation, and Darfur.[119]

The HRC's agenda[120] consists of ten items, compared to the CHR's twenty-one. However, one item remained unchanged: CHR agenda item 8 on *Human Rights Violations in the Occupied Arab Territories, including Palestine*, became HRC agenda item 7 on the *Human Rights Situation in Palestine and other occupied Arab territories*. Unfortunately, during the negotiations, the CHR majority chose to retain this specific and

114 Joosten, 2011, p. 6.
115 Mallory, 2013, p. 21.
116 UN Affaires, 2022.
117 Maitya, 2010, p. 318.
118 Cox, 2010, p. 105.
119 See: UN Human Rights Council Special Sessions [Online]. Available at: https://www.ohchr.org/en/hr-bodies/hrc/special-sessions (Accessed: 10 June 2025).
120 See: UN Human Rights Council agenda [Online]. Available at: https://www.ohchr.org/en/hr-bodies/hrc/year-round-activities (Accessed: 10 June 2025).

arguably discriminatory agenda item focusing on the human rights situation of one country, while all other country situations were addressed under agenda item 4.

4.2.2. Special Procedures

The Special Procedures of the HRC consist of independent human rights experts who prepare reports and offer advice on both thematic and country-specific human rights issues based on their mandates. UN Secretary-General Kofi Annan referred to the Special Procedures as the "crown jewels" of the UN human rights system,[121] aptly highlighting their crucial role in the international protection and promotion of human rights. When the CHR's work ended in June 2006, there were twenty-eight thematic mandates and thirteen country-specific mandates. In the course of negotiations on the framework for the UPR, it became apparent that some countries saw the establishment of the UPR as an opportunity to eliminate country-specific resolutions and mandates. China, for instance, referred to country-specific decisions as "a chronic disease of the CHR".[122]

Given this context, it was no surprise that Beijing sought to introduce a two-thirds majority for the adoption of country resolutions when establishing the UPR. Ultimately, a compromise was reached, where supporters of country resolutions had to secure broad support for their initiatives – preferably at least fifteen members – before a vote on the resolution could be held.[123] The EU and other countries in favour of country-specific resolutions were fortunate that the Chinese proposal could have complicated matters for Arab countries regarding their resolutions on the occupied Arab territories, which helped ensure the adoption of the compromise. As a result, two country-specific mandates, those concerning Cuba and Belarus, were eliminated due to member-state disputes over country situations. This reflected the ongoing trend of reducing country-specific mandates, which dropped from twenty-six in 1998 to thirteen in 2006.[124]

HRC Resolution No. 5/1 on institutional development,[125] adopted on 18 June 2007, established a more transparent, though rigid, process for selecting mandate holders. A five-member Consultative Group, with representatives from each regional group, now plays a leading role. This group reviews applications, interviews the best candidates, and makes recommendations to the President of the HRC, who typically accepts the group's suggestions.[126] If the President chooses a different candidate, they must provide a detailed and well-reasoned explanation for the decision. In contrast,

121 Freedman, 2013, p. 110.
122 Joosten, 2011, p. 17.
123 Ibid., pp. 17–18.
124 Spohr, 2010, p. 186.
125 See: HRC Resolution 5/1 on institution building of the UN Human Rights Council [Online]. Available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=a/hrc/res/5/1 (Accessed: 10 June 2025).
126 Tomuschat, 2007, p. 30.

under the CHR[127], the President, after consulting the Bureau,[128] made the decision unilaterally, without requiring plenary approval.[129] It is also notable that, in addition to countries, regional groups, international organisations, and NGOs can propose candidates, who are then evaluated by the Consultative Grou.[130] Country-specific mandates are renewed annually, while thematic mandates are renewed every three years. The only exception to this is the mandate on the human rights situation in the occupied Arab territories, which remains in place 'until the end of the Israeli occupation of these territories' and does not require annual renewal like other country-specific mandates.[131]

In response to strong criticisms of mandate-holders' work from certain countries, the HRC made a regrettable decision in June 2007 with the adoption of the Code of Conduct for Special Procedures mandate-holders (HRC Resolution 5/2).[132] The Code's unspoken objective seemed to be to limit the operational freedom of Special Rapporteurs. It prioritises information from governments, which can unfortunately be used as a mechanism to suppress civilian voices while reinforcing government narratives. This undermines the impartiality of the Special Rapporteurs' work, diminishing its ability to remain critical and independent.

As of November 2023, there were forty-six thematic mandates[133] and fourteen country-specific mandates.[134] Over the past fourteen years, eighteen new thematic mandates have been established, while the number of country-specific mandates has increased by one since the HRC's inception in 2006.[135] As Marc Limon pointed

127 Nowak, et al., 2011, p. 67.

128 In the case of the CHR and the HRC, the Bureau is composed of the President, the three Vice-Presidents and the Rapporteur.

129 See more on: Basic information on the selection and appointment of independent experts of the HRC [Online]. Available at: https://www.ohchr.org/en/hr-bodies/hrc/sp/basic-information-selection-independent-experts (Accessed: 10 June 2025).

130 Joosten, 2011, p. 26.

131 Ibid., p. 24.

132 See: HRC Resolution 5/2. On Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council [Online]. Available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=a/hrc/res/5/2 (Accessed: 10 June 2025).

133 The thematic special procedures of the HRC cover the following issues: people of African descent, albinism, arbitrary detention, business and human rights, cultural rights, development, disability rights, disappearances, education, environment, executions, food, foreign debt, freedom of expression, freedom of assembly and association, hazardous substances, health, housing, human rights defenders, judicial independence, indigenous peoples, internally displaced persons, international order, international solidarity, leprosy, mercenaries, migrants, minority issues, elderly, poverty, private sphere, racism, religion, belief, child trafficking, sexual orientation and gender identity, slavery, terrorism, torture, trafficking, justice, unilateral coercive measures, violence against women, water and sanitation, women, girls, and the last mandate on the human rights impact of climate change.

134 Country-specific procedures of the HRC: Afghanistan, Belarus, Burundi, Cambodia, Central African Republic, Democratic People's Republic of Korea, Eritrea, Islamic Republic of Iran, Mali, Myanmar, Sudan, Somalia, Palestinian Territories occupied since 1967, Syria.

135 See more: Special Procedures of the Human Rights Council [Online]. Available at: https://www.ohchr.org/en/special-procedures-human-rights-council (Accessed: 10 June 2025).

out, if this trend persists, the total number of mandates could reach 100 by 2030.[136] This trend is not surprising, as creating a new mandate is typically more challenging than renewing an existing one, and there have only been few instances of mandates being discontinued.[137]

Rosa Freedman and Jacob Mchangama have highlighted this phenomenon in an insightful study on the proliferation of special procedures. Their research revealed that "free" states, as classified by Freedom House, are increasingly supportive of civil and political rights mandates, but show much less enthusiasm for economic and social rights mandates.[138] These countries tend to be more sceptical of "third-generation" rights, which are primarily championed by "non-free" states, who, in turn, rarely support mandates focused on civil and political rights. One key finding of their study was that semi-free and non-free states, often with poorer human rights records, tend to favour the expansion of mandates, shifting the focus beyond civil and political rights to include more costly mandates addressing economic, social, and third-generation rights.[139]

Their research indicates that special procedures have evolved from being solely focused on promoting and protecting human rights to becoming a significant tool in the ideological and political battles among Member States, each pursuing their own agenda to further their objectives.[140] It is hard to disagree with Freedman and Mchangama's final conclusion that increasing the number of mandates without sufficient financial support will negatively affect the entire special procedures system. A telling statistic from the OHCHR's 2012 financial report shows that only 24% of targeted funding[141] was allocated to civil and political rights mandates, while 44% went to economic, social, and cultural rights, and 32% supported initiatives for vulnerable groups (such as minorities, indigenous peoples, persons with disabilities, women, and children). In my view, there are currently several thematic mandates that fail to deliver practical, tangible outcomes for the international human rights system, yet drain significant financial resources, hindering the work of more vital and effective mechanisms. These mandates, which address issues like foreign debt, toxic waste, international order, international solidarity, or unilateral coercive measures, often serve political rather than human rights purposes.

Since 1994, CHR/HRC mandate holders have gathered annually in Geneva, providing an excellent platform for experts to share best practices and align their working methods. Their annual report to the HRC presents key data on the special procedures system. According to the 2024 report, the system included 83 seats, with 59% held

136 Freedman and McHahgama, 2016, p. 165.
137 Ibid., p. 173.
138 Ibid., pp. 180–181.
139 Ibid., p. 187.
140 Ibid., p. 190.
141 Ibid., p. 193.

by women and 41% by men.[142] The report also highlighted significant information regarding cooperation with special procedures. It revealed that 172 Member States have accepted at least one mandate holder, while 21 countries have not yet hosted a visit from any mandate holder. Of these, four countries have never received an invitation for such a visit, sixteen have declined any request, and one country agreed to a visit that has yet to take place.[143] An important aspect of this context is the concept of a "standing invitation," where a government extends an open invitation to all thematic mandates, expressing its readiness to respond to any request for a visit. As of June 2024, 128 Member States and one observer have made this declaration.[144]

4.2.3. Universal Periodic Review (UPR)

The UPR is the only universal process that reviews the human rights situation of all UN Member States. Administered by Member States within the HRC framework, it gives each country the opportunity to report on the actions they have taken to enhance their human rights record and meet their human rights obligations. The UPR was created to ensure that all countries are treated equally in the assessment of their human rights situations. The primary goal of the process is to improve human rights worldwide and address violations wherever they occur.[145]

The launch of the UPR was widely regarded as the most significant new institution of the HRC, characterised by its emphasis on constructive dialogue and cooperation, marking a clear departure from the "naming and shaming" approach of the former CHR, especially in the eyes of many developing countries. Many nations had hoped that the UPR would serve as an alternative to the widely criticised country decisions and mandates.[146] However, as highlighted by the Netherlands in its UPR review,

> 'The UPR is an additional tool for human rights monitoring that complements, rather than duplicates, the work of treaty bodies[147] and special procedures.

142 A/HRC/55/69, Report on the activities of Special Rapporteurs, independent experts and working groups of the special procedures of the Human Rights Council undertaken in 2023, including updated information on special procedures and on the twenty-ninth annual meeting of special rapporteurs, independent experts and chairs of working groups. 27 March 2024. Para. 3., A/HRC/55/69: Activities of special rapporteurs, independent experts and working groups of the special procedures of the Human Rights Council undertaken in 2023, including updated information on special procedures and information on the twenty-ninth annual meeting of special rapporteurs, independent experts and chairs of working groups | OHCHR.

143 A/HRC/55/68 para. 7.

144 See more: Standing Invitations to thematic special procedures [Online]. Available at: https://spinternet.ohchr.org/StandingInvitations.aspx (Accessed: 10 June 2025).

145 See more on Universal Periodic Review: https://www.ohchr.org/en/hr-bodies/upr/upr-home (Accessed: 10 June 2025).

146 Joosten, 2011, p. 32.

147 The UN human rights treaty monitoring bodies, composed of independent experts, which discuss the periodic reports on the implementation of the treaty by the States Parties to the treaty.

> Moreover, the review should not change the mandate of the HRC to address serious human rights violations in specific countries'.[148]

A key benefit of the UPR is its ability to foster a cooperative environment where countries can collaborate on human rights initiatives aimed at improving conditions on the ground through the exchange of best practices.[149] An essential aspect of the UPR is its seamless connection to technical assistance and capacity-building programmes, which help ensure the more effective implementation of UPR recommendations. The creation of the Voluntary Fund for Financial and Technical Assistance is designed to support this objective.[150]

Some experts and academics have raised concerns that the UPR may become a mere formality, where participation no longer reflects a genuine intent to bring about meaningful changes in the human rights situation.[151] The cooperative and non-confrontational nature of the intergovernmental process – lacking punitive sanctions – was a concession made to gain support from some developing countries, despite HRC Resolution 5/1 clarifying that the UPR 'should not diminish the Council's capacity to respond to urgent human rights situations'.[152] In this context, it is crucial that the process evolves from being a ritual into a genuine commitment. 'States must not be allowed to mask their low commitment to human rights by mere participation in the process.'[153]

The UPR process has the potential to create a more inclusive international human rights agenda than previously seen, offering a comprehensive range of human rights issues aligned with the Universal Declaration of Human Rights. This is especially significant in regions with low ratification of international human rights conventions, as it enables more peripheral regions of the world to engage in a shared human rights dialogue.[154] The UPR's focus on bilateral, state-to-state relations represents a shift from the more regionalised approach and North-South divide seen in other parts of the HRC.[155] Research by Edward McMahon and Marta Ascherio reveals that the African and Asia-Pacific Groups have made 40% of their recommendations to countries within their own regions, while this proportion is much lower for the other three regional groups (EEG, GRULAC, and WEOG).[156] Consistent with this trend, countries in the African and Asia-Pacific Groups have been more receptive to accepting recommendations from countries within their own regions.[157]

148 Carey, 2009, p. 469.
149 Vega and Lewis, 2011, p. 385.
150 Charlesworth and Larking, 2014, pp. 6–7.
151 Ibid., p. 10.
152 McMahon and Ascherio, 2012, p. 234.
153 Charlesworth and Larking, 2014, p. 12.
154 Ibid., p. 13.
155 McMahon and Ascherio, 2012, pp. 234–235.
156 Ibid., p. 237.
157 Ibid., p. 242.

In conclusion, the process clearly reflects regional differences, with Asian and African countries often adopting a more lenient stance on human rights issues, while the WEOG (Western European and Other States Group) tends to make the most critical recommendations demanding concrete action. The GRULAC (Group of Latin American and Caribbean States) and EEG (Eastern European Group) can serve as intermediaries between African/Asian countries and the WEOG, given their unique historical contexts. A key insight from McMahon and Ascherio is that the long-term success of the HRC hinges on whether states acknowledge that criticism can be a valuable aspect of cooperation.[158]

4.2.4. Complaint Procedure[159]

Due to the lack of interest from Member States in reforming the previous CHR's 1503 procedure, it continued with only minor adjustments, such as easing eligibility criteria and increasing the frequency of case committee meetings.[160] The complaints procedure is designed to address serious human rights violations occurring anywhere in the world, under any circumstances, provided they show a consistent pattern and can be substantiated. The inclusion of the phrase "under any circumstances" broadens the scope, making it difficult for challenges to be raised based on substance or geographical scope. This means that emergency situations or internal conflicts no longer prevent the HRC from examining a case. Additionally, the admissibility criteria have been updated, allowing for cases that fall under the mandate of a special procedure or are subject to the public procedure of the HRC. The only grounds for inadmissibility now are *litis pendent,*[161] where a similar complaint is already in process.

4.2.5. Participation of NGOs and National Human Rights Institutions in the Work of the Human Rights Council

The CHR had the most liberal participation rules for NGOs within the UN system. NGOs accredited by ECOSOC were permitted to attend all public meetings, speak during agenda discussions, and distribute written materials to Member States.[162] These rights were granted to NGOs with a consultative status, which was granted by the NGO Committee, a body made up of representatives from nineteen Member States meeting in New York. The criteria for a consultative status were outlined in ECOSOC Resolution 1996/31.[163] Currently, more than six thousand NGOs hold consultative

158 Ibid., p. 246.
159 See more on Human Rights Council Complaint Procedure: https://www.ohchr.org/en/hr-bodies/hrc/complaint-procedure/hrc-complaint-procedure-index (Accessed: 10 June 2025).
160 Spohr, 2010, pp. 169–218.
161 *Litis pendentia*: as a ground for dismissal of a civil action, *lis pendens* refers to a situation where two actions are pending between the same parties on the same cause of action, rendering one of them redundant.
162 Abraham, 2016, p. 88.
163 Mertus, 2009, p. 62.

status with ECOSOC.[164] According to the founding resolution of the HRC, NGO and National Human Rights Institution (NHRI)[165] participation follows the same model as the CHR, and these rules apply to the HRC as well.[166]

Research by Laura K. Landolt and Byungwon Woo on NGO involvement in the work of the CHR and HRC revealed that the creation of the Council has significantly improved the participation of local and regional NGOs. Their findings showed that more NGOs are now voicing concerns about human rights issues in democratic countries and those that are members of the CHR/HRC.[167] The data clearly indicates that the procedural changes introduced by the HRC have enhanced NGO participation, especially among NGOs from the Global South.[168]

Olivier de Frouville noted that, with the HRC holding three regular sessions a year, along with three UPR sessions and numerous special sessions, it has become increasingly challenging for NGOs to keep track of all the events. On top of financial constraints, the rise of government-organised NGOs (GONGOs) has become more apparent, as well as the growing restrictions on NGO activities within the HRC.[169] In response, UNHRC Resolution 24/24, introduced by Hungary on 'Cooperation with the United Nations, its representatives, and mechanisms in the field of human rights,' led to the appointment of a *UN focal point* (coordinator). This individual's role is to ensure that those who cooperate with the UN on human rights issues are not subjected to retaliation by governments or other actors, and to ensure a swift and coordinated response across the UN system in such cases.[170] Following this resolution, the UN Secretary-General appointed Andrew Gilmour as the Under-Secretary-General for Human Rights in October 2016 to address these concerns.[171] This initiative is critical to safeguarding the UN's credibility, as any intimidation or silencing of those who collaborate with the organisation would erode its moral foundation.

4.2.6. Subsidiary Bodies of the Human Rights Council

4.2.6.1. Advisory Committee[172]

The HRC made the decision to dissolve the CHR's Sub-Commission on the Promotion and Protection of Human Rights and replace it with the Advisory Committee (AC). The Sub-Commission, which was established in 1947 and initially named the Sub-Commission on the Prevention of Discrimination and Protection of Minorities

164 See more on: NGO Branch of UN Department of Economic and Social Affairs: https://ecosoc.un.org/en/ngo (Accessed: 10 June 2025).
165 National human rights institutions include ombudsman offices and some national human rights commissions.
166 Abraham, 2016, p. 91.
167 Landolt and Woo, 2017, p. 420.
168 Ibid., p. 421.
169 Frouville, 2011, p. 249.
170 United Nations General Assembly, 2013.
171 Sinclair and McEvoy, 2018, p. 2.
172 See more on HRC Advisory Committee: https://www.ohchr.org/EN/HRBodies/HRC/AdvisoryCommittee/Pages/HRCACIndex.aspx (Accessed: 10 June 2025).

until 1999, was tasked with recommending standards for the protection and promotion of human rights.[173] Over time, its mandate expanded, and the Sub-Commission evolved into a think tank for the CHR, focusing on analysing information about severe human rights violations, researching, and interpreting international human rights standards.[174]

The AC was made slightly smaller than the Sub-Commission, with 18 members instead of 26, and the option to hold two sessions per year, each lasting up to 10 days, rather than a single three-week annual session.[175] However, under HRC Resolution 5/1, its work was limited to cases it was specifically asked to address, removing its ability to act on its own initiative. Additionally, the HRC decided to eliminate the AC's authority to create subsidiary bodies and adopt resolutions or decisions.[176] AC members are elected by secret ballot, with seats distributed geographically among the five regional groups.[177]

4.2.6.2. Forum on Minority Issues

The Forum on Minority Issues, established by Human Rights Council Resolution 6/15 in 2007 and renewed in 2012, functions as a platform for dialogue and cooperation concerning the rights of national or ethnic, religious, and linguistic minorities. It supports the Special Rapporteur on minority issues by providing thematic input and identifying best practices, challenges, and opportunities in implementing the UN Declaration on Minority Rights.[178] Meeting annually for two days, the Forum is chaired by an expert selected regionally by the HRC President and has addressed a range of topics, including minority participation in public life, education, conflict prevention, hate speech, and humanitarian crises.

4.2.6.3. Social Forum[179]

The Social Forum, also a subsidiary body of the HRC, meets each year for three days, gathering states, international organisations, and civil society to discuss key social issues[180]. Led by a Chairperson-Rapporteur appointed through regional consultations, its sessions have focused on themes such as poverty eradication, globalisation, climate change, the right to development, the rights of older persons and persons with disabilities, access to medicine, the role of sport in human rights promotion, the impact of communicable diseases like HIV and COVID-19, as well as the human rights dimensions of water and post-pandemic recovery through science and innovation.

173 Abraham, 2006, p. 52.
174 Ibid.
175 Silva, 2013, pp. 102–103.
176 Silva, 2013, p. 103.
177 Spohr, 2010, p. 188.
178 See: Forum on Minority Issues [Online]. Available at: https://www.ohchr.org/en/hrc-subsidiary-bodies/minority-issues-forum (Accessed: 10 June 2025).
179 See: The Social Forum of the Human Rights Council [Online]. Available at: https://www.ohchr.org/EN/Issues/Poverty/SForum/Pages/SForumIndex.aspx (Accessed: 10 June 2025).
180 Richardson, 2015, p. 428.

4.2.6.4. Expert Mechanism on the Rights of Indigenous Peoples[181]

The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) is a subsidiary body of the HRC, established in 2007 by HRC Resolution 6/36. The EMRIP convenes annually for five days and is tasked with offering the HRC thematic advice on the rights of indigenous peoples. Additionally, it may propose recommendations for the HRC's consideration.

4.3. Expert Discourse on the Work of the Human Rights Council

As previously noted, inefficiency and selectivity were two key weaknesses resulting from the over-politicisation of the CHR.[182] However, it is difficult to hold a political body accountable for not fully countering its own politicisation. This implies that the work of the HRC, as its successor, should be viewed realistically and not in isolation from *realpolitik*. In 2015, a significant study by the Universal Rights Group revealed that over 55% of HRC decisions focused on general thematic issues, while country-specific decisions – covering only 12 countries – made up just 7% of the total.[183]

The research also revealed that the percentage of decisions adopted by consensus fell from 80% in 2007 to 69% in 2014. The authors noted that 56% of decisions adopted by the Third Committee correspond to those in the HRC, with 40% having significant content overlap.[184] Each year, the Third Committee – not the UNGA Plenary – adopts a brief resolution on the HRC report, usually presented by the African Group. However, in some instances, the Third Committee has expressed reservations about certain HRC initiatives, such as in 2011 with HRC Resolution 17/19 on human rights, sexual orientation, and gender identity, or in 2013 when it decided to postpone a decision on Resolution 24/24 regarding cooperation with the UN and its human rights mechanisms.[185] These examples demonstrate that the HRC's new institutional status, compared to the CHR, has certain drawbacks, as the Third Committee can revisit the HRC report, which was not the case in the relationship between ECOSOC and the CHR.

Assessing the work of the CHR/HRC is complex, as illustrated by research from Krishna Chaitanya Vadlamannati, Nicole Janz, and Oyvind Isachsen Berntsen on the impact of CHR/HRC reports on foreign direct investment (FDI). Their study found that countries condemned by the CHR or the HRC saw a decline in FDI of approximately 49% within a few years.[186] This data shows that criticism from the world's leading human rights body has a far more significant negative effect on FDI than the human rights violations themselves, which also have their own damaging consequences.[187]

181 See: Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) [Online]. Available at: https://www.docip.org/en/indigenous-peoples-at-the-un/expert-mechanism/ (Accessed: 10 June 2025).
182 Salama, 2009, p. 186.
183 Gujadhur and Lamarque, 2015, p. 2.
184 Ibid., p. 3.
185 Bichet and Rutz, 2016, p. 7.
186 Vadlamannati, Janz and Berntsen, 2018, p. 229.
187 Ibid., p. 229.

As a result, critical HRC resolutions can inflict tangible economic harm on repressive regimes by deterring foreign investors. Vadlamannati and colleagues also discovered that media coverage of human rights abuses plays a crucial role in amplifying the impact of HRC resolutions on FDI.[188] This suggests that international human rights bodies, like the HRC, can be instrumental in encouraging offending regimes to improve their human rights practices.

Peter S. Henne's research reveals a connection between HRC membership and higher levels of religious oppression, suggesting that countries with HRC membership often see an increase in religious repression. Despite this, Henne supports participation in human rights bodies rather than exclusion. His findings are significant because many countries use their HRC membership not just to deflect criticism of their human rights record, but also to conceal increasingly repressive policies against religious groups. In this context, it's not about cultural or religious factors, but rather political circumstances and the degree of international scrutiny that play a key role.[189]

Sibylle Scheipers argued that the structure of the HRC resulted from an intellectual struggle between the North, which sought an exclusive and confrontational body, and the Global South, which favoured inclusivity and cooperation.[190]

Rosa Freedman, on the other hand, believed that the HRC's new mechanisms, such as the UPR and special sessions, while not new, have gained importance by making it easier to convene them, and are being used by regional groups and other blocs in order to advance their political agendas. According to Freedman it undermines the HRC's ability to fulfil its primary mission of promoting and protecting human rights. She specifically highlighted the OIC and the African Group as dominant players utilising these mechanisms to deflect attention from their own human rights situations.[191]

Marisa Viegas e Silva, reflecting on the first six years of the HRC, believed that the political environment surrounding the Council was aligned with the realities of international relations. Her assessment was more balanced than that of the experts referred to earlier. She highlighted some positive developments, such as the semi-permanent nature of the HRC (with longer sessions compared to the CHR), changes in the election process for members, the potential to suspend the membership of offending countries, and the introduction of the UPR. However, she also pointed out that the HRC had repeated some of the CHR's mistakes, including politicisation, double standards, and the strengthening of the intergovernmental nature of the body, which had led to a reduced role for civil society.[192]

Theodor Rathgeber was highly critical of the HRC, stating that it lacked both credibility and effectiveness, with many Member States showing only a limited interest in addressing controversial issues.[193] He argued that the misplaced solidarity of the

188 Ibid., p. 234.
189 Henne, 2018, pp. 723–724.
190 Scheipers, 2007, pp. 237–238.
191 Freedman, 2011, p. 23.
192 Silva, 2013, p. 109.
193 Rathgeber, 2010, p. 193.

Global South hinders meaningful human rights monitoring by the HRC. Rathgeber emphasised that the HRC's role as a political body was unusual, given that its mandate includes 'fact-finding, assessment, and negotiation'. He believed that special procedures, NGOs, and the OHCHR should play a much more significant role in enhancing the HRC's performance.[194]

Eric Cox, on the other hand, was straightforward in asserting, 'We cannot expect the HRC to function any differently from the CHR, because both are essentially political bodies that reflect the will of the membership'.[195]

4.4. Concluding Remarks and Lege Ferenda Proposals about the Human Rights Council

The United Nations Human Rights Council plays a vital role in promoting and protecting human rights globally. However, persistent criticisms regarding its membership, politicisation, and effectiveness have spurred debate over necessary reforms.

A political body like the CHR could only operate within the limits set by its Member States and could not be faulted for adhering to political approaches. However, the international community opted to replace the CHR, believing that the new body could overcome the political shortcomings of its predecessor. It was not surprising, therefore, that a new body of nearly the same size, composed of the same actors, and operating under similar political conditions, did not result in a breakthrough in the global fight against human rights violations.

Nonetheless, the establishment of the UPR introduced a fresh approach within the UN system, ensuring a cooperative process where the human rights situation of all Member States is reviewed, with a growing emphasis on technical assistance to implement UPR recommendations. Future reforms should aim at standardising the format and content of UPR recommendations, and at enhancing the involvement of independent civil society organisations in both the review and follow-up stages which would further strengthen the credibility of the UPR mechanism.

The literature often overlooks the significance of the HRC's so-called side events, which are frequently the only platforms where sensitive human rights issues involving the P5 (such as Guantánamo, Tibet, and Chechnya) can be addressed. Civil society has played a key role in organizing these events, bringing human rights defenders and victims to Geneva and shedding light on violations that Member States may not have raised in the HRC plenary sessions.

The expanding agenda of the HRC is becoming unsustainable. There is a pressing need for a significant reorganisation, where certain issues – such as toxic waste or foreign debt – could be transferred to more specialised UN bodies. Some of the thematic mandates mentioned earlier should also be eliminated to enhance the HRC's effectiveness. This could be achieved through the use of sunset clauses, which would

194 Ibid., p. 193.
195 Cox, 2010, p. 89.

signal that the issues covered by a particular resolution are no longer necessary on the HRC's agenda and should instead be addressed by other UN bodies.

While the introduction of the UPR process has not made the adoption of country-specific resolutions redundant, the approach of naming and shaming should be more strategic and coordinated within the UN system, with a greater emphasis on the regional dimension in the world body's work. The current practice, where some resolutions that could be presented under agenda item 4 on country situations are instead placed under agenda item 10 on technical cooperation due to political pressure, can only be accepted if there are real, tangible improvements in the human rights situation of the country in question.

It would not be politically realistic to expect the HRC to become a group of countries with flawless human rights records, but governments that advocate for human rights should support the nomination of countries that view the protection and promotion of human rights as a positive political goal. The international community should adopt stricter criteria for Council membership, such as compliance with core international human rights treaties or cooperation with UN human rights mechanisms which would promote the credibility of the HRC and would reduce the risk of self-interested membership aiming at seeking protection from international criticism about the human rights policy of the concerned country through HRC membership.

An interesting aspect of the HRC is that, despite the significant influence of the African and Asian Groups and the relatively low profile of the West in the Council, there are still many important thematic and country-specific resolutions introduced or supported by Western countries. Furthermore, the standard-setting work of the CHR has continued within the HRC. These positive developments are largely the result of growing coalitions between regions, moving beyond the traditional North-South divide. On several important and sensitive issues, WEOG, the majority of EEG and GRULAC, as well as African and Asian countries with a positive view on human rights, have been able to form coalitions. The ongoing process of global democratisation,[196] which we hope will persist despite occasional setbacks, could strengthen these positive trends, improving the composition of the HRC as more democratic countries seek to join.

Finally, it is crucial for the international community to prioritise strengthening the preventive role of the HRC, strategically utilising special procedures and the databases produced through the UPR process. An enhanced composition of the HRC, coupled with greater cross-regional cooperation and a balanced approach between naming and shaming and technical cooperation, could significantly improve the HRC's capacity to fulfil its vital mandate in safeguarding and promoting international human rights. In light of the present geopolitical conditions, it is unlikely that the

196 According to Pew Research, at the end of 2017, of the 167 countries with at least 500,000 inhabitants, 57% were democracies, 28% were mixed, while only 13% were autocracies. This democratic wave began in the mid-1970s and while there has been a decline in recent years, the numbers are still not comparable to 1976, when 62% of countries were autocracies, 25% were democracies and 13% were mixed regimes. See: Desilver, 2019.

international community can adopt far reaching reform proposals regarding the global human rights architecture. However, there are certain small and concreate steps, like the better and more adequate funding of UN Special Procedures, the enhanced protection of the participation of the civil society or stricter HRC membership criteria, which could be adopted and could have measurable impact on the UN human rights protection system.

5. UN High Commissioner for Human Rights

5.1. The History of the Mandate

As referred to previously in this chapter, René Cassin was the first to propose, in 1947, the creation of a position similar to that of an Attorney-General. This role could be compared to the current role of the UN High Commissioner for Human Rights; however, it would have specifically focused on assisting individuals and states in proceedings before a proposed Court of Human Rights. Nevertheless, at that time, the international community did not support this idea, as most states deemed it unfeasible.

In 1950–1951, Uruguay proposed the establishment of an attorney-general position to assist in the implementation of the International Covenant on Civil and Political Rights, which was being drafted by the Commission on Human Rights. The attorney-general's role would have involved receiving and reviewing complaints from individuals and groups. However, this proposal ultimately failed to gain enough support for adoption.[197]

In 1965, with significant input from NGOs, Costa Rica proposed the creation of a High Commissioner for Human Rights. Interestingly, when the proposal was presented to the CHR in 1967, René Cassin strongly opposed it. However, the French delegation later supported the idea during the ECOSOC debate.[198] The Commission ultimately adopted the proposal, and ECOSOC recommended that the General Assembly create the position. Despite this, the General Assembly postponed its decision every year. Although the proposal was discussed throughout the 1970s, it failed to reach a consensus during the Cold War period, largely due to opposition from the Socialist Bloc.[199]

5.2. The Establishment of the Mandate

At the start of the 1990s, the end of the Cold War marked a shift in the global human rights landscape. While many human rights NGOs were established, human rights violations continued to rise. UN missions were deployed to countries like Yugoslavia, Cambodia, El Salvador, Guatemala, and Haiti, but the Geneva-based UN Centre for

197 Mertus, 2009, p. 9.
198 Hobbins, 2001, p. 41.
199 Mertus, 2009, p. 10.

Human Rights struggled to manage the increasing workload, and UN personnel lacked adequate human rights training. To address these challenges, the idea of a UN High Commissioner for Human Rights resurfaced. A campaign launched in 1992 advocated for the creation of this position, and it became the central proposal at the World Conference held in Vienna in 1993. Interestingly, the UN Secretary-General at the time opposed the idea, arguing that it would only add more bureaucracy and that "quiet diplomacy" was a more effective approach.[200]

The establishment of the UN High Commissioner for Human Rights in 1993, largely due to public human rights advocacy during the Vienna World Conference on Human Rights, marked a significant milestone in the international protection and promotion of human rights.[201] Although the Vienna Declaration was not legally binding, it was adopted by 171 states at the conference. In December 1993, the UN General Assembly adopted resolution 48/141, which created the Office of the High Commissioner for Human Rights (OHCHR) as the central body responsible for coordinating all UN human rights efforts. The High Commissioner holds the rank of Under-Secretary-General within the UN.

5.3. The High Commissioners

The first High Commissioner, José Ayala Lasso (1994–1997) (Ecuador), former foreign minister and ambassador did a lot for the development of inter-agency cooperation but was often criticised for not being sufficiently confrontational. He did not have a human rights background and always refrained from publicly criticising countries. He initiated the field presence of the OHCHR.

In 1997, Mary Robinson, (1997–2002) former President of Ireland, was appointed as the second High Commissioner. She further expanded the UN's presence in many countries, but she had a confrontational relationship with Washington because of her criticism of the human rights violations that occurred in occupied Palestinian territories (OPT) and of the US War on Terror.

Moscow and Beijing were also not very pleased with her work as she criticised Russia's policy regarding Chechnya and China's measures regarding the Muslim Uighurs in Xinjiang. Not surprisingly, she was not supported by Washington and Moscow to extend her mandate.

Sérgio Vieira de Mello (2002–2003) (Brazil) followed Mary Robinson. He had excellent diplomatic skills and managed to maintain good relations with Washington and Moscow; he was killed in 2003 in Iraq by a suicide bomber.

The acting High Commissioner, who followed Vieira de Mello, Bertrand Ramcharan (2003–2004) (Guyana) did a lot during his short tenure to raise the morale of the agency and keep human rights and humanitarian principles at the centre in case of violent conflicts. He was an outspoken defender of human rights, who frequently

200 Mertus, 2009, pp. 11–12.
201 Pillay, 2009.

carried out investigations on his own initiative, without specific authorisation from Member States. (Iraq, Darfur, Liberia)

In 2004, Louise Arbour (2004–2008) (Canada), a former prosecutor of the International Criminal Tribunals for Yugoslavia and Rwanda, was appointed as a new High Commissioner. She became quite outspoken by the end of her mandate. This led to clashes with Washington regarding her criticism of US policy on arbitrary detention and interrogation techniques. She secured major expansion of OHCHR resources. She carried out silent diplomacy concerning countries like China or Russia.

Navi Pillay (2008–2014) (South Africa) followed Arbour in 2008. A former judge of the International Tribunal for Rwanda, Pillay was very outspoken on lesbian, gay, bisexual, transgender, and intersex (LGBTI) rights, but in other cases, she used quiet diplomacy if deemed necessary. She was very supportive of civil society. In 2012 she had a conflict with China over her statement on Tibet. She called for international inquiries in case of Libya, Syria and North Korea.[202]

The next High Commissioner was Prince Zeid Ra'ad Al Hussein (2014–2018) (Jordan), a former diplomat who became a vocal and passionate human rights advocate. He strongly criticised the Islamic State and called the international community to combat it. He expressed concern over the presidential campaign of Donald Trump, but also criticised several heads of state, like President Duarte.

Michelle Bachelet, (2018–2022) former President of Chile, succeeded Zeid Ra'ad Al Hussein of Jordan on 1 September 2018.[203] Her relationship with Washington also became hostile within a short time, as she was personally criticised by US Secretary of State Michael Pompeo for releasing a database of companies that are helping Israel to develop Jewish settlements in Palestine-occupied territory.[204] Her visit to China in 2022 was criticised by human rights organisations as she was considered being too polite with Beijing. Her report about the visit appeared just before she left the office.

The current High Commissioner for Human Rights is Volker Türk (2022 –) (Austria) who was previously Under-Secretary-General for Policy and Assistant Secretary-General for Strategic Coordination in the Executive Office of the UN Secretary-General. He had a statement on the risk of famine in Gaza, but also urged to end repression of independent voices in Russia.

5.4. The Office of the UN High Commissioner for Human Rights

The Office of the High Commissioner for Human Rights (OHCHR) is part of the United Nations Secretariat, with a staff of approximately 1,960 people from 148 different nationalities. Its headquarters are located in Geneva, with an additional office in New York. In 2024, the Office's regular budget amounted to 171,630,000 USD, while extrabudgetary requirements were 216,673,000 USD. The OHCHR's Geneva-based headquarters comprises three main divisions: 1) Thematic Engagement, Special

202 Mertus, 2009, pp. 32–35.
203 Pease, 2016, pp. 102–112.
204 Crossette, 2020.

Procedures, and Right to Development Division (TESPRDD): This division focuses on developing policy, providing guidance, tools, advice, and capacity-building support on various thematic human rights issues. It also supports the Human Rights Council's special procedures and human rights mainstreaming efforts; 2) Human Rights Council and Treaty Mechanisms Division (CTMD): This division offers substantive and technical support to the Human Rights Council (HRC) and its Universal Periodic Review (UPR) mechanism, as well as assisting the human rights treaty bodies; 3) Field Operations and Technical Cooperation Division (FOTCD): This division manages and implements the OHCHR's work in the field.[205]

6. The Human Rights Aspects of the Work of the International Court of Justice

The International Court of Justice (ICJ), as the principal judicial organ of the United Nations, primarily adjudicates inter-state disputes and provides advisory opinions on questions of international law. It is one of the six principal organs of the United Nations, which is located in The Hague. It consists of a panel of 15 judges, elected by the UN General Assembly and the Security Council for nine-year terms. Pursuant to Article 59 of the Statute of the Court, its rulings and opinions are binding on the parties with respect to the particular case ruled on by the Court. Although it is not a human rights court in the strict sense – unlike the European or Inter-American human rights courts – the ICJ's jurisprudence increasingly engages with human rights norms, reflecting the broader international legal environment in which it operates.

6.1. Jurisdiction and Mandate: Structural Limitations and Opportunities

The ICJ's jurisdiction is based on state consent, and its statute does not explicitly mandate it to adjudicate human rights claims. Moreover, only a limited number of human rights treaties – such as the Genocide Convention and the Convention Against Torture – grant it jurisdiction.[206] As such, individuals cannot bring cases before the Court, and the ICJ does not serve as an enforcement mechanism for international human rights treaties per se. Nonetheless, as a court of general international law, it is competent to interpret and apply human rights norms when raised in inter-state disputes or advisory proceedings. Recent case law of the ICJ includes several rulings concerning human rights violations, with direct implications for individuals. This increased focus on human rights can be attributed to the growing number of

205 See Structure of the OHCHR: https://www.ohchr.org/en/about-us/where-we-work (Accessed: 10 June 2025).

206 The 5 human rights treaties which have a clause allowing proceedings to be brought before the ICJ are the following: Genocide Convention, ICERD, CEDAW, CAT and the Convention on the Political Rights of Women.

ICJ judges who have previously served on international human rights tribunals or mechanisms.[207]

Interestingly, statistical analysis of the Court's decisions between 1947 and 2018 shows that while the collective decisions of the ICJ mention "human rights" only 14 times, individual or separate opinions by judges refer to human rights over 680 times. This discrepancy highlights the evolving attitudes of judges and the growing receptivity to human rights within the ICJ's judicial culture, even if not fully reflected in the majority rulings.[208]

6.2. The Normative Elevation of Human Rights in Early Jurisprudence

In its early advisory opinions, such as *Interpretation of Peace Treaties* and *Reservations to the Genocide Convention*, the Court recognised the normative weight of human rights and underscored their universal and humanitarian character. It established that the Genocide Convention had a civilising and non-reciprocal purpose, which limited states' ability to make reservations inconsistent with its object and purpose. These decisions contributed to the normative "internationalisation" of human rights – moving them beyond exclusive domestic jurisdiction, despite Article 2(7) of the UN Charter emphasising state sovereignty.

The *Namibia* advisory opinion and the *Teheran Hostages* case further affirmed that certain human rights obligations, notably those grounded in the UN Charter and the Universal Declaration of Human Rights, hold binding force, thereby reinforcing the legal relevance of human rights principles within the UN legal framework (Though it did not comment on the legal status of the UDHR itself.).[209]

6.3. Human Rights as Obligations Erga Omnes

A major breakthrough in integrating human rights into general international law came in the *Barcelona Traction* case, where the ICJ articulated the concept of obligations *erga omnes* – duties owed by states towards the international community as a whole. These include prohibitions against aggression, genocide, slavery, and racial discrimination, as well as the right to self-determination.[210]

The Court reiterated this in *Belgium v. Senegal* (2012), (regarding the *obligation to prosecute or extradite*) holding that obligations under the Torture Convention are *erga omnes* parts—binding upon and enforceable by all States Parties. These cases established that human rights violations, particularly those involving *jus cogens* norms, transcend bilateral state relations. However, despite recognising the special status of these norms, the Court has remained cautious, affirming that core principles of state sovereignty – such as jurisdictional immunities and the requirement of consent

207 Pipan, 2018, pp. 209–210.
208 Jubilut and Sanctis, 2018, p. 226.
209 Pipan, 2018, pp. 211–212.
210 Ibid., p. 215.

– remain intact. Thus, fundamental human rights cannot override the consensual basis of the court's jurisdiction.[211]

6.4. Interpretation and Integration of Human Rights Norms

The ICJ has increasingly adopted a value-oriented and evolutive interpretative approach to human rights treaties. It considers the "object and purpose" of treaties, their humanitarian character, and the principle of effectiveness (*effet utile*), which demands that treaties be interpreted in a way that ensures practical impact.[212]

In the *Genocide* cases, the court clarified that the obligation to prevent genocide requires states to exercise due diligence, using all reasonably available means to prevent such acts, regardless of the outcome.[213] Similarly, in the *Diallo* case, the court acknowledged that diplomatic protection can be used to enforce human rights obligations, extending the traditional scope of this doctrine beyond mere injury to foreign nationals. While initially limited to the minimum standards of treatment of foreign nationals, this concept has since expanded to include, among other things, internationally guaranteed human rights.[214]

6.5. Cross-Fertilisation with Human Rights Jurisprudence

The ICJ increasingly references the jurisprudence of specialised human rights bodies. In *Ahmadou Sadio Diallo*, it cited the Human Rights Committee and the African Commission on Human and Peoples' Rights. In the *Genocide* cases, it relied on findings from the International Criminal Tribunals for the Former Yugoslavia and Rwanda. This judicial dialogue enhances the coherence and legitimacy of international human rights law and reflects the ICJ's responsiveness to evolving legal standards.[215]

6.6. Extra-Territorial and Conflict-Contextual Application

The ICJ has also affirmed that human rights obligations apply beyond a state's territorial boundaries. In its *Wall advisory opinion*, it found that the ICCPR, ICESCR, and CRC were applicable to the Occupied Palestinian Territory. In *Armed Activities on the Territory of the Congo*, the court confirmed that states are bound by international human rights law when exercising jurisdiction outside their territory. In *Nuclear Weapons*, the court held that the ICCPR continues to apply during armed conflict, except for derogable rights under Article 4 of the Covenant.[216]

211 Ibid., p. 216.
212 Crawford and Keene, 2019, p. 944.
213 Ibid., p. 946.
214 Ibid., p. 948.
215 Pipan, 2018, pp. 218–220.
216 Ibid., pp. 220–221.

7. Conclusion: A Gradual but Clear Evolution

While the ICJ is not a human rights court, it plays a vital role in integrating human rights into the mainstream of international law. Its contributions are cautious but cumulative, often shaped by the willingness of states to frame disputes in human rights terms, and by the judges' own expertise and perspectives. Through its interpretations of *erga omnes* obligations, evolving references to human rights bodies, and its embracement of value-driven treaty interpretation, the ICJ has helped elevate human rights to a central concern of international law, even within the boundaries of a state-centric legal system. Based on its recent case law, the court appears willing to adopt a more liberal and flexible approach when the text, context, and purpose allow for it.[217]

217 Crawford and Keene, 2019, p. 950.

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| Chapter 4 |

The 1948 Universal Declaration of Human Rights (UDHR) – Impact on Central and Eastern European Countries

Irine Kurdadze – Eka Siradze

ABSTRACT

This chapter presents a comprehensive overview of the development of the Universal Declaration of Human Rights as the cornerstone of the international bill of rights, its legal nature and its impact on universal and regional human rights treaties, based on the extensive literature, the *Travaux Préparatoires* and commentaries on the UDHR, as well as resolutions of the United Nations, the Human Rights Committee, etc., decisions of international courts and national reports of states. The study begins with the concept and meaning of the International Bill of Human Rights and then highlights the contribution of the Universal Declaration of Human Rights to the international human rights system – the impact of the Universal Declaration of Human Rights on human rights instruments at the universal and regional levels. Next important matter addressed is the legal nature of the UDHR as a source of international law and its path from soft law to customary law. And finally, implementation of UDHR (which does not establish any judicial or quasi-judicial system to consider claims by individuals or States) is analysed on the basis of both the practice of the HRC and the national reports of the 16 Central and Eastern European countries that underwent the UPR process.

KEYWORDS

UDHR, Bill of Rights, Soft Law, HRC, UPR, National reports

1. Introduction

The International Bill of Rights represents a fundamental framework of human rights developed on a global level. It consists of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) (adopted in 1966, and entered into force in 1976), and the International Covenant on Economic, Social and Cultural Rights (ICESCR, adopted in 1966). Together, these documents have become the basis of global efforts to promote, protect and advocate dignity and rights of all. For decades, these documents have continually influenced the development of

Irine Kurdadze, Eka Siradze (2026) 'The 1948 Universal Declaration of Human Rights (UDHR) – Impact on Central and Eastern European Countries' in Kovács, P., Béres, N. (eds.) *The Universal Protection Of Human Rights*. Miskolc–Budapest: Central European Academic Publishing, pp. 149–192. https://doi.org/10.71009/2026.pknb.uphr_4

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the international human rights system. Their significance covers not only legal and political aspects, but also social and moral ones.

The UDHR is a foundational document of the International Bill of Rights. It proclaimed that all individuals are born free and equal in dignity and rights, marking a global turning point in consciousness. While not formally legally binding, the UDHR has had immense influence, and many of its provisions are now considered customary international law.[1]

The International Bill of Rights establishes a legal framework for human rights protection. The ICCPR and ICESCR set out specific legal obligations for States Parties to the treaties. As can be seen from the title of the documents themselves the ICCPR covers civil and political rights, such as the right to life, freedom of speech, freedom of religion, and the right to a fair trial, while the ICESCR focuses on economic, social, and cultural rights, including the right to work and to an education.

As demonstrated by the practice of application and incorporation, the International Bill of Rights has had a profound impact on national legal systems and constitutions. Many countries have integrated the principles of the Bill into their constitutions and legal systems, strengthening the rule of law, democratic governance, and the protection of fundamental freedoms. The Bill has also led to the creation of national human rights institutions that monitor and combat human rights violations within their jurisdictions.

The International Bill of Rights emphasises the interdependence and interrelatedness of human rights. No one set of rights is more important than another. Civil and political rights (e.g. freedom of speech) are vital for their impact on economic, social and cultural rights (e.g. education, health, housing). Conversely, the enjoyment of economic rights is impossible without the existence of political freedoms. This holistic approach promotes a balanced and inclusive understanding of human dignity.

The bill plays a vital role in monitoring and holding states accountable. The ICCPR is overseen by the Human Rights Committee, which reviews reports submitted by States Parties and complaints under the Optional Protocol. The ICESCR is overseen by the Committee on Economic, Social and Cultural Rights. These bodies make recommendations, identify problem areas and encourage states to improve their human rights practices. Although human rights enforcement mechanisms vary in effectiveness, these procedures promote transparency and therefore strengthen the legal system of states parties in the area of human rights' protection.

Furthermore, the International Bill of Rights has served as a foundation for the development of other international human rights treaties. Its principles have inspired the drafting of numerous specialised human rights conventions, including those protecting the rights of women (CEDAW), children (CRC), persons with disabilities (CRPD), and others. It has also influenced regional human rights systems in Europe, the Americas, and Africa.

1 In details see: Kurdadze and Siradze, 2026, pp. 167–181, subchapter 3.

Finally, the International Bill of Rights remains a powerful tool for civil society and human rights organisations. It provides a common language and framework for activists, human rights defenders, and groups fighting injustice and promoting equality in the entire world. Whether campaigning against discrimination, advocating for equality, or defending free speech, human rights defenders rely on the Covenant's authority and legitimacy to guide their work. The importance of the International Bill of Rights cannot be overstated. It provides a universal, legal, and morally compelling framework affirming the dignity and equality of all human beings. By establishing a uniform standard of rights and responsibilities, it guides the actions of states, empowers individuals, and creates a more just and humane global society.

The chapter provides a comprehensive overview of the development of the UDHR as the cornerstone of the International Bill of Right, its legal nature, and its impact on universal and regional human rights treaties. It concludes with a detailed analysis of the UDHR's implementation at a national level in 16 Central and Eastern European countries.

This Chapter is divided into several sections and subsections.

The second Section is devoted to the concept and significance of the International Bill of Rights. However, while separate chapters of this manual are devoted to the 1966 Covenants, the main focus remains on the UDHR. As for the Covenants, in addition to their significance, attention is also paid to the historical reasons for the adoption of two separate documents. As for the Declaration, separate subsections are discussed: the reasons for its adoption, the process of drafting and its structure; and the legal nature of the Universal Declaration, its role and place in the hierarchy of sources of international law – due to its non-binding nature, the main question that needs to be answered is, whether it constitutes a soft law or a customary law. A separate subsection explains the concept of "soft law" and defines its characteristics and categories.

The next Section elaborates the Contribution of UDHR to the International Human Rights System. Firstly, what is the influence of UDHR on human right instruments on a universal and regional level. Thus, the first subsection is devoted to the universal system like the HRC, including the UPR and Special Procedures, and the second to the regional level, such as the European Convention on Human Rights and the ECtHR, the EU Charter of Fundamental Rights and OCSE documents[2]. A general and institutional overview of the High Commissioner for Human Rights, the International Court of Justice etc., is covered in another Chapter of the present textbook, therefore those institutions are not considered here.

The fourth Section analyses the level of implementation of the Universal Declaration of Human Rights (UDHR) in all 16 countries of Central and Eastern Europe. Since, unlike covenants or regional human rights instruments (such as the ECHR), the

2 Since the aim of this Chapter is to examine the impact of the UDHR on Central and Eastern European countries, the research was limited to organizations operating in the Eurozone and did not consider say, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights.

UDHR does not establish any judicial or quasi-judicial system for considering claims from individuals or states. Implementation of the UDHR was analysed based on the national reports of the respective countries that underwent the UPR process. Due to limited space, the focus is on the period following 1990, when democratic transformations commenced in these countries.

Finally, the Chapter ends with a conclusion that summarises the main findings and highlights any important issues.

This Chapter may address and explore issues in more detail than in other chapters. The research is based on the review of the extensive literature on subject matters, *Travaux Préparatoires* and commentaries of the UDHR, as well as resolutions of the UN, HRC etc., decisions of international courts and national reports of States.

2. What is the UDHR?

The UDHR was adopted by the United Nations General Assembly on December 10th 1948 in Paris, France. The UDHR is an essential document providing a comprehensive and universal set of principles beyond cultural, religious, and political ideologies. The Declaration was the first instrument of international law to use the phrase "rule of law,"[3] establishing the principle that all members of all societies are equally bound by the law. The UDHR is a fundamental constitutive document of the United Nations and for all 193 parties mandated by the UN Charter.[4]

2.1. Adoption of the UDHR

This historic document includes a preamble and 30 articles, which for the first time articulated basic human rights to be universally protected. Although the declaration is not a legal treaty and has not been signed by states, it has inspired more than 80 subsequent human rights conventions and treaties, including the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Today the UDHR, translated into 500 languages, is the best-known and most often cited human rights document on Earth. By setting out, for the first time, fundamental rights to be universally protected, it is a milestone of human interactions and the cause of human rights.[5]

The fundamental rights enshrined in the declaration begin with the fact that everyone is born free and equal in dignity and rights, and end with the fact that no state, group or person has the right to abrogate the rights and freedoms set forth in the declaration. Although the declaration does not bind UN member states, the rights

3 Preamble of UDHR.

4 Despite that, in international law, a declaration is different from a treaty in the sense that it generally states aspirations or understandings among the parties, rather than binding obligations.

5 Gordon, 2016, p. 31.

and freedoms included in it have been used to create other binding documents such as the European Convention on Human Rights.

Over time, the UDHR has been translated into hundreds of languages and dialects, making it the most translated document in the world. The adoption of the UDHR is appreciated as a historic act aimed at strengthening peace through the UN's involvement in one of its main objectives.

The UDHR, was the result of the experience of World War II. After World War II, when the United Nations Organisation was established, members of the international community made a solemn pledge to prevent future atrocities such as those which had occurred during that war. The United States President Harry S. Truman said that 'under this document (the Charter) we have good reason to expect an international bill of rights, acceptable to all the nations involved'.[6] The UN Charter prominently enshrines human rights in preamble and Art. 1 as a purpose of the Organization: 'reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in equal rights of men and women and of nations large and small' and 'in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'.

World leaders decided to add to the UN Charter a document guaranteeing the rights of every human being, everywhere and at all times. The document they envisioned, which later became the UDHR, was considered at the first session of the General Assembly in 1946. The Assembly considered the draft declaration on fundamental human rights and freedoms. It referred it to the Economic and Social Council 'for transmission to the Commission on Human Rights (...) in the context of its preparation of an international bill of rights'. In 1946, as part of the preliminary work of drafting the Declaration, under the auspices of UNESCO, Jacques Maritain assembled a Philosophers' Committee to identify key theoretical issues in framing a charter of rights for all peoples and all nations. The work of the Philosophers' Committee then moved to the UN Commission on Human Rights.[7]

At its first session in 1947, the Commission authorised its members to elaborate what it called 'a preliminary draft of an international bill of rights'.[8] This work was later referred to a formal drafting committee composed of Commission members from eight States selected on the basis of equitable geographical representation.[9]

The Commission on Human Rights, comprised of 18 members from diverse backgrounds, was led by Eleanor Roosevelt, who chaired the drafting committee. Alongside her were important figures such as René Cassin, Charles Malik, Peng Chun Chang, and John Humphrey. The drafting of the UDHR in 1947 was primarily driven

6 Cited in Schabas, 2013, p. XXXVII.
7 Gordon, 2016, p. 29.
8 Universal Declaration of Human Rights (1948) Drafting History [Online]. Available at: https://research.un.org/en/undhr/draftingcommittee#:~:text=Drafting%20Committee%20%2D%20Members&text=In%20February%201947%2C%20in%20accordance,International%20Bill%20of%20Human%20Rights (Accessed: 20 June 2024).
9 Ibid.

by Mrs. Roosevelt's activism. The commission's collaboration resulted in the creation and adoption of the Declaration, with key roles played by individuals from different countries. Eleanor Roosevelt's leadership and dedication to human rights were instrumental in the drafting process, as recounted in her memoirs. The Commission held its first meeting in 1947. In her memoirs, Eleanor Roosevelt recalls:

> 'Dr. Chan was a pluralist and spoke admirably of the fact that there is more than one form of ultimate reality. The Declaration, he said, should reflect more than one Western idea and Dr. Humphrey should have taken an eclectic approach. His remark, though directed at Dr. Humphrey, was actually addressed to Dr. Malik, who immediately responded with a rather lengthy explanation of the philosophy of Thomas Aquinas. Dr. Humphrey enthusiastically engaged in the discussion, and I remember that at one-point Dr. Chan said that the Secretariat could use a few months to study the basics of Confucianism!'.[10]

While working on the text of the Declaration, it was crucial to clarify what "rights" were. Several options were considered. In essence, were rights merely names for interests (albeit important interests) that could be outweighed by other, more important interests, if society so decided? Were rights stronger than other interests, prevailing over them in the event of conflict, and subject to being balanced only with other rights? Or were rights absolute, protected by immunity from limitation on any grounds, even with respect to other rights?[11]

However in the end, Humphrey's draft made clear that the exercise of rights could be limited by the rights of others, and this language was eventually adopted by the General Assembly without controversy.[12]

The second important question concerned the definition of obligations. A number of delegates tried to include the concept of "duties", as mentioned in the American Declaration of Human Rights, but Eleanor Roosevelt was against this, and the issue of "duties" ended up by being mentioning only in Article 29(1) which states that '[E]veryone has duties to the community in which alone the free and full development of his personality is possible'.

The Soviet Union tried to have the declaration allow rights to be limited in accordance with the 'corresponding requirements of the democratic state'. But it was rejected by a vote of 23 to eight, with nine abstentions. The final language was adopted as:

> 'In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of

10 See: Universal Declaration of Human Right (1948) History of the Declaration [Online]. Available at: https://www.un.org/en/about-us/udhr/history-of-the-declaration (Accessed: 20 June 2024).
11 See: Waldron, 1984 cited in Knox, 2008, p. 6.
12 Knox, 2008, p. 9.

> securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society'.[13]

The drafting of UDHR took place in two main different settings: in the Commission of Human Rights (between early 1947 and summer of 1948), and during the Third Committee of GA (in fall of 1948).[14]

Cassin's final draft was presented to the Commission on Human Rights in Geneva. This draft, which was sent to all UN member states for comment, became known as the "Geneva draft". The first draft of the Declaration was proposed in September 1948, and more than 50 member states participated in the final version. Third Committee of GA adopted draft text of the Declaration consisting of 28 articles on 3rd December 1948.[15] This text was complemented by the final draft of the preamble the next day.[16] In its resolution 217A (III) of 10th December 1948, the General Assembly, adopted the UDHR consisting of Preamble and 30 articles. Among the United Nations members at the time, 48 voted in favour, none against, eight abstained and two did not vote.[17] Hernán Santa Cruz (Chile), a member of the Drafting Subcommittee, wrote:

> 'I was clearly aware that I was witnessing a truly historic event in which a consensus was reached on the supreme value of the human person, a value that is not determined by the decision of any worldly authority, but by the very fact of human existence, which gives rise to the inalienable right to be free from want and oppression and to develop fully as an individual. In the Great Hall (...) there was an atmosphere of genuine solidarity and fraternity between men and women from the most diverse backgrounds, the like of which I have never seen in any other international forum'.[18]

13 UDHR Article 29(1).
14 See: Rivera, 2023, p. 2.
15 A/c.3/SC.4/20 (3 December 1948).
16 A/c.3/SC.4/22 (2 December 1948).
17 The following 48 countries voted in favour of the Declaration: Afghanistan, Argentina, Australia, Belgium, Bolivia, Brazil, Burma, Canada, Chile, China, Colombia, Costa Rica, Cuba, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Iceland, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Siam, Sweden, Syria, Turkey, United Kingdom, United States, Uruguay, and Venezuela. The following eight countries abstained: the Soviet Union, the Ukrainian SSR, the Byelorussian SSR, People's Federal Republic of Yugoslavia, the People's Republic of Poland, the Union of South Africa, Czechoslovakia, and the Kingdom of Saudi Arabia. Honduras and Yemen – both members of the UN at the time – failed to vote or abstain. Former USSR abstained because wanted to postpone adoption to 1949.
18 See: History of the Declaration, available at: https://www.un.org/en/about-us/udhr/history-of-the-declaration#:~:text=The%20first%20draft%20of%20the%20Declaration%20was%20proposed%20in%20September,to%20be%20a%20colossal%20task (Accessed: 20 June 2024).

2.2. Analysis of the UDHR Structure

The United Nations Charter encompasses various general commitments to human rights, though it does not define their content. The preamble of the UN Charter referred to the 'faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights of men and women' held by the peoples of the UN. It also expressed a determination to 'promote social progress and better standards of life in larger freedom.' Article 1 of the UN Charter states that one of the purposes of the UN is to 'achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all, without distinction as to race, sex, language, or religion'.

While these provisions laid the foundation for the international recognition of human rights, they did not provide a detailed catalogue of rights or mechanisms for their enforcement. This gap was soon addressed by subsequent instruments, most notably the UDHR.

The UN Charter obligated the UN General Assembly (UNGA) to 'initiate studies (...) for the purpose of (...) assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'.[19] The promotion of 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction' was required by the UN on the same four grounds[20], and the empowerment to 'make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all' was given to the ECOSOC.[21] Additionally, the UN Charter extended references to human rights to colonies and other non-self-governing territories (Arts. 73 and 76).

Based on UN charter requirement the UDHR outlines a wide range of rights. The Declaration identifies the basic features of human rights, such as universality, interdependence and indivisibility, making it a living and symbolically significant instrument, but its fundamental moral domain lies in the idea of human dignity.[22]

The UDHR articulates a broad range of fundamental rights and freedoms to which all human beings are entitled. Its structure is carefully designed to reflect both the philosophical foundations of human rights and their practical implementation across legal, political, and social contexts. The Declaration consists of a preamble and 30 articles that together form a comprehensive and coherent human rights framework.

René Cassin famously likened the Declaration to the portico of a Greek temple, 'replete with a foundation (Arts. 1–2), steps (preamble), four pillars (Arts. 3–27), and a pediment (Arts. 28–30)'.[23] Cassin's framework emphasised both individual rights and the collective responsibility of society. Cassin's architectural analogy effectively highlights the interconnectedness and importance of each element of the UDHR,

19 Art. 13 UN Charter.
20 Ibid., Art. 55.
21 Ibid., Art. 62.
22 See: https://www.ohchr.org/en/what-are-human-rights (Accessed: 20 June 2024).
23 Charlesworth, 2008.

ensuring that the declaration serves as a comprehensive framework for protecting human dignity and promoting international cooperation.

2.2.1. Preamble

The UDHR opens with a preamble (steps) that explains the need for the Declaration and affirms that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family' is 'the foundation of freedom, justice and peace in the world.' The preamble consists of seven paragraphs that provide the ethical and political context for the articles that follow. The preamble also reflects the lessons of World War II, emphasising the need to prevent future atrocities through a shared commitment to universal principles.[24] It views human rights not only as moral obligations, but also as essential elements of social progress.

2.2.2. Foundational Principles, Articles 1–2

Articles 1–2, the foundation of the temple, establish the inherent equality, liberty, and dignity of all humans, as well as the "spirit of brotherhood" that should bind them together.

The first two articles establish the core principles of the Declaration: Article 1 proclaims that 'All human beings are born free and equal in dignity and rights', affirming universality, freedom, and equality as guiding ideals. Article 2 guarantees that all rights and freedoms in the Declaration apply to everyone without discrimination of any kind, establishing the principle of non-discrimination.

These articles establish a universal ethical framework and provide the normative basis for the rest of the document. They argue that all humans are inherently equal, free, and dignified, and that a "spirit of brotherhood" should bind them together.

2.2.3. Civil and Political Rights, Articles 3–21

These articles address a broad spectrum of civil and political rights, commonly referred to as "first-generation" rights. As noted by Antonio Cassese, these rights can be grouped into three thematic pillars: *First Pillar* (Articles 3–11): Focuses on fundamental individual rights, including the right to life, liberty, equality before the law, and freedom from slavery and torture. *Second Pillar* (Articles 12–17): Covers civil and political entitlements such as the right to privacy, freedom of movement, and the right to a nationality. *Third Pillar* (Articles 18–21): Encompasses constitutional liberties like freedom of thought, conscience, religion, opinion, and peaceful assembly.

These articles collectively affirm: the right to life, liberty, and personal security (Articles 3–5); legal protections, including equality before the law, the presumption of innocence, and safeguards against arbitrary arrest or detention (Articles 6–11); freedoms of movement, thought, expression, assembly, and political participation (Articles 12–21).

24 Ballard et al., 2021.

This section reflects the influence of liberal democratic traditions and underscores the importance of individual autonomy, emphasising the protection of personal freedoms from undue state interference.

2.2.4. Economic, Social, and Cultural Rights, Articles 22–27

Articles 22 to 27 focus on economic, social, and cultural rights, commonly referred to as "second-generation" rights. According to Antonio Cassese, these form the *fourth pillar* of the UDHR. They include: the right to social security and work (Art. 22–23); the right to rest, leisure, and an adequate standard of living (Art. 24–25); the right to education and participation in cultural life (Art. 26–27).

This set of rights reflect a broader conception of human rights that includes material well-being and access to essential services, influenced in part by socialist and welfare state models.

2.2.5. Duties, Limitations, and Final Provisions, Articles 28–30

The final three articles address the contextual and structural limitations of rights, as well as the responsibilities of individuals. This set emphasises the individual's duty to society and the need to balance rights with social responsibility.

Article 28 affirms the right to a social and international order in which rights can be fully realised.

Article 29 introduces the concept of duties to the community and notes that individual rights may be subject to limitations in the interests of general welfare, morality, and public order.

Article 30 acts as a safeguard clause, preventing any interpretation of the Declaration that would justify the destruction of the rights and freedoms it proclaims.

This concluding section balances individual rights with collective responsibilities and ensures the internal coherence of the Declaration.

Importantly, the document acknowledges that all rights are equally vital. These rights reflect genuine needs that every state has a duty to meet for the benefit of all those in its jurisdiction. It is acknowledged that social and economic rights are conceptually linked to civil and political rights because respect for human dignity requires a respect for both. There is also a mutual dependency: civil and political rights secure social and economic rights, and social and economic rights enable the meaningful exercise of civil and political rights. Failure to respect social and economic rights makes people more vulnerable to other human rights violations (e.g. such as forced labour). By enshrining individual, social and economic rights alongside civil and political rights, the document recognises human rights as a unified and interlinked system.

Although the document does not explicitly state who is responsible for fulfilling rights, the modern system of international law assumes that states bear primary responsibility.

The document also suggests that the responsibility for human rights can be attributed to individuals and 'organizations below the level of the State and to organizations

above the level of the State'.[25] These actors include international bodies, private individuals and national authorities, etc.

Indeed, the Preamble states that 'every individual and every organ of society (...) shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance'.

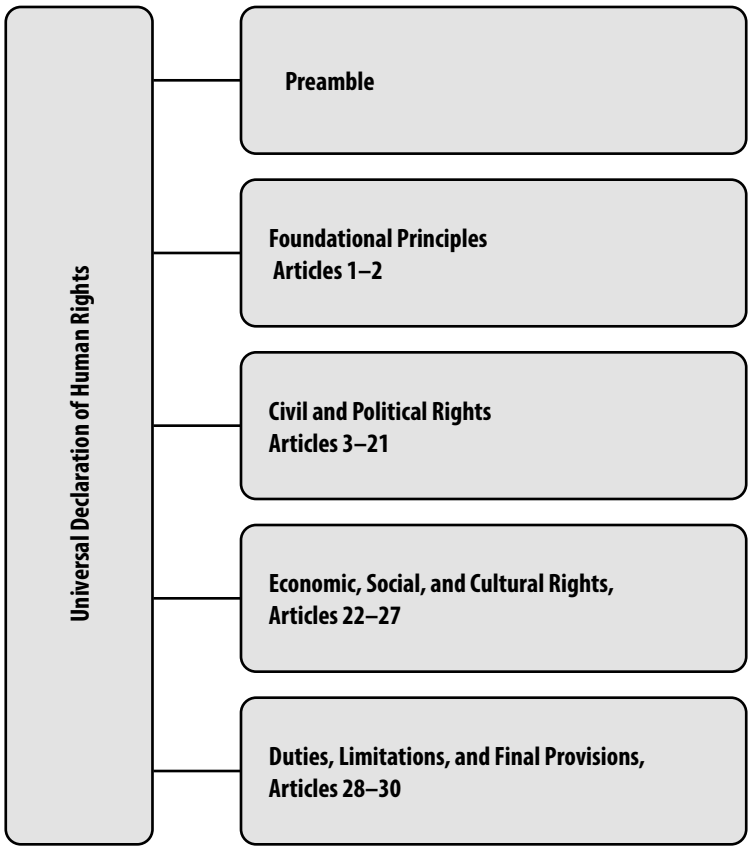
States have an obligation to respect the human rights of their citizens. The special position of States is not simply a matter of efficiency and control. States claim a form of legitimacy that distinguishes them from other actors and agencies operating, legally or illegally, in society. The UDHR and the Covenants seek to impose human rights-based conditions on this legitimacy.

Of course, the human rights regime established by the UDHR was intended to serve as a basis, not only for subsequent covenants and international agreements, but also for domestic laws, including constitutions. The national laws of states should in most cases, be the first means of responding to any human rights violations and should be seen as the primary means of realising human rights.

The idea that one entity, such as a state, is responsible for a certain right does not mean that other entities do not have their own obligations. Rights generate waves of responsibility, and these responsibilities can fall on different duty bearers. The UDHR is organised in such a way that it moves from general principles to specific rights, and from individual freedoms to collective responsibility. It carefully balances the different categories of rights – civil, political, economic, social, and cultural – while promoting the principles of universality and indivisibility. This structure enhances the coherence and clarity of the document, reflecting a holistic vision of human dignity that remains relevant across cultures and political systems. The structural integrity of the UDHR has contributed significantly to its enduring influence as a foundational text in the emerging field of international human rights law.

25 Brown, 2016, pp. 79–80.

Figure 1: UDHR Structure



2.3. Legal Nature of UDHR

Although some countries have emphasised the perception of the draft declaration as a political manifesto and not a legally binding document, several delegations have supported the draft as the result of an international compromise on the common ideals of humanity, and moreover, South Africa considered voting for the declaration to be binding in the same way as signing a convention would be.[26]

Thus, from the moment of its adoption, the nature of the UHDR has been a source of legal debates among the scholars. However, the past 75 years have largely confirmed that it is not only universal in its content and scope, but also developed the obligation for States[27] and is widely recognised as part of customary law.[28] Schabas claims that its

26 Rivera, 2023, p. 3.

27 Rights protected by the Declaration, such as freedom from torture (Article 5) and from arbitrary arrest (Article 9), are recognized as mandatory under U.S. Code § 1350 – Alien's Action for Tort; See: Scoble, 1986, p. 132.

28 Humphrey, 1975; Sohn, 1982; Hannum, 1996, p. 305.

negotiating history and subsequent application indicate that it is treaty-like, and there is no good reason to apply a different approach to the interpretation of the Declaration from that which would be used for a treaty.[29]

Although the UDHR's current status itself does not cause any doubt and there is little room for debate, the main focus is on the way the Declaration adopted by the GA resolution passed from a so-called soft law instrument, which is not a part of the law as such,[30] to the law-binding instrument it became. As Norberto Bobbio rightly underlined back in 1964, the fundamental problem with human rights is not how to justify them, but rather how to protect them.[31] And in this regard, its legal nature became of paramount importance.

2.3.1. The Nature of Soft Law

Lord McNair coined the term "soft law" to describe 'instruments with extra-legal binding effect'.[32]

Long time there was no consensus about the definition and even the existence of "soft law",[33] however, in recent times the notion of "soft law" has gained more support. As Boyle and Chinkin stated, the

> 'soft law is a frequently misunderstood phenomenon, although evidence of its importance as an element in modern international law-making is abundant, most notably in the declarations or resolutions adopted by states in international conferences or in the United Nations General Assembly. While the relationship between treaty and custom is well understood, the interplay between soft law and treaties, custom, or general principles of law is less often appreciated, but it is no less important and has great practical relevance to the law-making and regulatory work of international organizations'.[34]

Not being the law itself, soft law has limited normative force and should be understood in the sense of programs rather than legal provisions, or guidelines rather than strict legal obligations. It still holds its significant place among other specific sources of international law.[35] However, soft law is not a formal source of law in its own right like those listed in Article 38 of the ICJ Statute.

29 Schabas, 2013, p. XXXVIII.
30 Shaw, 2021, p. 100.
31 Bobbio, 1992 cited in Alves, 2000, p. 496. [Online]. Available at: https://www.jstor.org/stable/4489286 (Accessed: 20 June 2024).
32 Thürer, 2009, p. 1.
33 Aust, 2010, pp. 145–58; Shaw, 2021, p. 100.
34 Boyle and Chinkin, 2007, p. 48.
35 Pataria, 2021, pp. 98–100.

The term soft law may refer to a variety of quasi-legal, non-binding rules, instruments, and processes used in international relations by countries and international organisations. As such, soft law is contrasted with hard law, which is always binding.[36]

Soft law is used in the legal literature to describe principles, rules, and standards governing international relations which are not considered to stem from one of the sources of international law enumerated in Art. 38 (1) ICJ Statute.[37] Generally, the term "soft law" is used to describe international instruments that, although non-binding, have general or universal applications without a mechanism of enforcement, but still expected to be implemented.[38]

In EU legislation, soft law is defined as the 'rules of conduct which are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects'.[39]

Daniel Thürer distinguishes four aspects common to the current concept of soft law. Firstly, soft law generally expresses common expectations concerning the conduct of international relations, as it is often shaped by, or arises within, the framework of international organisations. Secondly, soft law is created by the subjects of international law – in contrast to commercial customs and rules such as codes of conduct set up by private organisations or companies. Thirdly, soft law rules have not – or not entirely – passed through all stages of the procedures prescribed for international law-making; they do not stem from a formal source of law and thus lack binding legal force. Finally soft law, despite its legally non-committal quality, is characterised by a certain proximity to the law, and above all by its capacity to produce certain legal effects.[40]

C. Chinkin distinguishes both "legal soft law" (i.e. treaties, which include only soft obligations), and "non-legal soft law", (i.e. non-binding or voluntary resolutions and codes of conduct formulated and accepted by international and regional organisations) from each other.[41] Non-binding instruments may include: Declarations, Codes, Guidelines, Recommendations, Programmes, *etc*. On the other hand, Senden and Van den Brink distinguish between soft regulatory rule-making and soft administrative rule making. The first has a para-law policy-steering function while the purpose of the other is to give post legislative guidance.[42]

So, in contrast, a norm can then be qualified as hard law when it cumulatively prescribes a sufficiently clear obligation that can also be enforced.[43] But, what shall

36 Mevorah, 2019, p. 508.
37 Thürer, 2009, p. 1.
38 Wolfrum, 2020, pp. 33–37.
39 Senden, 2004, p. 112.
40 Thürer, 2009, p. 3.
41 Chinkin, 1989.
42 Senden and Brink, 2012.
43 Chamon, 2024, p. 367.

be borne in mind is that the mere usage of a treaty form does not of itself ensure the creation of a hard obligation. The Vienna Convention on the Law of Treaties (VCLT) only requires that a treaty is in writing and subject to international law.[44] Thus, if a treaty is to be regarded as "hard", it must be precisely worded and specify the exact obligations undertaken or rights granted. Where a treaty provides only for the gradual acquiring of standards or for general goals and programmed action, it is in itself soft.[45] For example, the Paris Agreement on Climate is an international treaty under the VCLT, but it is recognised as a document of action, not of result, and despite its treaty nature and form, it can be attributed to softer rather than hard law. On the other hand, the Articles on Responsibility of States for International Wrongful Acts, which is a document approved by a resolution of the UN General Assembly,[46] has been established as a binding norm within the framework of customary international law through state practice and *opinio juris*.[47]

While hard law is always about the precise obligations and the mechanisms or guarantees for their enforcement, the question may arise as to why soft law is needed at all. It should be remembered that in the field of human rights, the choice is often between soft law and no law.[48]

Soft law should not be considered as an independent, formal source of international law, which extends the scope of the international order in its traditional sense. Nevertheless, the concept of soft law represents an important phenomenon in international relations: a complex system of norms lacking binding force, but producing significant legal effects nevertheless. Soft law is of particular importance where good faith needs to be protected.[49]

Bellow, two major categories of soft law can be found: resolutions of international organisations, and non-binding inter-State agreements (i.e. declarations) which will be considered.

2.3.2. Legal Effect of GA Resolutions

Unlike the UN Security Council, which are binding on all member states,[50] resolutions of the General Assembly are merely recommendatory, putting forward opinions on various issues with varying degrees of majority support.[51] However, as practice has proven, the General Assembly resolution could lay the groundwork for the establishment of a customary rule. For example, in the Nicaragua case, the Court declared, that 'just as the wording of certain General Assembly declarations adopted by States

44 Article 2.1(a).
45 Baxter, 1980, for a discussion of "hard" and "soft" international agreements.
46 General Assembly resolution 56/83 of 12 December 2001, corrected by document A/56/49 (Vol. I)/Corr.4.
47 Sea in Dixon et al., 2016, p. 478.
48 Chinkin, 1989.
49 Thürer, 2009.
50 See e.g.: *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, ICJ Reports, 1971, pp. 16, 54.
51 Schlochauer, 1981, p. 277.

demonstrates their recognition of the principle of the prohibition of force as definitely a matter of customary international law'.[52] Besides, in Nuclear Weapon Advisory Opinion ICJ notes that

> 'General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradua1 evolution of the *opinio juris* required for the establishment of a new rule'.[53]

Thus, there must be sufficient evidence of State practice and *opinio juris*. The elements of the formation of the rules of international custom provide criteria by which the actual expectations and commitments of States can be tested.[54]

For establishing the binding character, the wording and range of influence of the document take on crucial importance. The UDHR, despite being adopted with 46 votes in favour and eight abstentions, i.e. with the participation of only 54 countries in total, in terms of its content and especially of Article 2, truly deserves to be referred to as "universal", because it appeared as the first document establishing the human rights standards for all human beings, regardless of the place of their residence, including territories under colonial or quasi colonial rule, which actually constituted the vast majority of the world at that time. Besides, the universality of the Declaration is also emphasised by the fact that the document was not unacceptable to any major religious, civilizational, cultural or legal systems.[55]

Thus, despite its mild nature, and the fact that it was a resolution of the General Assembly, the potential for universal recognition and binding force was initially built into it. This was confirmed during the process of decolonisation, when newly formed states, despite having had no part in its drafting, eventually recognised and even more used it widely in their fight for freedom and decolonisation, as well as even adopting it into their domestic legislation.[56] Moreover, the importance and universality of the UDHR was reaffirmed at the 1993 Vienna Declaration, adopted at the World Conference on Human Rights. The World Conference was held in Vienna shortly after the end of the Cold War, and in this case, the number of participating States left no doubt about its genuinely universal character. The Vienna Declaration reaffirms 'commitment to

52 Case *Concerning Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua vs. USA*), Judgment of 27 June 1986, ICJ Reports. Para. 193.
53 See: *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, 08 July 1996, ICJ Reports. para. 70.
54 Brownlie, 1992 cited in Chinkin, 1989.
55 Alves, 2000, pp. 481–83.
56 Ibid.

the purposes and principles contained in the Charter of the United Nations and the Universal Declaration of Human Rights,'[57] and *inter alia*, 'urges all States to put an immediate end to the practice of torture and eradicate this evil forever through full implementation of the Universal Declaration of Human Rights (...)'.[58]

2.3.3. Declarations as Source of Customary Rules

It is not uncommon for a so-called soft law instrument like a declaration to become a part of customary law. Moreover, there are some authors, who claim that 'the modem international customary law is based on international (or regional) declarations'.[59]

For example, the 1975 Helsinki Final Act, or 2014 Gulf Declaration of Human Rights, despite their soft nature, have created a doctrinal basis for the protection of human rights at regional levels. The Helsinki Final Act's influence in Central and Eastern Europe in growing the role and importance of international human rights is undoubtable,[60] and in case of the Gulf Declaration, the transformation from its normative framework into a system practiced by its states is clearly considered the basis for becoming part of regional customary law.[61]

Besides, recent literature in international law suggests that a modern approach to international customary law has risen to the surface. Namely, Anthea Roberts proposes that modern international custom be based on international declarative law, which is founded on declarations rather than traditional State practice, and which is difficult to determine in most cases.[62] This approach is shared by many contemporary scholars, and it provides a clear and strong ground for the codification of international customs, based on easily identified practice.[63] During the 1990s many authors agreed that customary rules based on declarations, provide an important source of law for human rights obligations.[64]

2.4. International Covenants – Why Two Separate Documents?

Although the UDHR covers a wide range of rights, the 1966 UN International Covenants were divided into two documents due to differing political and economic views, as well as the desire to legally enshrine human rights. Developing the covenants involved lengthy discussions and compromises among states with different priorities and views on human rights. The International Covenant on Civil and Political Rights was seen as enshrining rights that states should respect, while the International Covenant on Economic, Social, and Cultural Rights was seen as setting standards that states should strive to achieve. However, there was a positive side to this division. The

57 Vienna Declaration and Programme of Action of 25 June 1993.
58 Ibid., para. 57.
59 Alfadhel, 2017, pp. 89–98.
60 See e.g.: the reference to it *Nicaragua* v. *US*, ICJ Reports, 1986, pp. 3, 100; 76 ILR, pp. 349, 434.
61 Alfadhel, 2017, pp. 89–98.
62 Roberts, 2001, pp. 757–791.
63 Shelton, 2006, pp. 291–323; Boyle, 2018.
64 Bruun, 1993; Lillich, 1996; Roberts, 2001, p. 757.

separation into two covenants allowed for more specificity in the rights and responsibilities of states.

Many countries played an important role in creating the 1966 UN International Covenants on Economic, Social and Cultural Rights and Civil and Political Rights. However, the most influential countries tended to have a rich democratic history and a significant influence on international law. Countries with well-established democratic traditions and systems, such as France, the United Kingdom, and the United States, played a significant role in drafting these covenants by contributing their own ideas and legal principles.

Socialist countries under the rule of the USSR actively promoted social and economic human rights and developed the International Covenant on Economic, Social, and Cultural Rights. There is an objective explanation for this. The USSR's attitude toward political rights were ideologically determined, differing from Western liberal democratic models and the universalist approach enshrined in the UDHR.

The USSR viewed human rights through the Marxist-Leninist ideological lens, which prioritises class interests and the dictatorship of the proletariat over individual freedoms. In this context, political rights (e.g., the freedom of speech, assembly, association, and participation in government) were recognised only if they served the interests of the socialist state and communist construction. The USSR Constitution formally enshrined these rights, including the freedom of speech, freedom of the press, freedom of assembly and rallies, and the right to elect and be elected (e.g., in the 1936 and 1977 editions). In practice, however, the exercising of these rights was severely limited because the USSR only recognised a one-party system, and the right to political participation was limited to members of the Communist Party. Freedom of speech and the freedom of the press existed only within the limits of permissible ideology. Any criticism of the CPSU or the Soviet system was considered "anti-Soviet agitation" and was punishable by law. Independent human rights groups and civil associations were persecuted as threats to the state. State security agencies (e.g., the KGB) monitored this activity to suppress political opposition, including through arrests, exile, and psychiatric repression.

Accordingly, the USSR criticised the Western concept of individual political freedoms, viewing it as a facade for "bourgeois democracy" that protected the interests of capital. During international human rights negotiations, such as those leading to the drafting of the ICCPR, the Soviet Union prioritised social and economic rights. Although the USSR signed and ratified the ICCPR in 1973, it did not allow for effective international control mechanisms, nor did it ensure the pact's provisions were genuinely implemented domestically.

Thus, while the Soviet Union formally declared political rights, it did not ensure their realisation. Citizens' political activity was strictly controlled and limited by the ideology and interests of the ruling party. The USSR viewed political rights not as universal and inalienable but as tools of socialist construction applicable only to those loyal to the state.

3. Contribution of the UDHR to the International Human Rights System

The UDHR was a defining moment in the evolution of international law and global governance. While not legally binding, it laid the groundwork for a body of human rights treaties, conventions, and institutional practices. It articulated a universal set of rights and freedoms to which all individuals are inherently entitled. This has profoundly influenced the international legal order.

Perhaps the UDHR's most significant contribution is its transformation of human rights from aspirational ideals into a fundamental component of international law. The UDHR established a common standard of achievement for all peoples and nations, providing the baseline for drafting national constitutions, domestic legislation, and judicial interpretations. Furthermore, the UDHR played a pivotal role in incorporating human rights norms into customary international law, thereby impacting both treaty-based and non-treaty legal developments. The UDHR introduced several key conceptual innovations that continue to shape human rights discourse. Firstly, it enshrined the idea of universal and inalienable rights, asserting that these rights belong to all individuals by virtue of their humanity, regardless of nationality, race, or religion. Secondly, the UDHR promoted the indivisibility and interdependence of civil, political, economic, social, and cultural rights. This understanding has become foundational to holistic approaches to human rights. Thirdly, the UDHR advanced the notion that human rights transcend state sovereignty. This challenges the traditional Westphalian principle of non-interference and affirms the legitimacy of international concern for how individuals are treated within states. In practical terms, the UDHR has catalysed the development of institutional mechanisms for monitoring, reporting, and addressing human rights violations. It has helped to elevate international norms and procedures for evaluating state conduct, which are now embedded in the work of United Nations treaty bodies, special rapporteurs, and international courts. Additionally, the UDHR has provided a moral and legal basis for the global human rights movement, empowering civil society organisations, human rights defenders, and activists worldwide to demand accountability and reform.

3.1. Influence on Global Level

3.1.1. Direct Influence on Global International Treaties

The UDHR's foundation directly shaped the drafting and adoption of several binding international treaties, particularly during the post-World War II period. The global community sought to institutionalise protections against the past's atrocities. Chief among these are the 1966 covenants: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). As already mentioned, together with the UDHR, these instruments form the International Bill of Human Rights. It encapsulates a broad spectrum of civil, political, economic, social, and cultural rights.

Beyond the core covenants, the UDHR's influence extends to a series of specialised human rights treaties, including the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the Convention on the Elimination of All Forms of Discrimination against Women (1979), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), and the Convention on the Rights of the Child (1989). Each of these instruments builds upon the UDHR's foundational principles, extending its reach and operationalising its values through detailed obligations for member-states.

The spirit of the UDHR has profoundly influenced all monitoring bodies, which have been established under the above-mentioned treaties. The UN treaty bodies, such as the Human Rights Committee (HRC), the Committee on the Elimination of Racial Discrimination (CERD), and the Committee Against Torture (CAT), often reference the UDHR in their decisions to: provide a historical and normative context for the rights enshrined in binding treaties: shows a progression from early national documents and limited international agreements to a more comprehensive global system; interpret provisions: Aid in interpreting treaty provisions by referencing the UDHR's articulation of fundamental rights; reinforce principles: Emphasise the universality and inalienability of human rights as outlined in the UDHR.

The UDHR is cited in individual decisions, also known as "views",[65] issued by United Nations human rights treaty bodies. The UDHR itself serves as a foundational document that informs the interpretation and application of binding international human rights treaties.

This has been proofed by e.g. the Human Rights Committee, which monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR) jurisprudence. The UDHR is a foundational text that informs the interpretation and application of the ICCPR, and the Committee often reflects its values in its reasoning. In the case of Diergaardt v. Namibia,[66] the Committee addressed issues related to language rights and discrimination. While the UDHR wasn't quoted directly, the Committee's emphasis on non-discrimination and the rights of minorities aligns with the UDHR's principles. The Committee found that the authors, as Afrikaans speakers, were victims of a violation of Article 26 of the ICCPR, due to the state's refusal to communicate with them in their language, reflecting the UDHR's commitment to equality and cultural rights.

In *Raihman v. Latvia*,[67] the Committee examined the state's refusal to register the author's name without Latvian grammatical endings. Although the UDHR wasn't cited, the Committee's focus on privacy and cultural identity resonates with the UDHR's provisions on personal dignity and cultural rights.

65 The United Nations Human Rights Treaty System, Fact Sheet No. 30/Rev.1, UN, New York and Geneva, 2012.
66 Communication No. 760/1997.
67 Communication No. 1621/2007.

The UN Committee on the Elimination of Racial Discrimination (CERD) addressed an anti-Semitic speech in the case of The Jewish Community of *Oslo et al. v. Norway.*[68] The Norwegian Supreme Court had acquitted the speaker, citing freedom of expression.

The CERD Committee found that the speech promoted racial superiority and hatred, violating the UDHR's principles. Such expressions are not protected when they incite discrimination or hatred. Norway's failure to convict the speaker violated Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.

These cases illustrate how the Human Rights Committee's decisions are influenced by the UDHR, even when not referenced directly. The UDHR remains a guiding principle in the Committee's efforts to protect human rights worldwide. These examples demonstrate how UN treaty bodies use the UDHR to provide context and strengthen the interpretation of binding treaty obligations in specific cases.

3.1.2. From CHR to HRC

The United Nations Commission on Human Rights, originally composed of 18 States members, was established in 1946 by the main United Nations legislative body working to promote and protect human rights.

Among the main themes addressed by the Commission were: the right to self-determination; racism; the question of the violation of human rights in the occupied Arab territories, including Palestine; the question of the violation of human rights and fundamental freedoms in any part of the world; economic, social and cultural rights; civil and political rights; the human rights of women, children, migrant workers, minorities and displaced persons; indigenous issues; the promotion and protection of human rights, including the work of the Sub-Commission, treaty bodies and national institutions; and advisory services and technical cooperation in the field of human rights.

The Commission's activities can be conditionally divided into three main stages. The first stage covers the years 1947–67, when the main goal of the Commission was to develop and establish human rights standards, which it successfully accomplished, first by adopting the UDHR and then by establishing two covenants. The second stage began in 1967, when the Commission was given the right to respond to violations of human rights, and the third stage began around 1993, when the Commission acquired a new function, providing an advisory service and technical assistance to states in ensuring human rights for all.[69]

The Special Procedures of the Commission on Human Rights was mandated to examine, monitor and publicly report either on human rights situations in specific

68 Communication No. 30/2003.

69 See more: https://www.ohchr.org/en/hr-bodies/chr/background (Accessed: 20 June 2024).

countries or territories or on major phenomena of human rights violations worldwide (known as thematic mechanisms or mandates).[70]

Although the Commission has performed well in terms of the establishment of human rights standards, it has increasingly come under fire for its ineffective response to human rights violations, as well as for frequent and serious human rights breaches by its members.[71]

In 1947, the Economic and Social Council passed a resolution stating that the Commission had 'no power to take any action with regards to any complaints concerning human rights'.[72] This statement was reaffirmed in 'Communications concerning human rights: note by the Secretary-General' later in same year, in which, *inter alia*, it has been proposed to the CHR to establish an ad hoc committee at each session, which would meet shortly before the next session of the Commission, to consider a confidential list of communications prepared by the Secretary-General and to recommend which of these communications could be made available to members.[73]

In its second session the Commission adopted the resolution which requested the Economic and Social Council to reconsider the procedure for communications relating to human rights. The result of this request, namely Resolution 75 (V),[74] suggests that the Secretary-General be requested (a) before each session of the Commission to compile two lists of communications received concerning human rights with a brief summary of the substance of each of the following: (1) a non-confidential list of communications in which the authors state that they have already divulged or intend to divulge their names, or that they have no objection to their names being divulged; (2) a confidential list which will be furnished to the Commission, in private meeting, without divulging the identity of the authors of the communications.[75] However, despite this and many other changes that Resolution 75 (V) underwent in the 1950s and early 1960s, the statement that there was no power to take any action with regard to any complaints concerning human rights, prevailed.[76] A statement that might have been objectively acceptable in 1947 was completely irrelevant 20 years later. The situation demanded real change, and the role of trigger for the navigation of the situation received individual petitions from South Africa in 1965. It became necessary to develop procedures to address the issues of combating racism, segregation and apartheid. The result came in 1967, when the Commission established a temporary working group of experts to investigate the human rights situation in South Africa. By resolution 8 (XXIII), entitled 'Study and investigation of situations which reveal

70 Ibid.
71 Blanchfield and Weber, 2022.
72 The Economic and Social Council resolution 75(V) (1947).
73 Commission of Human Rights Communications Concerning Human Rights, Note by Secretary-General, E/CN.V27 of 27.10.1947 [Online]. Available at: https://digitallibrary.un.org/record/561096?ln=ru&v=pdf (Accessed: 20 June 2024).
74 Res. 75(V) of August 5th, 1947, 1st Session of CHR.
75 See: Res. E/CN. 4/64, 17.12.1947 of the 2nd Session of CHR [Online]. Available at: https://digitallibrary.un.org/record/561292?v=pdf (Accessed: 20 June 2024).
76 Möller, 1979, p. 58.

a consistent pattern of violations of human rights', the CHR had requested that the Economic and Social Council authorise the Commission and the Sub-Commission to study grave violations of human rights and to authorise them 'to make thorough study and investigation of situations which reveal a consistent pattern of violations of human rights and to report with recommendations thereon to the Economic and Social Council.'[77] By the time of resolution 1235 (XLII) on 6th June 1967, the Economic and Social Council had granted that authority to the CHR and hence put out the statement that there was no power to take any action with regard to any complaints concerning human rights.[78] However, it took the ECOSOC another three years to approve the rules for filing and reviewing complaints. Finally, in resolution 1503 (XLVIII), adopted in 1970, the Council established a procedure to deal confidentially with complaints relating to a consistent pattern of gross violations of human rights.

During the next decades, the Human Rights Commission received thousands of human rights-related communications every year, which were divided into two parts, confidential and non-confidential lists, in accordance with the above-mentioned resolution. Although there was no effective mechanism for responding to human rights violations and, accordingly, to communications, the authors nevertheless believed that the gathering of all communications about human rights violations in the Commission was having a positive result, because at least the members of the Commission, whose main goal was to introduce human rights standards, had a more or less complete picture of the current situation in the field of human rights in the world.[79]

Viewing the overall picture, despite the US Secretary of State Edward Stettinius considered the creation of the CHR to be one of the greatest achievements of the San Francisco Conference[80] in 1945, it appeared in practice that the CHR had a relatively weak mandate in line with the political considerations of UN member states. Some experts even have referred to it as a 'moral talk shop'.[81] Moreover, as former Secretary General of UN Kofi Annan stated, by 2005

> 'the Commission's capacity to perform its tasks has been increasingly undermined by its declining credibility and professionalism. In particular, States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others. As a result, a credibility deficit has developed, which casts a shadow on the reputation of the United Nations system as a whole'.[82]

77 Operative Para. 5.
78 See the text of the resolution [Online]. Available at: https://digitallibrary.un.org/record/214657?ln=en&v=pdf (Accessed: 10 May 2024).
79 Möller, 1979, p. 57.
80 Lauren, 2007, pp. 307–345.
81 Forsythe and Park, 2008.
82 Report of the Secretary General, In Larger Freedom: Towards development, security and human rights for all, (2005) UN Doc. A/59/2005. para. 182.

As a result, the Human Rights Council (HRC) was created to replace the Human Rights Commission by General Assembly resolution 60/251 on 3rd April 2006.

The primary decision on the establishment of a Human Rights Council was formally taken by a summit of world leaders in September 2005.[83] As a matter of fact, replacing the Commission with a Council was a part of the project of the then UN Secretary-General Kofi Annan, as part of his reforms of the UN.[84]

Some authors claim that a political body such as the CHR and HRC cannot do more than the member states allow it to do, and as the result cannot be blamed for being driven by their political motivations.[85] Nevertheless, the accusations of excessive politicisation significantly undermined the Commission's reputation and pushed the need to create a new body.[86]

The Human Rights Council differs from its predecessor, the CHR in several important respects. Firstly, the subordination – the Council is a subordinate body of the General Assembly, while the Commission was one of the subordinate bodies of the UN Economic and Social Council. The Council consists of 47 members,[87] which must meet at least three times a year for no less than ten weeks,[88] while the Commission, consisting of 53 members,[89] had met for six weeks in a year. However, the most important difference between these two bodies is the mechanism of Universal Periodic Review (UPR) of the implementation of human rights obligations by all UN Member States, which has significantly increased the potential of the Council. The UPR was created as a mechanism that would prevent the selectivity,[90] which widely characterised the Commission – the ultimate and universally recognised goal of the Universal Periodic Review is to improve the human rights situation in all countries, which should have a positive impact on all people.

3.1.3. The Influence of the UDHR on the Universal Periodic Review (UPR)

Besides UN treaty bodies, the UDHR plays a crucial role in institutional human rights structures, one of the most prominent of which is the Universal Periodic Review (UPR). Established in 2006 by the UN Human Rights Council, the UPR is a peer-review process that assesses the human rights records of all UN Member States.

At its core, the UDHR established a common standard of achievement for all peoples and nations by declaring that 'all human beings are born free and equal

83 Resolution adopted by the General Assembly on 16 September 2005, 60/1. 2005 World Summit Outcome; paras. 157–159.

84 Report of the Secretary General, In Larger Freedom: Towards development, security and human rights for all, (2005) UN Doc. A/59/2005, para. 183.

85 Lakatos, 2022.

86 See: Preamble of GA Resolution 60/251.

87 The majority of its 47 members are developing countries, so the balance of power on the HRC mirrors that of the GA.

88 Ibid.

89 Since 1992.

90 In larger freedom: towards development, security and human rights for all (2005), Report of the Secretary General, A/59/2005, Add 1, para 2.

in dignity and rights'. The UPR reflects this universalism by applying equally to all countries, regardless of their size, power, or geopolitical influence. This demonstrates the UDHR's influence in establishing a non-discriminatory system of human rights accountability.

The UDHR's wide and comprehensive classification of human rights – including civil, political, economic, social, and cultural rights – has also formed the scope of the UPR. In its reviews, the UPR covers an extensive range of rights, including those not limited to those in legally binding treaties. This mirrors the UDHR's comprehensive approach to human dignity, emphasising the interlinked nature of rights and the idea that none of them are more important than the others.

The UDHR emphasis on participation and transparency has significantly influenced the procedural aspects of the Universal Periodic Review (UPR). The UDHR's recognition of the role of individuals and communities in promoting human rights is reflected in its encouragement of civil society organisations, national human rights defenders, and other stakeholders participating in the review process.

Moreover, many States refer to the UDHR when defending their documents and either accepting or rejecting recommendations. The moral authority of the UDHR often provides additional weight to recommendations that comply with its principles, even when they go beyond treaty obligations.

The UDHR also provides guidance to States in developing national legislation and policies in response to UPR recommendations. For example, reforms in areas such as anti-discrimination laws, access to justice, and gender equality often draw on the UDHR as a source of inspiration or justification.

Despite its significant influence, the UDHR's impact on the UPR is not without limitations. Some states contest the interpretation or applicability of certain UDHR rights, particularly when they are in conflict with local cultural or religious norms. Additionally, because the UPR relies on voluntary state cooperation, implementation of UDHR-based recommendations often varies in commitment and effectiveness.

Furthermore, while the UDHR establishes ideal standards, the UPR operates within a political context where states may prioritise national sovereignty or strategic interests over universal values. Nevertheless, the UDHR remains a vital reference point that civil society and other states can invoke to encourage compliance and progress.

The influence of the UDHR within the UPR is profound and permanent. As a fundamental human rights instrument, it provides not only moral but also normative basis. Its universal approach and comprehensive scope form how human rights are assessed and promoted by the UPR. Despite the challenges, its influence is vital in ensuring that the UPR becomes more than just a diplomatic exercise, but an effective mechanism for advancing human dignity worldwide.

The UPR is a cooperative mechanism with the full involvement of the country concerned.[91] It is a new, unique institutional mechanism of the United Nations in the

91 See: Human Rights Council, 2007b.

field of human rights protection. As then UN Secretary-General Ban Ki-moon noted, the Universal Periodic Review, established by the Human Rights Council, 'holds great promise for opening a new chapter in human rights promotion and underscores the universality of human rights'.[92]

The uniqueness of UPR lies in the fact that, unlike the treaty mechanisms, the mandate of which applies only to the member states of the treaty and is bound by a specific area of human rights or a circle of persons in the review process, the UPR review procedure applies to all 193 UN member states and has the potential to review all aspects of human rights. As rightly noted, 'no country – big or small – will be immune from scrutiny'.[93]

It is very important to underline, that the UPR is similar to other UN mechanisms, in that it is based on the principle of cooperation and interactive dialogue and is intended to complement the activities of other human rights bodies, including treaty bodies, and not to replace them.

The UPR model of studying human rights implementation allows the development of the overall picture of the situation in the country, which with a high probability can lead to an improvement in the situation, including the prevention of violations. Ultimately, such an approach has a positive impact on the fulfilment of the obligations undertaken by the state.

The UPR was established in 2006 by General Assembly resolution 60/251(establishing the HRC). The Human Rights Council resolution 5/1 of 2007 set up the sources, principles, objectives and rules of conducting of the UPR in details. This resolution also laid down details for the conduct and review of special procedures, provided for the creation of the Human Rights Council Advisory Committee, composed of eighteen experts serving in their personal capacity, intended to function as a think-tank for the Council and work at its direction,[94] and providing for the establishment of a confidential complaints procedure based upon the mechanism created by ECOSOC resolution 1503 (1970).[95] To facilitate the participation of developing countries in the universal review process and the implementation of the results of the process at a national level, two financial mechanisms were established: the Voluntary Trust Fund for the Universal Periodic Review, and the Voluntary Fund for Financial and Technical Assistance.[96]

The Universal Periodic Review operates on a four-and-a-half-year cycle.[97] Work with the State party consists of several stages: preparation of documents on which the review is based, the review itself, the adoption of recommendations and conclusions,

92 United Nations, 2007.
93 Ibid.
94 Para. 65 of Annex of HRC Res. 5/1.
95 Ibid., para. 86.
96 Human Rights Council, 2007b adopted without a vote.
97 Originally the periodicity was fixed as four years. Since the first periodic review in 2008, all 193 UN Member States have been reviewed three times. The fourth UPR cycle began in November 2022 and will end in May 2027.

and finally the implementation of follow-up actions on recommendations and conclusions. The UPR's engagement is not limited to the State party. The various stages of the review include the participation of relevant regional intergovernmental organisations, national institutions, and representatives of civil society, including NGOs, human rights defenders and academia. Based on the experience gained from the completion of the UPR round, the Human Rights Council may consider and decide to redesign its mechanism and review the periodicity issues, in order to ensure best practices and address existing procedural shortcomings.

The legal bases of UPR are: the Charter of the United Nations; the UDHR; human rights instruments to which a State is party; voluntary pledges and commitments made by States, including those undertaken when presenting their candidatures for election to the Human Rights Council; and applicable international humanitarian law.[98]

The review is based on the compilation of three written reports: a national report, which is a self-assessment of the human rights situation in the national context;[99] an external report on the State's human rights obligations, which is a compilation of information provided by a number of United Nations bodies; and finally an external report on the State's human rights obligations, which is based on information provided by stakeholders such as non-governmental organisations (NGOs) or other national human rights institutions.[100] Following the dissemination of these reports, State representatives are invited to discuss the reports and develop questions and recommendations to be addressed to the State under review at a key stage of the review process: an interactive dialogue session. Each State review is formally conducted by the Universal Periodic Review Working Group, which is composed of the 47 member states of the UN Human Rights Council. However, during the interactive dialogue phase, any UN Member State may take the stage and express its views, ask questions or make recommendations to the State under review on any human rights issue. In response, the State under review must respond promptly.[101] After the discussions, a final report is drawn up, containing all comments, questions, recommendations and responses provided by States.[102] NGOs can submit information and attend the UPR Working Group sessions and can make statements at the regular session of the Human Rights Council when the outcome of the State reviews are being considered.[103]

Among the main objectives of the Universal Periodic Review are the improvement of the human rights situation on the ground via a dialogical peer review process; the fulfilment of the State's human rights obligations and commitments, and an

98 Ibid.
99 Ibid., Section 15(a).
100 Ibid., Sections 15(b)–(c).
101 Human Rights Council, 2008a, para. 4.
102 See: HRC Resolution 5/1 on institution building of the UN Human Rights Council, Annex 1 Section 27 [Online]. Available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=a/hrc/res/5/1 (Accessed: 10 June 2024).
103 Ibid., para. 15

assessment of positive developments and challenges faced by the State; the sharing of best practice among States and other stakeholders; support for cooperation in the promotion and protection of human rights; and the encouragement of full cooperation and engagement with the Human Rights Council, other human rights bodies and Office of High Commissioner for Human Rights (OHCHR).[104]

Following the review by the Working Group, a report is prepared by the Troika with the involvement of the State under review and assistance from the OHCHR. This report, referred to as the "outcome report", provides a summary of the actual discussion. It therefore consists of the questions, comments and recommendations made by States to the country under review, as well as the responses by the reviewed State. As noted in the letter of the President of the Human Rights Council dated 1st November 2022, on the launch of the 4th cycle of the Universal Periodic Review, 'the role of Trika is to facilitate each review, including the preparation of working group report by fully involving the state under review'.[105] The primary aim of this process is to promote and protect the universality of all human rights issues and concerns, by asking the following question: has this claim of promoting and protecting the universality of the human rights been met, or challenged, during state reviews in the UPR process?[106]

The State has the responsibility to implement the accepted recommendations contained in the final outcome. So, the UPR differs from other mechanisms by its essentially inter-State character, i.e. the recommendations are issued by States individually and not by the Council as a body.[107]

The implementation of UPR recommendations aims to strengthen national human rights protection systems, addressing the root causes of human rights violations, the implementation of recommendations can have a preventive effect. Not having a Special Rapporteur assigned to a particular country does not absolve that country from its obligations under the UDHR and every other human rights treaty.[108]

The UPR ensures that all countries are accountable for any progress or failure in implementing these recommendations. During the second review the State is expected to provide information on what they have been doing to implement the recommendations made during the first review as well as on any developments in the field of human rights. The international community will assist in implementing the recommendations and conclusions regarding capacity-building and technical assistance, in consultation with the country concerned. If necessary, the Council will address cases where States are not co-operating. The HRC will decide on the measures it would need to take in case of persistent non-co-operation by a State with the UPR.[109]

To summarise, the most important positive aspect of the UPR process is the monitoring of all UN member states in terms of human rights compliance, equal treatment

104 Ibid.
105 Villegas, 2022.
106 Patel, 2017, p. 5.
107 Viegas e Silva, 2013, p. 106.
108 United Nations, 2007.
109 Human Rights Council, 2025.

of all States, consideration of capacity building needs, sharing of good practices as well as the broad participation of Stakeholders in the process.[110]

3.2. Influence on Regional Human Rights Systems

3.2.1. Impact on Council of Europe

The UDHR has also significantly influenced regional human rights regimes. For example, the European Convention on Human Rights (1950) was the first regional treaty to legally bind many UDHR provisions, establishing the European Court of Human Rights (ECtHR). Similar processes followed in the Americas and Africa, with the adoption of the American Convention on Human Rights in 1969, and the 1981 African Charter on Human and Peoples' Rights, respectively. In each case, the UDHR served as an inspiration and a substantive reference point for rights and enforcement mechanisms.

It is notable that the ECHR was adopted in 1950, preceding the major universal human rights treaties. This chronological difference is not coincidental but rather reflects the relative ease of achieving consensus among a smaller, more politically and culturally aligned group of states. The Council of Europe, comprising mainly from Western European democracies with shared values and legal traditions, was able to negotiate and adopt a binding regional human rights instrument more rapidly than the broader international community represented in the United Nations. In contrast, the drafting of universal treaties required negotiations among a vastly larger and more diverse group of states, encompassing different legal systems, political ideologies, and levels of development. Reaching a common will under such conditions naturally proved to be more complex and time-consuming, delaying the adoption of universal instruments. The ECHR thus serves as an early and influential model of regional human rights protection, demonstrating how regional cooperation can sometimes advance more quickly than global consensus.

The European Court of Human Rights (ECtHR) has occasionally referenced the UDHR in its judgments, when interpreting and reinforcing the principles established in the European Convention on Human Rights (ECHR). Its influence is evident in the Court's jurisprudence. It serves as a foundational text that informs the understanding and application of human rights within the European context.

The ECtHR does not treat the UDHR as a directly enforceable treaty, but the Court repeatedly uses it as a contextual and interpretive authority because the ECHR was drafted in the same post-war legal environment, and its Preamble explicitly refers to the UDHR. The Court most often invokes the UDHR either in the Convention's Preamble or as a source of general principles – such as dignity, asylum, and non-discrimination – when interpreting Convention rights. These practices illustrate the manner in which the ECtHR integrates the principles of the UDHR into its interpretation and

110 During 3rd cycle total number of submissions by the stakeholders reached 6131. Universal Periodic Review Facts and Figures 2024.

application of the ECHR, even in the absence of direct citation, thereby affirming the enduring influence of the UDHR on European human-rights jurisprudence. In this context, the Court has consistently employed an interpretive methodology that situates the ECHR within the broader framework of international human-rights law, with a particular reference to the UDHR. The following cases exemplify this jurisprudential approach: *Tyrer v. United Kingdom*[111] – concerning the judicial corporal punishment of a minor, the Court emphasised the evolving standards of decency. While not directly quoting the UDHR, the Court acknowledged that the ECHR should be interpreted in light of contemporary conditions, reflecting the UDHR's influence. *Soering v. United Kingdom*[112] – the Court examined extradition of a German national to the U.S., where he faced the death penalty. It held that extradition would violate Article 3 ECHR. The Court referred to the UDHR, noting that the ECHR was designed to give effect to the rights and freedoms enshrined in the UDHR, reinforcing the universality of human rights principles. *Lehideux and Isorni v. France*[113] – involving convictions for publishing an article defending Philippe Pétain, the Court held that Article 10 of the ECHR (freedom of expression) was violated. It implicitly aligned its interpretation with the UDHR, emphasising the universal freedom of opinion and expression. *Novaya Gazeta and Others v. Russia*[114] – recent freedom-of-expression rulings situate the Convention within the UDHR's wider framework: 'Universal Declaration of Human Rights... and similar clauses were later (...)' *S.S. and Others* v. *Italy*[115] – the judgment on the right to seek asylum links the principle to the UDHR: 'In many ways, the principle is the logical complement to the right to seek asylum recognized in the Universal Declaration of Human Rights.' *Ships Waste Oil Collector B.V. and Others v. The Netherlands*[116] – the Court refers to the Convention's Preamble and notes the connection to the UDHR as part of the interpretive background. *Ukraine and the Netherlands v. Russia*[117] (2025) – the ECtHR held that Russia's military attacks in Ukraine were 'extensive, strategically planned' and 'wholly at odds with any notion of chaos,' departing from Georgia v. Russia (II). The Court recognised a systematic pattern of violations, held Russia responsible, and extended jurisdiction to affected individuals. Importantly, it cited the UDHR preamble: '(...) It was expressed in the preamble to the Universal Declaration of Human Rights (...)", affirming the rule of law as the core safeguard of human rights. *Alneel v. Norway*[118] – some recent judgments recall that Article 1 of the ECHR obligations should be interpreted against the general human-rights landscape, including the UDHR: 'The relevant part of the United Nations Universal Declaration of Human Rights (...)'.

111 *Tyrer v. United Kingdom*, Application No. 5856/72, 1978.
112 *Soering v. United Kingdom*, Application No. 14038/88, 1989.
113 *Isorni v. France*, Application No. 55/1997/839/1045.
114 *Novaya Gazeta and Others v. Russia*, Applications Nos. 35023/13 and 25657/15, 2023.
115 *S.S. and Others* v. *Italy*, Application No. 21660/18, 2023.
116 *Ships Waste Oil Collector B.V. and Others v. The Netherlands*, Application No. 2799/16, 2025.
117 *Ukraine and the Netherlands v. Russia*, Application No. 43800/14, 8019/16, 28525/20 et al, 2025.
118 *Alneel v. Norway*, Application No. 14368/22, 2025.

Moreover, the ECHR itself was designed to give effect to certain rights stated in the UDHR. These rights were made binding within the European legal framework. The Convention's regulations frequently reflect those of the UDHR, demonstrating the shared dedication to basic human rights and liberties. This alignment illustrates the UDHR's enduring impact on the development and interpretation of human rights law in Europe.[119]

In summary, the ECtHR's practice shows that it's consistently engaged with the UDHR. It uses the UDHR as a kind of compass to interpret the ECHR and affirm the universal values that underpin human rights protections across Europe.

3.2.2. Impact on OSCE Documents

The UDHR served as a blueprint for many postwar human rights instruments, including those that shaped the formation of the OSCE (then the CSCE) in the 1970s.

The 1975 Helsinki Final Act, the OSCE's foundational document, explicitly acknowledges the UDHR as a standard for international human rights norms. Participating states pledged to respect human rights and fundamental freedoms 'in accordance with the purposes and principles of the Charter of the United Nations and the Universal Declaration of Human Rights'.[120]

The UDHR influenced the framing of rights in the Helsinki Final Act, particularly covering freedom of thought, conscience, religion, and belief (Art. 18 of the UDHR) and freedom of expression (Art. 19 of the UDHR). 'VII. Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief.'[121]

The UDHR is directly referred to in various OSCE Documents and institutions. Among them are the following examples:

The 1990 Copenhagen Document: This human rights document references to the UDHR several times. It emphasises the 'universality of human rights'[122] and affirms that participating States 'categorically and irrevocably declare that the commitments undertaken in the field of the human dimension (...) are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned'.[123] The principles laid out in the UDHR underlie commitments to free elections, fair trial rights, and freedom of association.

The 1991 Moscow Document: This document reiterates that the UDHR and other international instruments provide the framework for the OSCE human rights

119 European Convention on Human Rights [Online]. Available at: https://www.echr.coe.int/european-convention-on-human-rights/? (Accessed: 15 May 2024).
120 Chapter VII, para 8.
121 See: Helsinki Final Act, 1975 Chapter VII. Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief [Online]. Available at: https://www.osce.org/files/f/documents/5/c/39501_1.pdf (Accessed: 15 May 2024).
122 Para 24.
123 Para 27.

commitments. It expands on the idea that democratic institutions and the rule of law are essential to securing the rights listed in the UDHR.

Several OSCE institutions and mechanisms embody and operationalise the principles of the UDHR.

ODIHR (Office for Democratic Institutions and Human Rights): This Warsaw-based institution was established to help participating States implement their human dimension commitments. The ODIHR works in areas such as electoral observation, judicial reform, freedom of assembly, and minority rights, all of which are grounded in UDHR values.

High Commissioner on National Minorities (HCNM): The HCNM reflects the UDHR's principles of non-discrimination and protection of minority rights, especially Articles 2 and 27.

Though not legally binding, the UDHR serves as: 1) a moral compass, providing legitimacy and normative weight to OSCE assessments and recommendations; 2) a universal benchmark for evaluating compliance with human rights standards, particularly in politically sensitive situations; 3) a reference point during dialogue with participating States about human rights performance.

To sum up, the UDHR is key to the OSCE's human rights commitments and activities because it is referenced in key OSCE documents and guides human rights mechanisms and monitoring activities. By reinforcing the idea that respect for human dignity is essential to peace and security, the UDHR has helped the OSCE establish a common language of human rights across a diverse range of participating States.

3.2.3. Impact on EU Human Rights System

The European Union (EU) is an association of countries that cooperate in areas of mutual interest, as well as a community of values. Respect for human rights is one of the EU's founding values and guides its actions. The European Economic Communities were created to prevent future wars – a desire that underpins the UDHR.

To strengthen the protection of human rights and make them more visible and explicit for people in the 27 EU member states, the EU adopted a legally binding document known as the Charter of Fundamental Rights, which is part of the TEU. The EU Agency for Fundamental Rights (FRA) is an independent agency dedicated to advancing human rights within the EU. The FRA engages with stakeholders at all levels, providing expert advice to policymakers and conducting research, collecting data, and publishing reports on various human rights issues. The FRA assists EU institutions and member states in better promoting and protecting human rights across the EU by offering expert insights.

The UDHR plays an important role in guiding EU external policies and serves as a useful reference for how the EU conceives fundamental rights. While the EU Treaty does not explicitly mention the UDHR, it provides for the strict observance and development of international law, including respect for the principles of the UN Charter. According to Article 21 of the Treaty on the European Union, EU external policies should promote the universality of human rights — which is also the core

of the UDHR. Therefore, the Declaration is an important source of reference for EU legislation and policy documents. For instance, Recital 9 of the 2014 Regulation establishing a financing instrument for democracy and human rights worldwide states, '[T]he Union's contribution to democracy and the rule of law, as well as the promotion and protection of human rights and fundamental freedoms, is rooted in the Universal Declaration of Human Rights, among other international instruments'. The anti-discrimination directives contain a reference in their recitals to the right to equality before the law and protection against discrimination for all persons, as enshrined in the UDHR. The 2016 Directive on strengthening certain aspects of the presumption of innocence and the right to be present at a trial in criminal proceedings refers to Article 11 of the UNDHR.[124] Many bilateral agreements, such as the recent trade agreements with Canada, Japan, and Singapore, include an explicit reference to the UDHR in their preambles. The standard human rights clause included in many framework and trade agreements[125] also contains an explicit reference to the UNDHR as the normative framework for respecting human rights.

The EU has been unable to accede to all binding human rights treaties, except for the 2006 Convention on the Rights of Persons with Disabilities. But, due to its nonbinding nature, the UNDHR has played a significant role in the EU's approach to human rights. The universal character of the UDHR makes it a useful tool for the EU's efforts to develop a uniform policy supporting human rights and democracy.[126]

4. The Impact of the UDHR on National Law of 16 Central and Eastern European Countries – National Reports Overview

The UDHR, despite its binding nature as a norm of customary law, remains a resolution of the UN General Assembly and accordingly, it does not have the mechanisms established by human rights treaties where persons can file complaints or applications in cases of alleged violations of the relevant human rights obligations by state(s).

Thus, in the context of the UDHR, monitoring of the implementation of state obligations is carried out within the framework of the Human Rights Council. Accordingly, before directly analysing the practice of specific countries, it is appropriate to briefly touch upon the Human Rights Council and its predecessor, the Human Rights Commission: mandate, implementation and enforcement mechanisms, if any, etc.

Thus, when examining country practices, the scope of the study was limited to the Human Rights Convention and the UDHR. Accordingly, the practice of the Human Rights Commission has not been examined.

124 Directive (EU) 2016/343 of 9 March 2016, Para (1) of Preamble.
125 E.g.: EU agreements with the Republic of Korea [2010], Central America [2012], Colombia and Peru [2012], Georgia [2013], and Moldova [2013].
126 EPRS_ATA (2018) 628295_EN, The Universal Declaration of Human Rights and its relevance for the European Union, 2018.

Therefore, within the framework of the present research, the compliance of States with the UDHR at a national level is examined based on the HRC's so-called 'institution-building' package,[127] which *inter alia* includes National Reports, other stakeholders information, National Reports of working group, and National Reports of the HRC.

4.1. National Reports Overview

Therefore, the UPR of the following 16 Central and Eastern European countries: Albania, Bosnia and Herzegovina, Bulgaria, the Czech Republic, Croatia, Estonia, Hungary, Latvia, Lithuania, Montenegro, North Macedonia, Poland, Romania, Serbia, Slovakia, and Slovenia are examined instead of case law (see: Figure 1 below).

Figure 2[128,129]

Country	Date of Consideration of		Compliance with UDHR
Albania	1st National Report	2nd December 2009	First National Report in Para 33 contains a single reference to UDHR, when lists the international human rights instruments Albania is party to.
	2nd National Report	28th April 2014	No direct reference has been made to the implementation of UDHR
	3rd National Report	6th May 2019	No reference has been made to the implementation of UDHR
	4th National Report	4th November 2024	No reference has been made to the implementation of UDHR
Bosnia and Herzegovina	1st National Report	17th February 2010	No reference has been made to the implementation of UDHR
	2nd National Report	5th November 2014	No reference has been made to the implementation of UDHR
	3rd National Report	13th November 2019	No reference has been made to the implementation of UDHR
	4th National Report	29th January 2025	No reference has been made to the implementation of UDHR
Bulgaria	1st National Report	4th November 2010	Para 22 of the National Report states that '[T]he legal system of Bulgaria is based on the core UN international instruments of human rights' including the Universal Declaration of Human Rights.
	2nd National Report	7th May 2015	No reference has been made to the implementation of UDHR
	3rd National Report	6th November 2020	No reference has been made to the implementation of UDHR
	4th National Report	Deadline for National Report – 4th August 2025	No National Report has been presented yet

127 See: Human Rights Council 5/1. Institution-building of the United Nations Human Rights Council, adopted in 9th meeting of 18 June 2007.

128 In 2022 the UPR's third cycle has ended and the fourth cycle has begun which will last until 2027. By the end of June 2025 all above-mentioned states have submitted 3 national and some four National Reports for the UPR cycles.

129 The information is obtained from official website of the Human Rights Council [Online]. Available at: https://www.ohchr.org/en/hr-bodies/upr/si-index (Accessed: 30 June 2024).

Country	Date of Consideration of		Compliance with UDHR
Croatia	1st National Report	8th November 2010	Para 4 of the National Report states, that '[T]he reference framework for the preparation is a combination of the … General Guidelines and the rights and freedoms contained in the Universal Declaration of Human Rights as well as emphasis in particular national priorities'.
	2nd National Report	12th May 2015	No reference has been made to the implementation of UDHR
	3rd National Report	10th November 2020	No reference has been made to the implementation of UDHR
	4th National Report	Deadline for National Report 4th August 2025	No National Report has been presented yet
Czech Republic	1st National Report	16th April 2008	No reference has been made to the implementation of UDHR
	2nd National Report	22th October 2012	No reference has been made to the implementation of UDHR
	3rd National Report	6th November 2017	No reference has been made to the implementation of UDHR
	4th National Report	23rd January 2023	No reference has been made to the implementation of UDHR
Estonia	1st National Report	2nd February 2011	No reference has been made to the implementation of UDHR
	2nd National Report	19th January 2016	No reference has been made to the implementation of UDHR
	3rd National Report	4th May 2021	Para 58 states, that the curriculum for basic schools based on the study of the Constitution, Universal Declaration of Human Rights (UDHR) and Convention on the Rights of the Child. Para 59 states, that the Estonian Institute of Human Rights has carried out a project for students about understanding the UDHR.
	4th National Report	Deadline for National Report February 2026 (tentative)	No National Report has been presented yet
Hungary	1st National Report	11th May 2011	No reference has been made to the implementation of UDHR
	2nd National Report	4th May 2016	No reference has been made to the implementation of UDHR
	3rd National Report	2nd November 2021	No reference has been made to the implementation of UDHR
	4th National Report	Deadline for National Report July 2026 (tentative)	No National Report has been presented yet
Latvia	1st National Report	5th May 2011	No reference has been made to the implementation of UDHR
	2nd National Report	26th January 2016	No reference has been made to the implementation of UDHR
	3rd National Report	11 May 2021	No reference has been made to the implementation of UDHR
	4th National Report	Deadline for National Report February 2026 (tentative)	No National Report has been presented yet
Lithuania	1st National Report	11th October 2011	No direct reference has been made to the implementation of the UDHR, just the general reference that the Lithuanian Constitution of 1992 was drafted taking into account the fundamental UN and Council of Europe human rights instruments.
	2nd National Report	2nd November 2016	No reference has been made to the implementation of UDHR
	3rd National Report	26th January 2022	No reference has been made to the implementation of UDHR
	4th National Report	Deadline for National Report October 2026 (tentative)	No National Report has been presented yet

Country	Date of Consideration of		Compliance with UDHR
Republic of North Macedonia	1st National Report	3rd December 2008	No reference has been made to the implementation of UDHR
	2nd National Report	28th January 2013	No reference has been made to the implementation of UDHR
	3rd National Report	22nd January 2018	No reference has been made to the implementation of UDHR
	4th National Report	8th May 2023	No reference has been made to the implementation of UDHR
Montenegro	1st National Report	12th May 2009	Right to education Para 76. A Comprehensive reform of the Montenegrin education system started in 2000, when the "Book of Change" was adopted. This Book contains the basic goals and principles of the reform, harmonised with the Constitution and international documents such as: the Universal Declaration of Human Rights, The United Nations Convention on the Rights of the Child, The Convention against Discrimination in Education, The Resolution on European Dimension in Education.
	2nd National Report	30th January 2014	Para 92. The progress presented herein and the clearly recognised challenges and obligations undertaken to further strengthen the system of the protection and exercising of human rights and freedoms confirm the unambiguous commitment of Montenegro to the highest values of democracy and principles proclaimed in the UN Charter, the Universal Declaration and international human rights law documents.
	3rd National Report	24th January 2019	Priorities, initiatives and commitments in addressing challenges in the implementation of recommendations and strengthening of human rights protection – Part VI, Paras 134–137 – The progress presented herein and the clearly recognised challenges and obligations undertaken to further enhance the system of human rights protection and promotion confirm the unequivocal commitment of Montenegro to the values of democracy and principles enshrined in the UN Charter, the Universal Declaration and international human rights instruments.
	4th National Report	2nd May 2024	Para 185. The progress presented in the National Report clearly showed challenges and obligations that must be fulfilled to strengthen the system of protection and enjoyment of human rights and freedoms, in line with the highest values of democracy and the principles proclaimed in the UN Charter, the Universal Declaration of Human Rights and international legal documents in these fields.
Poland	1st National Report	14th April 2008	No reference has been made to the implementation of UDHR
	2nd National Report	30th May 2012	No reference has been made to the implementation of UDHR
	3rd National Report	9th May 2017	Para 147. According to the requirements of the Act on the Educational System, which provides that education in Poland follows the principles enshrined in the Constitution and the guidance of the Universal Declaration of Human Rights, the ICCPR, and the Convention on the Rights of the Child, human rights and the rights of the child have been and will remain a part of the school curricula.
	4th National Report	15th November 2022	No reference has been made to the implementation of UDHR

Country	Date of Consideration of		Compliance with UDHR
Romania	1st National Report	15th May 2008	Para 14. Article 20 of the Constitution stipulates that constitutional provisions concerning citizens' rights and freedoms shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is party to. In case of inconsistencies between these covenants and treaties and national laws, international regulations shall take precedence, unless domestic legislation comprises more favourable provisions. Para 64. The Government has approved the National Strategy for the protection, integration and social inclusion of persons with disabilities – 'Equal chances for the persons with disabilities – towards a society without discrimination' – for the period 2006–2013. (. . .) The main principles of the Strategy are based on the respect of rights and the dignity of the persons with disabilities according to the Universal Declaration of Human Rights, (. . .)
	2nd National Report	22nd January 2013	9. As concerns recommendation 2[130], in Romania the legal provisions on citizens' rights and freedoms are interpreted and enforced in accordance with the Universal Declaration of Human Rights, the covenants and other treaties to which Romania is a party.
	3rd National Report	16th January 2018	No reference has been made to the implementation of UDHR
	4th National Report	2nd May 2023	No reference has been made to the implementation of UDHR
Serbia	1st National Report	5th December 2008	The criminal-law protection of minors in the Republic of Serbia is primarily realised in accordance with a special law – the Law on Juvenile Offenders and Criminal Protection of Juveniles – which has been in force since January 1st 2006. This is a modern law which respects human rights standards proclaimed in the international documents such as the Universal Declaration of Human Rights, the Convention on the Right of the Child and the European Convention for the Protection of Human Rights and Fundamental Freedoms.[131]
	2nd National Report	30th January 2013	No reference has been made to the implementation of UDHR
	3rd National Report	24th January 2018	No reference has been made to the implementation of UDHR
	4th National Report	10th May 2023	No direct reference has been made to the implementation of UDHR

130 'To take all necessary steps to ensure that relevant Romanian legislation is in conformity with its international undertakings (United Kingdom)' – Universal Periodic Review National Report of the Working Group on the Universal Periodic Review Romania. Human Rights Council, 2008b.

131 Para. 109 of the National Report Submitted in Accordance with Paragraph 15 (A) of the Annex to Human Rights Council Resolution 5/1 for Serbia. Human Rights Council, 2008c.

Country	Date of Consideration of		Compliance with UDHR
Slovakia	1st National Report	13th May 2009	Para 41. The Charter of Fundamental Human Rights and Freedoms is part of the Slovak legal system; this Charter is based on international documents, in particular on the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, as well as other international human rights instruments.[132]
	2nd National Report	3rd February 2014	No reference has been made to the implementation of UDHR
	3rd National Report	28th January 2019	No reference has been made to the implementation of UDHR
	4th National Report	6th May 2024	No reference has been made to the implementation of UDHR
Slovenia	1st National Report	16th February 2010	No reference has been made to the implementation of UDHR
	2nd National Report	4th November 2014	No reference has been made to the implementation of UDHR
	3rd National Report	12th November 2019	No reference has been made to the implementation of UDHR
	4th National Report	28th January 2025	Para 25. The active implementation of the UDHR continues through cultural and arts education, where children and young people learn about the different art forms and the social impact of cultural arts (cultural diversity, intercultural awareness and dialogue, social and civic competences).

Although the UPR, along with other international human rights instruments, is also based on the UDHR, the above table clearly shows that in most cases, States not even do not focus on the specific norms of the UDHR in their national reports, but do not mention it at all. Similarly, there is no direct reference to the Declaration in the preliminary questions and recommendations of other States either.

The only State among the 16 in this study that has mentioned the UDHR in all four reports is Montenegro, although even in this case, the UDHR is listed as one of the main sources of the country's international obligations in the field of human rights, and only in the first report is there a direct reference to the Declaration in the context of the right to education.

It is noteworthy that the right to education is also mentioned in other national reports in the context of the UDHR. In particular, the third National Report of Estonia refers to the UDHR as one of the main sources of the basic school curriculum, and also highlights the actions taken by the country in context of studying the UDHR for the students. The third National Report of Poland notes that in accordance with the Act on the Education System of Poland, the principles of the UDHR are reflected in the school curriculum. The Fourth National Report of Slovenia also notes that implementation of the UDHR by the country is ensured, *inter alia*, through educational mechanisms.

132 Pursuant to Article 7(5) of the Constitution of Slovakia, international treaties on human rights and fundamental freedoms, international treaties for whose exercise a law is not necessary, and international treaties which directly confer rights or impose duties on natural persons or legal persons and which were ratified and promulgated in a manner laid down by the law, shall prevail over laws see Para. 41 of the National Report Submitted in Accordance with Paragraph 15 (A) of the Annex to Human Rights Council Resolution 5/1 for Slovakia. Human Rights Council, 2009.

The first national reports of Bulgaria and Slovakia contain statements which claim that the legal systems of the countries are based, among others, on the UDHR; while in the case of Lithuania, it is indicated that the Constitution was written on the basis of, among others things, the fundamental instruments of the UN Human Rights. Most probably this is referring directly to the UDHR. The first report of Romania states that according to Article 20 of the country's Constitution, human rights and fundamental freedoms must be interpreted and implemented in accordance with the UDHR. And that in the event of inconsistency between national legislation and international norms, the latter shall prevail, unless the national legislation establishes a more favourable regime. This in turn, is another guarantee of the state's implementation of the UDHR. It is noteworthy that Romania's second national report responds to the recommendation (#2) made by the United Kingdom during the first cycle and notes that in Romania, citizens' rights and fundamental freedoms are interpreted and implemented in accordance with the UDHR.

Romania's first report also notes that the country's National Strategy for the protection, integration and social inclusion of persons with disabilities (described as 'Equal chances for the persons with disabilities – towards a society without discrimination') for the period 2006–2013 is based, among other things, on the UDHR.

Finally, in Serbia, the juvenile justice system, namely the Law on Juvenile Offenders and Criminal Protection of Juveniles, is based, among other things, on the UDHR, as mentioned in the first National Report.

5. Conclusion

Nearly eight decades have passed since its adoption, yet the UDHR remains a dynamic instrument that continues to inform contemporary human rights debates and innovations. Emerging challenges, such as digital rights and privacy, environmental protection, corporate responsibility, and the ethical use of artificial intelligence, are increasingly framed within the UDHR's principles of dignity, equality, and freedom. The UDHR's core message that human rights are universal and must be upheld for all people resonates today amid complex global transformations and crises. The UDHR has had a profound and lasting impact on the development of international and regional human rights law. It established the normative and legal basis for an extensive and evolving human rights system that continues to adapt to new circumstances. Although the world has changed significantly since 1948, the UDHR's emphasis on human dignity, equality, and freedom remains central to efforts to promote justice, peace, and shared humanity in the 21st century.

The UDHR, originally intended to be of "soft" character, not only became the precursor for many universal and regional human rights treaties, but thanks to general State practice accompanied by *opinio juris,* transformed into one of the most significant tools of international customary law, and became an encouraging model to adopt.

Judging from both the HRC reports, as well as the preliminary questions and recommendations of the states, and also from the concerns of other stakeholders, in the case of these specific 16 countries, as a rule, no separate reference, comment or request for clarification is made in terms of compliance with the UDHR, which, first of all, should be conditioned by the membership of each of these countries, not only in the Covenants, but also in the European Convention for the Protection of Human Rights and Fundamental Freedoms, which among other things covers the obligations undertaken in the UDHR, the fulfilment of which is ensured by other mechanisms, including the European Court of Human Rights.

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| Chapter 5 |

The 1951 United Nations Convention Relating to the Status of Refugees

Nóra Béres

ABSTRACT

This chapter seeks to provide the readers with a brief overview of the key elements of the Refugee Convention. To this end, the definition of "refugee" will be analysed first of all, where the so-called inclusion, exclusion and cessation criteria will be scrutinised with due consideration. Within the framework of assessment of the inclusion element, the meaning of 'being outside the country of his nationality', well-founded fear, persecution, and of the five limitative grounds as motives of persecution will be highlighted. Secondly, refugee rights will be examined within a comparison of refugee rights and human rights. For the third pillar of this chapter, the principle of non-refoulement will be addressed as a cornerstone of international refugee law. Concluding remarks will also be added in closing this chapter.

KEYWORDS

asylum, non-refoulement, refugee, UNHCR, Refugee Convention

1. The Refugee Convention as the Fundamentum of International Refugee Law: Old Rules, New Challenges?

The 1951 Convention relating to the Status of Refugees[1] (hereinafter referred to as the Refugee Convention)[2] and its 1967 Protocol relating to the Status of Refugees[3] (hereinafter referred to as Protocol) are fundamental components of international refugee law. The Refugee Convention was adopted at a diplomatic conference organised by the United Nations (hereinafter referred to as the UN) in Geneva, Switzerland, on 28th July 1951. Since then it has been subject to only one amendment in the form of the Protocol. The temporal and territorial scope of the Refugee Convention were initially limited focusing on 'events occurring before 1st January 1951' which were understood

1 United Nations, 1951.
2 For comprehensive analysis see: Zimmermann and Mahler, 2011.
3 United Nations, 1967, p. 267.

Nóra Béres (2026) 'The 1951 United Nations Convention Relating to the Status of Refugees' in Kovács, P., Béres, N. (eds.) *The Universal Protection Of Human Rights*. Miskolc–Budapest: Central European Academic Publishing, pp. 193–220. https://doi.org/10.71009/2026.pknb.uphr_5

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to mean 'events occurring in Europe' prior to that date. The Protocol eliminated these temporal and territorial limitations, and has expanded the *ratione temporis* and *ratione loci* of the Refugee Convention, providing universal protection for any person worldwide.[4] Accordingly, the more than 70-year-old text of the Refugee Convention reflects the approach of the post-WWII era, and judicial interpretation plays a crucial role in adjusting the treaty to the challenges of modern times.

The Refugee Convention, *inter alia*, defines the term "refugee", outlines the standards of treatment of refugee protection, and sets up the framework of the United Nations High Commissioner for Refugees (hereinafter: UNHCR). As of the time being, there are 146 States Parties[5] to the Refugee Convention, and 147 States Parties to the Protocol,[6] meaning that both enjoy an almost universal acceptance. Additionally, the majority of rules provided under the Refugee Convention are of customary origin, binding universally on any State irrespective of its treaty status.

Despite the Refugee Convention being of great importance and an inevitable point of reference in handling contemporary global migration challenges, there has been a notable rise in a perspective that deems it as outdated legal instrument. Agreeing with Fitzpatrick, this can be attributed to three main reasons. Firstly, the Refugee Convention's approach putting emphasis on persecution as a central tenet of refugee definition appears to be both anachronistic and conceptually inadequate in the context of ongoing forced migratory patterns, which are predominantly driven by violence but lack a clearly defined persecutive ground.[7] For instance, those compelled to seek refuge due to climate change, rising sea levels, or desertification are excluded from refugee protection on the basis that they lack a persecutory ground. Secondly, policy analysts have pointed out that the significant increase in the number of forcibly displaced persons has resulted in costly procedures, which are burdensome for States both in economic and social terms.[8] Moreover, from a pragmatic point of view, there has been a noticeable decline in support for the Refugee Convention among traditional asylum-granting States, who at times have expressed the desire for a new regime.[9]

Actually, the Refugee Convention was not meant to deal with the mass migration flows that we face these days. Rather, it was drafted with the intention of managing a foreseeable number of asylum seekers. Nevertheless, the Refugee Convention was designed to guarantee safeguards to individual political asylum seekers, not large-scale influxes. Consequently, the Refugee Convention's capacity to provide protection for various categories of individuals, including internally displaced persons (hereinafter referred to as IDPs) and those fleeing from their countries of nationality without facing persecution or due to other drivers not specified under the Refugee

4 UNHCR, n.d.
5 United Nations, 1951, Chapter V. Refugees and Stateless Persons, 2.
6 Ibid., Refugees and Stateless Persons, 5.
7 Zolberg et al., 1989, pp. 1–394.
8 Fitzpatrick, 1996, pp. 230–231.
9 Helton, 1994, p. 1623.

Convention, such as armed conflicts, famine, and extreme poverty, is restricted. Even though it has faced harsh criticism, the Refugee Convention remains in force and millions of asylum claims are settled in accordance with its provisions on an annual basis.[10] However, this concept of the Refugee Convention, as described above, is the main reason why this treaty regime does not appear to work when facing modern day challenges.

2. Historical Context and Current Relevance of the Refugee Convention

Refugee issues first grabbed the attention of the international community at the turn of the 20th century.[11] Due to the events surrounding WWI, approximately two million Armenians, Russians and asylum seekers from other origins were compelled to depart from their home countries between 1917 and 1926.[12] In the aftermath of these events, the international community began to assume responsibility for the protection and assistance of refugees driven away by humanitarian reasons, and the first institutional framework was provided under the auspices of the newly established international organisation, the League of Nations, where numerous treaties were adopted that are no longer in effect.

As has already been highlighted above, the effective UN treaty regime of international refugee law is comprised of two key legal documents, the Refugee Convention and its Protocol which have three essential elements: the refugee definition, the content and scope of refugee status, and the prohibition of expulsion or return ("non-refoulement"). As Chetail describes precisely, these elements truly reflect the "existential dilemma" of refugee law, creating a fragile balance between the competence of States controlling the access of aliens to their territory and the protection of the most vulnerable fleeing from gross human rights violations.[13]

The Refugee Convention was adopted directly after the end of WWII, which represented a significant accomplishment of the UN's early efforts to address the war-generated refugee crisis. The drafting of the Refugee Convention was a direct response to the horrifying events that took place during and after WWII by the Nazis and Communists in Europe.[14] This kind of speedy reaction of the UN-led international community is not very common: for instance, the International Convention on the Elimination of All Forms of Racial Discrimination was only adopted in 1965, and

10 Béres, 2024, pp. 84–85.
11 The Balkan Wars (1912–1913), the First World War (1914–1918), and its aftermath in the Near East, i.e., the wars in the Caucasus (1918–1921) and the Greco-Turkish War (1919–1922) caused significant refugee flows in the States involved, especially in the Russian Empire. About 1 and 2 million refugees left Russia, then the Soviet Union, for European countries of Asia Minor, Central Asia and East Asia between 1918 and 1922. See: Jager, 2001, p. 727.
12 Hathaway, 2021, p. 19.
13 Chetail, 2019, p. 169; Béres, 2024, p. 87.
14 Hernández, 2019, p. 427.

the International Covenant on Civil and Political Rights as well as the International Covenant of Economic, Social and Cultural Rights in 1966. This also means that at the time of its adoption, the Refugee Convention would have had no context with other UN human rights covenants or conventions.

In consideration of the challenges experienced in the post-WWII era, particularly the fact that the majority of refugees were of European origin due to the Nazi mass extermination and the Communist regimes in Central and Eastern Europe, the Refugee Convention was established with a deadline that limited its scope of application to the then known groups of refugees, i.e., persons who had become refugees as a result of events occurring in Europe before 1st January 1951.[15] However, following the adoption of the Refugee Convention, refugee problems not related to WWII continued to occur in various regions worldwide, leading to endeavours to extend the full application of the Refugee Convention to all refugee situations. Consequently, the Protocol, removing the geographical and temporal limitations, was adopted sixteen years after the original Refugee Convention.[16] The Protocol thus endowed the Refugee Convention with universal scope. Since that time, no further modifications have been adopted relating to the Refugee Convention or its Protocol, though.

3. The Definition of a Refugee in Accordance with the Refugee Convention

The term "refugee" is an accurately defined category under the Refugee Convention, and even if international refugee law is solidarity-driven on the first place, not every vulnerable person fleeing from life-threatening circumstances will be legally recognised as a refugee. The complexity of the definition of a refugee basically stems from the limitations attached to it, which aim to find a delicate balance between States' obligations derived from the principle of solidarity, and States' concerns regarding unmanageable refugee influxes.[17] Therefore, defining who is a refugee serves a dual purpose: firstly, it is a means of recognising those individuals who are in need of international protection from persecution; and secondly, it enables the determination of the respective obligations incumbent upon States under international law.[18] In general terms, the Refugee Convention rather puts an emphasis on the latter purpose: most of the time, States' obligations are in sharp focus while individual rights are left in the background. The historical context of the Refugee Convention offers an obvious explanation to this approach. During the drafting and adoption of the Refugee Convention, no other UN human rights treaties existed, only the UN General Assembly

15 For comprehensive analysis, see: Hathaway, 2021; Goodwin-Gill and McAdam, 2021; Lambert, 2010; Zimmermann 2011.
16 Weis, 1990, p. 1.
17 Béres, 2024, p. 88.
18 Chetail, 2019, p. 169.

resolution on the Universal Declaration of Human Rights[19] (hereinafter referred to as the UDHR), which was adopted in 1948. Lacking the human-rights-centric approach that fittingly describes other UN covenants and conventions, the Refugee Convention does not guarantee unalienable and unconditional rights for any human being, and it does not provide international protection for any victim of irregular forced migration. The difference between human rights and refugee rights is clearly demonstrated here. Whilst human rights apply to any human being due to their dignity, refugee rights depend on the formal recognition of the refugee status.[20]

Art. 1(A)(2) of the Refugee Convention provides,

> '[...] for the purposes of the present Convention, the term "refugee" shall apply to any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'.

The definition complies with the human rights approach that appears under Art. 14 of the 1948 UDHR guaranteeing the right to seek and enjoy asylum from persecution, which reads as follows,[21]

> '1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
> 2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations'.

According to the Refugee Convention, refugee status is declaratory in nature, which means that State authorities do not constitute this status, they merely recognise it. According to the UNHCR,

> 'a person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition but is recognized because he is a refugee'.[22]

19 United Nations General Assembly Resolution 217 (III) A, 10 December 1948, Art. 14(1): 'Everyone has the right to seek and to enjoy in other countries asylum from persecution. (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.'
20 Chetail, 2014, pp. 19–72; Béres, 2024, p. 88.
21 Ádány, 2016, p. 239.
22 UNHCR, 2011, p. 38

In accordance with this approach, a rebuttable presumption may be set up related to the refugee status and principle of non-refoulement: asylum seekers are deemed to be potential refugees as far as the benefits arising from non-refoulement are concerned until it is proven that they are not entitled to refugee status.[23] As Goodwin-Gill and McAdam remark 'in principle, its benefit ought not to be predicated upon formal recognition of refugee status which, indeed, may be impractical in the absence of effective procedures or in the case of a mass influx'.[24] Justice Kirby of the High Court of Australia, in his dissenting opinion in Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004[25] also added some valuable remarks on the declaratory nature of the refugee status, emphasising that the language of "recognition" suggests a process whereby an asylum seeker, who already is a refugee, gains "formal recognition" as such within the country of refuge, therefore recognition does not render a person a "refugee" but it simply recognises the status as one that preceded the recognition.[26]

Although there is no agreed and detailed procedure to follow for States under the Refugee Convention in order to establish who is a refugee, the UNHCR has issued a 'Handbook of Guidelines',[27] a soft law instrument, to assist domestic asylum authorities in applying the refugee criteria in practice. This 'Handbook of Guidelines' was published in 1979 for the first time and re-published in 1992 and in 2019.

Nonetheless, the refugee definition is a very limited legal category from several other perspectives. From the outset, the refugee protection regime was designed to be restrictive and to partially reflect the compromise between State sovereignty over the admission of aliens and State obligation of the protection of victims of grave human rights violations.[28] At the Conference of Plenipotentiaries[29] of the Refugee Convention, State representatives, as a consequence of their general fear of unmanageable refugee flows, insisted on not signing a "blank cheque" and assuming unlimited and indefinite commitments in terms of all refugees for the future.[30] Thus, the definition of refugee was tailored to individual political refugees, not to the mass influx of migrants.

As has been already mentioned above, the definition of refugee is inherently limited in scope and requires three criteria to be met, namely inclusion, exclusion and cessation criteria.[31]

23 Béres, 2024, p. 89.
24 Goodwin-Gill and McAdam, 2021, p. 469.
25 *Minister for Immigration and Multicultural and Indigenous Affairs v. QAAH of 2004,* [2006] HCA 53 (Aus. HC, Nov. 15, 2006), at [96], per Kirby J. (dissenting).
26 In this case, the applicant was an Afghan national of the Hazara ethnic group fearing that the Taliban would kill him upon returning Afghanistan because of his ethnicity.
27 UNHCR, 2011.
28 Bhabha, 2002, p. 176.
29 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: summary record of the 35th meeting, held at the Palais des Nations, Geneva, on Wednesday, 25 July 1951.
30 Bem, 2004, p. 609.
31 For comprehensive analysis, see in detail Goodwin-Gill and McAdam, 2021, pp. 63–197; Zimmermann and Mahler, 2011, pp. 281–465; Chetail, 2019, pp. 170–171.

3.1. Key Elements of the Definition of Refugee: The Inclusion Criterion

The inclusion criterion is enshrined under Art. 1(A)(2) of the Refugee Convention, encompassing four cumulative elements of the refugee status. These elements are as follows: (I) the refugee is outside his country of origin; (II) the refugee is unable or unwilling to avail himself or herself of the protection of the country of origin; (III) the reason of this inability or unwillingness is attributable to a well-founded fear of persecution; and (iv) persecution or the lack of protection provided by the country of origin therefrom is in connection with at least one of five limitative grounds such as race, religion, nationality, membership of particular social group or political opinion. These elements may also be considered as positive preconditions of the refugee status which reflect a notable difference between refugee rights and human rights. As Béres sums up,

> 'although all refugees have human rights as anyone else and shall be additionally protected as an especially vulnerable group with considerate care on international as well as on national level, rights under the Refugee Convention, unlike human rights, are not inalienable and unconditional. In accordance with the inclusion criterion, refugee status offers a protection of substitution based on the principle of surrogacy when the country of origin violates the bond of trust, loyalty, protection, and assistance between the national and the State which otherwise constitutes the normal basis of society'.[32]
>
> 'The general purpose of the convention is to enable the person who no longer has the benefit of protection against persecution for a conventional reason in his own country to turn to protection from the international community.'[33]

3.1.1. Being Outside the Country of His Nationality

In the criterion of 'being outside the country of his nationality', the term "nationality" is to be understood as referring to the concept of citizenship, since in the majority of cases, refugees retain the nationality of the country from which they originate.[34] One should bear in mind that in order to qualify for international protection, an applicant's well-founded fear of persecution must be connected with their country of nationality. In cases where the asylum seeker's well-founded fear of persecution is related to some other country, he can avail himself of the protection of his country

32 Béres, 2024, p. 91; see also: Shacknove, 2016, p. 164.

33 *Horvath v. Secretary of State for the Home Department* [2001] 1 AC 489, 497 (Lord Hope of Craighead). In this case, the applicant was a Slovak national and a member of the Roma minority who, along with his family, was the target of racially motivated ill treatment by skinheads. After fleeing Slovakia, he claimed for asylum in the UK, where his application was dismissed unanimously by the court, since he was able to acquire protection from his country of origin against the non-state actors.

34 Like nationals of any State, stateless persons may also become refugees, and the Refugee Convention offers protection for them under Art. 1(2) as follows, *'who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.'*

of nationality, and therefore will not need recourse to international protection.[35] This works as a *stricto sensu* rule with no exceptions, meaning that applicants must be outside their country of origin to qualify for international protection. Consequently, the territorial jurisdiction of their home country precludes the possibility of seeking international protection. IDPs constitute a particularly salient case within the field of forced migration, given that they are also victims of this phenomenon and in need of protection. However, they do not fall under the scope of the Refugee Convention due to this *stricto sensu* rule, which is considered one of the most remarkable limitations set up by the Refugee Convention. This limitation is of particular concern in light of the growing mass of IDPs worldwide these days.[36]

Under Art. 1(A)(2), a refugee is also 'unable or, owing to such fear, is unwilling to avail himself of the protection of that country'. On the one hand, inability represents the objective side of this element referring to circumstances that grow beyond the asylum seekers. E.g., insurgencies, grave disturbance, and (civil) wars may lead to a general situation in a country that prevents nationals from availing protection. These circumstances may also render State protection ineffective or simply denied, resulting in the unavailability of services that are normally available to co-nationals. This, in turn, may intensify an applicant's fear of persecution. On the other hand, unwillingness is also related to asylum seekers who refuse to accept the protection provided by their home country. "Unwillingness" is more subjective than "inability", however it is counterbalanced to some extent by the qualification of 'owing to such fear'. The UNHCR highlights the connection between unwillingness and being outside someone's country of origin as 'where a person is willing to avail himself of the protection of his home country, such willingness would normally be incompatible with a claim that he is outside that country "owing to well-founded fear of persecution"'.[37]

Art. 1(A)(2) of the Refugee Convention contains a subsequent parallel phrase that refers to stateless persons, '[…] or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'.

In this context, "former habitual residence" means 'the country in which he had resided and where he had suffered or fears he would suffer persecution if he returned'.[38] In the case of stateless asylum seekers, the 'country of nationality' is replaced by 'the country of his former habitual residence', and the expression 'unwilling to avail himself of the protection' is replaced by 'unwilling to return to it'. Consequently, in the case of stateless persons, the availability of protection will not arise at all. It is also true that not all stateless persons will be refugees, however, once a stateless person

35 UNHCR, 2019, pp. 25–26.

36 According to UNHCR's Refugee Data Finder, as of end-2023 as a result of persecution, conflict, violence, human rights violations or events seriously disturbing public order, there were 68.3 million IDPs worldwide.

37 UNHCR Handbook 2019, p. 27.

38 Report of the Ad Hoc Committee on Statelessness and Related Problems, Lake Success, New York, 16 January to 16 February 1950, UN Doc. E/1618, p. 39.

is recognised as a refugee relating the country of his former habitual residence, any further change in his or her country of habitual residence will not affect his or her refugee status.[39]

3.1.2. Well-Founded Fear

The well-founded fear of persecution is an essential element of the definition of refugee. However, fear is an inherently subjective sensation and a state of mind, thus the definition of refugee adds a subjective element relating to the person applying for asylum. Subsequently, the evaluation of the applicant's statements is more relevant than a judgment on the ongoing situation in the asylum seeker's country of nationality. The evaluation of fear is inseparable from the assessment of the applicants' personality, their psychological reactions, credibility, family background, their membership in a racial, religious, national, social, or political group, as well as their own interpretation of their situation, and their personal experiences.[40] Counterbalancing the subjectiveness of fear, the drafters of the Refugee Convention added the qualification of 'well-founded' to it. The UNHCR notes that well-founded

> 'implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. "Well-founded fear" therefore contains a subjective and an objective element, and in determining whether "well-founded fear" exists, both elements should be taken into consideration'.[41]

3.1.3. Persecution

In the context of universal treaty law, a general definition of "persecution" is still missing, as historical efforts to establish such a definition have met with only moderate success. In line with Article 33 of the Refugee Convention, the threat of harm to life or freedom, on the basis of factors such as race, religion, nationality, membership of a specific social group, or political opinions will certainly result in persecution. Nevertheless, other serious violations of human rights can also be considered as persecution. The New Zealand Refugee Status Appeals Authority established in Refugee Appeal No. 71427/99[42] that the core norms of international human rights law are relied on to define the forms of serious harm within the scope of persecution. In this case, the applicant had divorced her abusive husband and had reconnected with her child, whom she had previously adopted without his knowledge. However, if she had been returned to Iran, she would have been at risk of death or imprisonment. As this case demonstrates, the national refugee authority applied a human rights approach in determining whether persecution had occurred. In determining the existence of

39 UNHCR, 2019, p. 27.
40 Béres, 2024, p. 93.
41 UNHCR, 2019, p. 19.
42 *Refugee Appeal No. 71427/99,* 16 August 2000 (New Zealand Refugee Status Appeals Authority).

persecution, the individual circumstances of each case are of special importance, given that 'the subjective character of fear of persecution requires an evaluation of the opinions and feelings of the person concerned'.[43] In *Korablina v. Immigration and Naturalisation Services*,[44] where the applicant, then a fifty-five-year old native of Russia and citizen of Ukraine, witnessed, and was the subject of repeated beatings and severe harassment by an ultra-nationalist group in Kiev due to her Jewish heritage, the US Court of Appeals for the 9th Circuit held less intensive persecutive incidents (e.g., discrimination in different forms, specific instances of violence and harassment toward an individual and his or her family members) altogether, as cumulative grounds, these could also lead to persecution.

3.1.4. Five Limitative Grounds as Motives of Persecution

The definition of refugee exhaustively enumerates five limitative grounds that may count as motives of persecution: race, religion, nationality, membership in a particular social group, and political opinion.

Race should be interpreted in accordance with Art. 1 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination[45] (hereinafter referred to as ICERD), also adopted by the auspices of the UN. The definition of "race", in its widest meaning, additionally covers colour, descent, and national or ethnic origin. The UNHCR notes that the mere fact of being a member of a particular racial group is not enough to substantiate a claim to refugee status, however, at the same time there may be cases where, due to the circumstances affecting the group, such membership provides in itself sufficient grounds to fear persecution.[46] Discrimination on the grounds of race has been subject to world-wide condemnation over the years, and today it can be identified as one of the most serious form of human rights violations.[47]

So as to establish a definition of the term "religion", it is recommended that the UDHR and the International Covenant on Civil and Political Rights[48] (hereinafter: ICCPR) be regarded as points of departure. Art. 18 of the UDHR and Art. 18 of the ICCPR stipulate the right to freedom of thought, conscience and religion, which encompasses the liberty of the individual to adopt different beliefs, to manifest their religion in public spaces, and to engage in observance, practice, teaching, and worship. In this regard, it is important to note that persecution on religious grounds may manifest itself in various forms. For instance, it can be directed against a

43 UNHCR, 2019, p. 21.
44 *Korablina v. Immigration and Naturalization Services*, No. 97-70361, 158 F 3d, 23 October 1998 (US Court of Appeals for the 9th Circuit).
45 International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, UNTS, vol. 660, p. 195.
46 UNHCR, 2019, p. 23.
47 Béres, 2024, p. 95.
48 International Covenant on Civil and Political Rights, 16 December 1966, UNTS, vol. 999, p. 171 and vol. 1057, p. 407.

different conviction or based on faith and directed against adherents of the same faith due to divisions within the religious group. Alternatively, it might be motivated by an individual's refusal to recognise certain tenets of the same religion.[49] The UNHCR asserts that this concept may also manifest itself as the prohibition of membership of a religious community, of worship in private or in public, of religious instruction, or of serious measures of discrimination imposed on individuals on the basis of their religious practice or affiliation with a specific religious community.[50]

The term "nationality" as defined in the context of the Refugee Convention signifies more than mere citizenship, rather it encompasses the civil status of nationals.[51] The term "nationality" is understood to denote membership of a specific ethnic or linguistic group. In certain instances, it may coincide with the concept of "race". A typical scenario of persecution on the grounds of nationality occurs when two or more ethnic or linguistic groups coexist within the boundaries of a State, leading to the occurrence of conflicts, and the potential for persecution or the threat of persecution arises. In such cases, the distinction between persecution on the grounds of nationality or political opinion becomes particularly challenging, especially when a political movement is closely associated with a specific nationality. Furthermore, it should be noted that nationality-related persecution may manifest itself in a variety of forms. For instance, an occupying State may target nationals residing within the occupied State's territory. Additionally, such persecution may be inflicted upon stateless individuals, in instances where their access to nationality is legally guaranteed, yet still denied to them. Whilst it is true that the majority of cases of persecution on the grounds of nationality concern individuals who belong to a national minority, there have also been numerous incidents on various continents where a person belonging to a majority group has feared persecution by a dominant minority.[52]

The term of 'membership in a particular social group' is potentially the broadest category among the persecutive grounds under the refugee definition with the aim to provide conventional protection for those who are otherwise not covered by the other four drivers. Subsequently, this category is suitable for international and national courts to fill in *lacunae* when other grounds have proven to be inapplicable. For instance, in *González et al ('Cotton Field') v. Mexico*[53] the Inter-American Court of Human Rights (hereinafter referred to as IACtHR) established that persecution on the grounds of gender[54] and persecution on the grounds of membership in a particular social group had both occurred in combination. In this case, three young women disappeared after leaving work, and later, their bodies were found in the cotton fields

49 Hernández, 2019, p. 428. UNHCR 'Guidelines on International Protection No. 6: "Religion-Based Refugee Claims under Article 1A.2 of the 1951 Convention and/or the 1967 Protocol"', 28 April 2004, UN Doc. HCR/GIP/04/06.
50 UNHCR, 2019, p. 23.
51 Hernández, 2019, p. 428.
52 UNHCR, 2019, p. 24.
53 *González et al ('Cotton Field') v. Mexico,* IACtHR Ser C, No. 205 (16 November 2016).
54 Edwards, 2003, pp. 51–57.

of their hometown. The women's bodies displayed evidence of intense physical and psychological torture, mutilation, and sexual abuse. During the investigations, law enforcement officials did not provide the young women justice, and they were unwilling to help the victims' mothers in finding out what had happened. Moreover, the families of the deceased received continuous threats from local officials to withdraw their complaints. The mothers' testimonies, work of advocates and data delivered by civil society organisations, illustrating a systematic pattern of violence against women and widespread discrimination, was presented to the IACtHR.[55] International courts also confirmed that sexual orientation and gender identity could fall under the scope of 'membership in a particular social group'. For example, *X, Y, Z v. Minister voor Immigratie en Asiel*[56] concerned three asylum seekers in the Netherlands from Senegal, Sierra Leone, and Uganda. In each country of origin, homosexuality is a crime that is punishable by life or long-term imprisonment. Despite that in none of the cases could the applicant demonstrate that persecution took place, or that he was threatened with persecution on the grounds of his sexual orientation, the Court of Justice of the European Union established that due to the criminalisation of homosexuality in their countries of origin, they would have a well-founded fear of being persecuted if they would had been returned home. The European Court of Human Rights (hereinafter referred to as the ECtHR) arrived at a similar conclusion in *OM v. Hungary*[57] where the court held that the detention of a homosexual asylum seeker, who had fled Iran because of his homosexuality, was arbitrary reiterating that sexual orientation and gender identity could fall into the term of 'membership in a particular social group'. Additionally, when clarifying the definition of 'membership in a particular social group', *Canada (Attorney General) v. Ward*[58] is also a landmark case. The defendant, Patrick Ward, fled Northern Ireland due to the risk of being murdered by the Irish National Liberation Army (hereinafter referred to as the INLA), from which he had defected. He was charged with guarding hostages by the INLA, however, when he found out that the hostages were to be executed, he allowed them to escape. After being tortured by the INLA and imprisoned in Ireland due to his role in the hostage-taking, he fled to Canada where he applied for refugee status. In the Ward decision the Supreme Court of Canada interpreted the term of 'membership in a particular social group' in a broader meaning and took into special consideration the 'defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative'. Eventually, the court found that Ward did not fall into the category of 'membership in a particular social group' but he was persecuted by the INLA due to his political opinion (that is, the killing of innocent hostages being

55 According to reports, between 1993 and 2005, 4 456 young women disappeared in the respecting Mexican municipality. See: Tackling Violence against Women, Centre for Women, Peace + Security, Landmark Cases, *Gonzalez, Monreal and Monarrez ("Cotton Field") v. Mexico.*
56 *X, Y, Z v. Minister voor Immigratie en Asiel*, C-199/12-C-201/12, CJEU (7 November 2013).
57 *OM v. Hungary*, ECtHR, No. 9912/15, 5 July 2016.
58 *Canada (Attorney General) v. Ward* [1993] 103 DLR (4th) 1, paras. 67–68.

an unacceptable way to bring about political changes).[59] Consequently, a particular social group normally comprises persons of a similar background, habit, or social status, and this heading may also overlap with other persecutive grounds, such as race, religion or nationality.

Art. 1(A)(2) of the Refugee Convention includes political opinion as the last persecutive ground. The definition of "political opinion" expands beyond a simple political affiliation or membership of a political party, as has already been pointed out in the Ward ruling above. The UNHCR notes that

> 'holding political opinions different from those of the Government is not in itself a ground for claiming refugee status, and an applicant must show that he has a fear of persecution for holding such opinions. This presupposes that the applicant holds opinions not tolerated by the authorities, which are critical of their policies or methods. It also presupposes that such opinions have come to the notice of the authorities or are attributed by them to the applicant'.[60]

Therefore, political opinion can be taken into consideration on persecutive grounds when the concerned individual holds an opinion that either has been expressed or has come to the attention of the authorities. However the situation may also occur where the applicant has not given any expression of his or her opinions, owing to the intensity of his or her convictions, and thus it may be reasonable to believe that his or her convictions will at some point find an expression and the applicant will, as a result, come into conflict with the authorities. In such a case, the asylum seeker can be considered to have fear from persecution on the grounds of their political opinion.[61]

All things considered, Art. 1(A)(2) of the Refugee Convention provides on an exhaustive list of persecutive grounds, and excludes many typical drivers of forced migration, e.g., armed conflicts, extreme poverty, famine, natural disasters, pandemics, and persecution on other grounds. As was clearly highlighted in the Ward decision,

> 'the international role was qualified by built-in limitations. These restricting mechanisms reflect the fact that the international community did not intend to offer a haven for all suffering individuals. The need for "persecution" in order to warrant international protection, for example, results in the exclusion of such pleas as those of economic migrants, i.e., individuals in search of better living conditions, and those of victims of natural disasters, even when the home State is unable to provide assistance, although both of these cases might seem deserving of international sanctuary'.[62]

59 *Canada (Attorney General) v. Ward,* para. 750.
60 UNHCR, 2019, p. 24.
61 Béres, 2024, pp. 96–98.
62 *Canada (Attorney General) v. Ward,* paras. 67–68.

3.2. Key Elements of the Definition of Refugee: The Exclusion Criterion

The exclusion clause[63] further underpins the conditionality and selectiveness of refugee status, and reflects common concerns of States towards aliens accessing their territories. Accomplishing the abovementioned positive preconditions is not sufficient to gain refugee status, and individuals, even those in need, can additionally be excluded from the protection provided by the Refugee Convention for other supplementary reasons. Art. 1(D) of the Refugee Convention enshrines that

> 'This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance. When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention'.

Besides that, Art. 1(E) of the Refugee Convention provides that

> 'This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country'.

And finally, Art. 1(F) of the Refugee Convention spells out that

> 'The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations'.

Concluding the grounds of exclusion, Arts. 1(D), 1(E) and 1(F) of the Refugee Convention, a person cannot benefit from the substitute protection offered by the Refugee Convention if he: already enjoys some other form of international or national protection, for example, he is offered protection by the UN Relief and Works Agency for Palestine Refugees in the Near East, or he was given refugee status by some other State; possesses the rights and obligations attached to nationality in the country of residence, that is, already enjoying the benefits of nationality as a "whole package" excludes the necessity of refugee status in the same State; or committed serious

63 UNHCR, 2019, pp. 111–139; Chetail, 2019, pp. 169–177.

crimes (crimes against peace [crime of aggression], crimes against humanity, war crimes, serious non-political crimes and acts contrary to the purposes and principles of the UN).

In terms of the last excluding criterion, Art. 1(F) of the Refugee Convention, in *Pushpanathan v Canada*[64] the Supreme Court of Canada established, 'the rationale [...] is that those who are responsible for the persecution which creates refugees should not enjoy the benefits of a Convention designed to protect those refugees'. In *Pushpanathan v Canada*, the applicant arrived in Canada seeking refugee status from his country of origin, namely Sri Lanka. However, before his asylum claim was settled in Canada, he had been convicted of conspiracy to traffic narcotics, and had been sentenced to imprisonment. Therefore, the court dismissed his refugee claim under Art. 1(F) of the Refugee Convention that excludes applicants 'with respect to whom there are serious reasons for considering that [they have] been guilty of acts contrary to the purposes and principles of the United Nations'.

3.3. Key Elements of the Definition of Refugee: The Cessation Criterion

As far as the cessation clause[65] is concerned, it underlines the temporary nature of the Convention protection. Art. 1(C) of the Refugee Convention provides that:

> 'This Convention shall cease to apply to any person falling under the terms of section A if: (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or (2) Having lost his nationality, he has voluntarily re-acquired it; or (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or (5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality; (6) Being a person who has no nationality he is, because of the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence; Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence'.

64 *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982, para. 63.
65 UNHCR, 2019, pp. 140–163; Chetail, 2019, pp. 169–177.

The provisions under Art. 1(C) enumerates the reasons for the termination of refugee status. When the rationale of refugee status is no longer justifiable, surrogate convention protection ceases to apply. The reasons for the termination of refugee status can be either connected with the refugee concerned and his or her voluntary acts, or with a change in circumstances in his country of origin.[66]

4. Refugee Rights under the Refugee Convention

The status of a refugee is determined by their rights and obligations, which are intrinsic to the concept of refugee rights. The universal rights of refugees are derived from two primary sources: international human rights law and the Refugee Convention. The latter delineates the fundamental minimum standards for the treatment of refugees, as well as their own obligations towards the host State. In regard to their obligations, refugees are required under Art. 2 of the Refugee Convention to observe the laws and regulations of their country of asylum, and to also respect measures taken for the maintenance of public order. As Hathaway spells out, their rights are derived from the Refugee Convention, and result in obligations on the side of host States. Despite the considerable evolution of human rights law since 1951, the Refugee Convention rights remain highly pertinent. Over the past seven decades, numerous human rights conventions have been adopted, establishing legal safeguards and fundamental protections for refugees. The necessity for these two-layered protective measures is multifaceted. Firstly, it is evident that a significant proportion of refugee-specific issues are not encompassed within the purview of general human rights legislation. Secondly, economic rights in general, are defined as duties of progressive implementation and may legitimately be denied to non-citizens by less developed countries. Thirdly, it is important to note that not all civil rights are guaranteed to non-citizens. Indeed, the majority of those which do apply to them can be withheld on the grounds of their lack of nationality during national emergencies. Finally, the duty of non-discrimination under international law has not always been interpreted in a way that guarantees refugees the substantive benefit of relevant protections.[67] Nevertheless, international human rights laws confer additional rights upon refugees under the Refugee Convention, and the application and interpretation of this convention by both international and national courts facilitates the refinement of standards pertaining to refugee rights, thereby responding to contemporary challenges.

The Refugee Convention defines the set of rights that derives from refugee status, which can be considered as another fundamental pillar of international refugee law. Access to convention protection is based upon two further criteria: the recognition as to whether the asylum seeker is a refugee, and whether the asylum seeker is

66 Béres, 2024, pp. 100–101.
67 Hathaway, 2021, p. 173.

protected by the principle of non-refoulement.[68] Whilst Shacknove defines the core criteria of refugee status as asylum, material relief and permanent resettlement,[69] Chetail identifies the essence of refugee status with the criteria of entitlement and standard of treatment.[70] Additionally, Molnár integrates protection status within the Refugee Convention as follows: the principle of non-refoulement, i.e., no State Party shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion; recognised refugees should be provided with travel documents; and Contracting States should either provide refugees equal treatment with their own nationals (e.g., freedom of religion, access to justice, labour and social security rights, and intellectual property rights) or definitely not provide refugees with less favourable treatment than provided for other foreigners (e.g., housing, self-employment, independent professions, and acquisition of property).[71]

In detail, the Refugee Convention provides the following refugee rights:[72]

Table 1. Refugee rights[73]

The right to non-discrimination	Arts. 3 and 5
The right to freedom of religion	Art. 4
The right to be issued civil, identity and travel documents	Arts. 12, 27 and 28
The right to housing, land and property, including intellectual property	Arts. 13, 14 and 21
The right to access to justice	Art. 16
The right to decent work	Arts. 17 to 19 and 24
The right to education	Art. 22
The right to social protection	Arts. 23 and 24[2-4]
The right to freedom of movement within the territory	Art. 26 and Art. 31[2]
The right not to be punished for irregular entry into the territory of a contracting State	Art. 31
The right not to be expelled, except under certain, strictly defined conditions	Art. 32

The Refugee Convention sets three standards for the treatment of refugees. There are rights where all refugees enjoy the same treatment accorded to nationals. These are, for instance, freedom of religion, access to justice or the right to elementary education. There are other rights where refugees get the same treatment accorded to nationals of a foreign country under similar circumstances. For example, the right to appropriate work or the right to association belong to this group of rights. And there

68 Chetail, 2014, p. 23.
69 Shacknove, 2016, p. 276.
70 Chetail, 2019, pp. 177–179.
71 Molnár, 2016, p. 48.
72 For a comprehensive analysis, see: Zimmermann, 2011.
73 Author's own work.

is a third category of rights where refugees are not treated less favourably in general than aliens in the same circumstances, for example the right to housing or the right to freedom of movement.[74]

As has been demonstrated above, the approach of the Refugee Convention to refugee rights is not the one that is regularly provided under human rights instruments, like the other conventions and covenants of the UN, for example the ICCPR. The system of refugee rights is not based on an enumeration of States' obligations equally applicable to all refugees. Instead, those who drafted the Refugee Convention made an attempt to unlock additional rights as the bond would strengthen between the refugee and the asylum State. Subsequently, the structure of refugee rights regime is incremental, i.e., whereas all refugees benefit from a basic set of rights, additional entitlements accrue as a function of the nature and duration of attachment to the asylum State.[75] The UK Supreme Court noted in *R (ST, Eritrea) v. Secretary of State for the Home Department*,[76] where focus was on the age assessment of an Eritrean asylum seeker who presented himself to the police claiming that he was sixteen years old since. Except under limited circumstances, it is unlawful for the Home Department under UK domestic law to detain unaccompanied minors,

> '[t]he rights that attach to the status of refugee under the Convention depend in each case on the possession of some degree of attachment to the contracting State in which asylum is sought [...] An examination of the Convention shows that it contemplates five levels of attachment to the contracting States'.

In accordance with the textual analysis of the Refugee Convention, the following levels could be distinguished. Firstly, the most basic set of rights or core rights that are applicable as soon as the refugee comes under the *de jure* or *de facto* jurisdiction of the asylum State. The second set applies when the refugee enters into the asylum State's territory. Thirdly, other rights inhere only when the refugee is lawfully or habitually within the asylum State's territory. Fourthly, there are some applicable rights when the refugee lawfully stays within the asylum State's territory; and finally, a few rights accrue only upon satisfaction of a durable residency requirement.[77]

Hathaway is of the view that 'as the refugee's relationship to the asylum State is solidified over the course of this five-part assimilative path, the Convention requires that a more inclusive range of needs and aspirations be met'.[78] However, Hathaway describes this "assimilative path" as a doctrinal reconstruction that is not demonstrated by the *travaux préparatoires*, and accordingly, Chetail observes, 'albeit

74 Chetail, 2014, p. 42.
75 Hathaway, 2021, pp. 174–175.
76 *R (ST, Eritrea) v. Secretary of State for the Home Department*, [2012] UKSC 12 (UK SC, 21 March 2012), para. 21.
77 Béres, 2024, pp. 102–106.
78 Hathaway, 2021, p. 177.

attractive, this conceptualization of the refugee status as an assimilative process remains an a posteriori and essentially doctrinal reconstruction'.[79]

At the same time, this incremental and multi-layered regime implies that the levels of refugee rights build upon each other; a refugee who enters into an asylum State's territory is also under the *de jure* or *de facto* jurisdiction of the asylum State; a refugee who is lawfully or habitually within the asylum State's territory has also entered into the asylum State's territory; a refugee who is lawfully staying is also lawfully or habitually within the asylum State's territory; and finally, a refugee satisfying the durable residency requirement is also lawfully staying within the asylum State's territory. Consequently, it is a primary and especially significant issue to define the nature of the refugee's attachment to the asylum State.[80] As the UK House of Lords highlighted in *Secretary of State for the Home Department v. AH (Sudan),*[81] 'once they achieve refugee status, not merely are they safeguarded from return home but they secure all of the other manifold benefits provided for under the Convention relating to the Status of Refugees'.[82] In the same case the UK House of Lords established that each of the three Sudanese applicants had a well-founded fear of persecution in Darfur, nevertheless in reconsidering their remitted appeals, it found that it would not be unduly harsh to expect the applicants to relocate internally to Khartoum.

This progressive entitlement to rights and benefits under the Refugee Convention determines the applicable law at the three stages of a refugee's life cycle. In "level 1" the addressees of rights are asylum seekers who are assumed to be of temporary presence and the sole purpose of their entitlements is to make it possible to examine their applications. In "level 2" the holders of rights are formally recognised refugees supported by the legislative intent to facilitate their progressive integration into the asylum State's society. Finally, in "level 3" rights encourage asylum States to naturalise refugees in the closure of the refugee's life cycle.

5. The Principle of Non-Refoulement

The ultimate pillar of the Refugee Convention is the principle of non-refoulement. Art. 33(1) of the Refugee Convention provides:

> 'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever, to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion'.

79 Chetail, 2019, p. 181.
80 Hathaway, 2021, pp. 174–175.
81 *Secretary of State for the Home Department v. AH (Sudan),* [2007] UKHL 49 (UK HL, 14 November 2007).
82 Ibid., para. 32.

According to the contemporary interpretation of non-refoulement, Art. 33, thereto no reservations are allowed to be attached under Art. 42[83] of the Refugee Convention and under Art. VII(1) of its Protocol, embodies a *lex specialis* as part of the set of rules of international refugee law compared to further human rights instruments.

Beyond any doubt, the principle of non-refoulement qualifies as a landmark of international refugee law, moreover it has such a considerable impact on the regime of the Refugee Convention that it can be labelled as 'the cornerstone of international refugee law'.[84] As Gammeltoft-Hansen has established, 'the non-refoulement obligation serves as the entry point for all subsequent rights that may be claimed under the 1951 Refugee Convention. Without this, little else matters'.[85] At the same time, it is important to note that in accordance with Art. 33(1) of the Refugee Convention, non-refoulement does not mean a right of the individual to be granted asylum by a particular State.[86] Indeed, it means that where a particular State is not prepared to grant asylum for a person who is in need for international protection, it must adopt a fair procedure and offer efficient guarantees that the person in need will not be removed or expelled to a country where his or her life, dignity or freedom would be endangered based on race, religion, nationality, membership of a particular social group or political opinion.[87] The prohibition of refoulement provides the obligation to all authorities of a State Party to the Refugee Convention and all persons acting on behalf of a State Party. As for the standard of proof for the prohibition of refoulement, 'would be threatened' means a relatively high threshold, in other words a 'reasonable degree of likelihood that the persecution will occur'.[88]

Non-refoulement differs from asylum in both conceptual and legal perspectives. While non-refoulement is a negative obligation of States, prohibiting them from sending any person back to a country of persecution, asylum is a positive one encompassing the admission to a new residence and long-lasting protection from the jurisdiction of another state. In other words, non-refoulement is an obligation of States, whereas asylum is a right of them, which at the same time means that it is not a right of the individual.[89] As a consequence of this normative separation, the Refugee Convention, except its Preamble,[90] does not comprise any provision on asylum, and

83 Refugee Convention, Art. 42(1) At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to Articles 1, 3, 4, 16(1), 33, 36–46 inclusive.

84 San Remo Declaration on the Principle of Non-Refoulement (September 2001).

85 Gammeltoft-Hansen, 2011, p. 44.

86 Weis, 1995, p. 342.

87 Lauterpacht and Bethlehem, 2003, p. 76.

88 *R v. Secretary of State for the Home Office, ex parte Sivakumaran and Conjoined Appeals* (UNCHR Intervening) [1998] AC 958 (UK), para. 993.

89 Chetail, 2019, p. 190.

90 Refugee Convention, Preamble: 'Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation.'

this kind of silence was intentional on the side of the drafters of the Refugee Convention. The statement of the delegate of the UK at the Conference of Plenipotentiaries unambiguously clarified this stance, 'The right of asylum [...] was only a right, belonging to the State, to grant or refuse asylum not a right belonging to the individual and entitling him to insist on its being extended to him'.[91]

Nevertheless, there are unalienable interactions between a State's obligation of non-refoulement and its right to grant asylum: non-refoulement shall be taken into consideration when a State decides on granting or refusing asylum. From this viewpoint, the separation of non-refoulement and asylum seems quite hypothetical, since in practice, before removing an asylum-seeker from State's territory, the assessment of non-refoulement shall be conducted by the respective State under any circumstances.

Under Art. 33(1) of the Refugee Convention, the material scope of the principle of non-refoulement is relatively broad. The wording "in any manner whatsoever" means any act of sending back of non-nationals when there is a real risk of their persecution. According to contemporary jurisprudence, the legal nature of such an act is irrelevant, and it might be executed in deportation, extradition, maritime interception, non-admission at a border, transfer, rendition, etc.[92] Subsequently, the essence is not the act but its consequence, i.e., putting the dignity, life, or liberty of the person in danger, is. At the same time, refoulement is different from expulsion or deportation since these terms cover a more formal process whereby a lawfully residing non-national may be required to leave a State or be forcibly removed.[93] The prohibition of refoulement encompasses not only the prohibition to return to the country of origin, but also to any country where the person's life or freedom would be threatened based on any of the five limitative grounds.

As for the personal scope, the protection against refoulement under Art. 33(1) applies to any person who, on the one hand, meets the "inclusion criteria" of the refugee definition provided under Art. 1(A)(2) of the Refugee Convention, and on the other hand, does not fall under the scope of the "exclusion criteria" (see the comprehensive analysis above).[94] Additionally, the prohibition of refoulement applies not only to refugees but also to asylum seekers, which can be primarily explained with the declaratory nature of refugee status. The UNHCR established that

> 'every refugee is, initially, also an asylum seeker, therefore, to protect refugees, asylum seekers must be treated on the assumption that they may be refugees until their status has been determined. Otherwise, the principle of non-refoulement would not provide effective protection for refugees, because

91 UNGA 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Thirteenth Meeting' (22 November 1951) UN Doc. A/CONF.2/SR/13, 13.
92 Chetail, 2019, p. 187; Lauterpacht and Bethlehem, 2003, p. 87.
93 Goodwin-Gill and McAdam, 2021, p. 466.
94 UNHCR, 2007.

> application might be rejected at borders or otherwise returned to persecution on the grounds that their claim had not been established'.[95]

Thus one can conclude that the declaratory nature of refugee status is based on a rebuttable presumption that asylum seekers are assumed to have the status of refugees with regards to the benefits from non-refoulement protection for the duration of the asylum procedure, unless proven otherwise. As Goodwin-Gill and McAdam remarks, 'in principle, its benefit ought not to be predicated upon formal recognition of refugee status which, indeed, may be impractical in the absence of effective procedures or in the case of a mass influx'.[96] Consequently, non-refoulement is of special significance for asylum seekers: since they may be potential refugees, they should not be returned or expelled while their asylum application is pending.

The asylum-seeker's application triggers the application of non-refoulement as soon as the person is within the jurisdiction of the State Party to the Refugee Convention. The ECtHR pointed out in *Amuur v. France*[97] and *Hirsi Jamaa and Others v. Italy*[98] that non-refoulement is activated from the moment that the person concerned intends to enter the border of another country, i.e., it not only protects those who are already staying in the territory of a particular country from being removed. In *Amuur v. France* the court found that the French authorities had violated the applicants' right to liberty and security by holding four Somali nationals in the international zone of Paris-Orly airport. The applicants arrived in France by aeroplane after fleeing Somalia due to fearing for their lives there. However, the Minister of the Interior refused them the right to entry and the applicants were sent back to Somalia. As far as *Hirsi Jamaa and Others v. Italy* is concerned, the case concerned Somali and Eritrean migrants travelling from Libya who had been intercepted at sea by the Italian authorities and sent back to Libya. Returning them to Libya without examining their case exposed them to a risk of ill-treatment and amounted to a collective expulsion. As the Human Rights Committee (hereinafter: HRC) remarks, this jurisdiction is extended to 'anyone within the power of effective control of that State Party, even if not situated within the territory of the State Party'.[99] Therefore, non-refoulement has a so-called extraterritorial scope meaning that it is applicable on those territories that are not part of state territory in a legal sense, but under the effective control of the respective State Party.[100] According to the UNHCR interpretation, where the drafters of the Refugee Convention intended a particular clause of the treaty to apply only to those within the territory of a State Party, language was chosen which leaves no doubt as to their

95 UNHCR 'Note on International Protection: Submitted by the High Commissioner' (31 August 1993) UN Doc. A/AC.96/815, para. 5.
96 Goodwin-Gill and McAdam, 2021, p. 469.
97 *Amuur v. France*, ECtHR, no. 19776/92, 25 June 1996.
98 *Hirsi Jamaa and Others v Italy,* ECtHR, No. 27765/09, 23 February 2012.
99 UN Human Rights Committee (HRC), General comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, para. 10.
100 De Boer, 2015, pp. 118–134; Goodwin-Gill, 2011, pp. 443–457; Trevisanut, 2014, pp. 661–675.

intention. Besides, the UNHCR established that any interpretation which tailors the geographical scope of Art. 33(1) as not applicable to measures whereby a State, outside its territory, drives refugees back to a country where they are threatened by persecution, would be manifestly inconsistent with the humanitarian object and purpose of the Refugee Convention and its Protocol.

Even though non-refoulement has a relatively broad scope of application, it is not an absolute term under the Refugee Convention. During the drafting the Refugee Convention, the 1951 Conference of Plenipotentiaries raised concerns related to the absoluteness of the prohibition of non-refoulement,[101] therefore the final text of Art. 33(2) provides that

> 'the benefit of the present provision may not, however, be claimed by a refugee who there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country'.

This provision encompasses two exceptions that reflect a state-centred approach: the first relates to the public security of the host country, while the second protects the host country specifically against crime. Nonetheless, these provisions should be interpreted restrictively and only be applied to highly exceptional circumstances. The wording of Art. 33(2) clearly implies this restrictive approach when it comes to the second exception defending the host country specifically against crime: 'convicted by a final judgment' suggests effectives remedies were exhausted; 'for a particularly serious crime' suggests that international crimes, such as crimes against humanity, and crimes against the state, such as terrorism, should be taken into consideration; and 'constitutes a danger to the community of that country' suggests that due to the risk of subsequent offence the person is dangerous for the host country.[102]

However, Art. 33(2) of the Refugee Convention does not affect the host State's non-refoulement obligations under international human rights law which are absolute and allow no such exceptions.[103]

Although under Art. 33(1) of the Refugee Convention a return to the State where persecution has occurred is prohibited, a return to any other State which has led to restrictions applied by host States such as the "first country of arrival rule" and the "safe third country rule", is not prohibited. This approach often entails "chains of deportation" leading to refugees finding themselves in the first State where they arrived after having fled their homeland.[104] Additionally, some States practice "extra-territorial refoulement" and intercept refugees on the high seas to keep them outside

101 Goodwin-Gill and McAdam, 2021, p. 468.
102 Chetail, 2019, pp. 189–190.
103 Lauterpacht and Bethlehem, 2003, pp. 159, 166, 179.
104 Hernández, 2019, pp. 431–432.

territorial waters. In *Sale v. Haitian Centers Council, the US Supreme Court*[105] found that intercepting Haitians in high seas and returning them to their home State was lawful, however, the Inter-American Commission on Human Rights (hereinafter: IACommHR) in the same case (Haitian Interdiction Case)[106] declared it a breach of Art. 33 of the Refugee Convention. *The Sale v. Haitian Centers Council* is a case in which the US Supreme Court ruled that the President's executive order that all aliens intercepted on the high seas could be repatriated was not limited by the Immigration and Nationality Act of 1952, or Art. 33 of the Refugee Convention. In the same vein, the ECtHR declared a similar bilateral agreement between Italy and Libya, concluded in 2012, unlawful in *Hirsi Jamaa and Others v. Italy* (see above for a more detailed account).

6. Concluding Remarks

The present chapter has concentrated on the framework of interpretation of the core provisions of the Refugee Convention, with particular regard given to the definition of "refugee", the contents of the refugee status, and the principle of non-refoulement. In order to provide a contemporary interpretation of the Refugee Convention, this chapter has paid special attention to the subsequent development of international law. In particular, it construes and applies the most significant concepts of the Refugee Convention within the normative context prevailing at the time of its interpretation. This is to say, it does so with consideration to the different human rights instruments (UDHR, ECHR, ICERD, ICCPR etc.) adopted since its entry into force. Furthermore, as the drafters of the Refugee Convention did not establish a treaty body or a human rights monitoring mechanism to provide an authentic interpretation of the document, due consideration has been devoted to respecting international and national judicial and committee case law, such as that of the ECtHR, IACtHR, HRC, IACommHR, the Canadian, UK and US supreme courts. This chapter has demonstrated, following an analysis of the definition of refugee, that international protection is tailored to a very limited category of refugees. Therefore, the Refugee Convention is unable to provide protection for IDPs or those who flee their home countries without persecution or owing to some other drivers not enumerated under Art. 1(A)(2) (for example, due to armed conflicts, famine, extreme poverty, climate change, etc.). It is also noteworthy that the Refugee Convention does not constitute a human rights treaty that would guarantee unalienable and unconditional rights concomitant with refugee status. While the recognition of refugee status is declaratory in nature, the rights that stem from being a refugee are not unalienable or unconditional. The acquisition of refugee rights is contingent upon recognition, and these rights cease to apply upon the termination of refugee status. Furthermore, refugee rights are incremental in nature,

105 *Sale v. Haitians Centers Council* (1993) 509 US 155.
106 *The Haitian Centre for Human Rights et al. v. US* 10.675 IACommHR No. 51/96 OEA/Ser.L/V/II.95 doc.7 Rev [1997] 550, paras. 156–158.

that is to say, as the bond strengthens between the refugee and the asylum state, the more the Refugee Convention provides for refugees. The concept of non-refoulement, which serves as the cornerstone of international refugee law, has been found to be subject to limitations in terms of its scope within the framework of the Refugee Convention. However, the progressive development of the doctrine of international human rights law has resulted in the broadening of its interpretation to encompass an absolute dimension, thereby extending its reach beyond the provisions set out in Art. 33(2) of the Refugee Convention. As demonstrated in this chapter, despite the numerous textual limitations of the Refugee Convention, it has been employed as a vital instrument for safeguarding those in genuine need. While its concept may be outdated, judicial interpretation has sought to maintain the Refugee Convention as a living instrument.

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| Chapter 6 |

The 1966 International Covenant on Civil and Political Rights (ICCPR) and the UN Human Rights Committee

Tanja Karakamisheva-Jovanovska

'Disregard and contempt for human rights
have resulted in barbarous acts which
have outraged the conscience of mankind.'
René Cassin[1]

ABSTRACT

After World War II, the world desperately needed strong faith in humanity, human rights and the values of civilisation. The world needed a strong motive and U-turn towards human solidarity and the rule of law and order, in order to win over the previous elitist arbitrariness and the "rule" of arms. That is why the international community put much of its efforts into drafting the UN Charter, with an aim to reaffirm faith in fundamental human rights, in the dignity and value of the human individual, and in the equal rights of men and women from nations large and small.

Historically speaking, civil and political rights protected in the ICCPR enabled the recognition of the human being and its liberties, especially in terms of citizenship rights, the protection of physical integrity, freedom of speech and thought, freedom from torture and slavery, the right to vote, etc. On the other side, the International Covenant on Economic, Social and Cultural Rights (ICESCR) protects the labour rights, the right to an adequate standard of living, the right to good health, the right to education, cultural rights, etc, which are all considered as "debt obligation". This means that the State has to step up and take appropriate measurements to guarantee their application, contrary to Civil and Political Rights. These two Covenants are well-known as the *International Bill of Rights.*

Prof. John Humphrey prepared the first documented outline of an *International Bill of Human Rights* covering over 400 pages. The Universal Declaration was constructed upon a firm international basis wherein no regional philosophy or way of life was permitted to prevail. The Declaration was a synthesis, not only of all the hundreds of suggestions that had been made by governments, private

1 On being informed of his Nobel Peace Prize, Cassin said: 'I am very happy. It is not given to every man to have the luck to learn law, to teach it, to make it as a judge and promote it internationally as an international judge.' But he added: 'I would be happier if there were a little more justice in the world.'

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organisations, and individuals, but also of the law and legal practices in all the various Members of the United Nations.[2]
In this chapter, special emphasis will be placed on the role and importance of the ICCPR in relation to the development of human rights. First the structure of the Covenant will be explained, and then the relationship between this Covenant and *René Cassin's* concept will be elaborated. Also, the Covenant will be analysed through a comparative prism with other relevant regional documents, their connection and mutual influence, as well as the monitoring that the UN Human Rights Committee (the Committee) performs in relation to the application of the Covenant. At the end of the chapter, several landmark cases from the work of the Committee will be elaborated upon, as well as relevant cases referring to Central and Eastern European countries.

KEYWORDS
UN, ICCPR, ICESCR, Human Rights Committee, René Cassin's concept

1. The Significance of the International Bill of Rights

The concept of human rights has existed for thousands of years. The ancient societies, the so-called city-states never elaborated on the idea of universal human rights but rather on systems of duties, conceptions of justice, legality and political legitimacy. Ancient philosophers like *Socrates, Plato,* and *Aristotle* argued for "a universal law of nature" that applied to all creation and provided the foundations for natural rights.[3]

The modern concept of human rights developed during the early Modern period, alongside Judeo-Christian ethics and the concept of natural rights,[4] appeared as a part of the medieval natural law tradition during the Enlightenment period in the works of *John Locke*[5], *Kant* and other philosophers. This concept was featured in the political discourse of the American Revolution as well as in that of the French Revolution. The revolutionary ideals inspired by American and French Revolutionary thinkers were implemented in the U.S. Declaration of Independence in 1776, the French Declaration of the Rights of Man and of the Citizen in 1789, and the U.S. Bill of Rights in 1791.

We can generally agree that the historical origins of human rights can be categorised into three groups: religious contemplations, philosophical inspirations, and political and social theories.[6]

It should be emphasised that no global benchmark for human rights was established until the end of the World War I. The *Treaty of Versailles* in 1919 created the *League of Nations* and the *International Labor Organization*, two of the first international organisations, which aimed to achieve peace and encourage social justice. In

2 United Nations General Assembly Third Session, Verbatim Record of the One Hundredth and Eightieth Meeting (*Document AIPV. 180, December 9, 1948*), p. 46.
3 Aristotle, 1926.
4 Witte, 1996, p. 13.
5 The English philosopher John Locke in his book *Two Treaties of Government* employed the theory of natural law to build upon the theory of natural rights, which he argued should include "life, liberty, and possessions." Locke, 1988, p. 87.
6 Duan, 2017.

1929, the Institute of International Law drafted and adopted the Declaration of the International Rights of Man at its meeting in New York. This document proclaimed "equal rights of every individual to life, liberty, and property" without a link to any particular nationality, gender, language, or religion.[7]

In 1941, U.S. President *Franklin D. Roosevelt* proposed his *Four Freedoms* identifying the basic liberties to which all persons were entitled: freedom of speech, freedom of religion, freedom from want, and freedom from fear, with the "supremacy of human rights everywhere".[8] Roosevelt, together with the British Prime Minister *Winston Churchill* used his Four Freedoms as the foundation of the Atlantic Charter, in which they affirmed the principle of self-determination and envisioned a bright future for the world. According to the international theory, the Atlantic Charter and the Declaration of the United Nations marked the official entry of human rights as a topic of international discussion and built the essential arguments for establishing the modern human rights documents which emerged over the second half of the twentieth century when international human rights laws were introduced.

A great action of the recognition and protection of human rights had taken place at the UN General Assembly on 10th of December 1948 when the Universal Declaration for Human Rights was adopted without any votes against it. What is of great importance about the Declaration vote is the world unification (unification of the Eastern and Western Bloc) around a project that symbolised political morality. Namely, the Eastern Bloc cautiously abstain but did not vote against it. 88% of the state's representatives voted affirmative. This demonstrated how morally compelling and publicly prevalent the human rights project had become.[9]

It should be emphasised that the Declaration is an expression of 'the common standard to be achieved by all nations and all people of the world'. Article 1 of this document clearly expresses the idea of basic human rights: 'All human beings are born free and equal in dignity and rights'. Although seemingly easy, the process of creating the Declaration was laborious, considering the circumstances under which many of the countries in the world lived at that time – apartheid in South Africa, the USSR which placed its main focus on collective rather than individual human rights, etc. The UN Commission on Human Rights, under the leadership of *Eleanor Roosevelt*

7 'Declaration of the International Rights of Man', 1941, p. 664.

8 Roosevelt, 1941; Duan, 2017.

9 United Nations, General Assembly, *Verbatim Record of the Hundred and Eighty-Third Plenary Meeting,* UN Doc. A/PV.183, at 933 (1948). The Universal Declaration of Human Rights was adopted by the United Nations, with 48 votes to zero plus 8 abstentions (the BSSR, Czechoslovakia, Poland, Saudi Arabia, Ukraine, the Union of South Africa, USSR, and Yugoslavia).

faced a truly great challenge that ultimately ended successfully.10 The essence of the UN Universal Declaration of Human Rights is that all humans have the right to freedom from discrimination, torture, and slavery; all humans are equal before the law; all humans have the right to privacy, peaceful public assembly, freedom of thought, and freedom of religion; all humans deserve equal pay for equal work in a safe environment; all humans deserve access to food, water, shelter, and education; and that everyone, especially governments, have a responsibility to protect human rights. Of most importance is that these rights cannot be taken away. The Universal Declaration of Human Rights is a declaration in form and essence. It is a formally non-binding document because René Cassin and its other creators believed that a document in the form of a "manifesto" supported by everyone who overthrew the Nazi regime at that point in time was the very maximum that could be achieved.

> 'The cruelties and oppression of the Nazi regime in Europe brought the conviction both during and after the Second World War that the international recognition and protection of human rights for people throughout the world is essential to the maintenance of international peace and order.'[11]

A binding human rights treaty was impossible to adopt immediately after World War II. *René Cassin* believed that it was the best possible time to create a basic document on which future generations could build other human rights documents, and that is exactly what happened. The architects of the UDHR believed that the Declaration should provide moral guidelines rather than act as a legal instrument. This is why in the international theory of human rights, some authors have viewed the Declaration primarily as a symbolic document, and its political and moral importance has outweighed its legal significance. Although René Cassin is widely known as an author of the Universal Declaration, he never made this claim himself. However, he does claim to be the sole author of the first draft of the Declaration upon which subsequent works were based. He stated that the eight-man drafting committee called on him to prepare a preliminary Declaration draft on 'the basis of material assembled by prof. *John P. Humphrey* and prof. *Emile Giraud*', and proposals submitted by the states, Panama and Cuba.[12]

However, prof. Humphrey, as Director of the Human Rights Division of the U.N. Secretariat, said that the story of "writing" the Declaration started earlier, on January

10 The UN Commission of Human Rights was consisted of eighteen representatives of governments that included Australia, Belgium, Soviet Byelorussia (the BSSR), Chile, China, Egypt, France, India, Iran, Lebanon, Panama, the Philippines, the UK, the US, the USSR, Uruguay, and Yugoslavia. The eminent UDHR team included Eleanor Roosevelt, P. C. Chang, Charles Malik, René Cassin, and Secretariat Humphrey in the most influential roles. In the human rights literature, Cassin is honored with title "father of Universal Declaration". Winter and Prost, 2013, p. 237.

11 Oda, 1968, p. 497.

12 Cassin, 1968a, p. 4; Cassin,1968b, p. 3.

27th, 1947, during the first regular session of the Commission under the chairmanship of Eleanor Roosevelt. According to his view, the document can be understood as an explicit elaboration of the rights granted by the UN Charter, supporting of the Declaration as a part of treaty law or, more precisely, as a codification of customary international law.[13]

The UDHR has become a living document, primarily with a moral authority, bearing in mind that the interpretations of the text have been adapted to the changing world. In this context, a judgment adopted by the Civil Tribunal of Brussels, explained that the

> 'Declaration has to be viewed as a mere declaration, without force of law. Its sole aim is to express the common ideal to be attained by all peoples and all nations, in order that by instruction and education respect for these rights and freedoms may be developed and that measures may be taken progressively to ensure that they are recognized and universally and effectively applied in the future'.[14]

The opinion that the Declaration is not a legal instrument has been expressed by various authorities including the Supreme Court of Justice and the United States Ambassador to the United Nations, Arthur J. Goldberg who said: 'The Universal Declaration has received universal recognition, but it remains just that, a declaration'.[15]

Mrs. Eleanor Roosevelt shared the same view: 'It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation'.[16] At the same time Mrs. *Roosevelt* made a different and enthusiastic statement about the document:

> 'This Declaration may well become the International *Magna Carta* of all men everywhere. We hope its proclamation by the General Assembly will be an event comparable to the proclamation of the *Declaration of the Rights of Man* by the French people in 1789, the adoption of the *Bill of Rights* by the people of the United States, and the adoption of comparable declarations at different times in other countries'.[17]

13 Humphrey, 1984, p. 65.
14 *M. v. United Nations and Belgium*, 45 I.L.R. 446 (Civ. Trib. of Brussels 1966), in *International law through the cases* 156, 157 (L.C. Green, 4th ed. 1978).
15 Goldberg, 1965, as well as Weston, 1990 (considering Ambassador Goldberg's dictum as "somewhat exaggerated").
16 Roosevelt, 1948.'The Declaration should not be in any sense a legislative document. The General Assembly was not a legislative body. Further, it was clear that the Declaration, as envisaged, did not create legal remedies or procedures to ensure respect for the rights and freedoms it proposed to the world; that ideal would have to be achieved by further steps taken in accordance with international and domestic law. The Declaration would have moral, not mandatory, force.' See: Sweeney, 1988, citing Humphrey, 1967, pp. 39, 51.
17 Ibid.

On the other side, there are authors who have viewed the Declaration as a document with legal weight. Proponents of this argument contend that the UDHR derives its legal power from two essential sources: its composition based upon customary international law, and its incorporation into national legislations.[18] The Universal Declaration 'constitutes an authoritative interpretation of the Charter of the highest order, and has over the years become part of customary international law'.[19] This argument for the force of the document's legal power is often closely associated with the UDHR's relevance to the UN Charter. In some systems, general or customary international law may be more easily implemented in national law than non-self-executing treaties.

Generally speaking, international human rights norms have inspired states to enshrine such standards into national constitutions and other domestic legislation. These may also provide avenues for the redress of human rights violations at a national level.[20] For instance, under *Article 9 of the Austrian Constitution*, generally accepted principles of international law are a part of municipal law, although this provision does not extend to treaty law.

Article 25 of the Federal German Basic Law provides: 'The general rules of public international law shall be an integral part of federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory'. However, a 1957 decision of the German Federal Administrative Court, which deemed the Universal Declaration to have "programmatic importance," nevertheless held that its provisions 'are not general rules of international law and do not therefore, according to Art. 25 of the Basic Law form part of Federal law'.[21] More recent German decisions have acknowledged the formative impact of the Declaration on the crystallisation of customary rules and courts have occasionally referred to the Declaration in considering alleged violations of rights.[22]

Under *Article 10 of the Italian Constitution*, domestic law is to conform to generally recognised principles of international law. Italian courts have taken a relatively broad view holding that the Universal Declaration

> 'is more than a mere declaration of intent from the point of view of Italian municipal law. On the contrary, it is a general principle of law which must be held to have become part of our law not only by virtue of Article 10 of the Constitution but also by virtue of the express, though also indirect, recognition

18 Hannun, 1995.

19 *Montreal Statement of the [Nongovernmental] Assembly for Human Rights* (1968), reprinted in 9 J. INT'L COMM. JURISTS REv. 94.

20 Council of Europe, n.d.a.

21 Judgment of June 29, 1957, BVerwG (Highest Admin. Ct.), 5 BVerwGE 153. See also 3 BVerwGE 171 (1956), 52 BVerwGE 313 (1977).

22 Judgment of May 4, 1971, BVerfG (Fed. Const. Ct.), 31 BVerfGE 58, Art. 16, reprinted in 72 I.L.R. 295 (Basic Right to Marry Case); Judgment of April 22, 1968, (Admin. Ct., Frankfurt), 1968 DVBI 472, Art. 15, reprinted in 60 I.L.R. 207 (Iranian Naturalization Case); Judgment of July 12, 1955, BGH (Fed. Sup. Ct.), 8 NJW 1365, reprinted in 22 I.L.R. 524 (Extradition of Greek National (Germany) Case).

> accorded to it in the law which incorporated the European Convention on Human Rights into domestic law, a convention which in turn refers to the 1948 United Nations Declaration in its Preamble'.[23]

The Constitution of the Netherlands in Article 93 contains an additional reference to 'resolutions of international institutions which may be binding on all persons by virtue of their contents after they have been published'.

Also, the provisions of the constitutions of Portugal, Romania, Spain and other European countries are of particular interest, since each directs its country's courts to "interpret" constitutional norms in conformity with the Universal Declaration. Many national constitutions have been directly inspired by the Universal Declaration. One author has estimated that 'no fewer than 90 national constitutions drawn up since 1948 contain statements of fundamental rights which, where they do not faithfully reproduce the provisions of the Universal Declaration, are at least inspired by it'.[24]

Many more examples of similarities between the provisions of the UDHR and national constitutions can be identified, since the Declaration has had a tremendous influence on national human rights standards. Its political and juridical importance cannot be questioned.

As a conclusion, the UDHR has become a source of inspiration for national constitutional catalogues of human rights. As a result, the constitutions have begun to reflect the direct domestic legal effects from international treaties, including human rights treaties. Hence, contemplations on human rights treaties are reflected as an external expression in the form of sources of law, and this is a purely positive way of approaching the issue.

> 'At the same time, it is quite evident that the field of human rights is concerned primarily with the effective protection of those rights, and the formally conceived issue of sources, in which these rights are merely declared, appear rather as subsidiary. It seems that the issue of the direct applicability of human rights, regardless of the source in which they are contained, is an issue more closely connected with the domestic tradition of the approach to the interpretation of law than with formal constitutional directives. And it is clear that especially the Central European region has been deeply afflicted by legal positivism (in the form of normativism), which prefers to devote attention to the formal sources and the relations between them, rather than devoting attention to the content of human rights.'[25]

23 Judgment of Feb. 1, 1962 (*Ministry of Home Affairs v. Kemali*), Cass. [Ct. of Last App.], Foro It. LXXXVII (1962), Part I, at 190, (1962), reprinted in 40 I.L.R. 191, 195; accord., Judgment of July 27, 1959 (Fallimento Ditta Maggi v. Ministry of Fin.), Trib. [Ct. of First Instance], Foro It. LXXXV (1960), I, col. 505, reprinted in 28 I.L.R. 607, 609 (both the Declaration and the European Convention 'have been made applicable in Italy by Italian municipal legislation').

24 Jayawickrama, 1992, p. 160.

25 Venice Commission. 2005.

2. Adoption, Structure, Implementation and Relevance of the ICCPR *versus* René Cassin's Concept

On 16th of December 1966, the UN General Assembly adopted two international treaties that shaped human rights and freedoms: The ICCPR and the ICESCR. Both these subsequent covenants have a binding force, i.e. the administrative and judicial authorities of the individual countries are responsible for their direct application. The two covenants are built on the rights contended in the UN Universal Declaration of Human Rights. According to Article 49, §1 ICCPR enters into force three months after the ratification or accession process (ICCPR Article 49, §1). All the State parties are required to take necessary steps to give effect to the rights recognised in the Covenant whereby inconsistencies of domestic law or practice with the Covenant must be changed. In the process towards the full implementation of the ICCPR, the efforts of State parties are supported by the UN Human Rights Committee (the Committee) through constructive dialogue and expert recommendations to the State concerned. State parties are requested to submit periodic reports to the Committee at intervals of between three and seven years. These reports contend the measures taken by the State concerned to implement the Covenant. Based on the information provided by the State party and other stakeholders, as well as through interactive dialogue with the State representatives, the Committee will issue recommendations to the State concerned for the effective implementation of the Covenant. It is recommended for State parties to establish a National Mechanism for Reporting and Follow-up, which can also give rise to coordinated efforts in the implementation of treaties.[26]

The International Covenant on Civil and Political Rights has two optional protocols. Firstly, an Optional Protocol to the ICCPR allows individuals to submit an individual complaint to the Human Rights Committee if any of their rights under the ICCPR have been violated. The First Optional Protocol was adopted by the UN on 16th December 1966 and came into force on 23rd March 1976. The Second Optional Protocol to the ICCPR aimed to commit state parties to the abolition of the death penalty. It was adopted by the UN on 15th December 1989 and came into force on 11th July 1991. Both Covenants guarantee and protect the following rights.

26 OCHR, 2016.

Table 1. Similarities and Differences Between Covenants [27]

ICCPR[28]	ICESCR[29]
• Freedom from discrimination • Right to equality between men and women • Right to life • Freedom from torture • Freedom from slavery • Right to liberty and security of person • Right to be treated with humanity in detention • Freedom of movement • Freedom of non-citizens from arbitrary expulsion • Right to a fair trial • Right to recognition before the law • Right to privacy • Freedom of religion and belief • Freedom of expression • Right of peaceful assembly • Freedom of association • Right to marry and found a family • Right of children to birth registration and nationality • Right to participate in public affairs • Right to equality before the law • Minority rights	• Freedom from discrimination • Right to equality between men and women • Right to work • Freedom to choose and accept work • Right to just and favourable conditions at work • Right to form trade unions • Right to strike • Right to social security • Right of mothers to special protection before and after birth • Freedom of children from social and economic exploitation • Right to an adequate standard of living • Freedom from hunger • Right to health • Right to an education • Freedom of parents to choose schooling for their children • Right to take part in cultural life • Right to enjoy the benefits of science • Rights of authors to moral and material interests from works • Freedom to undertake scientific research and creative activity[30]

The rights catalogued and defined by both Covenants are substantially the same as those set forth in the Universal Declaration, but still there are some important differences. Unlike the Declaration, each of the Covenants recognises the right of all peoples to self-determination. There is no mention in either Covenant of the right to own property or of the right not to belong to an organisation. The Covenant on Civil and Political Rights gives States that are parties to the Covenant the right to take measures derogating from their obligations under it 'in time of public emergency which threatens the life of the nation'.[31]

The ICCPR has 53 articles divided into 6 parts. Parts I and II contains provisions which are generally applicable to all the rights described in the Covenant while the Part III is the "backbone" of the Covenant, elaborating on substantive individual rights. The final Parts deal with the establishment of the Human Rights Committee, the Committee's monitoring functions, and a variety of technical matters.

27 See more: https://www.ohchr.org/en/what-are-human-rights/international-bill-human-rights (Accessed: 15 April 2024).
28 Nowak, 2005.
29 United Nations Office of the High Commissioner for Human Rights, n.d.b.
30 English, 2024.
31 United Nations Office of the High Commissioner for Human Rights, n.d.a.

The first two Parts are composed of articles numbered from 1 to 5. They are defined as an important set of provisions with a structural nature. Article 1 guarantees the right of self-determination. This right is expressly ascribed to "peoples" rather than to individuals, and it is the only right that is common to both Covenants. Article 2 is a fundamental cornerstone of the Covenant where it is emphasised that a State party must respect and ensure the rights of the Covenant to all persons within its territory and subject to its jurisdiction. With some exceptions, such as the right to vote, these rights extend not only to citizens but to all persons in the State's territory and jurisdiction and must be respected without discrimination. If necessary, legislation should be enacted to properly guarantee these rights.[32]

The obligations under the ICCPR can be broadly categorised into negative and positive obligations. Negative obligations generally impose a duty on the state to abstain from interference with the enjoyment of rights by individuals. These obligations are traditionally viewed as "classic" civil and political rights protections, in which the state must refrain from violating individual liberties. For example, ICCPR Article 6, Right to life, declares that States must not engage in the arbitrary deprivation of life, such as extrajudicial killings. Article 7, Freedom from torture, means that States are prohibited from subjecting individuals to torture or cruel, inhuman or degrading treatment, Article 17, Right to privacy, means that States must not engage in arbitrary or unlawful interference with privacy, family, home or correspondence. And Article 19, Freedom of expression, explains that States must not censor or unduly restrict speech, unless under narrowly defined and necessary limitations. On the other hand, positive obligations require that a State should take proactive measures to ensure that rights are effectively guaranteed. This extends to protection against violations by non-State actors, ensuring legal, institutional, and practical mechanisms for the realisation of rights. For example, ICCPR Article 2(2), Implementation measures, stipulates that States must adopt legislative or other measures necessary to give effect to the Covenant's provisions. Article 6, Right to life, means that States must not only refrain from unlawful killings but must also take appropriate measures to protect individuals from any threats to life by a third party (domestic violence, organised crime, etc.). Article 14, Right to a fair trial, gives positive obligation that States are required to establish an independent and impartial judiciary, provide legal aid where necessary, and ensure due process etc. While negative obligations are generally less resource intensive and more easily justiciable, positive obligations pose significant practical and normative challenges which include requirements for State resources

32 United Nations Office of the High Commissioner for Human Rights, n.d.c.

and administrative capacity, as well as the need for detailed legislation and enforcement mechanisms.[33]

Article 3 of the Covenant provides the equal right of men and women to enjoy the Covenant rights while Article 4 of the Covenant recognises exceptional situations where a State party cannot protect some human rights for a temporary period of time. This article sets out the boundaries for suspending and/or derogating certain rights.[34] Article 5 is usually defined as a general protective provision in which it is stated that nothing in the Covenant confers the right to limit or destroy any of its provisions. A State party whose domestic law provides greater protection than those contained in the Covenant may not use that as an excuse to restrict or derogate from the fundamental rights contained in the Covenant.

In Part III, the Covenant stipulates substantive rights and fundamental freedoms. In Articles 6 to 11, which are perceived as core provisions for the protection of the life, liberty and the physical security of the individual, the narrow confines within which the death penalty may legitimately be imposed in States parties where that penalty has not been abolished are also stipulated.[35]

Specific prohibitions are set out concerning torture, unauthorised medical experimentation, slavery and forced labour. The rights of a person in the context of the deprivation of liberty, commonly by arrest, and in detention, are also covered here.[36]

Articles 12 and 13 deal with the movement into, out of, and within the country together with the rules applicable to the expulsion of aliens. Articles 14 to 16 concern the treatment of individuals within the judicial process, guaranteeing the right to a fair trial in both criminal and civil cases. This right is of fundamental importance and is closely linked to the right to an effective remedy set out in Article 2. These articles include the right to equality before the courts and to the fair adjudication of claims resolved before courts and tribunals, and they list a series of additional protections applicable to criminal trials.[37]

Article 15 prohibits retroactive criminal punishments, while Article 16 states that everyone has the right to be recognised as a person before the law. Articles 17 to 22 stipulate the fundamental freedoms to be enjoyed free of unjustified external

33 The dichotomy between negative and positive obligations under the ICCPR is not only a semantic distinction but reflects the dual nature of human rights protection in international law. A state's compliance with the ICCPR is not achieved solely by abstaining from direct violations, but also by actively safeguarding the rights of individuals through effective legislative, judicial, and administrative measures. The Human Rights Committee's growing jurisprudence underscores this dynamic understanding, reinforcing that the Covenant's guarantees are both defensive and enabling in character, requiring states to act where inaction would result in rights being rendered ineffective.

34 Ibid.

35 Ibid.

36 Ibid.

37 Ibid.

interference, and guarantee the right to privacy, freedom of thought and religion, freedom of opinion and expression, which is also subject to prohibitions in Article 20 of the advocacy of war or of national, racial or religious hatred, as well as the right to peaceful assembly and freedom of association, including through trade unions.

Articles 23 and 24 of the Covenant recognise the particular role of the family and address issues of marriage and the rights of children, while Article 25 highlights the right to political participation, with special emphasis on the right to vote and the right to be elected at genuine periodic elections by universal suffrage and secret ballot, as well as the right to take part in public affairs and to have equal access to public services.

Together with Articles 2 and 14, Article 26 is seen as a fundamental provision of the Covenant enshrining the rights to equality before the law and to equal protection of the law, with a wide guarantee of non-discrimination. Part III of the Covenant concludes with Article 27, which guarantees persons belonging to ethnic, religious or linguistic minorities the right, in community with other members of the group, to enjoy and practice their own culture, religion or language. While nominally expressed as an individual right, this provision may be best understood as a group right that protects a community of individuals.[38]

Articles 28 to 45 set up the Committee and provide for its functions and procedures, while Articles 46 and 47 include the provisions with respect to the UN Charter, and linked with Article 1, the inherent right of people to freely enjoy and utilise their natural wealth and resources. Articles 48 to 53 contain standard treaty provisions concerning the mechanisms for becoming a party, and presenting notification and amendments. Article 50 provides that the Covenant's provisions extend to all parts of a federal State without limitation or exception. This article is a restatement of the well-known principles of international law whereby a State's international responsibility is engaged by the acts and omissions of its authorities at all levels, whether national, provincial or local, and that a State's domestic law does not excuse a breach of a treaty obligation.[39]

The Covenant places certain limitations on the exercise of the recognised rights primarily in the interest of public safety, public order and morals, national security, or for the protection of human rights of others. Such limitations must be stipulated in domestic law and must be proportional, reasonable and non-arbitrary. The so-called limitation clauses provide states with an opportunity to balance universal human rights with national specifics, cultural and religious values.[40] States are under obligation to prove that restrictions are necessary and reasonable although the State is not permitted to violate or derogate any person from the right to life, freedom from torture, freedom from slavery and slave trade, freedom from civil prison, the right

38 Ibid.
39 Ibid.
40 Symonides, 2019.

against *ex post facto* criminal law, the right to recognition as a person before law, and the right to freedom of thought, conscience and religion.

These seven rights are considered the minimum fundamental rights which should remain guaranteed to an individual at all times. The state has no excuse to abridge, limit or deny them to its people.[41]

It is important to mention that the States can make reservations or declarations in line with the 1969 Vienna Convention on the Law of Treaties, which exempts them from certain provisions in the document. This idea was crucial for getting as many States as possible to sign the human rights treaties.

Table 2. Structure of International Covenant on Civil and Political Rights[42]

Articles of ICCPR	Details
Article 1	It recognises the right of all peoples to self-determination, including the right to "freely determine their political status", pursue their economic, social and cultural goals, and manage and dispose of their own resources.
Articles 2 – 5	These articles enable parties to come up with legislation to give effect to the rights recognised in the Covenant, and to provide a legal remedy in case of violation of such rights.
Articles 6 – 27	Articles 6 –27 contain rights such as: • The guarantee of physical integrity as in the right to life and freedom from torture and slavery. • Freedom from unlawful arrest, the right to habeas corpus and the guarantee of individual liberty and security. • Fairness in law and its procedure through the rights to due process, fair and impartial trial, the presumption of innocence. • Freedoms of moment, thought, religion association, conscience, assembly, right to privacy and right to a nationality. • Disallowing propaganda for war and religious purposes as well as advocacy of national or religious hatred that will result in violence or hostility. • Political participation, including the right to vote • Equality before the law, no discrimination on the grounds of an individual either belonging or not belonging to a minority group.
Articles 28 – 45	These articles establish the guidelines by which the Human Rights Committee will operate, as well as the reporting and monitoring of the Covenant. It also enables the parties to recognise the authority of the committee to resolve disputes between the parties on the implementation of the ICCPR.
Articles 46 – 47	Articles 46 – 47 state that the provisions of the ICCPR does not mean that parties will interfere with the operation of the United Nations or "the inherent right of all peoples to enjoy and utilize full and freely their natural wealth"
Articles 48 – 53	Governs ratification, entry into force, and amendments of the Covenant.

41 Ibid.
42 United Nations, 1966.

3. Comparison of the ICCPR with Other Relevant Regional Documents

Human rights are increasingly being acknowledged through wider instruments that offer their protection. These instruments are usually classified under three main categories: 1) the geographical criteria (regional and/or universal); 2) the category of guaranteed rights and 3) the specific category of persons or groups to whom protection is given.[43]

International law in general and human rights laws specifically, are enforced through a treaty system. While there are no "international police" to make sure states comply with the law, States take it upon themselves to follow the treaties they have signed. This is hardly a fool-proof system, but it has evolved over the years with the aid of different types of compliance mechanisms.[44]

At the UN level, there are more than a hundred human rights documents. If we add to those documents' different regional human rights conventions and treaties, the number is further increased. Of the world's five continents, four have established systems for human rights' protection. The objective of these regional systems is to articulate human rights standards and mechanisms at a regional level without downgrading the universality of the human rights.

Bearing in mind that it is impossible to compare all these instruments in one chapter, the most relevant regional documents will be analysed in connection with the ICCPR. One general remark is that the main international and regional instruments uphold the same minimum human rights standards and that the Universal Declaration of Human Rights is the source of inspiration for all of them. These instruments may differ in their focus, or in their specific regional concerns but the undeniable truth is still that human rights have universal character and universal spirit. Most of the instruments are devoted to specific subjects such as racial discrimination, torture, enforced disappearances etc., or for special groups, such as women, children, migrant workers, and persons with disabilities. For example, the issue of internally displaced persons was first raised within the African political region before it became a matter for the UN concern. Furthermore, the mechanism of visiting places of detention as an effort for torture prevention was first established at European level before an Optional Protocol allowed the same mechanism under the UN Convention Against Torture. These examples show how regional and international norms and mechanisms can enhance and deepen the promotion and protection of human rights.[45]

The practical advantage of regional human rights norms and systems is that they are more likely to have been developed based on closer geographic, historical,

43 Council of Europe, n.d.b.
44 Currie, 2008. One such mechanism is international human rights courts. The most important are three human rights courts: The United Nations Human Rights Committee, the European Court of Human Rights, and Inter-American Court of Human Rights.
45 Council of Europe, n.d.a.

political, cultural, and social ties. Therefore, it can be said that the human rights protection is three-tiered: domestic, regional and international.

Table 3. Major United Nations' Human Rights Treaties[46]

Major United Nations' Human Rights Treaties		
Treaty	**Monitored by**	**Optional Protocols**
International Convention on the Elimination of Racial Discrimination (1965)	Committee on the Elimination of Racial Discrimination	
International Covenant on Civil and Political Rights (1966)	Human Rights Committee	First Optional Protocol establishing an individual complaint mechanism (1966) Second Optional Protocol aiming at the abolition of the death penalty (1989)
International Covenant on Economic, Social and Cultural Rights (1966)	Committee on Economic, Social and Cultural Rights	Optional Protocol recognising the Committee's competence to receive communications submitted by individuals or groups (2008)
Convention on the Rights of the Child (1989)	Committee on the Rights of the Child	Optional Protocol on the involvement of children in Armed Conflict (2000). Optional Protocol on the sale of children, child prostitution and child pornography (2000). Optional Protocol allowing children to bring complaints directly to the Committee (2011).
Convention on the Elimination of All Forms of Discrimination Against Women (1979)	Committee on the Elimination of Discrimination Against Women	Optional Protocol on the right to individual complaints (1999)
Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment (1984)	Committee against Torture	Optional Protocol establishing a system of regular visits by independent international and national bodies – monitored by the Subcommittee on Prevention (2002)
Convention on the Protection of the Rights of Migrant Workers and members of their Families (1990)	Committee on the Protection of the Rights of Migrant Workers and members of their Families	
The Convention on the Rights of Persons with Disabilities (2006)	Committee on the Rights of Persons with Disabilities	Optional Protocol on Communications allows individuals and groups to petition the Committee (2006).
The Convention on Enforced Disappearances (2006)	Committee on Enforced Disappearances	

46 Council of Europe, n.d.a.

The first difference between the two treaties, the ICCPR and the ICESCR, refers to the clarity and character of obligations of states with respect to two different types of rights. Article 2(1) of the ICCPR talks about States' obligations to respect and to ensure civil and political rights without distinction of any kind while the same article in the ICESCR uses much more cryptic language about how the compliance of States to the treaty on economic, social and cultural rights will be monitored.

The second difference between the two treaties is State responsibility. When the ICCPR was adopted, an independent monitoring body known as the Human Rights Committee (HRC) was established with three main responsibilities: 1. Examining states' compliance with the treaty approximately every five years; 2. Dealing with interstate complaints and 3. Receiving complaints from individuals who consider themselves to be victims of a violation of any of the political and civil rights contained in the ICCPR.

On the other hand, the ICESCR did not contain a Human Rights Committee but another special body, the Committee on Economic, Social and Cultural Rights (CESCR) consisted of 18 independent experts that monitor implementation of the Covenant by its State parties. The Covenant protects economic, social and cultural rights, such as the right to adequate food, adequate housing, education, health, social security, water and sanitation, and work.

The third difference can be found in the three levels of separation between the two sets of rights: 1. Different treaties that states could pick and choose from, 2. Different legal wording, and 3. Different accountability mechanisms.

The comparison of the ICCPR with the ECHR is also very important, keeping in mind that the ICCPR has been called 'probably the most important human rights treaty in the world', in recognition of its global coverage and wide range of protected rights, while the ECHR is seen as the most important convention for the protection of human rights in Europe. The ICCPR represents a common standard of civil and political rights achievements for all peoples and all nations, while the ECHR strengthens the human rights protection and promotion in Europe.

The European Court of Human Rights was established on the basis of the ECHR, while the United Nations HRC is a body that monitors the implementation of the ICCPR established within the Covenant. While there are substantive similarities and possibilities for a comparative approach, each institution – the ECtHR and the HRC – remains an authentic interpreter of their respective treaties, and neither of them should give any binding interpretations of other norms of the international law.

The ICCPR is defined as a global treaty. In terms of substance, contents and membership of states parties, the ICCPR and the ECHR overlap to a great extent. The two documents contain certain so-called derogation clauses which allow states to suspend certain human rights obligations in times of great danger. The states can temporarily "escape" from their obligations stipulated under these treaties. Despite the fact that international human rights instruments are older than the institution of "*ius cogens*" itself, which was not expressed in a positive sense before the adoption of Article 53 of the 1969 Vienna Convention on the Law of Treaties, human rights documents

contain provisions on the non-derogatory character of certain rights guaranteed by their provisions. Article 4(2) of the ICCPR enumerates a comprehensive list of rights from which no derogation is permitted, even in times of emergency. These include: the right to life[47]; the prohibition of torture and cruel, inhuman, or degrading treatment or punishment[48]; the prohibition of slavery and servitude[49]; the prohibition on imprisonment for the inability to fulfil a contractual obligation[50]; the principle of legality in criminal law (*nullum crimen sine lege*)[51]; the recognition of legal personality[52]; and the freedom of thought, conscience, and religion.[53] These rights reflect the core values of human dignity, personal autonomy, and legal certainty. The inclusion of rights such as the freedom of religion and legal personality underlines the ICCPR's broader conception of non-derogability, which encompasses both physical integrity and fundamental civil liberties.[54]

In contrast, the ECHR limits its non-derogable rights to four provisions, as outlined in Article 15(2); the right to life, except with respect to deaths resulting from lawful acts of war[55]; the prohibition of torture and inhuman or degrading treatment or punishment[56]; the prohibition of slavery and servitude[57]; and the principle of legality in criminal law.[58] Notably absent from the ECHR's list of non-derogable rights are the freedoms of religion and conscience, the right to legal personality, and the prohibition of imprisonment for debt.[59] Furthermore, Article 2 of the ECHR contains a qualification not found in the ICCPR: it permits derogation for deaths resulting from the use of force in lawful acts of war, which creates a potentially broader margin for states to justify lethal actions during armed conflict.

The ICCPR adopts a more expansive view of non-derogable rights, aiming to provide comprehensive protection even under exceptional circumstances. Its explicit protection of freedom of religion[60] and the right to recognition as a person before the law[61] illustrates a broader conception of inalienable rights. By contrast, the ECHR limits non-derogable rights to the most essential protections of physical integrity and legal certainty. While the ECHR does protect other fundamental freedoms – such as freedom of expression, religion, and assembly – these rights are in principle, subject to derogation in emergencies, potentially leaving gaps in protection when national

47 ICCPR, Art. 6.
48 Ibid., Art. 7.
49 Ibid., Art. 8 paras. 1–2.
50 Ibid., Art. 11.
51 Ibid., Art. 15.
52 Ibid., Art. 16.
53 Ibid., Art. 18.
54 International Covenant on Civil and Political Rights, Art. 4.
55 ECHR, Art. 2.
56 Ibid., Art. 3.
57 Ibid., Art. 4 para. 1.
58 Ibid., Art. 7.
59 European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.
60 ICCPR, Art. 18.
61 Ibid., Art. 16.

institutions are under strain. Another point of divergence lies in the treatment of slavery and forced labour. The ICCPR categorically prohibits both slavery and servitude, while the ECHR only guarantees non-derogability for slavery, not forced or compulsory labour, which is regulated under Article 4(2) and is not included in the non-derogable category. Moreover, jurisprudence plays a crucial role. Although the ECHR contains fewer non-derogable rights, the ECtHR has developed a comprehensive body of case law that may serve as an additional check on abusive derogations. In contrast, while the UN Human Rights Committee's jurisprudence is influential, it is not legally binding in the same way.

4. The UN Human Rights Committee (the Committee) and Its Landmark Cases

The Committee is an independent expert body created by the ICCPR. Although some of the rights protected by the ICCPR are also addressed in other human rights treaties at a global level, certain fundamental rights are substantively guaranteed to everyone only by the ICCPR, such as freedom from detention, freedom of expression, and the right to political participation. The Committee started its work in 1977 under Article 28 of the Covenant. It consists of 18 members, who must be nationals of the countries-parties to the Covenant, and are legal experts, 'persons of high moral character and recognized competence in the field of human rights', with 'consideration given to the usefulness of the participation of some persons having legal experience'. Article 36 of the ICCPR requires the UN Secretary-General to 'provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant'.

The Committee members are elected by a secret ballot to four-year terms and nominated by the States parties. Under Article 31, the Committee should take care of the equitable geographical distribution of membership and to the representation of the different forms of civilisation and of the principal legal systems. Committee members are elected in two-yearly intervals at the United Nations Headquarters, during the annual session of the General Assembly.

Members play diverse roles. One former member, Martin Scheinin, has emphasised three ideal types of Committee member, which he and a co-author call "the Captain, the Fire Brigade, and the Icebreaker".

> 'The captain emphasizes maintaining stability on a forward course, as if the Committee were a massive vessel that could not make sharp turns or reduce speed quickly. The fire brigade responds to burning injustices, and rushes to extinguish them by any means that work. The icebreaker leads the way through blocked seas, creating the single channel that states must follow to

> reach the treaty's goal. *Scheinin* makes evident his sympathy with the fire brigade."[62]

The HRC has elected a new Chairperson from a different region every two years since 1987. Along with the three Vice-Chairpersons and a Rapporteur (for the Annual Report), the Chairperson participates in the Bureau to handle certain administrative matters.

There are three special rapporteurs appointed by the Committee to perform specific functions: the Special Rapporteur on New Communications, whose functions include the registration of new complaints under the Optional Protocol and such preliminary issues as requests for interim measures of protection; the Special Rapporteur on Follow-ups to Views, who monitors the implementation of the Committee's decisions on the merits of individual cases and the Special Rapporteur on Follow-ups to Concluding Observations, who is tasked with the Committee's new procedure of following-up with respect to individual State party reports considered by the Committee.[63]

Special Rapporteurs are appointed for two-year terms to perform specialised functions, such as the follow-up procedures. The heaviest load is carried by the Special Rapporteur for New Communications and Interim Measures, who is on call year-round for urgent decisions. One member in an average session is likely to play multiple roles, as rapporteur for one state report, task force member on another, rapporteur for a few communications, and more generally actively participating in deliberations on concluding observations, communications, pending draft general comments, and the HRC's working methods.[64]

Members may be re-elected upon the expiry of their terms. If a committee member vacates his or her position early, another election may be held. After elections, members also maintain contact with States parties and engage in dialogue on general issues of mutual concern through the forum of meetings with States parties that the Committee regularly schedules during its sessions. Members of the Committee serve in their personal capacity, not as representatives of their governments, and according to ethical guidelines. The proceedings of the Committee should be politically impartial.

The First Optional Protocol of the ICCPR authorises the Committee to receive complaints from individuals alleging that their rights under the ICCPR have been violated. This process is defined as the Individual communication procedure. Communications may only be submitted to the Committee where they relate to a State that has ratified this Protocol, and all domestic remedies have been exhausted.

62 Neuman, 2016; Slotte and Scheinin, 2011, p. 89.
63 Ibid.
64 Neuman, 2016, p. 9, and Human Rights Civil and Political Rights: The Human Rights Committee Fact Sheet No. 15 (Rev.1), p. 12.

The Committee acts in a quasi-judicial manner and conducting its work on a fair basis to both petitioners and States parties. In Article 5, paragraph 4 of the ICCPR, the Committee's decisions on the merits are referred to as "views". Although views are read like court judgments, in fact drafters of the ICCPR did not call them so, nor did they confer legally binding force upon them. This is the first drawback of the Optional Protocol. The second drawback is that the Protocol does not provide an enforcement mechanism of the Committee's views. In practice they are seen as recommendations. To make the Committee more effective, a State may provide an implementation of the Committee's decisions in its domestic legislation.[65]

The Second Optional Protocol of the ICCPR aims for the abolition of the death penalty. In Article 1 of the OP2, it is stipulated that each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction. States are permitted to enter a reservation allowing the application of the death penalty in time of war, for serious crimes of a military nature committed during wartime.

The benefits of the stipulated Covenant rights depend mostly on the implementation measures taken by the States parties. Domestic implementation gives effect to the rights of individuals, while international implementation, through the mechanisms of reporting and complaint systems, is set up as a secondary means.

The Committee has three principal activities: the examination of states' reports, the decision on individual communications, and the writing of General Comments. Each of these activities has evolved over the lifetime of the Committee. According to Article 40 of the Covenant, all States are obliged to submit reports to the Committee on the measures they have adopted to give effect to the rights established in the Covenant, and on the progress made in the enjoyment of those rights. In 1997, the Committee changed its previous rule regarding subsequent periodic reports, under which States parties were generally required to submit reports every five years. The Committee may call for reports outside the five-year cycle from any States which are suffering from acute human rights crises.[66]

The process of examining a national report runs across two Committee sessions. At the first session, the report is assigned to a group of between four and six Committee members known as a Country Report Task Force. This Group is designed to streamline the reporting procedure and improve the quality of dialogue with States parties. At least one member of the Group should come from the same region as the relevant State. One member is the designated "country rapporteur", whose main responsibility is to make a report through the Committee's processes. With the assistance of the Committee's secretariat, the CRTF draws up a "List of Issues" arising from the relevant report and other information supplied to the Committee.[67]

The Committee is competent to carry out the interpretive function (authoritative elaboration) of the ICCPR implementation. Interpretations are foreshadowed

65 Human Rights Civil and Political Rights
66 Human Rights Civil and Political Rights, p. 15.
67 Ibid., p. 18.

in Concluding Observations, articulated in holdings on communications, and summarised in General Comments. In this sense, the International Court of Justice expressed its appreciation of the HRC's role in a well-known judgment applying the ICCPR:

> 'Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of its 'General Comments'. Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of the treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled'.[68]

In 2022, the Committee enlarged its jurisprudence by issuing 175 individual communications (95 communications decided on merit, 21 declared inadmissible and 59 discontinued). As had been the case in previous years, the Committee received the greatest number of communications from all the United Nations treaty bodies, and the backlog of submissions continued to be a major issue of concern.

Table 4. The Committee's Work Through the Years[69]

Year	New cases registered	Cases concluded	Pending cases
2021	212	132	1273
2020	170	155	1193
2019	413	134	1178
2018	190	101	746
2017	167	131	635
2016	211	113	599
2015	196	101	532
2014	191	124	456
2013	93	72	379
2012	102	99	355
2011	106	188	352

68 Taken from Neumann, Ibid., p. 5; see also: *Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*), Judgment, 30 November 2010, ICJ Reports (2010) 636, at 664.
69 Based on author's analysis.

In the next section, several relevant cases and landmark decisions from the Human Rights Committee archive will be elaborated.

In the case of *Portillo Cáceres v. Paraguay*[70], the Committee addressed, for the first time, the State's obligation to protect individuals from environmental harm under Articles 6 (right to life) and 17 (protection of the family) of the ICCPR. The Committee reinforced the recognition of environmental protection as integral to human rights, following the example set by the Inter-American Court of Human Rights and the ECtHR in cases such as *Cordella and others v. Italy*[71], *López Ostra v. Spain*[72], and *Dubetska and others v. Ukraine*[73] etc.[74] The IACHR, in its advisory opinion[75], affirmed the existence of an autonomous right to a healthy environment, stating that any right could be jeopardised by environmental harm (paras. 63, 64). Additionally, the Committee's General Comment No. 36 on the Right to Life[76] raises significant points regarding the right to life in the context of environmental damage. The Committee emphasised that environmental degradation, climate change, and unsustainable development are some of the most urgent and serious threats to both the present and future generations' ability to fully enjoy the right to life (para. 62). In this case the Communication was filed by two families who had been poisoned by excessive pesticide and insecticide use from nearby industrial farms. Despite existing legal regulations prohibiting such actions, the State had failed to adequately enforce these laws. As a result, one family member died, others were hospitalised, and their families experienced significant losses, including the destruction of fruit trees, the death of farm animals, and severe crop damage. The families argued that the State had neglected its duty to protect them by not taking appropriate action. The Committee called on Paraguay to provide reparations to the victims, including a thorough investigation, criminal and administrative sanctions, and full compensation for the harm caused. The significance of this case is that it represents the Committee's explicit acknowledgment of the connection between environmental protection and human rights in an individual context, drawing on the jurisprudence of regional bodies. The Committee referenced General Comment 36, reaffirming the right to life with dignity and stating that 'States must take all appropriate measures to address societal conditions that may endanger the right to life, including environmental pollution'.[77]

In the case of *VDA, on behalf of her daughter LMR, v. Argentina*.[78] LMR is a girl with an intellectual disability. She was raped by her uncle and as a result became pregnant. The first hospital, where her pregnancy was identified, refused her mother's request

70 ESCR-Net, 2020.
71 European Court of Human Rights, 2019.
72 European Court of Human Rights, 1994.
73 European Court of Human Rights, 2011.
74 Reeh, 2019.
75 Inter-American Court of Human Rights, 2017.
76 United Nations, 2019b.
77 Reeh, 2019; See also: ESCR-Net, 2020.
78 See more: https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/Amicus-Brazil_Annex.pdf (Accessed: 15 April 2024).

for a termination of the pregnancy. She was referred to another hospital where the Bioethics Committee was solicited for an opinion as to whether this abortion could proceed. Since it was determined that this case fell within the definition of a non-punishable abortion in the Argentinian Criminal Code, the hospital began steps to carry out the abortion.[79] Despite the fact that the Argentinian Criminal Code does not require judicial authorisation in these cases, an injunction was ordered by a juvenile court judge, who subsequently ruled that 'a termination should be prohibited because she did not find it acceptable to repair a sexual abuse "with another wrongful assault against a new innocent victim, i.e. the unborn child"'. This decision was upheld on appeal at the Civil Court. A further appeal was filed with the Supreme Court of the province, which overturned the Civil Court ruling and found that no judicial ruling was required for the hospital to perform the procedure in this case. Despite this ruling, the hospital and the family were under considerable pressure not to perform the abortion, and the hospital ultimately refused to perform the procedure on the grounds that the pregnancy was too advanced. The family sought assistance from other hospitals and clinics, but all of them refused. On 26th August 2006, two months after the rape had been reported and the pregnancy identified, the girl underwent an illegal abortion. VDA argued

> 'forcing her daughter to continue with her pregnancy constituted cruel and degrading treatment and, consequently, a violation of her personal well-being under Article 7 of the Covenant. The refusal to terminate the pregnancy inflicted many days of mental and physical anguish and suffering on L.M.R. and her family, forcing them to resort to an illegal abortion that endangered her life and health while enduring opprobrium from numerous sources. The pressure to continue the pregnancy and give the baby up for adoption exposed the family to some very painful dilemmas. She felt that people dared to make such offers only because she was poor and found this deeply humiliating'.[80]

The Committee found a violation of Article 7 (prohibition of torture or other cruel, inhuman or degrading treatment or punishment) by the State party's omission 'in failing to guarantee L.M.R.'s right to a termination of pregnancy, as provided under Article 86.2 of the Criminal Code, when her family so requested' as this

> 'caused L.M.R. physical and mental suffering which was made especially serious by the victim's status as a young girl with a disability. In this connection the Committee recalls its general comment No. 20 in which it states that the right protected in Article 7 of the Covenant relates not only to acts that cause physical pain but also to acts that cause mental suffering'.

79 Ibid.
80 ESCR-Net, 2013.

Although the Committee could not impose damages, it did point to Article 2 of the Optional Protocol to the ICCPR, which creates an obligation for Argentina to provide compensation as a remedy and to take steps to ensure similar violations of the Covenant do not occur.[81] This Committee's case contributed to a growing consensus in international law that restricting women's access to an abortion may be considered as torture or cruel, inhuman or degrading treatment under Article 7 of the ICCPR. Obstructing access to legal, elective medical procedures may violate the Covenant. Additionally, it indicates that the Court will analyse the right of a person with a disability under Article 7 in a way which heightens the recognised impact of the violation.[82]

In the case of *A.S. and Others v. Italy and Malta*,[83] the Committee examined a communication alleging that the Italian and Maltese authorities had failed to fulfil their duties to protect life at sea and to promptly investigate a 2013 incident in the Central Mediterranean Sea, in which over 200 migrants drowned. The central issue was that Malta, as the responsible state for the Search and Rescue (SAR) area where the event occurred, and Italy, as the first state alerted and the one best positioned to provide aid, did not meet their search and rescue obligations under international law, thereby violating the migrants' right to life. The Committee found that Italy had violated the right to life of the complainants under Article 6(1) of the ICCPR, as it did not act with the required diligence in protecting life at sea (para. 8.5). Additionally, Italy was found to have violated Article 2(3)(a) by depriving the victims of access to an effective remedy, due to unjustified delays in investigating the incident (para. 8.7). This case marked a significant moment in the efforts to hold European states accountable for human rights violations related to the mishandling of migration and the abandonment of responsibilities to save lives at sea, as required by international law.

In the case of *Daniel Billy et al. v. Australia*,[84] the Committee found that Australia failed to adequately protect the members of an indigenous community living on four small, low-lying islands in the Torres Strait from the adverse impacts of climate change. This resulted in violations of the complainants' rights to enjoy their culture (Article 27 ICCPR) and to be free from arbitrary interferences with their private life, family, and home (Article 17 ICCPR).[85] The Australian authorities were criticised for their failure to implement an adaptation program to ensure the long-term habitability of the islands and to mitigate the effects of climate change (paras. 2.7 and 2.8). The complaint was based on the unique challenges faced by the Torres Strait indigenous community, which mirrors the challenges faced by low-lying island communities globally. Even minor sea level changes could significantly affect the community's survival, cause flooding, erosion, and the loss of territory, graves, and agricultural

81 Ibid.
82 See more: https://www.law.cornell.edu/gender-justice/resource/l.m.r._v._argentina (Accessed: 15 April 2024).
83 Criminal Justice Network, n.d.
84 ClientEarth, 2022.
85 Climate Litigation Database, n.d.

capacity. Additionally, higher temperatures and ocean acidification have resulted in the severe degradation of marine ecosystems, including coral bleaching, reef death, and the decline of seagrass and other vital species.[86]

Billy et al. v. Australia is the first climate change-related case heard by an international human rights body, advancing to substantive legal issues.[87] This decision is also the first international ruling to address human rights concerns in the context of climate change for small islands and their indigenous populations, aligning with the broader climate justice movement. The Committee's decision recognised the indigenous community's right to maintain its culture and continue to live on its ancestral lands, offering one potential response to the calls for climate protection from individuals, communities, states, organisations, and social movements.[88]

In the case of *Lazaros Petromelidis v. Greece*[89] the applicant, a Greek national and conscientious objector to compulsory military service, repeatedly objected to his conscription and each time was punished. Over 14 years, he faced discriminatory treatment through alternative civil service and, on subsequent occasions, was detained, tried, and imprisoned for his stance. Despite the enactment of new laws recognising conscientious objection, the applicant was repeatedly criminally charged, and justice proceedings were delayed. The applicant claimed that Greece violated his rights under Article 18(1) (lack of recognition of the right to conscientious objection until 2001) and Article 18(2) (penalties and fines imposed for exercising this right). The Committee found that the right to conscientious objection could be derived from Article 18(1) of the ICCPR, noting that penalising individuals for refusing to serve in the military due to their conscience or religion is incompatible with the Covenant. It also concluded that the alternative civil service did not provide a real option, as excessive working hours and insufficient compensation were discouraging. In addition to finding a violation of Article 18, the Committee determined that the applicant's detention and imprisonment violated his right to freedom from arbitrary detention (Article 9(1)), his right to freedom of movement (Article 12(2)), and his right not to be tried repeatedly for the same offense (Article 14(7)). Furthermore, the applicant's rights under Articles 9(1), 12(2), 14(7), and 18(1) were found to have been violated, and Greece was required to provide an effective remedy, including expunging the applicant's criminal record,

86 Kahl, 2022b, pp. 380–381; Torres Strait Regional Authority, 2014, p. 3.
87 Climate Law Accelerator Toolkit, n.d.
88 Taken from Kahl, 2022a.
89 United Nations Human Rights Committee, n.d.a.

reimbursing fines, and compensating him adequately. The State was also urged to take measures to prevent similar violations in the future.[90]

The cases of *Lazaros Petromelidis v. Greece*, *Daniel Billy et al. v. Australia*, *A.S. and Others v. Italy and Malta*, *VDA v. Argentina*, *and Portillo Cáceres v. Paraguay* illustrate the broad scope of the ICCPR and its application to diverse human rights contexts.

The similarities across these cases are that they all allege violations of ICCPR rights, particularly: *Article 6* (the right to life), *Article 7* (the prohibition of torture and cruel, inhuman or degrading treatment), *Article 17* (the right to privacy and family life), and *Article 18* (freedom of thought, conscience and religion).

In each case, the State is alleged to have failed to protect or respect individual rights, either by direct action, omission, or systemic shortcomings. All these cases involve vulnerable groups or individuals: *Petromelidis*: a conscientious objector (freedom of conscience); *Billy et al.*: indigenous peoples; *A.S. et al.*: refugees/migrants at sea; *VDA/LMR*: a girl with an intellectual disability, as well as the victim of a rape; *Portillo Cáceres*: a poor, rural child and her family affected by environmental harm.

The UN Human Rights Committee has used these cases to expand the interpretation of ICCPR rights, linking civil and political rights to environmental harm, reproductive rights, and climate change. The cases could be grouped in several legal and thematic groupings: Freedom of Conscience and Civil Liberties – *Petromelidis v. Greece*: addresses individual liberty and freedom from coercive state power in matters of conscience; Environmental and Climate Justice – *Billy et al. v. Australia* and *Portillo Cáceres v. Paraguay*: the first cases where the HRC explicitly linked environmental harm to human rights under the ICCPR (notably Articles 6 and 17); Right to Life and State Protection – *A.S. et al. v. Italy and Malta*: demonstrates state responsibility for extraterritorial human rights violations (failure to rescue at sea); Reproductive Rights and Dignity – *VDA v. Argentina*: a key case establishing that denial of abortion access, especially to a rape victim with an intellectual disability, which violates the ICCPR.

These cases collectively show how the ICCPR adapts to evolving human rights challenges, addressing: traditional civil liberties (*Petromelidis*); emerging global threats like climate change (*Billy*, *Portillo*); state responsibility in cross-border humanitarian crises (*A.S. and Others*); reproductive autonomy and gender-based violence (*VDA/LMR*).

90 Important remark: All cases elaborated in the chapter are retrieved from the Human Rights Committee's digital archive. While it is not the first time that the Committee has examined a case involving a punitive and discriminatory alternative service, this is the first case where the conscientious objector has not reported for such service at all. Furthermore, contrary to older cases, this time it was examined under, and was found to be a violation of, Article 18(1) of the International Covenant on Civil and Political Rights (ICCPR), about freedom of thought, conscience and religion, instead of Article 26 about discrimination – although in an interesting partly dissenting opinion a member of the Committee opined that the case should have been also examined under Article 26 and the Committee should have found an additional violation. See: *Frédéric Foin v. France* (CCPR/C/67/D/666/1995); *Marc Venier and Paul Nicolas v. France* (CCPR/C/69/D/690/1996).

Despite varying contexts, they all underscore the central principle that States must protect the dignity, safety, and rights of all individuals under their jurisdiction or effective control.

5. The UN Human Rights Committee Cases from the Central or Eastern European Countries

In the case of *A.S. et al. v. Albania*[91] the authors of the communication were A.S. (born in 1957), A.L. (born in 1968), Ar. S. (born in 1977), D.S. (born in 1984), N.S. (born in 1966), and S.S. (born in 1968), all of whom were Albanian nationals of Roma origin, residing in Elbasan, Albania. They were all unemployed and lived with their families, comprised of 32 people, including children, in informal houses built without permission in the early 1990s. Despite living there for over 20 years, and the authorities *de facto* tolerating their residence, the families had not received formal recognition of their homes. Their houses were connected to the public electricity grid and municipal water supply. On July 2nd, 2014, the Albanian Council of Ministers issued Decision No. 432, which decided to widen and extend Qemal Stafa Street, a major road in Elbasan, as part of a renovation project for the football stadium. On July 16th, 2014, the Elbasan municipal urban construction inspectorate issued eviction notices to the authors, demanding they vacate their properties within five days. The notices justified the eviction on grounds of "public interest" related to the road construction. However, the authorities did not consult with the families, nor did they offer any assistance, compensation, or alternative housing. The authors argued that domestic law provided no effective remedy to challenge the eviction notices, as appeals against such orders would not suspend their execution. Furthermore, while the Agency for the Legalisation, Urbanisation, and Integration of Informal Zones determined that A.L.'s house was eligible for legalisation, the other authors' homes were deemed ineligible due to their interference with the public road project.

Although a meeting was held on July 18th, 2014, where the authorities explained the evictions and the possibility of offering partial rental subsidies, assistance was only provided after the authors filed their complaint. No guarantees of alternative accommodation were made before the eviction date, and rental subsidies did not fully cover their rent, with no indication of how long they would last. Moreover, the municipal council had not approved any of the mayoral plans, and the release of funds for remedies would not be immediate. The authors claimed that the eviction violated their right to protect their family unit under Article 23 of the Covenant. They were forced to live in inadequate conditions that severely impacted family life. Additionally, the housing they were temporarily provided with did not meet their family needs and ignored their Roma culture. The authors argued that the eviction and destruction

91 Decision was adopted by the Committee at its 127th session (CCPR/C/127/D/2444/2014), (14 October – 8 November 2019). United Nations Human Rights Committee, n.d.b.

of their homes were discriminatory, as only Roma citizens were affected, violating Article 26 of the Covenant. They further claimed that systemic discrimination against Roma individuals made them particularly vulnerable to forced evictions and deprived them of opportunities to secure legal land tenure, violating Article 27. The Committee acknowledged the State party's argument that the authors did not exhaust domestic remedies, noting that they failed to challenge the eviction through administrative or judicial processes. While the authors attempted to legalise their homes, they did not explain why further appeals would have been ineffective. Given this, the Committee concluded that the authors had not exhausted domestic remedies, and thus the communication was inadmissible under Article 5(2)(b) of the Optional Protocol.

In the case of *A.A. v. Bosnia and Herzegovina*[92] the applicant was a Russian national of Chechen origin, facing extradition due to criminal charges in his home country. He claimed that his extradition would violate his rights under Articles 6 and 7 of the Covenant. The applicant had fled the Russian Federation in 2013 after facing persecution and threats from the Chechen authorities, who viewed him as a potential terrorist due to his religion, appearance, and attire (beard and short-sleeve trousers). He explained that most Sunni Muslims in Chechnya, who have been fighting for the recognition of a genocide against their people, were labelled as terrorists by the authorities, particularly those raising the issue of genocide or wearing a beard.

In 2012, the applicant's house was searched by the police, and in 2013, his car was stopped and drugs planted on him by the authorities. Fearing for his life, he fled Chechnya and initially sought refuge in Sochi, Russia, before moving to Turkey in 2013, where he worked as a computer programmer. In June 2015, the Russian Federation initiated a criminal case against him and several others for the alleged participation in an armed group in Syria. The applicant was accused of joining Da'esh (ISIS) between 2013 and 2015. The Russian authorities issued a warrant for his arrest in 2016, and in March 2018, the applicant travelled to Bosnia and Herzegovina to regularise his status. Upon arrival at Sarajevo airport, he was arrested based on two Interpol Red Notices issued by Russia and Bosnia and Herzegovina. On March 22nd, 2018, the Court of Bosnia and Herzegovina placed the applicant in provisional detention, which was later extended. The Russian Federation requested his extradition, assuring that this was not politically motivated, and that he would receive due process and humane treatment in detention. The applicant intended to apply for asylum, but this opportunity was delayed until July 2018. The Court of Bosnia and Herzegovina examined the extradition request on July 2nd, 2018, and determined that the legal conditions for extradition had been met. It noted that the applicant had filed for asylum after the extradition request, and that this did not prevent the extradition process. The applicant argued that his extradition would expose him to the risk of torture, ill-treatment, or unfair trial, but the Committee found that he failed to substantiate his claims with sufficient evidence.

92 United Nations Human Rights Committee, 2023b.

The Committee determined that the applicant had not provided convincing arguments or evidence of a real risk of harm if extradited to Russia. Thus, the Committee found that the communication was inadmissible under Article 2 of the Optional Protocol, due to the lack of substantiation of his claims regarding the risk of death, torture, or inhuman treatment.[93]

In the case of *Ivan Yordanov Lazarov and Yordan Ivanov Lazarov v. Bulgaria*[94] the authors of the communication were Ivan Yordanov Lazarov and Yordan Ivanov Lazarov, acting on their own behalf and on behalf of their deceased sister and daughter respectively, Valya Yordanova Lazarova. They were all citizens of Bulgaria. Ms. Yordanova was born on 25th March 1974. The authors claimed that the State party had violated Ms. Lazarova's rights under Articles 6, 7 and 10 (1) of the Covenant.

In 1992, Ms. Lazarova was diagnosed with schizophrenia. On 6th June 1998, Ms. Lazarova's family, lacking the support to ensure her care, was forced to place her in a Social Care Home for Mentally Ill Adults (the Radovtsi Home) in the village of Radovtsi, Bulgaria. The Radovtsi Home is an institution that is controlled and financed by the Ministry of Labour and Social Policy and the Dryanovo municipality. She remained under the care of the Radovtsi Home until her death, in January 2007. On 11th December 1998, Ms. Lazarova was diagnosed with an intellectual disability and was declared intellectually incapable by the Veliko Trnovo Regional Court. From that date, she was represented by her parents as her guardians. During her nine-year stay in the Radovtsi Home, her parents were never asked to make any decisions with respect to her accommodation, care or treatment, which was carried out by the institution. In October 2006, an inspection by the Agency for Social Assistance, which operates under the authority of the Ministry of Labour and Social Policy, established that the Radovtsi Home was in a poor state of repair. The inspectors found some 20 residents with severe disabilities isolated in a special care room. They were locked up in appalling conditions – barefoot, unwashed and soaked in urine and excrement. The Agency ordered the immediate closure of the room. It was subsequently closed down, and the practice of isolating residents ceased on 1st November 2006. Ms. Lazarova was one of the residents who had been isolated in the special care room. Ms. Lazarova was administered a medication with a sedative effect, used to moderate states of agitation. Afterwards, it was discovered that she had disappeared from the institution. Another resident reported that she had decided to go to the village, since she was hungry. According to the residents, Ms. Lazarova often cried because she was hungry, and she had previously visited a man in the village who had given her food. On that day, seven staff were working at the institution, which housed 114 residents, including 20 like Ms. Lazarova, with high support needs. The staff carried out a search on that day, which was completed by the evening. Temperatures below 0°C were expected during the night, creating a substantial risk to Ms. Lazarova. There is evidence that residents had previously gone missing in extreme temperatures and that they had allegedly died.

93 Ibid.
94 United Nations Human Rights Committee, 2023a.

The institution contacted the police on 3rd or 4th January 2007 and Ms. Lazarova was declared missing on 4th January 2007. On 8th January 2007, the authors were notified of her disappearance, and they initiated a further search. On 22nd January 2007, in a forest approximately 20 km away from the Radovtsi Home, Ms. Lazarova was found dead by a shepherd, who notified the police. The cause of death was hypothermia and physical exhaustion. She had been dead for at least 10 days before her body was found. Following Ms. Lazarova's disappearance, it became evident that she had been subject to neglect and abuse during her time at the Radovtsi Home.

The Committee found evidence of neglect and abuse resulting from beatings at the institution, malnutrition and the use of strong sedative medication without proper supervision. The State party admitted that the authorities were aware of the failures in care and treatment at the Radovtsi Home, at least following its inspection in 2006, and that those failures included a lack of staff leading to an ineffective oversight following the closure of the isolation ward. The Committee considered that Ms. Lazarova had been exposed to inhuman and degrading treatment in violation of Article 7 of the Covenant. Regarding the conditions of confinement, the Committee noted that the State party conceded that the material conditions at the Radovtsi Home were substandard mainly as a result of chronic underfunding and that, at the relevant time, residents could not be properly supervised owing to understaffing. The Committee also noted the information from the authors that Ms. Lazarova was regularly locked in an isolation ward until October 2006 and that the residents were kept in inhuman and insanitary conditions, without proper medication and clothing, often hungry and lacking adequate hygiene, amounting to humiliating treatment. The Committee concluded that Articles 6(1), 7 and 10(1) of the Covenant were violated. Pursuant to Article 2(3)(a) of the Covenant, the State party was obliged to provide the authors with an effective remedy. This required it to make full reparation to individuals whose Covenant rights had been violated. Accordingly, the State party was obligated, *inter alia*, to take appropriate steps to ensure that conditions in psychiatric care facilities were compatible with the State party's obligations under articles 6, 7 and 10 of the Covenant. The State party was also obliged to take all necessary steps to prevent similar violations from occurring in the future.

In the case of *A.B. and B.D. v. Poland*[95] the applicants submitted a complaint on their own behalf and on behalf of their two children, both of whom were minors. All family members were citizens of the Russian Federation and of Chechen origin, who had fled from the country and arrived in Belarus in January 2017 with the intention of applying for asylum in Poland. According to the complaint, A.B.'s brother was working in a security firm in Chechnya in 2010. He disappeared a few months after he got the job and had not been heard from since. In the first half of 2013, men, some in camouflaged uniforms, arrived at A.B.'s house in Grozny, asking him about his cousin, who, they claimed, was suspected of involvement with a terrorist organisation. A.B. told them he did not know where his cousin was. The men took him to a private house

95 See more on: https://ccprcentre.org/decision/17375 (Accessed: 20 April 2024).

where he was held for several days and beaten and tortured. After this incident, the A.B. decided to flee the Russian Federation. He travelled to Poland where he applied for asylum. Immediately after this he left for Denmark where he also applied for asylum. After five months in Denmark, he was sent back to Poland and a month later, he returned to the Russian Federation and lived in a village near the city of Kaluga. He did not however, return to Chechnya. On 7th and 14th December 2016, his wife, B.D., who was living in the city of Shali in Chechnya, received a summons from the police ordering her husband to report to the police station. Later in December 2016, A.B. and B.D. visited A.B.'s mother in Chechnya. An hour after they arrived, men in camouflage uniforms broke into the house. They asked where A.B.'s brother was. They beat A.B. in front of his family and raped B.D., after which, they kidnapped A.B. and held him for three days during which he was tortured through the use of electric shocks and beatings. He was later taken by car and thrown out near the village of Valerik in Chechnya. On 24th December 2016, A.B. was taken to a hospital in Grozny where he was treated for serious injuries including concussion and posttraumatic cerebral deviations with severe hypertension, amnesia, multiple abrasions to his face and bruising of the soft tissue of his upper extremities. He was discharged from the hospital on 4th January 2017. On 16th January 2017, the spouses left the Russian Federation and travelled to Belarus. They arrived at Terespol at the border between Belarus and Poland. Even though they told the Polish Border Guards that they wanted to apply for asylum and showed the guards their medical records and the police summonses as evidence of their fear of persecution, their request was not acknowledged. The guards simply stamped their passports with a denial-of-entry stamp, indicating that their entry into Poland had been rejected, as they did not hold valid visas.

The applicants tried again to apply for asylum again on 18th, 19th, 20th, 21st, 23rd, 24th, 26th, 28th, 29th and 30th January, and 1st, 2nd, 3rd, 6th, 13th, 15th and 16th February 2017. A Belarusian human rights defender also prepared a written motion for asylum in Polish on their behalf. The applicants made several further attempts to apply for asylum, on 20th and 25th April, 25th May and 24th August 2017. On 27th August 2017 a representative of the Helsinki Committee for Human Rights sent a letter in Polish on behalf of the applicants to the Head of the Polish Border Guard reiterating the Committee's decision and informing the authorities that the applicants would come to the border on 29th August 2017 to request asylum. The applicants went to the checkpoint at the Border in Terespol on 29th August 2017 with a written motion in Polish requesting asylum, including supporting documents and the Committee's letter requesting interim measures, however the Border Guard did not accept the asylum claim and once again the authors received a denial-of-entry stamp and were sent back to Belarus. In response to a request by the Helsinki Foundation for an explanation, the Border Guard stated that the applicants had not claimed asylum. The applicants claimed that they made more than 20 attempts to request asylum at the border. On each of those occasions, however, their claim for asylum was not recognised by Border Guards with the result that the claim was not passed on to the competent authorities for consideration. The applicants addressed the Committee on

24th August 2017, claiming that Poland had violated their rights under articles 7 and 13 of the Covenant and in conjunction with article 2 of the Covenant. The applicants requested that the Committee grant interim measures of protection by requesting the State to accept their applications for international protection and register them as asylum-seekers. The applicants asserted that the Asylum Procedures Directive applied to all international protection applications lodged within the territory of the European Union, including the borders. According to the Practical Handbook for Border Guards (Schengen Handbook),[96] once a foreigner makes an application, he or she is considered an asylum applicant and, from that moment, he or she will benefit from the rights enshrined in European Union law. From that moment a foreigner should therefore be allowed to remain within the territory of the given member State until his or her case is reviewed. Moreover, the Return Directive explicitly stipulates that such a foreigner should not be regarded as staying illegally on the territory of that member State unless and until a negative decision on the substantive application, or a decision ending his or her right of stay as an asylum-seeker, has entered into force. The Schengen Borders Code provides for exceptions to entry conditions in the event that a foreigner fails to fulfil all entry conditions.

On 25th August 2017, the Committee decided to grant the applicants' request for interim measures and made the above-mentioned requests to the State. On 25th October 2017, the State requested that the Committee examine the admissibility of the communication separately from its merits and declare it inadmissible and that interim measures be lifted as the applicants were no longer in the territory of the State party. The Committee granted the request to lift interim measures, but pursuant to rule 93 (1) of the Committee's rules of procedure, the Committee decided to examine the admissibility of the communication together with its merits. The Committee recalled its jurisprudence on the obligations of State parties towards foreigners in which it confirms that States must respect and ensure the rights laid down in the Covenant to anyone within their power or effective control, even if not situated within the physical territory of the State. The Committee also recalled that, if the legality of a foreigner's entry or stay is in dispute, he or she is entitled to submit reasons against their expulsion before the competent authority, and must be given full facility for pursuing a remedy against expulsion so that this right would, under all the circumstances of the case, be an effective one. The Committee recalled its jurisprudence which underlines that States have an obligation not to extradite, deport, expel or otherwise remove a person from their territory when there are substantial grounds for believing that there exists a real risk of irreparable harm, including both physical pain and mental anguish, such as is contemplated under Article 7 of the Covenant, either in the country to which removal is to be affected or in any country to which the person may subsequently be removed. The Committee found that by denying the applicants the opportunity to have their protection claims considered and by denying them the right or opportunity to challenge those denials, including failures to provide

96 Council of the European Union, 2018.

access to legal assistance, to produce an interview either at the time of the expulsion decision or thereafter, and to offer a remedy with suspensive effect on their expulsion orders, the State failed to afford the applicants the procedural safeguards necessary to avoid arbitrariness and provide effective redress in violation of Articles 2(3) and 7 of the Covenant.

The cases of *A.A. v. Bosnia and Herzegovina, A.S. et al. v. Albania, Ivan Yordanov Lazarov and Yordan Ivanov Lazarov v. Bulgaria,* and *A.B. and B.D. v. Poland* are all communications submitted to the UN Human Rights Committee, involving alleged violations of the ICCPR.

The similarities across these cases are that all cases involve vulnerable individuals or communities: *A.A., A.B. and B.D.*: Russian nationals of Chechen origin, often associated with persecution or security-based discrimination; *A.S. et al.*: members of the Roma community in Albania; *Lazarov case*: a family seeking justice for the death of a relative, pointing to violations of due process and right to life. All these applicants claimed violations of ICCPR rights, especially: *A.A.* and *A.B. and B.D.*: violation of Articles 6 and 7 (Right to life and Prohibition of torture) in the context of extradition or asylum; *Lazarov case*: Violation of Articles 6 and 14 (Right to life, Fair trial); *A.S. et al.*: Likely claims under non-discrimination (Art. 26), housing rights, or the right to privacy/family life (Art. 17).

Each case concerned the alleged failures of national authorities to protect individuals from serious rights violations – either due to state action, omission, or discriminatory policies. All communications involve more than one individual – either families (*Lazarov, A.B. and B.D.*) or communities (*A.S. et al.*), reflecting collective harm or shared grievance.

While all four cases centre on the ICCPR and involve state obligations to protect fundamental human rights, they differ in context: two (*A.A., A.B. and B.D.*) involve cross-border risks and asylum/extradition, one (*A.S. et al.*) focuses on domestic ethnic discrimination, one (*Lazarov*) is about state accountability for death and due process.

These cases collectively illustrate a range of human rights challenges–from non-refoulement and procedural safeguards, to anti-discrimination and access to justice–as encountered by ethnic minorities, asylum seekers, and victims of state neglect in the European context.

6. Conclusion

Civil and political rights are human rights which are often considered as "liberty rights" that imply the abstinence of the state from intervening in the liberty of any human. Civil and political rights are the foundation of every democratic society. It is no coincidence that these rights, seen as fundamental rights, are essential for every democratic state and international organisation. Many international documents together with the national constitutions define and protect these rights. The UN

Declaration as well as the above-mentioned UN covenants have laid the foundations of general and specific civil and political, individual and collective rights of people across the world. They are further elaborated and explained in numerous regional documents and interpreted by different Courts. The UN Universal Declaration serves as fundamental document for all human rights' covenants and treaties. They actually expand the UN Declaration with the stamp of legal force. They have their DNA, as René Cassin foresaw.

Civil and political rights are also referred to as the "first generation" or "first dimension" of human rights, which distinguishes them from economic, social and cultural rights, as well as from the collective or solidarity rights of the third generation. They are the most important achievements of the American and French revolutions in the late XIX century, and other democratic revolutions of the XIX and XX centuries based on the natural law doctrine. These rights are primarily concerned with the recognition of human dignity, the right to live according to one's own choice while enjoying equality and liberty in the State and society.

The UN Human Rights Committee, as was explained in this chapter, is acting as a quasi-judicial body conducting its work on a fair basis to both petitioners and States parties. The Committee's decisions are referred to as "views". They are not court judgments. These "views" are not legally binding, which is seen as a weakness in the ICCPR First Optional Protocol. Also, these Committee's decisions have no enforcement mechanism, and in practice they are seen mainly as recommendations. It is up to the national States to provide a domestic mechanism for the implementation of the Committee's decisions. As can be seen from the cases enumerated in this chapter, the Committee has no mechanisms to establish sanctions against the states that violate the provisions of the Covenant, which indicates that this body is a toothless watchdog of the Covenant and of the rights of citizens. It is a body that barks but cannot bite when it needs to show serious legal power.

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| Chapter 7 |

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

Grega Strban – Katarina Kogej

ABSTRACT

The International Covenant on Economic, Social, and Cultural Rights (ICESCR), adopted in 1966, is a part of the International Bill of Rights, alongside the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights. It codifies key economic, social, and cultural rights (ESCR), such as the right to work, health, education, and an adequate standard of living, while emphasising their progressive realisation. Despite its significance, the ICESCR faces challenges in enforcement, with the absence of strong, binding mechanisms.

Chapter 1 outlines the significance of the International Bill of Rights, while Chapter 2 explores René Cassin's vision of integrating all human rights, including ESCR, into the UDHR and compares it to the ultimate separation in the Covenant, examining the challenges surrounding ESCR, such as debates on justiciability.

Chapter 3 discusses the adoption, relevance and implementation of the ICESCR, showing its widespread ratification and exploring different aspects and measures of implementation, including the process and circumstances regarding the adoption of the Optional Protocol in 2008. Chapter 4 compares the ICESCR with the European Social Charter, the European Convention on Human Rights and the EU Charter of Fundamental Rights.

Chapter 5 breaks down the structure of the ICESCR, detailing rights-based obligations imposed by part I and III and the general obligations stemming from part II of the Covenant. Procedural obligations regulated by part IV are discussed in Chapter 6, where the role of the Committee on Economic, Social, and Cultural Rights (CESCR) in monitoring the ICESCR is analysed. Although its decisions are non-binding, studies of cases from the Individual communications' procedure illustrate its impact on housing, social security, and health rights.

As no cases involving Central or Eastern European countries have been published under the Individual communications' procedure, Chapter 7 highlights selected recommendations from the Concluding Observations on the periodic reports of Montenegro, Slovenia, and Czechia.

Despite its limitations, the ICESCR remains a cornerstone of global human rights advocacy, influencing both national legislation and international norms.

KEYWORDS

ICESCR, economic, social and cultural rights, progressive realisation, CESCR, monitoring

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1. The Significance of the International Bill of Rights

Distressed by the atrocities of the two World Wars and having faced devastating economic and social crises, countries brought into existence a new international organisation, the United Nations (UN), constructed to strive for peace and prevent another world war. A transnational consensus emerged that a set of universally accepted and respected human rights should be enacted. Article 55 of the UN Charter[1] declared that the UN should promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion' and Article 56 required Member States to take action to achieve that purpose. In 1946, the Commission on Human Rights (HR Commission) was established to elaborate an international bill of rights. As it turned out, the time was not right to adopt a treaty, so a declaration was proposed instead.[2] The Universal Declaration of Human Rights (UDHR) was adopted by resolution 217 A (III) of 10 December 1948 by the General Assembly, with no dissenting and only eight abstaining votes. It encompassed civil and political rights (CPR) as well as economic, social and cultural rights (ESCR).[3]

After the adoption of UDHR, the HR Commission worked on preparing a binding treaty. However, increasing ideological disputes prevented the adoption of a unified instrument, leading to the adoption of two covenants in December 1966: the International Covenant on Civil and Political Rights (ICCPR)[4] and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).[5] The two Covenants and the UDHR together form the International Bill of Rights.[6]

The International Bill of Rights holds extensive significance. First and foremost, it represents a global consensus on the fundamental rights and freedoms that all individuals are entitled to. The universal nature of the rights detailed in these documents underscores the idea that human rights are intrinsic to every person by virtue of their humanity, rather than being granted by states. As a crucial tool for human rights advocacy, it provides a cohesive set of principles and language that has empowered non-governmental organisations (NGOs) and activists in their efforts to drive change.[7]

Secondly, while the UDHR is not legally binding, its principles have been widely adopted into national constitutions, laws, and policies. Its provisions are considered

1 Signed on 26 June 1945, entered into force on 24 October 1945.
2 Winter and Prost, 2013, pp. 237–238.
3 Riedel, Giacca and Golay, 2014, pp. 5–6; Baderin and McCorquodale, 2007, p. 3; Odello and Seatzu, 2013, pp. 4–5; Ó hAdhmaill and McCann, 2020, pp. 31–33.
4 Adopted by the UN General Assembly (GA) Resolution 2200A (XXI), 16 December 1966. Entry into force: 23 March 1976.
5 Adopted by the UN General Assembly (GA) Resolution 2200A (XXI), 16 December 1966. Entry into force: 3 January 1976.
6 Sepúlveda, 2003, p. 1.
7 Ó hAdhmaill and McCann, 2020, p. 38; Hertig Randall, 2018, pp. 7–9, 26–27.

part of customary international law, which grants them significant legal authority.[8] On the other hand, the ICCPR and the ICESCR are international treaties that are legally binding for the states that have ratified them. These states are required to implement the rights outlined in the Covenants, establishing a legal framework that enables individuals to assert their rights.[9] The monitoring mechanisms of both covenants are essential in ensuring the implementation of the rights. The Human Rights Committee (HR Committee) and the Committee on Economic, Social and Cultural Rights (CESCR) have played a pivotal role in shaping international norms and guiding national legislation.[10]

Another key function of the International Bill of Rights is that it provides a shared foundation for dialogue and cooperation on human rights issues, influencing the adoption of not only the European Convention on Human Rights,[11] but also the African Charter on Human and Peoples' Rights.[12] Its principles have been incorporated into various United Nations treaties and resolutions, further strengthening the global human rights system.[13]

However, the International Bill of Human Rights faces various challenges and criticisms. A key challenge is the absence of strong enforcement mechanisms. The HR Committee and the CESCR as the quasi-judicial monitoring bodies are limited to issuing 'Views' with recommendatory force rather than binding judgements.[14] Additional criticism arises from the separation of CPR and ESCR, a topic that will be discussed in Chapter 2.[15]

Although it encounters various challenges, the International Bill of Human Rights plays an essential role in promoting and protecting human rights worldwide. It has significantly impacted international norms, shaped national laws, and served as a cornerstone for advocacy and accountability initiatives.[16]

2. The ICESCR Versus René Cassin's Concept

René Cassin, as one of the main authors of the Universal Declaration of Human Rights, was committed to place economic and social rights alongside civil and political rights

8 Ssenyonjo, 2009, pp. 7–9; Ó hAdhmaill and McCann, 2020, pp. 31–34; Odello and Seatzu, 2013, pp. 11–14.
9 Ó hAdhmaill and McCann, 2020, pp. 34–35; Hertig Randall, 2018, pp. 14–17.
10 Ó hAdhmaill and McCann, 2020, pp. 36–37; Hertig Randall, 2018, pp. 23–26.
11 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950.
12 African Union, 27 June 1981. Winter and Prost, 2013, pp. 238–239; Sepúlveda, 2003, pp. 48–49, 51–52.
13 Sepúlveda, 2003, pp. 46–58.
14 Riedel, Giacca and Golay, 2014, p.10; Odello and Seatzu, 2013, pp. 21–23 and 154.
15 Sepúlveda, 2003, p. 45; Ssenyonjo, 2009, pp. 3–4 and pp. 9–17; Ó hAdhmaill and McCann, 2020, p. 38.
16 Ó hAdhmaill and McCann, 2020, p. 38.

in the UDHR. One of the reasons for his commitment was his involvement in veterans' movements, thus he was in daily contact with the International Labour Organisation (ILO), especially during his work in Geneva in 1920s. He trusted that disabled men have rights to justice, not to charity, regardless of the army they fought for.[17] Cassin was successful in his efforts, which is evident from the adopted UDHR, Articles 22–26.

The 1966 Covenants on the other hand do not follow the same logic, as there are two: ICESCR only includes economic, social and cultural rights, while the civil and political rights are covered by ICCPR. There are various reasons behind this, explained through historical context.

At the second session of the HR Commission, in 1947, it was decided that it should draft (next to a declaration and measures of implementation) one binding human rights treaty. However, some states expressed their unwillingness to sign a Covenant which would include ESCR. The disagreements at the time were touching upon the technical nature of those rights and the obligations of states in relation to them. Consequently, the General Assembly requested the HR Commission to draft two covenants, one containing CPR and the other ESCR. Nevertheless, the connection between the two instruments was underlined in that same resolution by stating that both Covenants will be approved by the General Assembly simultaneously and opened for signature at the same time. The HR Commission was instructed to include as many similar provisions as possible in the Covenants to emphasise the unity of the aim and to ensure respect for and observance of human rights.[18]

The disagreements in the period of drafting of the Covenants continued to haunt the development of ESCR, to a certain extent. The discussion is framed as a debate on the nature of the human rights of the first generation (CPR) and of second generation (ESCR) and as a discussion on the justiciability of ESCR. The next paragraphs address some of the main arguments.

The adoption of the ICESCR itself should negate the earlier arguments that ESCR were not human rights but only aspirational societal goals. It was argued that CPR depend mostly upon negative obligations of the states, while ESCR require positive action and are costly. Their progressive implementation depends on the availability of resources. However, certain positive obligations stem from CPR as well and certain ESCR are of immediate effect, as the right of everyone to form and join a trade union, guaranteed in Article 8 ICESCR or the obligation of states to adopt legislation against forced evictions, stemming from Article 11 ICESCR.[19] The Covenant contains both obligations of conduct and result. Although the full realisation of rights may be achieved progressively, states should take deliberate, concrete steps, targeted clearly towards meeting the ICESCR obligations. In other words, states are obligated to move as expeditiously and effectively as possible towards the full realisation of the ESCR.[20]

17 Winter and Prost, 2013, p. 221.
18 GA Resolution 543 (VI), 5 February 1952.
19 See: Subchapter 5.2.1. Strban and Kogej, 2026, pp. 266–267.
20 Ibid.

They are therefore required to realise the full entitlement to an ESCR over time or immediately, but in neither of the cases are they entitled not to act at all.[21]

Furthermore, ESCR have been scrutinised as vague and non-justiciable, because one could not claim them against a state in the same way as CPR. The critique of vagueness was connected to the fact that they were not yet elaborated to the extent that the CPR were. However, this has changed since the adoption of ICESCR and the work of the CESCR. The vague formulation and thus uncertain content are also commonly addressed when discussing the issue of direct applicability. Assertions against the judicial enforceability of ESCR are based on the argument that (quasi)judicial institutions cannot adjudicate on ESCR because they are dependent on the policy decisions for which legislative and executive branches of states are competent. This argument can no longer be sustained in international law. (Quasi)judicial institutions adjudicating ESCR are not competent to take over the policy making but are called to review the decisions of the states to ensure that they are consistent with fundamental human rights.[22]

The debate on justiciability is closely connected to the discussion on implementation and supervision of the ICESCR. While ICESCR only foresaw a state reporting obligation, the ICCPR provides for Individual communications and state complaint procedures from the outset. The debate has changed since the adoption of the Optional Protocol to the ICESCR (OP),[23] which introduced the Individual communications procedure and emphasised the equal importance of CPR and ESCR.[24] This is in line with Cassin's view of the concept of state sovereignty and position of the individual in international law. Anyone should have a right of individual complaint against violations of human rights against the state they live in.[25]

Although human rights are divided into two Covenants, the Preambles of both affirm their interconnection and interdependence.[26] This principle is also reflected in the 1968 Proclamation of Tehran,[27] reaffirmed in the 1993 Vienna Declaration on Human Rights,[28] and emphasised in the legal doctrine[29] as well as interpretations by international bodies and national courts. Although the process of implementation and supervision may differ, all human rights include obligations to respect (refrain

21 Langford and King, 2008, pp. 486–487; Baderin and McCorquodale, 2007, pp. 10–14.
22 Baderin and McCorquodale, 2007, pp. 10–12; Nussberger and Landau, 2023, p. 13.
23 Adopted by the UN GA Resolution A/RES/63/117, 10 December 2008. Entry into force: 5 May 2013.
24 Riedel, Giacca and Golay, 2014, p. 7.
25 Winter and Prost, 2013, p. 221.
26 'In accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.' Preambles of the ICESCR and the ICCPR.
27 Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, UN Doc. A/CONF.32/41.
28 Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 14 to 25 June 1993, UN Doc. A/CONF.157/24.
29 Nussberger and Landau, 2023.

from interfering directly or indirectly), to protect (ensure others do not interfere) and to fulfil (provide the rights).[30] Despite human rights being divided into two Covenants, Cassin's concept of placing ESCR alongside political rights is followed through the interpretation. What is more, as Cassin foresaw, the Covenants along with various UN instruments and other human rights acts such as the European Convention on Human Rights, expand the UDHR with legally binding norms. His goal of creating a basic document on which later generations could build was successfully achieved.[31]

3. Adoption, Relevance, Implementation

The drafting of the ICESCR and ICCPR lasted almost twenty years and involved several UN bodies. In addition to the HR Commission, which was composed of members voted on by governments, the process involved the Economic and Social Council (ECOSOC), the Committee on Social, Humanitarian and Cultural Questions and the General Assembly (GA). NGOs and specialised agencies of the UN, such as the ILO, the World Health Organisation (WHO), the Food and Agriculture Organisation (FAO) and the UN Educational, Scientific and Cultural Organisation (UNESCO) were also instrumental.[32] The HR Commission worked on drafting a single Covenant from 1949 to 1951. Political, legal and economic disagreements (as further explained in Chapter 2) led to the GA resolution requesting the HR Commission to prepare two Covenants, one on CPR and the other on ESCR.[33] The GA adopted the ICESCR unanimously, without abstentions, by a resolution of 16 December 1966, simultaneously with the ICCPR.[34] In accordance with Article 27, it entered into force three months after the date of being deposited with the Secretary-General of the UN of the thirty-fifth instrument of ratification or instrument of accession. The conditions set out in that Article were met on 3 January 1976.

The ICESCR has provided a strong ground for the protection of ESCR and created an important frame of reference in human rights protection. That is evident from the wide support of the instrument from across all regions and all economic and political systems of the world.[35] As of September 2024, there are 172 parties to the ICESCR, compared to the 174 parties to the ICCPR. Comoros, Cuba, Palau and the United States of America have signed, but not ratified the ICESCR.[36]

The Covenant does not prohibit or regulate the formulation of reservations and declarations, and some states made use of that option. A few states have made

30 Odello and Seatzu, 2013, p. 7; Langford and King, 2008, pp. 484–486; See: Subchapter 5.1. Strban and Kogej, 2026, pp. 274–275.
31 Winter and Prost, 2013, pp. 238–239.
32 Baderin and McCorquodale, 2007, p. 5.
33 GA Resolution 543 (VI), 5 Feb 1952.
34 UN Doc. A/RES/2200 (XXI).
35 Baderin and McCorquodale, 2007, pp. 3–4.
36 United Nations, 2024.

objections within 12 months of communications on the reservations.[37] The possibility to make reservations to international treaties stems from the principle of state sovereignty and allows states to refuse the binding effect of certain provisions. Since ICESCR is a treaty under international law, the 1969 Vienna Convention on the Law of Treaties is applicable. According to Article 19, the states may formulate a reservation unless prohibited by the treaty and unless incompatible with the object and purpose of the treaty. The object and purpose of the Covenant is to establish clear obligations for the full realisation of ESCR. Reservations to human rights instruments raise complex questions since the effect of a reservation is either to weaken protection for or fail to guarantee the protection of certain rights to individuals within a state.[38]

The ICESCR is legally binding for the States Parties and the discussion on the nature of the obligations does not affect this conclusion.[39] When looking at the implementation of the Covenant in the ratifying states, the question whether a legal system in place is monist or dualist is crucial. In the monist states, no special act needs to be passed to incorporate the Covenant in national law, while such a law needs to be passed in the dualist systems. Nevertheless, the *de facto* impact of the ICESCR on the respect of ESCR varies between states and is not necessarily correlated with the legal status of the treaty within the national system. The international treaties can have the same status as statutory legislation or a status between the national and constitutional law.[40] The States Parties' constitutions normally include the ICESCR rights, and the Covenant impacts the interpretation of the constitutions.[41]

The principal obligation of contracting states is the implementation of the Covenant at the domestic level, not only by actions but also abstentions of the competent state organs. The CESCR, competent to supervise the enforcement of the ICESCR, recommended the states to incorporate the Covenant into domestic law in a way to allow it to be directly invoked before the domestic courts, so as to ensure effective legal remedies. States should take appropriate measures for implementation, encompassing not only legislative measures but also non-legislative, for instance social measures and administrative, financial and educational campaigns.[42] The CESCR has emphasised the importance of the national level monitoring, underlining the role of ombudspersons and national human rights commissions.[43]

International measures of implementation are crucial for relevance of the Covenant. There are three possible avenues: judicial, quasi-judicial and political. The first includes judgements, which need to be executed at the national level. This possibility is not used with regard to ICESCR. The political approach is, however, adopted in all

37 Ibid.
38 Ssenyonjo, 2009, pp. 203–243.
39 Odello and Seatzu, 2013, p. 11.
40 Nussberger and Landau, 2023, pp. 13–15.
41 Ibid.
42 General comment No. 3: The nature of States Parties' obligations (Art. 2 para. 1 of the Covenant), fifth session (1990), E/1991/23; Odello and Seatzu, 2013, pp. 21–23.
43 Langford and King, 2008, pp. 495–496.

human rights treaties and encompasses a state reporting procedure. Each States Party is obligated to report on the accomplishment of ESCR in the domestic system. CESCR reviews the reports, but its recommendations are not legally binding, although of great importance for the evolution and interpretation of the Covenant. They may also influence policy and legislative changes, administrative practice and jurisprudence of the national courts. Quasi-judicial approach, on the other hand, includes monitoring of individual communications, which leads to recommendations in the form of opinions. It gives the right to individuals or groups of individuals to allege violations of their rights against a state. The treaty body does not have the competence to issue judgements, but only views with recommendatory force. Concerning the ICESCR rights, this possibility was only introduced in 2008, with the Optional Protocol to the Covenant.[44]

The discussion on the possibility of individual complaints mechanism was closely connected to the debate on enforceability and justiciability of ESCR (see Chapter 2). In 1990, Philip Alston, a member of the CESCR, proposed that the Committee conduct a study on the feasibility of implementing an individual complaint procedure. He was tasked with preparing a discussion note outlining the key issues that could emerge from establishing such a procedure. By 1991, the initial report was approved, but additional analysis on the matter was requested. The Committee submitted a comprehensive "analytical paper" in support of developing an optional protocol to the 1993 World Conference on Human Rights. The HR Commission was encouraged to continue exploring optional protocols to the ICESCR in collaboration with the CESCR. At its fifteenth session, the CESCR presented a proposal for an optional protocol, which was approved by the HR Commission in 1997 and subsequently circulated to governments, intergovernmental organisations, and NGOs for their feedback.[45]

In 1998, the HR Commission adopted a resolution requesting Member States to share their opinions on the draft. Only a few governments responded – some voiced support, while others opposed its adoption. In February 2001, the Office of the High Commissioner for Human Rights organised a workshop titled 'The Justiciability of Economic, Social, and Cultural Rights, with Particular Reference to a Draft Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights'. The experts concluded that ESCR should be justiciable and that a complaints procedure would be an appropriate platform for consideration. However, not all delegations agreed; some raised concerns about the lengthy timeframes required for working groups to fulfil their responsibilities and felt it was premature to submit a draft optional protocol to a working group process.[46]

In 2002, the Commission concluded to establish an Open-ended Working Group at its next session to explore options for drafting an optional protocol to the ICESCR. In 2005, the Working Group mandated its chairperson, Catarina de Albuquerque, to

44 Riedel, Giacca and Golay, 2014, p. 10; Odello and Seatzu, 2013, pp. 21–23 and p. 154.
45 Odello and Seatzu, 2013, pp. 46–47; De Albuquerque, 2010, pp. 147–150.
46 Odello and Seatzu, 2013, pp. 46–51.

prepare a report to facilitate discussions on the Optional Protocol (OP). By resolution 1/3 on June 29, 2006, the Human Rights Council modified the Working Group's mandate, authorising it to begin negotiating the text of the OP. In 2008, the Open-ended Working Group reached a consensus to forward the draft text of the OP to the Human Rights Council for approval. The revised text was approved without a vote by the Council members on 18 June 2008 and was then submitted to the Third Committee of the General Assembly. On 10 December 2008, the General Assembly unanimously adopted the OP. It is open for signature by any state that has signed the Covenant[47] and can only be acceded to or ratified by a state that has ratified the Covenant.[48] The OP came into force on May 5, 2013, three months after the tenth instrument of ratification or accession was deposited with the UN Secretary-General, in accordance with Article 18(1).[49]

The relevance of the ICESCR extends even to the states which are not party to it. Some provisions of the ICESCR reflect the norms of customary international law, and certain part of its rules could be recognised as reflecting the general principles of law recognised by civilised nations. Even in states, which are not party to the Covenant, courts have used the General Comments of the CESCR[50] to interpret ESCR included in the national constitutions.[51]

The relevance of the ICESCR is evident when various UN bodies, regional frameworks, and national parliaments reference it as a fundamental universal standard. The Covenant serves not only as a benchmark for evaluating human rights compliance in states but also as a foundation for developing international human rights instruments.[52]

4. Comparison with Other Relevant Regional Documents

Regional instruments related to the protection of human rights play a fundamental role in the process of clarification and interpretation of ICESCR rights. In the European context, the regional instruments include the European Convention on Human Rights (ECHR), the European Social Charter (ESC),[53] and the EU Charter of Fundamental Rights (EU Charter).[54] The comparison considers the legal status of the

47 Art. 17(1) of the OP.
48 Ibid., Article 17(2).
49 Ibid. See also: de Albuquerque, 2010, pp. 144–178.
50 On the General Comments see: Subchapter 6.2.2. Strban and Kogej, 2026, pp. 282–283.
51 Odello and Seatzu, 2013, pp. 11–14.
52 Ibid. On the influence of the ICESCR in Europe see: Müller, 2018, pp. 215–242.
53 Council of Europe, adopted on 18 October 1961. In this paper, the term European Social Charter is used to represent a set of several instruments: the original 1961 European Social Charter, the 1988 Additional Protocol, the 1991 Protocol, the 1995 Additional Protocol providing for a system of collective complaints, and the Revised European Social Charter (1996).
54 OJ C 326, 26.10.2012, pp. 391–407.

instrument, the types of rights it covers (whether it focuses solely on ESCR, CPR, or both), and the supervisory mechanisms.

The European Social Charter, adopted in 1961 and revised in 1996, is one of the key documents under the auspices of the Council of Europe, specifically focused on ESCR. The Charter guarantees the protection of 31 fundamental rights, such as the right to just conditions of work, the right to social and medical assistance, and the right to protection against poverty and social exclusion. While both the ICESCR and the European Social Charter recognise many of the same rights, such as the right to work, the right to social security, and the right to an adequate standard of living, there are notable differences in their approach. The ICESCR is more focused on establishing broad, globally applicable standards and requires states to progressively achieve the full realisation of the rights it protects. The Charter, however, is more specific in its obligations, setting out more detailed standards for the protection of social and economic rights within the context of European states.[55]

The European Social Charter is monitored by the European Committee of Social Rights, which assesses state compliance based on periodic reports submitted by States Parties. The reporting obligation is therefore similar to the one under the ICESCR. For countries which accepted the Additional Protocol providing for a system of collective complaints (1995), monitoring is extended by the Collective Complaints procedure.[56] It complements the judicial protection of civil and political rights provided by the ECHR. Unlike the Individual complaints under the Optional Protocol to the ICESCR,[57] complaints under the ESC should address a state's general non-compliance with its laws or practices, rather than individual situations. The procedure allows complaints to be lodged without the prior exhaustion of domestic remedies, and the complainant does not need to be a direct victim of the alleged violation. Complaints can be submitted by representative trade unions, employers' organisations, European social partners, and certain international non-governmental organisations with participatory status in the Council of Europe. States may also permit representative national non-governmental organisations to lodge complaints. When violations are identified, countries are required to report on the steps they have taken to address them. Much like the 'Views' adopted in the Individual complaints' procedure before the CESCR, the decisions of the European Committee of Social Rights are not legally binding; however, they are influential and can lead to political and legal pressure on states to comply with their obligations under the Charter.[58]

On the other hand, *the ECHR*, adopted in 1950 by the Council of Europe, primarily focuses on civil and political rights. It provides for a robust enforcement mechanism through the European Court of Human Rights (ECtHR), which allows individuals, groups, and states to bring cases directly before the Court alleging violations of the

55 Odello and Seatzu, 2013, pp. 11–14; Sepúlveda, 2003, pp. 48–29; Council of Europe, 2024b.
56 Kresal, 2020, p. 418; Council of Europe, 2024a.
57 See: Subchapter 6.2.3. Strban and Kogej, 2026, pp. 283–284.
58 Sepúlveda, 2003, pp. 29–48.

rights protected by the Convention. The ECtHR's decisions are legally binding on the States Parties to the ECHR. When the Court finds a violation, the state concerned is obliged to provide appropriate remedies, including compensation and, where necessary, changes to national laws or practices. This strong enforcement mechanism makes the ECHR one of the most effective regional human rights instruments, ensuring that CPR are upheld within the Member States of the Council of Europe. However, while it is true that the ECtHR primarily protects first-generation rights, it is important to emphasise that all human rights are universal, indivisible, interdependent, and interrelated. ECtHR held that many of the CPR have implications of a social or economic nature and that 'there is no water-tight division separating that sphere from the field covered by the Convention'.[59] Therefore, the ECHR, together with the practice of the ECtHR, importantly contributes to the justiciability of the ESCR, guaranteeing an individual right to a judicial remedy before an international or supranational court.[60]

As Mišič and Strban note, the ECHR can be applied to fundamental social rights in at least three distinct ways. Firstly, it indirectly protects social rights by safeguarding essential CPR, thereby establishing a broader legal framework for the implementation of the European Social Charter (and therefore ESCR), such as upholding democratic principles, the rule of law, and prohibiting discrimination. Secondly, ESCR can be directly protected when they are connected to CPR. Lastly, certain provisions of the ECHR possess a significant social dimension.[61]

Mikkola points out several articles that have been particularly significant in the ECtHR's practice for protecting ESCR. The Court has safeguarded the right to human dignity through Article 2 (right to life) and Article 3 (prohibition of torture). Article 2 imposes an obligation on states to protect the health and life of individuals, leading to the requirement that states provide an adequate healthcare system accessible to anyone at risk of life-threatening health deterioration.[62] Article 3 offers protection to vulnerable groups, such as the elderly and children. A violation was identified in a case where a state failed to protect children living in grossly inadequate conditions by implementing proper child welfare measures.[63]

Additionally, Article 8 of the ECHR, which guarantees the right to respect for private and family life, can be employed to protect labour and social rights more comprehensively than Articles 2 and 3. The scope of Article 8 has expanded beyond merely requiring states to protect privacy and family life from excessive interference

59 *Airey v. Ireland*, Application No. 6289/73, Judgement of 9 October 1979, para. 26.
60 Mišič and Strban, 2021, p. 529; Eide, 2000, p. 119; Končar, 2010, p. 152; Vienna Declaration and Programme of Action, adopted on 25 June 1993, by the World Conference on Human Rights in Vienna; Sepúlveda, 2003, pp. 48–49, 52–53.
61 Mišič and Strban, 2021, pp. 526–527.
62 *Cyprus v. Turkey*, Grand Chamber judgement, Application No. 25781/94, 10.5.2001; *Pentiacova v. Moldova*, Application No. 14462/03, 4.1.2005.
63 *Z and Others v. United Kingdom*, Application No. 29392/95, 10 May 2001; Mikkola, 2010, pp. 82–86; Kogej, 2024, pp. 311–312.

by public authorities. The evolving case law now also obligates states to actively support family life, for example, by taking measures to prevent social insecurity for individuals and families.[64]

Other important provisions for the protection of labour and social rights include Article 4 (prohibition of slavery and forced labour),[65] Article 5 (right to liberty and security),[66] Article 11 (freedom of assembly and association),[67] Article 14 of the ECHR and Article 1 of Protocol 12 (prohibition of discrimination), Article 2 of the Additional Protocol (right to education) and Article 1 of the Additional Protocol (protection of property).[68]

The EU Charter, proclaimed in 2000 and becoming legally binding in 2009 with the entry into force of the Treaty of Lisbon, encompasses a wide range of civil, political, economic, social, and cultural rights, making it more extensive than the ICESCR, which is limited to ESCR. However, the Charter's applicability is restricted to 'the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.'[69] Therefore, in this respect, its application is narrower than that of the ICESCR.

The enforcement of the EU Charter is overseen by the Court of Justice of the European Union (CJEU), which has the authority to hear cases brought by individuals, companies, or Member States alleging violations of the Charter's provisions. Decisions of the CJEU are legally binding on all EU Member States and EU institutions, providing a strong mechanism for ensuring that the rights enshrined in the EU Charter are respected and protected throughout the EU. This strong enforcement mechanism is a significant aspect that the ICESCR lacks, as the 'Views' of the CESCR are not legally binding.[70]

In conclusion, while the regional instruments such as the European Social Charter, the ECHR, and the EU Charter provide overlapping protections for ESCR, each has distinct features and enforcement mechanisms that reflect their specific legal and political contexts. The European Social Charter focuses on detailed standards for ESCR within European states, monitored through both periodic reporting and a collective complaints procedure, albeit without legally binding decisions. The ECHR primarily safeguards CPR but has evolved to address ESCR indirectly through its robust enforcement mechanism via the ECtHR, whose decisions are legally binding. Meanwhile, the EU Charter encompasses a broad range of rights but is applicable only within the specific context of EU law, with enforcement through the CJEU providing strong legal oversight. Together, these instruments illustrate a complex landscape

64 Mikkola, 2010, pp. 86–88; Kogej, 2024, pp. 311–312.
65 In the case of *Siliadin v. France,* Application No. 73316/01, 26 May 2005, the work of a woman in a household (where she also lived with her employer) was identified as a form of modern slavery.
66 In particular on the protection of juvenile offenders.
67 Particularly important for the protection of collective labour law rights.
68 For more, see: Mikkola, 2010, pp. 82–94.
69 Art. 51 of the EU Charter.
70 European Union, 2024.

of human rights protection in Europe, where various legal frameworks and institutions contribute to the progressive realisation and enforcement of both civil-political and economic-social rights, albeit with varying degrees of enforceability and scope. As Nussberger and Landau note, for European states, the treaties established under the Council of Europe are even more important than the UN Covenants, not because the rights they guarantee differ significantly, but due to the more effective enforcement mechanisms.[71]

5. Analysis of Its Structure

The ICESCR encompasses 31 Articles structured into five parts, preceded by a Preamble. The Preambles of ICESCR and ICCPR are identical in their content, as the UN GA resolution 543(VI) instructed the HR Commission to include as many similar provisions as possible in the Covenants to underline the unity of the aims and the interconnection and interdependence of human rights.[72] The Preamble recognises the inherent dignity of the human person and the equal and inalienable rights of all people. Underlining the interconnection of human rights, it is emphasised that 'the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.' It expresses the obligation of states under the Charter of the UN to promote fundamental rights, and responsibilities of the individual to strive for the promotion and observance of the rights recognised in the Covenant.[73]

Obligations imposed by the ICESCR can be divided into (a) rights-based obligations imposed by part I (Article 1) and III (Articles 6–15), (b) general or basic obligations imposed by part II (Articles 2–5) and (c) procedural obligations imposed by part IV (Article 16–25).[74]

Obligations under points (a) and (b) will be discussed in the sections below, while the procedural obligations of part IV will be discussed in Chapter 6. According to the provisions of Articles 24 and 25, the ICESCR must not be interpreted as impairing the provisions of the Charter of the UN and of the constitutions of the specialised agencies which define the respective responsibilities of the various organs of the United Nations and of the specialised agencies in regard to the matters dealt with in the Covenant. The provisions of the ICESCR should not neither be interpreted as impairing the inherent right of all peoples to enjoy and utilise fully and freely their natural wealth and resources. Part V (Articles 26–31) contains provisions on signature, ratification, accession, entry into force, the process of amendment of the Covenant,

71 Nussberger and Landau, 2023, pp. 13–15.
72 See: Subchapter 2.
73 Odello and Seatzu, 2013, p. 9.
74 Sepúlveda, 2003, p. 251.

and the extension of the ICESCR to all parts of federal states without any limitations or exceptions.

5.1. Rights-Based Obligations

The ICESCR seems to cover three main categories of rights. Economic rights relate to the participation in the economic life of the community, while social rights are connected to the conditions under which people work and live. Cultural rights are correlated with the right to participate freely in the cultural life. However, since the rights are interrelated, no strict division is followed. The rights encompassed in the Covenant have been interpreted and clarified by its monitoring body, the CESCR, through the reporting process, the Individual complaints mechanism and the adoption of General Comments.[75]

Article 1 contains the inalienable right to self-determination. It is the right of all people to freely determine their political status and freely pursue their economic, social and cultural development. Articles 6–15 outline ESCR and freedoms, each article beginning with a general declaration of the right, followed by a detailed description of its aspects and any applicable limitations or restrictions. The right to work (Article 6) and to the enjoyment of just and favourable conditions of work (Article 7) is followed by collective labour law rights (Article 8). Article 9 governs the right to social security, while Article 10 focuses on the protection of families, mothers, children and young people. The right to an adequate standard of living protected in Article 11 includes the right to adequate food, clothing and housing and the right to be free from hunger. Article 12 encompasses the right to the enjoyment of the highest attainable standard of physical and mental health, while Articles 13 and 14 include the right to education. Article 15 recognises the right to take part in cultural life, to enjoy the benefits of scientific progress and its applications, to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production and the freedom indispensable for scientific research and creative activity.

When discussing state obligations, various typologies are used. Differentiation of the obligations of result and of conduct has already been mentioned, while the notions of immediate obligations and those to be realised progressively will be explained below. Another widely accepted typology, both in literature and as established by General Comment No. 12 from the CESCR,[76] distinguishes between the obligations to respect, protect and fulfil ESCR. While this typology has faced criticism for the lack of clear distinctions between the categories, the CESCR has countered this argument, clarifying that all types of obligations can coexist simultaneously or in combination.[77] Before examining the general obligations imposed by part II, this typology will be explained in brief.

75 OHCHR, 2024c; Riedel, Giacca and Golay, 2014, pp. 8–10.
76 General Comment No. 12 on the right to adequate food (Art. 11), twentieth session (1999), E/C.12/1999/5.
77 Riedel, Giacca and Golay, 2014, pp. 18–20.

The obligation to respect requires that states refrain from interfering with ESCR directly or indirectly. Legislation that fails to treat similar situations equally would indicate a violation of the state's obligation to uphold the prohibition of discrimination, unless it can provide justification for such actions. The obligation to protect, on the other hand, requires states to ensure that private third parties do not infringe on human rights of their citizens. To fulfil this obligation, they may adopt legislation which imposes duties to respect basic human rights and provide remedies if those duties are breached.[78]

The obligation to fulfil requires states to take on an active role and adopt legislation or administrative, budgetary, judicial and other measures. It can be split into obligations to promote, facilitate and provide. To fulfil the first obligation, states can for instance adopt campaigns to raise awareness or inform the population. The obligation to facilitate requires the state to take measures to enable and assist individuals and communities to enjoy a right, while the obligation to provide calls for the state to fulfil a specific Covenant right when the people or groups concerned are unable to attain it by the means at their disposal for reasons beyond their control. Examples of the obligation to provide include providing social assistance or establishing non-contributory schemes, ensuring access to schools and essential medicines.[79]

5.2. General Obligations

Part II encompasses provisions relevant to the generality of the substantive rights contained in Parts I and III of Article 2 focuses on the fundamental obligations to respect and uphold the rights outlined in the Covenant, ensuring that appropriate measures are adopted to give full effect to these rights and freedoms, with the primary goal of achieving an adequate standard of living for all individuals. It also mandates the provision and enforcement of effective remedies in cases of significant rights violations. Article 3 commits States Parties to guarantee equal rights for men and women in accessing the rights and freedoms outlined in the ICESCR. Articles 4 and 5 address general limitations, which should be interpreted narrowly in the light of the general rule.[80] Article 5 addresses not only states, but also groups or persons. They hold an obligation not to engage in any activity or perform any act aimed at the destruction of any of the rights or freedoms recognised in the Covenant. The next section will further analyse the obligations imposed by Article 2(1).

First paragraph of Article 2 reads

> 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view

78 Ibid.
79 Ibid.; General Comment 19 on the right to social security (Art. 9), thirty-ninth session (2007), E/C.12/GC/19.
80 Odello and Seatzu, 2013, pp. 9–10.

to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'.

The language used in Article 2(1) of the ICESCR is often considered more ambiguous than other human rights obligations, which can lead to challenges in clearly defining the extent of state responsibilities and identifying specific violations of the Covenant. This vagueness has been a focal point of scrutiny by both the Committee and legal scholars. In response to these concerns, the CESCR issued General Comment No. 3 in 1990 to clarify the nature of state obligations under the Covenant. Concurrently, the academic community developed interpretative frameworks like the Limburg Principles[81] and the Maastricht Guidelines.[82] Although these guidelines are not legally binding, they serve as valuable tools for interpreting the Covenant, drawing on the insights and writings of esteemed legal scholars.[83]

Article 2(1) of the ICESCR outlines several key obligations that states must fulfil to ensure the realisation of the Covenant's provisions: obligation to 'take steps…by all appropriate means'; progressive realisation; minimum core obligations; maximum available resources; international assistance and cooperation

Those obligations will be analysed in the following paragraphs.

5.2.1. Obligation 'To take steps… by all appropriate means'

Article 2(1) of the Covenant obligates states 'to take steps (…) by all appropriate means, including particularly the adoption of legislative measures' towards the full realisation of the ICESCR rights. In the General Comment 3 on the nature of States Parties' obligations, the CESCR clarified that while the full realisation of the rights may be achieved progressively, initial steps must be taken within a reasonably short time after the Covenant's entry into force. These steps should be deliberate, concrete, and clearly aimed at fulfilling the obligations recognised in the Covenant.

Despite Article 2(1) recognising the progressive realisation of the ESCR, the ICESCR contains certain obligations of immediate effect. This is especially the case with negative obligations requiring non-interference, such as ensuring non-discrimination (Article 2(2)). However, the progressive nature of other rights requiring positive obligations with significant direct resource implications does not negate the need for prompt action. The states are required to take steps without deliberate regressive actions, which would decrease national investments in healthcare, primary education and social services. A case-by-case approach is recommended when evaluating State compliance. Nevertheless, the Committee has made it clear that obligations cannot be limited by social, cultural, or economic conditions. States must address the

81 Limburg Principles on the Implementation of the ICESCR, 1987.

82 Masstricht Guidelines on Violations of Economic, Social and Cultural Rights, 1997. The CESCR later reissued both the Limburg Principles and the Maastricht Guidelines as UN document E/C.12/2000/13.

83 Odello and Seatzu, 2013, pp. 14–21.

needs of vulnerable populations, such as children, the elderly, and nursing mothers, in line with Article 12 of the Covenant. This interpretation limits the risk of states using the progressive clause to avoid obligations and clarifies the extent of their responsibilities.[84]

Article 2(1) of the Covenant specifies that states must use 'all appropriate means,' particularly legislative measures, to fulfil their obligations. The Committee acknowledges that legislation is often crucial, and in some cases, indispensable, especially in combating discrimination and addressing key areas like health, the protection of children and mothers, and education. It should outline clear targets, methods for achieving them, such as collaboration plans, institutional responsibilities, monitoring mechanisms, and remedies.[85]

However, legislative measures are not enough to ensure the full realisation of ESCR. 'Other measures which may also be considered "appropriate" for the purposes of Article 2(1) include, but are not limited to, administrative, financial, educational and social measures.'[86] States are required to provide accessible, affordable, timely, and effective remedies for any violations of ESCR.[87] These remedies can include restitution, compensation, rehabilitation, satisfaction, or guarantees of non-repetition. Effective implementation of ESCR might also involve improved macroeconomic policies, such as reducing foreign debt and inflation and enhancing export capacity.[88]

5.2.2. Progressive Realisation

States are required to make continuous efforts to advance ESCR progressively. This approach reflects the understanding that achieving full realisation of ESCR takes time and resources. However, as it was already underlined, there are certain obligations under ICESCR which require immediate action, such as the prohibition of discrimination.[89]

To comply with the progressive realisation of ESCR, states must develop strategies, policies, and programmes, using indicators and benchmarks to measure progress. Monitoring must involve collecting reliable quantitative and qualitative data, disaggregated by categories like gender, race, and socioeconomic status, to understand the situation of vulnerable groups. This data helps measure compliance with the Covenant, and the UN and its specialised agencies provide guidance and tools, such as indicators developed by the WHO for health rights.[90]

84 Ibid., pp. 15–16; Ssenyonjo, 2009, pp. 52–54; General Comment No. 3.
85 General Comment No. 3; Ssenyonjo, 2009, pp. 54–56.
86 General Comment No. 3.
87 General Comment 9, The domestic application of the Covenant, nineteenth session (1998), E/C.12/1998/24.
88 Ssenyonjo, 2009, pp. 56–58.
89 General Comment No. 3; Ssenyonjo, 2009, pp. 58–61.
90 On health indicators see: WHO, 2024; General Comment No. 3; Ssenyonjo, 2009, pp. 58–61.

5.2.3. Minimum Core Obligations

Even in the most challenging circumstances, all States Parties under the Covenant must guarantee a minimum set of core obligations. This requirement ensures that essential levels of protection are maintained, and fundamental rights as defined in the Covenant are upheld.[91]

The CESCR has emphasised that every States Party has a minimum core obligation to ensure at least the basic essential levels of each right. For example, if a significant number of people in a state are deprived of essential food, primary healthcare, basic shelter and housing, or the most fundamental forms of education, that state is, *prima facie*, failing to meet its obligations under the Covenant.[92]

The Committee has further clarified that these core obligations are non-derogable, meaning they must be upheld even in situations of conflict, emergency, or natural disaster. Additionally, given that poverty is a global issue, core obligations are relevant not only to less developed nations but also to certain individuals and communities within the wealthiest countries. Once a States Party has fulfilled the core obligations related to ESCR, it still has a responsibility to continue progressing as quickly and effectively as possible towards the full realisation of all rights outlined in the Covenant.[93]

5.2.4. Maximum Available Resources

The obligation to utilise "maximum available resources" emphasises the responsibility of states to employ all available resources to progressively realise the ESCR enshrined in the Covenant. The concept of "maximum available resources" is interpreted broadly within the context of the ICESCR. It encompasses not only financial but also natural, technological, and human resources that a state has at its disposal. This broad interpretation implies that states must utilise all possible means – both domestic and those available from the international community – to fulfil their obligations under the Covenant.[94]

The principles of transparency and accountability are key in the use of resources. States are expected to demonstrate how their policies, actions, and budgetary allocations are directed towards the realisation of ESCR. This involves creating mechanisms for monitoring and evaluating the effectiveness of resource utilisation. Furthermore, the equitable distribution of resources is paramount to prevent discrimination and ensure that all segments of society, particularly marginalised and vulnerable groups, benefit from the state's efforts to fulfil its obligations under the Covenant.[95]

The CESCR has developed indicators in its Concluding Observations to determine whether the state is fulfilling its obligations. For example, it examines the proportion of the national budget allocated to ESCR compared to the spending on costly defence

91 General Comment No. 3, Odello and Seatzu, 2013, pp. 20–21.
92 Ibid.
93 Ibid., Ssenyonjo, 2009, pp. 65–69.
94 General Comment No. 3; Ssenyonjo, 2009, pp. 61–65.
95 Ibid.

projects and expensive armaments. Additional criteria have been developed for Individual complaint mechanisms under the 2008 Optional Protocol. These criteria consider factors such as the country's stage of development, the severity of the breach with specific reference to minimum core standards, and the presence of particular conditions like economic recession, recent natural disasters, and the adoption of low-cost solutions.[96]

In certain states, especially in developing countries, which lack the necessary resources to meet their obligations, international assistance and cooperation becomes crucial, which is emphasised by the specific provisions in Articles 11, 15, 22, and 23. Developed countries are encouraged to provide technical and financial support to help developing countries enhance their capacity to fulfil ESCR. This global approach reinforces the interconnectedness of states and the shared responsibility to promote human rights worldwide.[97]

5.2.5. International Assistance and Cooperation

In the General Comment 3, the CESCR underlined that, in line with Articles 55 and 56 of the UN Charter, established international law principles, and the Covenant's own provisions, international cooperation for development is an obligation for all states, while the responsibility is especially pressing for those states capable of assisting others.

States are required to meet three levels of obligations regarding international assistance and cooperation: to respect, protect, and fulfil ESCR. The obligation to respect means that states must not, by any action or omission, hinder the realisation of ESCR in other states. The obligation to protect requires states to take all necessary measures, including legal ones, to ensure that ESCR are not violated by private entities under their jurisdiction. The obligation to fulfil involves developed states taking an active role in providing tangible assistance to less developed states.[98]

The amount and type of resources allocated to international development largely depend on the independent decisions of individual states. Since 1970, the UN has recommended that 0.7% of the Gross National Product (GNP) of developed countries be dedicated to international cooperation to meet the essential needs of populations in developing countries. The CESCR has used this target as a benchmark to evaluate State compliance with their obligations under the Covenant.[99]

96 Odello and Seatzu, 2013, pp. 17–18.
97 General Comment 3; Ssenyonjo, 2009, pp. 61–65.
98 Odello and Seatzu, 2013, pp. 18–20.
99 Ibid.

6. Monitoring: The Committee on Economic, Social and Cultural Rights (CESCR)

6.1. The Establishment of the CESCR

The discussion on implementation and monitoring of the ICESCR was difficult and long, as the debate was connected to the perceived differences between the CPR and the ESCR. During the drafting of the Covenant, there was no consensus on the critical question of whether there should be international mechanisms for implementation. Developed countries strongly advocated for the inclusion of provisions to ensure implementation but opposed any international measures to enforce them. Furthermore, the creation of petition systems was seen as having the potential of turning complaints into international disputes, which could impact peaceful international relations negatively. Among those states that recognised the necessity of international measures, there were significant differences of opinion regarding the most suitable types of measures. Proposals included the introduction of a periodic reporting system that would cover either some or all of the Covenant's provisions, allowing the proposed committee to collect information on all matters related to the observance and enforcement of fundamental rights and to initiate an investigation if deemed necessary. In 1951, an independent Committee on ESCR was unsuccessfully proposed. Under this proposal, it would be granted extensive powers, including the ability to receive petitions from groups, individuals, states, or associations, gather information, and seek resolution through negotiations. Later, it was agreed that implementation would take the form of periodic reports, which would be examined by the ECOSOC, composed of state representatives. A proposal in 1966 to establish a committee of independent experts was not supported.[100]

After the ICESCR came into force in 1976, the ECOSOC established Working Groups composed of governmental experts to assist in reviewing State reports. However, the first such Working Group was not formed until 1979. These Working Groups were widely regarded as an inadequate means of supervision, and little action was taken to address this issue until 1985, when a working group itself proposed transforming into a committee of independent experts. This suggestion was endorsed by ECOSOC, which passed a resolution 1985/17 establishing the CESCR, consisting of independent experts. The mandate of the CESCR is restricted, as it is only able to assist ECOSOC in carrying out its monitoring functions under the ICESCR. Nevertheless, it is important to stress that the CESCR is a permanent body, not an *ad hoc* committee convened to examine each particular case. Even though the CESCR is still subject to ECOSOC's authority to change its structure and functioning, and it lacks the stability of being established as a treaty-based body, most commentators agree that it functions in practice in much the same way as other bodies that oversee compliance with international

100 Baderin and McCorquodale, 2007, pp. 7–8; Langford and King, 2008, p. 478; Odello and Seatzu, 2013, pp. 21, 23–24.

human rights treaties. This is even more true since 2008, when an international right of petition for individuals and NGOs was introduced with the Optional Protocol to the ICESCR.[101]

6.2. The Functioning of the CESCR

The CESCR is comprised of 18 independent experts, elected by States Parties for a term of four years with due consideration to equitable geographical distribution and to the representation of different forms of social and legal systems. Members are individuals of high moral standing and recognised expertise in the field of human rights. They serve in their personal capacity and are eligible for re-election if nominated.[102]

The CESCR is responsible for five monitoring functions under the ICESCR and the 2008 Optional Protocol: reviewing periodic reports submitted by States Parties; drafting General Comments; managing the Individual communication procedure, inter-State procedure and inquiry procedure. Besides these core responsibilities, the CESCR is also required to submit an annual report on its activities under the ICESCR to the General Assembly through the ECOSOC. The annual report should include a summary of its activities under the Optional Protocol as well.[103] In the following sections, those competences will be explored.

6.2.1. Periodic Reports

The establishment of a reporting procedure is central to the international framework for protecting and promoting ESCR and freedoms. Importantly, the obligation to submit a comprehensive report within two years of the ICESCR entering into force for the concerned States Party, and subsequently every five years, is the sole duty that Parties to the ICESCR automatically undertake upon accession or ratification.[104]

States Parties need to report on the 'measures which they have adopted and the progress made in achieving the observance of the rights recognised therein'.[105] Since the ICESCR does not include requirements regarding the content and form of States' reports, the CESCR had adopted reporting guidelines in 1991 to improve the effectiveness of the supervisory mechanism.[106]

States Parties submit their reports to the UN Secretary-General, who then forwards copies to the ECOSOC. If a States Party has already provided relevant information to the UN or any specialised agency, it may simply reference that information in its report. The CESCR can also request the state to provide additional information or address any urgent issues before the next report is due. If the CESCR believes it cannot

101 Baderin and McCorquodale, 2007, pp. 7–8; Odello and Seatzu, 2013, pp. 23–25. See: Subchapter 3.
102 ECOSOC Resolution 1985/17 of 28 May 1985; Odello and Seatzu, 2013, pp. 117–118.
103 Art. 15 OP.
104 Odello and Seatzu, 2013, p. 25.
105 Para. 1 of art. 16 ICESCR.
106 CESCR, Reporting Guidelines, UN Doc. E/1991/23; E/C.12/1990/8, supplement No. 3, Annex IV.

obtain the necessary information (because for instance, the state in question did not submit reports even after reminders were sent), it may require the state to accept a mission from one or two CESCR members. The strictest measure the Committee can take when States Parties fail to submit their reports, despite multiple reminders, is to review the implementation of the Covenant based on all available information, even in the absence of the report.[107]

The review of the reports take place during meetings where government representatives present their report and respond to questions from CESCR members. While NGOs are not allowed to participate directly in the discussion of the report, they can provide relevant information at any point before its examination.[108]

The reporting process begins with the pre-sessional working groups, where the CESCR prepares lists of issues related to the reports of States Parties before the dialogue takes place. States Parties are expected to provide responses to these issues. The CESCR has introduced a simplified reporting procedure on a pilot basis for certain States Parties, based on specific criteria.[109] Under this simplified procedure, the state's response to the list of issues prior to reporting serves as its report to the Committee.[110]

After reviewing the reports from States Parties, the CESCR formulates Concluding Observations in a closed meeting to assist the states in implementing the ICESCR. They highlight positive aspects, key areas of concern, and the Committee's recommendations for addressing the challenges faced by the states. Once finalised, the Concluding Observations are published on the CESCR webpage under the relevant session.[111]

ECOSOC may seek the input of the Commission of Human Rights for the evaluation of and general recommendations on reports submitted by States Parties. Under Article 20 of the ICESCR, States Parties and specialised agencies may provide comments on any general recommendations included in the reports of the Commission on Human Rights. ECOSOC can also submit general recommendations and a summary of the information it has received to the General Assembly.[112]

6.2.2. General Comments

Through the adoption of General Comments, the CESCR provides recommendations on matters related to ESCR that it believes require greater attention from States Parties. Although not legally binding, they are of significant practical importance, as the Committee uses them to communicate its interpretation of ESCR and freedoms to the Contracting States and to outline its working methods. General Comments

107 Concluding Observations of the CESCR: Solomon Islands, UN Doc. E/C.12/1/Add.33 (1999); Odello and Seatzu, 2013, pp. 25–26, 161–163.
108 Odello and Seatzu, 2013, p. 25.
109 List of such states: OHCHR, 2024b.
110 OHCHR, 2024e.
111 Ibid.
112 Odello and Seatzu, 2013, pp. 25–26.

contribute to the development of CESCR jurisprudence and can be valuable for states considering becoming parties to the ICESCR. The contents of the General Comments are shaped primarily by the Committee's experience of reviewing states' reports, so there is an important relationship between both mechanisms.[113]

Up to date, the Committee has adopted 26 General Comments, the last one on Land and ESCR (in 2022).[114] No state has formally objected to the General Comments, indicating the broad acceptance of the Committee's interpretation.[115]

6.2.3. Individual Complaints under the 2008 Optional Protocol

The ICESCR did not initially provide for an individual complaint mechanism; this was later established in 2008 through an Optional Protocol, which entered into force on May 5, 2013.[116] The mechanism is highly significant because it allows individuals or groups of individuals who claim to be victims of a States Party's violation of any ICESCR right to submit communications to a supervisory body, alleging that the States Party has failed to fulfil its obligations under the Covenant.[117]

The CESCR first considers the admissibility of the communication. It will only consider a communication if it has verified that all available domestic remedies have been exhausted, except in cases where the use of these remedies is unreasonably prolonged. A communication will be declared inadmissible if

> 'It is not submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit; the facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the States Party concerned unless those facts continued after that date; the same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement; it is incompatible with the provisions of the Covenant; it is manifestly ill-founded, not sufficiently substantiated or exclusively based on reports disseminated by mass media; it is an abuse of the right to submit a communication; or when it is anonymous or not in writing'.[118]

113 Odello and Seatzu, 2013, p. 29; CESCR, The purpose of general comments (1989), U.N. Doc. E/1989.

114 OHCHR, 2024d. Several General Comments are referenced throughout the chapter. General Comment No. 3 on the nature of States Parties' obligations (Art. 2 para. 1) is discussed in the Chapter 5.2. Meanwhile, Chapter 6 discusses General Comment No. 4 on the right to adequate housing (Art. 11 para. 1), 7 on forced evictions (Art. 11 para. 1), 14 on the right to the highest attainable standard of health, 19 on the right to social security (Art. 9) and 22 on the right to sexual and reproductive health (Art. 12).

115 Ssenyonjo, 2009, pp. 29–30.

116 On the process of adoption of the OP see: Subchapter 3. Strban and Kogej, 2026, pp. 266–268.

117 Art. 2 OP; Odello and Seatzu, 2013, p. 80.

118 Art. 3 OP.

The Committee may choose not to consider a communication if it does not show that the individual has been substantially and concretely affected by the alleged violation, unless the Committee deems that the communication addresses a serious issue of general importance.[119]

Unless the CESCR deems a communication inadmissible without involving the States Party concerned, it will confidentially notify it of any communications submitted under the OP. The state must then provide written explanations or statements within six months, detailing the issue and any remedies that may have been offered.[120] The Committee will offer its assistance to the parties to help them reach an amicable settlement based on the obligations of the Covenant. Once an agreement is reached, the CESCR will cease consideration of the communication.[121]

The Committee will review the communications in closed meetings. It may consult relevant documents from other UN bodies, specialised agencies, international organisations, and regional human rights systems, as well as any observations or comments from the States Party. When assessing a communication, the Committee will evaluate the rationality of the state's actions in line with Part II of the ICESCR, recognising that the state may choose various policy measures to implement Covenant rights.[122]

After reviewing a communication, the CESCR will share its views and recommendations (if any) with the parties involved. The state shall consider them and submit a written response within six months, detailing any actions taken. The Committee may also request additional information on measures implemented in response to its views or recommendations, which may be included in the state's future reports under Articles 16 and 17 of the ICESCR.[123]

After a final decision is made, either regarding the inadmissibility of the communication or its merits, a summary of the decision is published and included in the relevant annual report of the CESCR.[124]

After receiving a communication and before reaching a decision on its merits, the Committee may request the States Party to take urgent interim measures as may be necessary in exceptional circumstances to avoid possible irreparable damage to the victim(s) of the alleged violations. Such a request does not imply any decision on the admissibility or merits of the communication.[125]

6.2.4. The Inter-State Complaint Procedure under the 2008 Optional Protocol

The inter-State complaint procedure is the oldest mechanism established by international human rights instruments. This procedure permits States Parties to file complaints with the relevant treaty body concerning alleged violations committed

119 Art. 4 OP.
120 Art. 6 OP.
121 Art. 7 OP.
122 Art. 8 OP.
123 Art. 9 OP.
124 Odello and Seatzu, 2013, p. 83.
125 Art. 5 OP.

by another States Party. It is available under several human rights treaties, including the ICCPR, and was introduced for ICESCR rights through the Optional Protocol.[126]

According to Article 10 of the OP, a States Party to the Protocol can declare that it recognises the CESCR's authority to receive and consider complaints of a States Party alleging that another States Party is not fulfilling its obligations under the Covenant. Only states that have made this declaration can submit such complaints, and complaints can only be made against states that have also made the declaration. Declarations must be deposited with the UN Secretary-General and can be withdrawn at any time. Withdrawal does not affect ongoing communications but prevents any new communication unless a new declaration is made.[127]

A States Party that believes another party is not fulfilling its obligations can send a written communication to that state and inform the CESCR. The receiving state must respond within three months with an explanation or statement, including references to any relevant domestic procedures or remedies. If the matter is not resolved within six months, either state can refer the issue to the Committee.[128]

The Committee will only consider the matter after confirming that all domestic remedies have been exhausted, unless those remedies are unreasonably delayed. It will attempt to facilitate a friendly resolution based on the Covenant's obligations.[129]

The CESCR will hold closed meetings when reviewing communications and may request relevant information from the concerned Parties. They shall have the right to be represented and to make oral and written submissions. The Committee must submit a report on the matter to the concerned states with due expediency.[130]

To date, no inter-State complaint procedures have been conducted under the OP.

6.2.5. Inquiry Procedure under the 2008 Optional Protocol

The inquiry procedure provides a method for addressing cases where individual complaints do not adequately capture the systematic nature of widespread violations of ESCR affecting individuals or groups who are unable to submit complaints due to fear of reprisals or practical limitations.[131] Article 11 of the OP outlines the procedure as follows

> 'A States Party to the Protocol can declare at any time that it recognises the Committee's authority under this article. If the Committee receives reliable information about the grave or systematic violations of ESCR by a States Party, it will invite that state to cooperate in reviewing the information and provide relevant observations'.[132]

126 Odello and Seatzu, 2013, pp. 98–100.
127 Art. 10 OP.
128 Ibid.
129 Ibid.
130 Ibid.
131 Odello and Seatzu, 2013, pp. 100–102.
132 Art. 11 OP.

Based on these observations and other reliable information, it may appoint one or more members to conduct an inquiry and report back urgently. The CESCR has significant discretion in assessing the reliability of the information or its sources. This inquiry, which may include a visit to the state's territory if warranted and with the consent of the States Party, will be conducted confidentially, seeking the state's cooperation throughout the process.[133]

After reviewing the inquiry's findings, the Committee will send these findings, along with any comments and recommendations, to the States Party. The state must submit its observations within a period of six months. Following the completion of the inquiry proceedings, the Committee may, after consulting with the States Party, decide to include a summary of the inquiry's results in its annual report.[134] The Committee may request the States Party to provide details in its report, as required under Articles 16 and 17 of the Covenant, about any actions taken in response to the inquiry.[135]

A States Party that has recognised the Committee's authority may withdraw this declaration at any time by notifying the Secretary-General.[136]

As of the time of writing, no inquiry procedures have been initiated under the OP.

6.3. Relevant Cases of the CESCR

This section seeks to highlight the work of the CESCR by examining some pertinent cases. Although the primary focus is on Individual complaints under the OP, it also incorporates references to various General Comments cited by the Committee in the cases reviewed.

To date, the Committee has adopted 16 decisions on merits ('Views'). Of these, 13 addressed the right to adequate housing, two concerned the right to social security, and one focused on the right to sexual and reproductive health and informed consent. In some of those cases, the Committee also addressed issues related to the prohibition of discrimination, the equal right of men and women to enjoy all Covenant rights, and measures to fully realise the rights outlined in the ICESCR.[137] Although cases involve significant procedural as well as substantive aspects, this section focuses exclusively on the substantive rights. The analysis will begin with complaints concerning housing rights and will then address the other three cases.

6.3.1. The Right to Adequate Housing

Housing-related rights were addressed in the General Comments as early as the 1990s. Before examining the Individual communications, this section will outline the key aspects of both applicable Comments.

133 Art. 11 OP; Odello and Seatzu, 2013, pp. 100–102.
134 Art. 11 OP.
135 Art. 12 OP.
136 Art. 11 OP.
137 See more: OHCHR, Jurisprudence [Online]. Available at: https://juris.ohchr.org/SearchResult (Accessed: 25 August 2024).

General Comment No. 4, adopted by the CESCR in December 1991,[138] aims to define and clarify the right to adequate housing,[139] addressing inadequacies in States' reports. The comment broadens the scope of housing rights to include all family structures, regardless of gender or household type.

CESCR presents a widely recognised seven-dimensional framework for evaluating the extent to which the right has been realised in specific cases. Firstly, legal security of tenure is fundamental, emphasising protection against eviction and harassment irrespective of the type of tenure, with a focus on the quality of protection rather than the form of tenure. Secondly, housing must also provide essential services, including safe drinking water, sanitation, energy, and access to emergency services. Affordability represents the third dimension, stressing that housing should be affordable without forcing residents to forgo other basic needs. Forth, housing must be habitable, meaning it must be structurally sound and protect residents from environmental hazards and health risks. Fifth, accessibility is crucial, ensuring that housing is available to the poor and vulnerable groups, including those with special needs such as disabilities or health conditions. Sixth, the location of housing should facilitate access to employment, healthcare, education, and other social facilities, avoiding areas with pollution or excessive transportation requirements. Seventh, housing should be culturally adequate, supporting cultural identity and accommodating communal and religious practices.[140]

General Comment No. 7, adopted in 1997,[141] focuses on forced evictions, recognising that while they generally conflict with the ICESCR, they may be permissible under strict conditions. Justification for eviction includes non-payment of rent, property damage, or public land use, provided they are legally admissible, meaning that the law must permit eviction for the stated reason, and that the reason aligns with the provisions of the Covenant. Even if an eviction appears to be justified *prima facie*, states must ensure that those facing eviction have the opportunity to challenge the grounds for it, and that all "feasible alternatives" to eviction are thoroughly considered.[142]

Justified evictions must still adhere to strict procedural requirements, including genuine consultation with affected individuals, adequate notice, and proper execution conditions. Importantly, evictions must not lead to homelessness. States must provide suitable alternative accommodation or resettlement options, ensuring that displaced individuals are protected from further human rights violations.[143]

Together, General Comment No. 4 and General Comment No. 7 establish comprehensive standards for ensuring adequate housing and regulating forced evictions,

138 General comment No. 4 on the right to adequate housing (Art. 11(1)), sixth session (1991), E/1992/23.
139 Art. 11 of ICESCR.
140 Donnelly, Finnerty and O'Connell, 2020, pp. 209–219.
141 General Comment No. 7 on forced evictions (Art. 11(1)), sixteenth session (1997), E/1998/22, annex IV.
142 Donnelly, Finnerty and O'Connell, 2020, pp. 209–219.
143 Ibid.

emphasising the need for protection, accessibility, affordability, habitability, and cultural adequacy.[144]

The CESCR has examined numerous cases related to the right to adequate housing, establishing an influential body of jurisprudence. Four of those cases are summarised below.

The case *I.D.G. v. Spain*,[145] involved an author[146] whose home was foreclosed by a bank in Madrid. Despite attempts to serve notice personally, the bank received permission to publish the notice on a public noticeboard. The author did not see this notice and only learned of the foreclosure when her home was scheduled for auction six months later.

The CESCR recognised that the failure to provide direct notice deprived the author of the opportunity to contest the foreclosure, which impacted her right to adequate housing. The Committee emphasised that public notice should be a last resort after all personal service attempts have failed, due to the significant likelihood that the foreclosure notice would not reach the mortgagor. The Committee determined that it had not been demonstrated that the Spanish authorities had exhausted all available means to effect personal service.

The CESCR issued several recommendations, including one stipulating that the author's home should not be sold until she had been given a fair opportunity to contest the foreclosure proceedings. Additionally, Spain was advised to revise its administrative and legislative procedures to ensure that its foreclosure practices are consistent with the Committee's decision and with General Comments Nos. 4 and 7.

The case *Djazia and Bellili v. Spain*[147] considered a couple and their two children facing eviction for non-payment of rent. The Spanish government's social housing programme was oversubscribed, leading to the family being offered shelter accommodation as an alternative (the mother was placed in a women's shelter together with the children, while the father was placed in a homeless shelter).

The CESCR concluded that the eviction was procedurally and substantively fair, but the failure to provide suitable alternative accommodation constituted a breach of the right to adequate housing. The government's offer to place the family in separate shelters did not meet the requirement to protect family unity and provide adequate alternative housing. Merely having a backlog in social housing provision did not justify the failure of the state to offer adequate alternative accommodation, particularly given that the Spanish government had sold off a significant portion of its social housing stock in the years leading up to the complaint.

The Committee advised Spain to fully assess the family's situation and provide public housing or other measures ensuring adequate accommodation. The

144 Ibid.
145 Communication No. 2/2014, E/C.12/55/D/2/2014.
146 In the Individual complaints' procedure, complainants are referred to as authors.
147 Communication No. 5/2015, E/C.12/61/D/5/2015.

recommendations aimed at addressing the systemic issue of inadequate provision of alternative housing.

In the case *López Albán v. Spain*,[148] the author, residing with her six children in a bank-owned apartment without legal title, applied for social housing but was rejected due to her unlawful occupation. Following eviction, the family experienced severe hardship, living in a series of emergency shelters, while the author was separated from two of her children.

The CESCR found that while Spain had a legitimate interest in protecting property rights, the eviction and the consequent homelessness of the author were disproportionate. The policy that excluded unlawful occupants from social housing applications was deemed unfair, especially given the urgency of the author's housing needs. There should be a provision to evaluate whether an eviction could be delayed or suspended until measures are in place to prevent homelessness. Spanish law did not require such a proportionality assessment, which constituted a breach of the ICESCR.

The Committee recommended establishing a legal framework to assess the proportionality of evictions and called for genuine consultation with those facing eviction. The state should provide for a comprehensive plan for social housing that does not involve excessively harsh exclusions.

The case *Infante Díaz v. Spain*[149] considered a Venezuelan national and her son who have been occupying a bank-owned apartment in Spain since December 2015. Their economic vulnerability was verified by Social Services. An eviction order was issued against them and suspended several times.

The CESCR observed that the author's irregular immigration status in Spain prevented her from applying for social housing or entering the job market. The Committee noted that this irregular status should not automatically disqualify them from accessing public housing services. The author reported her socio-economic vulnerability to social services, though this was done two years after the illegal occupation began, and also informed the judge who issued the eviction order. Consequently, the Committee determined that issuing the eviction order without providing alternative housing violated their right to adequate housing.

The state was instructed to provide the author and her son with effective reparations, including financial compensation for the violations, and to assess their situation to offer them alternative housing.

The CESCR's decisions underscore the importance of fair and adequate processes in housing rights. By emphasising the need for an effective notice and alternative accommodations, the Committee aims to ensure that evictions do not result in homelessness and that housing policies are just and equitable. The decisions reflect a broader commitment to addressing housing inequalities and improving the protection of vulnerable populations under international human rights standards.[150]

148 Communication No. 37/2018, E/C.12/66/D/37/2018.
149 Communication No. 134/2019, E/C.12/73/D/134/2019.
150 Wilson, 2020, pp. 189–192.

6.3.2. The Right to Social Security

In the case *López Rodríguez v. Spain*,[151] the author alleges that the state violated his right to social security under Article 9 of the ICESCR by reducing his non-contributory disability benefit. This reduction, implemented by the Ministry of Andalusia, was to cover his expenses while imprisoned. The author argues that individuals in prison should retain all their rights, including social security benefits received before incarceration, and that the state is responsible for maintaining these benefits for prisoners and their families. Additionally, he claims that this reduction is discriminatory when compared to: (a) other prisoners who do not have to cover their prison upkeep costs; (b) prisoners in other regions where such benefits are not reduced; and (c) individuals not incarcerated but using publicly funded services who receive free meals without a reduction in their benefits.

CESCR recalled General Comment No. 19 on the right to social security of 2008 and underlined the importance of this right in light of the prevention of social exclusion. The CESCR explained that 'benefits, whether in cash or in kind, must be adequate in amount and duration in order that everyone may realize his or her rights to family protection and assistance, an adequate standard of living and adequate access to health care'.

The Committee emphasised that while fulfilling the right to social security has significant financial implications for States Parties, they are still obligated to ensure at least the minimum essential levels of this right as outlined in the Covenant. This includes providing access to a social security scheme that guarantees a minimum essential level of benefits, enabling individuals and families to secure essential health care, basic shelter, housing, water, sanitation, food, and basic education.

The Committee reiterated that the Covenant prohibits any form of discrimination, whether direct or indirect, that impairs the equal enjoyment of the right to social security. States must take effective and regularly revised measures, using their maximum available resources, to fully realise this right for all individuals without discrimination.

The CESCR underlined that a non-contributory benefit should not generally be reduced, suspended, or withdrawn simply because the beneficiary is deprived of liberty, unless this action is legally sanctioned, reasonable, and proportionate, and still provides a minimum level of support. The appropriateness of any such measure should be assessed on an individual basis, considering the beneficiary's specific circumstances. A reduction in benefits for prisoners could align with the Covenant if it is legally mandated and if prisoners receive the same level of care through services provided in prison.

For non-contributory benefits that are funded solely through public resources and do not rely on prior contributions from the beneficiary, states have some discretion in how they allocate tax revenue. The Committee considers it reasonable for states to reduce a non-contributory benefit if the beneficiary's needs change, which was

151 Communication No. 1/2013, E/C.12/57/D/1/2013.

initially the basis for determining the benefit amount. In this case, the Committee finds that the author's needs have changed because the state now covers his upkeep in prison, justifying a reduction in his benefit. The Committee notes that replacing cash benefits with in-kind support might constitute a violation of the right to social security if such a measure has a disproportionate effect on the person. However, in this case, there is no evidence that the replacement caused serious harm or impaired the author's basic needs. The author did not provide proof that the change was disproportionate or particularly detrimental due to his disability. Therefore, the Committee concluded that, given the specific circumstances, the reduction in the author's non-contributory benefit does not violate Article 9 of the Covenant.

In the case *Trujillo Calero v. Ecuador*,[152] the author was a voluntary affiliate to the Ecuadorian Social Security system while working as an unpaid domestic worker, managing her household and caring for her three young children. She alleges that due to the Social Security Institute's negligence, she was effectively denied a special pension despite making 305 contributions over 29 years. She argues that the Institute incorrectly recorded only 238 contributions, not meeting the 300 required by law, and failed to inform her promptly that contributions made between August 1989 and February 1995 were invalid. She learned of this issue only in 2007, after a 14-year delay in administrative and judicial proceedings. The author also claims this situation involved discriminatory treatment based on gender and notes that she could not obtain a minimum old-age pension due to the lack of a non-contributory pension scheme in the States Party. She argued that the social security benefits provided by the state were insufficient to meet her basic living needs, thereby violating her rights under Article 9 of the ICESCR, while also alleging that the benefits were inequitably distributed, disadvantaging marginalised groups.

Referring to the General Comment No. 6 (1995) on the economic, social and cultural rights of older persons[153] and General Comment No. 19 on the right to social security, CESCR recalled that Article 9 ICESCR implicitly recognises the right to old-age benefits. States are required to prioritise the promotion and protection of the ESCR of older persons. To achieve this, they must implement appropriate measures to establish general regimes of mandatory old-age insurance.

States have some discretion in deciding how to ensure their retirement pension systems are efficient, sustainable, and accessible to everyone. They can set conditions that the claimants must meet to be eligible for social security schemes, but they must be reasonable, proportionate, and transparent and must be communicated to the public in a timely and sufficient manner to ensure predictability. If failing to meet these conditions results in penalties, such as termination from a social security scheme, the state must prove the penalty is reasonable and proportionate.

152 Communication No. 10/2015, E/C.12/63/D/10/2015.
153 Adopted at the thirteenth session of the CESCR.

National regulations should define the range, qualifying conditions and levels of benefits. If contributions are required, they should be set in advance, be affordable, and should not interfere with the fulfilment of other rights under the Covenant.

States must ensure that access to social security schemes is free from discrimination against women, both legally and in practice. Given that women often spend more time in unpaid work due to persistent stereotypes and structural issues, states should address the barriers that prevent women from contributing equally to social security schemes.

According to the core obligations in connection to the right to social security, states are obligated to provide non-contributory old-age benefits, social services, and other assistance to all older persons who, upon reaching retirement age, do not qualify for a pension based on contributions, lack eligibility for other social security benefits, and have no other source of income. These non-contributory schemes must consider that women are more likely than men to live in poverty, often have sole caregiving responsibilities for children, and are more frequently without contributory pensions.

The author's right to social security was violated by the Ecuadorian Social Security Institute, because it failed to inform the author that her voluntary social security affiliation had ended after she did not pay contributions for six consecutive months. Despite this, the Institute continued to accept her contributions for more than five years, leading her to believe she was fulfilling the requirements for a special retirement pension. Additionally, Institute officials verbally confirmed she met the legal requirements for the pension, prompting her to resign from her job and apply for the pension. After resigning, she was informed that her contributions were invalid, leaving her ineligible for the special retirement pension because she lacked the required 300 months of contributions. At this point, her ability to work and re-enter the labour market was significantly diminished, frustrating her legitimate expectation of receiving a pension. Even if these expectations were not strictly based on the existing legal regulations, they were reasonable given the state authorities' conduct.

Furthermore, CESCR believes that disaffiliation due to non-payment for six consecutive months could be inappropriate and disproportionate, especially for independent workers with irregular income. This penalty is even more disproportionate for the author, who was an unpaid domestic worker at the time.

The violation of the author's right to social security was worsened by the state's failure to provide an alternative measure to ensure an adequate standard of living for her old age. The state lacks a comprehensive non-contributory pension scheme for individuals who cannot receive contributory benefits.

The Committee concludes that the conditions imposed on the author, an unpaid female domestic worker, were discriminatory, as they invalidated her affiliation and contributions without sufficient explanation from the state to refute the allegations of discrimination.

The state is required to provide the author with an effective remedy, which includes: (a) granting her the pension benefits she is entitled to, based on her contributions to

the Ecuadorian Social Security Institute, or providing other equivalent social security benefits to ensure an adequate standard of living; (b) compensating her adequately for the violations of her right to social security and any related harm; and (c) reimbursing her for the legal costs incurred in pursuing her case.

The CESCR issued general recommendations with a view for the state to take measures to prevent similar violations of the right to social security in the future. This includes ensuring access to information about social security rights, providing timely and accurate information on contributions and affiliation status, ensuring proportionate penalties, offering effective remedies for violations, promoting gender equality in accessing social security benefits, and developing a comprehensive non-contributory benefits plan.

6.3.3. The Right to Sexual and Reproductive Health and Informed Consent

The communication[154] was submitted by *S.C. and G.P.*, Italian nationals who challenged Italy's Law 40/2004 concerning in vitro fertilisation (IVF). The authors visited a private clinic in Italy in 2008 to seek assistance in conceiving a child. During their first IVF cycle, they requested that at least six embryos be produced and subjected to pre-implantation genetic diagnosis to identify possible genetic disorders and that the embryos with such disorders not be transferred into the uterus of S.C. However, the clinic rejected their request due to Law 40/2004, which prohibited the production of more than three embryos, prohibited the pre-implantation genetic diagnosis and 'mandated the simultaneous transfer into the uterus of all embryos, regardless of their viability or genetic disorders'. The authors filed a lawsuit against the clinic and the Court of Florence ordered the clinic to carry out pre-implantation genetic testing. Since all embryos were affected by hereditary multiple osteochondromas, they were not transferred into S.C's uterus.

The authors later underwent a second IVF cycle where they produced ten embryos. Only one embryo was deemed free of hereditary multiple osteochondromas. However, it was deemed "average quality" with a low chance of nesting if transferred into the uterus. Consequently, S.C. declined the procedure, but the clinic personnel insisted on it, stating that the Law 40/2004 regulates that the consent to transfer embryos into the uterus can only be revoked before fertilisation. Because they threatened her with a lawsuit, she agreed to the procedure, but eventually suffered a miscarriage, which she considered traumatising. The clinic refused their subsequent request to use the remaining embryos for scientific research, citing the same law.

When discussing violation of the right to health,[155] the Committee referred to its General Comment No. 22 from 2016 on the right to sexual and reproductive health,[156] where it stated

154 *S.C. and G.P. v. Italy*, Communication No. 22/2017, E/C.12/65/D/22/2017.
155 Art. 12 of ICESCR.
156 E/C.12/GC/22.

> 'the right to sexual and reproductive health is also indivisible from and interdependent with other human rights. It is intimately linked to civil and political rights underpinning the physical and mental integrity of individuals and their autonomy, such as the rights to life; liberty and security of person; freedom from torture and other cruel, inhuman or degrading treatment'.

It recalled that

> 'the right to sexual and reproductive health entails a set of freedoms and entitlements. The freedoms include the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, regarding matters concerning one's body and sexual and reproductive health'.

Furthermore,

> 'violations of the obligation to respect occur when the State, through laws, policies or actions, undermines the right to sexual and reproductive health. Such violations include State interference with an individual's freedom to control his or her own body and ability to make free, informed and responsible decisions in this regard(...) Laws and policies that prescribe involuntary, coercive or forced medical interventions, including forced sterilization or mandatory HIV/AIDS, virginity or pregnancy testing, also violate the obligation to respect'.

The Committee concluded that the forced transfer of the embryo into S.C.'s uterus against her will clearly constitutes a forced medical intervention and means a violation of her right to health. It emphasised that any medical treatment must be based on free and informed consent, and forcing a woman to undergo a procedure without her consent constitutes a violation of her physical and mental integrity.

Regarding the right to gender equality,[157] the Committee found that the law's restrictions on withdrawing consent disproportionately affected women undergoing IVF treatments, violating their right to gender equality. CESCR explained that 'even if, on the face of it, this restriction on the right to withdraw one's consent affects both sexes, it places an extremely high burden on women'.

Regarding the right to enjoy scientific progress,[158] the Committee found that the authors did not substantiate how the prohibition of embryo research directly affected their rights under the Covenant. Therefore, this part of the communication was declared inadmissible.

The Committee recommended that Italy provide the authors with effective remedies, including establishing appropriate conditions so that the right to withdraw their

157 Arts. 12 and 3 of ICESCR.
158 Ibid., Art. 15.

consent to medical treatments will be respected, ensuring the right of S.C. to make free decisions regarding her own body is respected, awarding her compensation for physical, psychological and moral damages suffered and reimbursing the authors for the legal costs related to the communication.

Furthermore, the CESCR provided certain general recommendations to the States Party. It should 'Adopt appropriate legislative and/or administrative measures to guarantee the right of all women to take free decisions regarding medical interventions affecting their bodies, in particular ensuring their right to withdraw their consent to the transfer of embryos into their uterus;' and

> 'Adopt appropriate legislative and/or administrative measures to guarantee access to all reproductive treatments generally available and to allow all persons to withdraw their consent to the transfer of embryos for procreation, ensuring that all restrictions to access to these treatments comply with the criteria provided in Article 4 of the Covenant'.

7. Plus: Cases from the 16 Central or Eastern European Countries

All 16 Central and Eastern European countries have ratified the ICESCR. However, only five of these countries have ratified the Optional Protocol,[159] which introduced the Individual complaints mechanism, the Inter-state complaint procedure, and the Inquiry procedure. At the time of writing, no cases involving these countries have been published under the Optional Protocol. Therefore, the chapter presents certain Concluding Observations adopted by the CESCR during the reporting procedure. The intention is not to offer a comprehensive summary of every observation made, but rather to illustrate the types of issues the CESCR may address through this monitoring tool. Only selected issues and recommendations from the most recent Concluding Observations on the periodic reports of Montenegro, Slovenia, and Czechia are presented.

In November 2014, the CESCR reviewed Montenegro's initial report on the implementation of the ICESCR.[160] In its Concluding Observations, it firstly underlined the positive aspects, which include ratifying certain international human rights instruments, including the Optional Protocol to the ICESCR (on 24 September 2013) and the Convention on the Rights of Persons with Disabilities and its Optional Protocol (on 2 November 2009).

159 Albania ratified it on October 3, 2013; Bosnia and Herzegovina on January 18, 2012, Montenegro on September 24, 2013, Slovakia on May 7, 2012, and Serbia on September 6, 2023. Slovenia signed it in 2009 and North Macedonia in 2013, but they have not yet ratified it.
160 CESCR, 15 December 2014, E/C.12/MNE/CO/1.

In the following section, the CESCR underlined principal subjects of concern and provided recommendations. The problem of corruption was mentioned, as well as discrimination against persons with disabilities, minorities, refugees and displaced persons including persons of Roma, Ashkali and Egyptian origin. The States Party was recommended to intensify its efforts in combating discrimination, particularly in relation to access to employment, social security, housing, healthcare and education. The state was furthermore recommended to reduce the unemployment rate through an effective employment policy including requalification and placement initiatives. Special measures should be adopted to promote employment for marginalised groups. Minimum wage should be increased and periodically reviewed, as well as social assistance benefits, while the enforcement of labour laws should be improved. Healthcare funding should be increased and equal access to healthcare ensured, including for the marginalised groups.

In December 2014, the CESCR adopted Concluding Observations on the second periodic report of Slovenia.[161] Among the positive aspects, the Committee underlined the adoption of the Convention on the Rights of Persons with Disabilities and the Optional Protocol (in April 2008) and of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (in January 2007). Certain legislative and policy measures taken by the state were also welcomed, such as the adoption of the Minimum Wage Act in 2010 and the introduction of the provision on equal pay for equal work or work of equal value into the Employment Relationships Act.

Since the ICESCR has only been invoked in a limited number of cases before national courts, the Committee recommended the state to raise awareness about the Covenant and the justiciability of ESCR. Recommendations focused on improving the anti-discrimination strategy as well, particularly focusing on overcoming the discrimination against Roma in access to employment, housing and health services. The CESCR underlined the problem of the majority of Roma living in informal settlements vulnerable to forced eviction. The state should prioritise the legalisation of Roma settlements or find other solutions in genuine consultation with the Roma communities.

The Committee expressed concern regarding the working conditions of migrant workers, urging the States Party to 'take effective measures to ensure that all migrant workers enjoy the protection of labour laws and can access justice to remedy violations of their rights'. The state was recommended to ensure that all children and adolescents have effective access to psychiatrists across the state. Among other recommendations, the state was encouraged to 'gradually increase its official development assistance with a view to achieving the international commitment of 0.7 per cent of its gross national product (GNP)'.

161 CESCR, 15 December 2014, E/C.12/SVN/CO/2.

CESCR adopted Concluding Observations on the third periodic report of Czechia in March 2022.[162] The Committee commended the state for the measures enhancing ESCR, including the 'Strategic Framework Czech Republic 2030'. Among principal subjects of concern and recommendations, the concern regarding high emissions and pollution was expressed and the state was recommended to enhance its adaptation efforts to address the adverse impacts of climate change on ESCR. When addressing the issues of discrimination, the state was called to redouble its efforts by for instance implementing strategies with intersectoral approach and conducting awareness-raising campaigns, as well as increasing efforts to address the discrimination against Roma persons. Although the CESCR welcomed the adoption in 2021 of the Act related to compensation for persons who were forced to undergo sterilisation between 1966 and 2012, it recommended the state to extend the compensation claim period and provide legal aid.

CESCR underlined that the inclusion of the most disadvantaged groups into the labour market should be promoted, while ensuring that such programmes do not perpetuate their concentration in low-skilled jobs and the informal economy. The Committee was concerned about restrictions on strike rights and high voting thresholds. Recommendations included revising the scope of essential services and reconsidering strike quorum requirements.

The implementation of the minimum wage scheme required improvement, while recommendations also addressed the right to social security. Among other measures, the state was advised to amend the Pension Insurance Act to facilitate access to the national pension scheme for refugees and asylum seekers. To ensure equitable sharing of family responsibilities, an extension of paternity leave was encouraged.

As demonstrated in Chapter 4, European states are committed to frameworks such as the ECHR, ESC and EU Charter, each equipped with its own monitoring mechanisms that contribute to advancing human rights standards. Nonetheless, the ICESCR remains a cornerstone of global human rights advocacy, shaping both national legislation and international norms.

162 CESCR, 28 March 2022, E/C.12/CZE/CO/3.

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| Chapter 8 |

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

András Bethlendi

ABSTRACT

This chapter aims to provide a comprehensive analysis of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), with a specific focus on Central and Eastern Europe (CEE). The paper describes the historical, political and legal background and circumstances that led to the creation of the Convention, analyses the content and specificities of the Convention in comparison with other international instruments, and discusses in detail the work of the treaty body Committee on the Elimination of Racial Discrimination (CERD). It discusses the mechanisms operated by the CERD: State reports, Inter-state complaints, Individual communications, Early warning and urgent action procedures, with particular reference to the CEE states. The study provides an exhaustive overview of the individual communications received from the region and addresses the issues of racial discrimination faced by Roma communities living in or originating from this area. Concluding remarks reflect on the ongoing challenges of racial discrimination in the region and the critical role of non-governmental organisations in advocating for marginalised groups. Finally, it raises pertinent questions about the implications of emerging technologies and artificial intelligence on racial equality, calling for adaptive legal frameworks to address new forms of discrimination in contemporary society.

KEYWORDS

ICERD, CERD, racial discrimination, discrimination, Roma

1. Introduction

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was adopted on December 21, 1965, unanimously during the 20th plenary session of the United Nations General Assembly. Although the term "discrimination" is absent from the UN Charter and the Universal Declaration of Human Rights, as these documents employ the phrase "without distinction", the prohibition of racial discrimination is nonetheless not alien to these international legal instruments.

András Bethlendi (2026) 'The 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)' in Kovács, P., Béres, N. (eds.) *The Universal Protection Of Human Rights*. Miskolc–Budapest: Central European Academic Publishing, pp. 301–336. https://doi.org/10.71009/2026.pknb.uphr_8

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One could view the prohibition of racial discrimination as a necessary logical consequence of the core values and commitments articulated in the UN Charter and the Universal Declaration of Human Rights. Nevertheless, the unanimous adoption of the convention was considered one of the most significant human rights achievements of the era by some of the signatory states,[1] and it indeed proved to be a substantial innovation in several aspects. The ambitious commitment identified in the title of the convention is nothing less than 'the elimination of all forms of racial discrimination.' Michael Banton points out the impossibility of fulfilling this commitment in his book: 'the Convention is founded upon a noble lie'.[2] While he acknowledges that racial discrimination can be reduced, restrained, or limited in society, he finds the notion of its complete eradication to be illusory.

This raises the question: if this is a commitment akin to the impossible from the perspective of the states, why did these states widely support the adoption of the convention? International law is not characterised by states making aspirational, unrealistic commitments that they can later be held accountable for through a monitoring mechanism. The question arises as to what political circumstances or state insights motivated these actors to undertake a commitment to solve an unsolvable problem. The second part of this chapter seeks to answer this question by examining the political, historical, and legal circumstances that converged to create such a significant international political consensus in favour of codifying the prohibition of racial discrimination. In the third part of the chapter, we will review the content of the convention, while the fourth part will examine the work of the treaty body overseeing its implementation.

2. The Preparation of ICERD

2.1. The Prevention of Discrimination and the Protection of Minorities

The prohibition of racial discrimination was not unfamiliar to international law after World War I. The minority treaties, which were part of the post-war peace processes,

1 See: General Assembly, 20th session: 1406th plenary meeting, Tuesday, 21 December 1965, New York, A/PV.1406, paras. 87, 95, 109. Mr. Verret (Haiti): '87. In conclusion, the delegation of Haiti pays homage to the members of the Third Committee and the General Assembly for this meritorious effort, which represents a new landmark on the path to social progress.' Mr. Lamptey (Ghana): '95. My delegation has been proud and honoured to participate in the drafting and adoption of this Convention, and we thank those who joined us in this collective task... 96. We leave this rostrum convinced that, because of what you have done today; when the story of the twentieth session of the General Assembly comes to be told, it can well be said, as it was once said by a great war leader: This was its finest hour.'
Mr. Bosco (Italy): '109. We are convinced that today's date will constitute a landmark in the history of the United Nations.' Mr. Morozov (Union of Soviet Socialist Republics): '117. Today, at its twentieth session, and on the twentieth anniversary of the founding of the United Nations, the General Assembly has added a memorable page to the annals of the Organization.'

2 Banton, 2003, p. 50.

declared that racial, religious, or linguistic minorities shall enjoy the same treatment and security in law and in fact as the other nationals.[3] However, The Covenant of the League of Nations endorsed the practices of colonisation and imperialism.[4] Between the two World Wars, discriminatory political thinking and legislation based on eugenics[5] and racial theories gained increasing traction not only in colonial territories but also within Western societies. Ultimately, the horrific historical experiences of race-based discrimination during World War II led to an international political consensus promoting a system of human rights under the auspices of the United Nations. The victorious powers of World War II recognised the tragic consequences that could ensue if international law provided no protection for those deprived of their fundamental rights due to national, ethnic, religious, or racial affiliations. It is no coincidence that the first article of the UN Charter, adopted on June 26, 1945, commits to the principle of equal treatment without distinction to race, sex, language, or religion. The Charter, drafted in San Francisco, proclaimed in its very first article the promotion and respect of human rights and fundamental freedoms for all, without regard to race, gender, language, or religion.[6] The Assembly, in Resolution 103 (I) on Persecution and Discrimination on 19th November 1946 (A/RES/103(I)), used the term *racial discrimination*, stating that 'it is in the higher interests of humanity to put an immediate end to religious and so-called racial persecution and discrimination'.[7] From the *travaux préparatoires*, we can see that states uniformly supported this initiative and fundamentally agreed on this at least at the level of political declarations.[8]

The prohibition of discrimination – including race-based discrimination – gradually became one of the declared cornerstones of the emerging human rights system.

3 See: Art. 8 of the Treaty between the Principal Allied and Associated Powers and Poland, signed at Versailles, June 28, 1919.

4 See: Art. 22 of The Covenant of the League of Nations.

5 Eugenics is a pseudoscientific theory popular in the 19th and early 20th century. Based on the logic of Darwinian natural selection, eugenics viewed the improvement of the human race or certain national groups as possible and even desirable through the scientific and political control of human reproduction. In the 20th century, this theory led to biopolitical measures such as the sterilisation, segregation, or even the killing of those deemed unfit. For more information see: Turda, 2010.

6 See: Art. 1: 'The Purposes of the United Nations are: [...] 3. To achieve international co-operation [...]in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion [...].'

7 See: A/RES/103(I).

8 See: General Assembly, 1st session: 48th plenary meeting, held on Tuesday, 19 November 1946, p. 971 (A/PV.48). The Soviet Union found it overly general: 'This resolution is general in character. It does not give any concrete data when mentioning racial persecution and discrimination, it does not give any facts, any names or addresses, calling for attention and the taking of appropriate measures against this discrimination and persecution on racial or similar grounds. This resolution, therefore, is of a general character, and there is nothing concrete in it. Nevertheless, we know that such facts exist and that measures to put an end to this shameful state of affairs should indeed be taken.'

Article 68 of the UN Charter[9] enabled the Economic and Social Council (ECOSOC) to create committees aimed at promoting human rights. This allowed for the establishment of the Commission on Human Rights, as well as the Commission on the Status of Women, which was originally intended as a subcommittee but ultimately fell directly under the Council.[10] The Commission on Human Rights was tasked with making proposals, providing recommendations, and preparing reports for the Council on various fundamental rights issues, including the protection of minorities and the areas of racial, gender, linguistic, or religious discrimination.[11] The Commission proposed the creation of additional sub-commissions. In addition to the Sub-Commission on Freedom of Information and of the Press, it suggested the establishment of two more sub-commissions focused on the prevention of discrimination and the protection of minorities. Although the Council allowed the creation of three sub-commissions, the Commission on Human Rights ultimately established only two during its first session held from January 27 to February 10, 1947, merging the topics of preventing discrimination and protecting minorities into the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities.[12]

The Universal Declaration of Human Rights was adopted by the UN General Assembly on December 10, 1948,[13] after nearly two years of preparation.[14] Articles 2 and 16 of the Declaration use the concept of "race" with Article 2 explicitly prohibiting race-based distinction; however, it does not use the term "racial discrimination." Part C of the resolution adopting the Declaration attested to the need to address the unsettled international legal status of national minorities. In this resolution, the Assembly directed the ECOSOC to ask the Commission on Human Rights and its subsidiary body, the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, to prepare a comprehensive study on the issues faced by minorities, enabling the UN 'to take effective measures for the protection of racial,

9 UN Charter, Art. 68:'The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions.'

10 See: Resolution adopted by ECOSOC on the establishment of a Commission on Human Rights with a Sub-Commission on the Status of Women, E/RES/5(I), 16 February 1946. Also see: Humphrey, 1968, p. 869.

11 United Nations, 1949, pp. 422–423.

12 In 1995 the Sub-Commission on Prevention of Discrimination and Protection of Minorities was replaced by the Sub-Commission on the Promotion and Protection of Human Rights. Simultaneously, under the new Sub-Commission, the Working Group on Minorities was established. In 2006, both expert bodies were dissolved. The Commission on Human Rights was replaced by the Human Rights Council, which, through its Resolution 6/15 of 28 September 2007, established the UN Forum on Minority Issues.

13 The Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 (III) A).

14 The Drafting Committee on an International Bill of Human Rights held its very first session from June 9 to 25, 1947.

national, religious or linguistic minorities'.[15] The Sub-Commission prepared two separate studies, one titled *Definition and Classification of Minorities*[16] *and the other The Main Types and Causes of Discrimination*.[17] Racial discrimination represented one of the primary inquiries of the second study.

2.2. From the Swastika Epidemic to the Codification of ICERD

Despite the fact that the prohibition of racial discrimination was one of the cornerstone principles of human rights from the beginning, the international legislative process to prohibit racial discrimination was ultimately catalysed by a wave of anti-Semitic acts that occurred during the winter of 1959–1960, known as the "swastika epidemic." The first antisemitic act was registered in Cologne, West Germany on Christmas morning, when neo-Nazis vandalised the Roonstrasse Synagogue. From the Christmas of 1959 to March 1960, antisemitic incidents (swastika paintings, display of anti-Semitic slogans, physical attacks on Jewish property) were reported in 34 countries. In the United States alone, over 637 antisemitic acts were recorded in 236 different cities.[18] These incidents triggered a series of resolutions from the Sub-Commission on Prevention of Discrimination and Protection of Minorities, through the Commission on Human Rights to the Economic and Social Council. In January 1960, the Sub-Commission, 'deeply concerned by the manifestation of anti-Semitism and religious and racial prejudices'[19] requested the Commission on Human Rights to adopt a resolution condemning these manifestations as

> 'violations of principles embodied in the Charter of the United Nations and in the Universal Declaration of Human Rights, as a violation of the human rights of the groups against which they are directed, and as a threat to the human rights and fundamental freedoms of all peoples'.[20]

The Commission on Human Rights adopted its condemning resolution on 16 March 1960.[21] Upon the proposal of the ECOSOC, the General Assembly adopted Resolution 1510 (XV) on 12 December 1960. This resolution condemned all forms of racial, religious, and national hatred across political, economic, social, educational, and cultural areas of society. It declared such practices to be violations of the United Nations

15 General Assembly resolution 217 (III) C. International Bill of Human Rights: 217 C (III) Fate of Minorities. UN Doc., A/Res/3/217C.
16 United Nations – Commission on Human Rights. Sub-Commission on Prevention of Discrimination and Protection of Minorities: Definition and Classification of Minorities, 27 December 1949, UN Doc., E/CN.4/Sub. 2/85.
17 United Nations – Commission on Human Rights. Sub-Commission on Prevention of Discrimination and Protection of Minorities: The Main Types and Causes of Discrimination, New York, 7 June 1949, UN Doc., E/CN.4/Sub.2/40/Rev.1.
18 Ehrlich, 1962, pp. 264–265.
19 Resolution 3 A (XII) (E/CN.4/800, para. 194).
20 Resolution 3 B (XII) (E/CN.4/800, para. 194).
21 Resolution 6 (XVI) (E/CN.4/804, para. 200).

Charter and the Universal Declaration of Human Rights. The resolution also urged all governments to take the necessary steps to prevent these forms of hatred.[22]

The issue of religious intolerance and racial discrimination divided the members of the UN. The phenomena of anti-Semitism, the question of Israel for the Arab states, along with the mixed feelings of the communist bloc towards the issue of religious intolerance, and the fear of African countries that religious issues would impede the resolution of racial matters led the Third Committee of the General Assembly to decide to address racial and religious issues in separate documents.[23] Thus, the General Assembly adopted two resolutions in 1962, instructing the ECOSOC to have the Commission on Human Rights adopt separate draft resolutions and conventions concerning the elimination of all forms of racial discrimination[24] and the elimination of all forms of religious intolerance.[25]

On November 20, 1963, the General Assembly adopted its Resolution on the United Nations Declaration on the Elimination of All Forms of Racial Discrimination.[26] The legally non-binding Declaration referred to discrimination based on race, colour, or ethnic origin multiple times while lacking a definition for racial discrimination. The General Assembly emphasised in its Resolution 1906 (XVIII) the necessity of taking further action towards the elimination of racial discrimination and the importance of preparing and adopting an international convention on the elimination of all forms of racial discrimination. The General Assembly requested the ECOSOC to invite the Commission on Human Rights to give absolute priority to the preparation of a draft international convention on the elimination of all forms of racial discrimination. Although anti-Semitic manifestations were the triggering actions for the process that led to the adoption of the first international legal instrument dedicated to the elimination of racial discrimination, the final adopted version of the Convention did not explicitly address this issue. The international motivation that enabled the adoption of the Convention primarily originated from countries in the Global South and the communist bloc. This motivation was largely driven by opposition to the exploitation experienced in the colonial world, the ongoing apartheid regime in South Africa, and the discrimination faced by black people in the United States. This explains why apartheid was rather explicitly mentioned in the Convention as a specific form of racial discrimination, instead of antisemitism that initially triggered the codification process.[27]

As the Mexican representative changed his abstention to an affirmative vote, the Draft International Convention on the Elimination of All Forms of Racial

22 A.Res.1510 (XV), p. 22.
23 See: Lerner, 2014, p. 4. Lovelace, 2022, p. 1858.
24 G.A.Res. 1780 (XVII).
25 G.A.Res. 1781 (XVII).
26 G.A.Res. 1904 (XVIII).
27 For a detailed analysis of the problem read: Schabas, 2023, pp. 272–275.

Discrimination was unanimously adopted on December 21, 1965, with 107 votes in favour and no votes against it.[28]

3. Content of the ICERD

After the Preamble, the Convention is divided into three parts. The first part[29] defines racial discrimination, outlines the scope of the Convention, and details the passive and active commitments of states to eliminate racial discrimination. The second part[30] describes the establishment and functioning of the expert committee responsible for monitoring, which is a true innovation in international law, and explains the complaint mechanisms against states. Article 16 clarifies the relationship between the ICERD and other international agreements concerning disputes or complaints related to discrimination. The third part[31] addresses the signing and ratification,[32] accession,[33] entry into force,[34] reservations,[35] denunciation,[36] dispute resolution between parties,[37] review of the Convention,[38] notification of changes to states,[39] and the deposit of the Convention.[40]

In this subchapter, we will examine the Preamble and Part I of the Convention. Part II will be analysed in the following subchapter. Part III will not be discussed in detail.[41]

3.1. Preamble

Although the Preamble of the ICERD does not impose legally binding obligations, it is a significant part of the Convention.[42] It refers to various conventions, values, and challenges that must be considered when interpreting and applying the Convention's substantive provisions. The Preamble cites the Charter of the United Nations, the Universal Declaration of Human Rights, the *Declaration on the Granting of Independence*

28 A/PV.1408, pp. 1–2.
29 Arts. 1–7 of the ICERD.
30 Ibid., Arts. 8–16.
31 Ibid., Arts. 17–25.
32 Ibid., Art. 17.
33 Ibid., Art. 18.
34 Ibid., Art. 19.
35 Ibid., Art. 20.
36 Ibid., Art. 21.
37 Ibid., Art. 22.
38 Ibid., Art. 23.
39 Ibid., Art. 24.
40 Ibid., Art. 25.
41 For the detailed analyses of Part III see: Lerner, 2014, pp. 94–102.
42 The legal relevance of the preamble is evidenced by the fact that the International Court of Justice (ICJ) refers to it in its judgement. See: Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Qatar v. United Arab Emirates*), Preliminary Objections, Judgment, I.C.J. Reports 2021, p. 71, paras. 85–86.

to Colonial Countries and Peoples of 14 December 1960, the *United Nations Declaration on the Elimination of All Forms of Racial Discrimination*, the *Convention concerning Discrimination in respect of Employment and Occupation* adopted by the International Labour Organization in 1958, and the *Convention Against Discrimination in Education* adopted by UNESCO in 1960.

Through the Preamble, the signatory states reaffirm their commitment to the principles of human dignity and equality outlined in the UN Charter and pledge to uphold the UN's goals, specifically the universal respect for human rights and fundamental freedoms without distinction as to race, sex, language, or religion. Similarly, they commit to the principle in the Universal Declaration of Human Rights that all people are born equal in dignity and rights, and that these rights apply to everyone without discrimination. The second paragraph declares that all people are equal before the law and are equally entitled to protection against discrimination and incitement to discrimination.

The third paragraph highlights that the convention was adopted during the decolonisation process. The text emphasises that the UN condemns colonialism, segregation, and the discrimination that accompanies these practices, as stated in *Resolution 1514 (XV)*, which called for the unconditional and prompt end of these practices.

Furthermore, the Preamble states that discrimination impedes peaceful and friendly relations between nations, threatens peace and security among people, and disrupts harmony within states. It also affirms that the existence of racial barriers is incompatible with the ideals of any human[43] society.

A particularly significant and debated issue is the explicit mention of apartheid in the Convention and its Preamble, while no reference is made to the Holocaust, antisemitism, or Nazism. Throughout various stages of the drafting process, there were suggestions to include explicit references to Nazism or antisemitism, but the majority of states repeatedly argued that it would be unjustified to single out a specific political regime or historical crime – the Convention needed to be more universal in scope.[44] This argument may seem contradictory given that apartheid is explicitly mentioned, but it can be explained by the fact that Nazism and the Holocaust were already in the past at the time of the Convention's adoption, whereas apartheid was still the official political system in South Africa. However, this reasoning was not satisfactory to everyone,[45] as the very events that led to the Convention's creation were the numerous antisemitic acts targeting the Jewish community. The ninth paragraph refers to apartheid, segregation, and separation as existing practices of racial discrimination, advocating racial superiority. However, as we will see in Article 1, these do not exhaustively define racial discrimination.

43 During the drafting process, an earlier version of the text included the term "civilized society," which was rejected by several states. See: Lerner, 2014, p. 26.

44 For more details on the debate that arose during the preparatory process, see: Banton, 2003, pp. 58–62.

45 For example, Natan Lerner finds this argument unconvincing. See: Lerner, 2014, pp. 70–75.

3.2. Part I of the Convention (Articles 1–7)

Part I of the Convention consists of Articles 1–7. Article 1 defines the term "racial discrimination" and outlines the scope of the Convention in terms of subject matter and the individuals it protects. Articles 2–7 address the passive and active obligations of states in combating racial discrimination.

3.2.1. Article 1 – The Definition of Racial Discrimination

3.2.1.1. Paragraph 1

Paragraph 1 of Article 1 defines what is meant by racial discrimination within the context of the Convention. Intuitively, one might think that defining racial discrimination would require a definition of race. However, this presents a challenge since the UN would need to define race while simultaneously denying the existence of distinct races among humans.[46] The drafters of the Convention chose a different approach, treating racial discrimination as a specific legal term used within the closed system of the Convention:

> 'In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'.

To constitute "racial discrimination" under this definition, an action must meet three conditions simultaneously: 1) It must involve a *distinction, exclusion, restriction, or preference.* 2) It must be based on *race, colour, descent, or national or ethnic origin.* 3) It must *have the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.*

Both the first and second components involve closed lists. In relation to the first component, it can be noted that the legislative intent was to provide the most comprehensive and complete conceptual framework for discrimination. The second component lists the specific bases for discriminatory treatment: *race, colour, descent, or national or ethnic origin,* excluding categories like political views, gender, sexual orientation, or social status. The third component covers various fundamental and

46 See: Valencia-Rodriguez, 1991, p. 194.

human rights fields but does so with an open-ended list, meaning it could extend to other areas.[47]

Significantly, the Convention condemns actions not only with the purpose of nullifying or impairing equal human rights but also those with the effect of doing so. This means that the Convention prohibits not only direct but also indirect discrimination. To determine whether an action contravenes the Convention, it is necessary to assess whether the action has an unjustifiable disparate impact on a group distinguished by race, colour, descent, or national or ethnic origin.[48] According to General Recommendation No. 32:

> 'The reference to public life does not limit the scope of the non-discrimination principle to acts of public administration but should be read in the light of the provisions in the Convention mandating measures by States parties to address racial discrimination "by any persons, group or organization"'.

3.2.1.2. The Definition of "Race" in Other International Treaties

The ICERD is not unique among international anti-discrimination treaties in not defining "race." For example, The European Convention on Human Rights, The European Commission Against Racism and Intolerance, The EU's Racial Equality Directive, and the Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law all address racial discrimination extensively, but do not define "race" specifically.

The European Convention on Human Rights prohibits discrimination on the grounds of race but does not define race. However, the jurisprudence of the European Court of Human Rights distinguishes between race and ethnicity:

> 'Ethnicity and race are related and overlapping concepts. While the notion of race is rooted in the biological classification of human beings based on morphological features like skin colour or facial characteristics, ethnicity originates in societal groups marked by nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds'.[49]

47 We can see a very similar definition in the ILO Convention (1958) Concerning Discrimination in Respect of Employment and Occupation defines discrimination in its first article as 'any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.' The UNESCO Convention Against Discrimination in Education uses the words 'distinction, exclusion, limitation or preference' based on "race," "colour," "national" origin or "birth".

48 See: CERD Committee, General Recommendation No. 14 on Art. 1 para. 1 of the Convention, Forty-second session (1993) (A/48/18).

49 ECtHR, *Timishev v. Russia*, Nos. 55762/00 and 55974/00, 13 December 2005, para. 55.

The EU's Racial Equality Directive[50] establishes a framework for combating discrimination on the grounds of "racial or ethnic origin" but does not define these terms. Likewise, the Framework Decision on combating racism and xenophobia by means of criminal law[51] defines neither race nor racial origin but refers to racism as violence or hatred *directed at groups defined by race, colour, religion, descent, or national or ethnic origin*.

The Council of Europe's monitoring body specialised in combating racism, the European Commission Against Racism and Intolerance (ECRI) defines terms such as "racism" and "direct and indirect racial discrimination" in General Policy Recommendation No. 7. According to ECRI, racism is: 'The belief that a ground such as race, colour, language, religion, nationality, or national or ethnic origin justifies contempt for a person or group of persons, or the notion of superiority of a person or group'.

3.2.1.3. Paragraphs 2–4

Paragraphs 2–4 of Article 1 address situations that are not considered racial discrimination under the Convention. According to Paragraph 2, the Convention does not apply to distinctions, exclusions, restrictions, or preferences made by a State Party between citizens and non-citizens. Paragraph 3 states that the Convention shall not be construed as having any impact on the legal provisions of States Parties regarding nationality, citizenship, or naturalisation, as long as these provisions do not discriminate against any specific nationality.

3.2.1.4. Special and Concrete Measures

Paragraph 4 allows states to implement *special measures* aimed at aiding certain racial or ethnic groups to achieve equality in the enjoyment of their rights. These measures are designed to be temporary and must be carefully managed to avoid creating separate rights or institutionalising inequality. By clarifying that these measures are not considered discrimination, the provision seeks to encourage states to take proactive steps to rectify historical disadvantages while ultimately aiming for a society where all individuals enjoy equal rights and freedoms. Similarly, Article 2, paragraph 2 addresses this issue from the perspective of state obligations. Although it refers to *special and concrete measures,* the terminological differences between the two articles are primarily formal, not substantive. Both paragraphs refer to the protection of groups and individuals with respect to human rights and fundamental freedoms. In its general recommendation, CERD also clarified that *special and concrete measures* should not be confused with specific rights aimed at accommodating the cultural needs of minorities, which allow them to practice their own culture, religion, or use their native language. The latter represents the permanent rights of these individuals

50 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

51 Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.

or groups. In contrast, *special and concrete measures* may remain in effect only as long as the circumstances of disadvantage exist, obliging the state to implement such measures until those conditions are rectified.[52]

Special and concrete measures are key components of non-discrimination measures in the human rights system: a) the UN Subcommittee, established in 1949, stated in its previously mentioned studies titled *The Main Types and Causes of Discrimination* and *Definition and Classification of Minorities* that in order to achieve actual equality, national minorities require not only a general prohibition of direct discrimination that ensures formal equality but also "special rights" and "positive services".[53] b) The term *special measures* later appears in the 1990 Copenhagen Document adopted under the auspices of the Conference on Security and Co-operation in Europe,[54] the UN's 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities,[55] and the Framework Convention for the Protection of National Minorities[56] adopted by the Council of Europe in 1993, all with similar implications. c) The Venice Commission refers to these rights as reinforcing measures that enable the manifestation of minority identities, thereby making real, effective equality attainable.[57]

The legal status of groups within the framework of prohibiting racial discrimination deserves attention, as the international human rights system primarily recognises only the right to self-determination of people as a collective human right. Thus, it raises questions about which group rights the Convention seeks to protect. Paragraph 34 of General Recommendation No. 32 clarifies that groups are not mentioned by chance:

> 'Beneficiaries of special measures under Article 2 paragraph 2, may be groups or individuals belonging to such groups. The advancement and protection of communities through special measures is a legitimate objective, pursued alongside respect for the rights and interests of individuals. Identifying an individual as part of a group should be based on self-identification unless a justified reason exists to the contrary'.

52 CERD General Recommendation No. 32. The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination. 24 September 2009. UN Doc., CERD/C/GC/32.

53 United Nations – Commission on Human Rights. Sub-Commission on Prevention of Discrimination and Protection of Minorities: Definition and Classification of Minorities, 27 December 1949, UN Doc., E/CN.4/Sub. 2/85, pp. 3–4; The Main Types and Causes of Discrimination, New York, 7 June 1949, UN Doc., E/CN.4/Sub.2/40/Rev.1, pp. 2–3.

54 Document of the Copenhagen meeting of the conference on the human dimension of the CSC, Part IV, para. 30.

55 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities, Art. 4.1.

56 Framework Convention for the Protection of National Minorities, art. 4.

57 CDL-MIN(1998)001rev, Summary Report on Participation of members of minorities in public life, Introduction, paras. 1.1., 2.1., 2.2.

3.2.2. Article 2

Article 2 discusses the obligations of the signatory parties. In the previously mentioned paragraph 2, the State Parties committed to the application of *special measures* in certain circumstances. Paragraph 1(a)–(d) addresses the obligations of states to *condemn racial discrimination and to undertake, by all appropriate means and without delay, a policy of eliminating racial discrimination in all its forms and promoting understanding among all races.*

3.2.2.1. Paragraph (a)

Paragraph (a) focuses on the negative obligation of the state to abstain from *any practice of racial discrimination against persons, groups of persons, or institutions*. While institutions themselves do not possess race, colour, descent, or national or ethnic origin, the leaders and members of these institutions certainly do. Therefore, it is reasonable that institutions without racial characteristics can also be included in this listing. However, it requires further investigation to define what constitutes an institution. For instance, does a minority-language school operated by the state, a church maintained by a specific ethnic group, or a company or association founded by members of a particular group qualify as institutions under the Convention?

3.2.2.2. Paragraph (b)

Paragraph (b) addresses another negative obligation of the state, namely, *not to sponsor, defend, or support racial discrimination by any persons or organizations.*

3.2.2.3. Paragraph (c)

Paragraph (c) calls on states to review their own laws, local and national policies, and to ensure that they do not result in or perpetuate racial discrimination. This shift in focus from direct racial discrimination to the outcomes and perpetuation of discrimination highlights the collective dimension of the anti-discrimination principle, which refers to various forms of structural discrimination affecting disadvantaged groups.

3.2.2.4. Paragraph (d)

Paragraph (d) outlines the state's obligation not only to refrain from discrimination but also to prevent and eliminate racial discrimination perpetrated by individuals, groups, and organisations.

3.2.2.5. Paragraph (e)

Paragraph (e) prescribes measures for promoting anti-discrimination education within society, fostering a culture of human rights, and encouraging initiatives that weaken racial divisions among the contracting states. According to this paragraph, State Parties are not only committed to eliminating discrimination but also to encouraging, where appropriate, integrationist multiracial organisations and movements, as well as other means of eliminating barriers between races, while discouraging any actions that tend to strengthen racial division.

3.2.3. Article 3

Article 3 of the Convention condemns racial segregation and apartheid, and commits the signatory states to prevent, prohibit, and abolish these practices under their jurisdiction. As previously discussed, paragraph 9 of the preamble also addresses the issue of apartheid, which has been a divisive topic among the states involved in the preparation of the Convention. During the drafting of this article, there was a proposal to also include antisemitism alongside racial segregation and apartheid. Natan Lerner consistently argues that the logic of the document warranted the inclusion of Nazism and antisemitism if the specific practice of apartheid was mentioned. He believes that the exclusion of Nazism and antisemitism can be attributed solely to political reasons.[58] General Recommendation No. 19 on Article 3 states that '[T]he reference to apartheid may have been directed exclusively to South Africa, but the article as adopted prohibits all forms of racial segregation in all countries'.[59]

3.2.4. Article 4

Article 4 imposes further obligations on the signatory states. The introductory paragraph states that the participating states condemn propaganda and organisations that justify racial theories or incite racial hatred and discrimination. Furthermore, they commit to taking immediate and active steps to eliminate incitement and acts of discrimination. This paragraph is followed by three active commitments, which imply restrictions on freedom of speech, thought, and assembly to prevent the dissemination of racial theories and incitement based on race in society. This posed problems for several states, leading to the incorporation of the following phrase in the introductory paragraph: 'to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention'.[60]

CERD has demonstrated longstanding and resolute engagement with the issue of hate speech, recognising its role in fostering serious human rights violations, and reflecting this concern in numerous general recommendations, including General Recommendations No. 7 (1985) on the implementation of article 4 and freedom of expression, No. 25 (2000) on gender-related dimensions of racial discrimination, No. 27 (2000) on discrimination against Roma, No. 29 (2002) on descent-based discrimination, No. 30 (2004) on discrimination against non-citizens, No. 31 (2005) on racial discrimination in criminal justice, and No. 34 (2011) on people of African descent.[61]

58 Lerner, 2014, p. 47.
59 CERD, General Recommendation No. 19 on Art. 3 of the Convention, Forty-seventh session (1995). Contained in document A/50/18.
60 The problem of hate speech was analysed in detail by the CERD, General Recommendation No. 35, Combating racist hate speech on art. 3 of the Convention, Forty-seventh session (1995). Contained in document A/50/18.
61 General Recommendation No. 35, para. 3.

3.2.4.1. Paragraph (a)

The first of the three commitments states that the State Parties shall punish the dissemination of racist ideas, hatred, incitement to racial discrimination, and all acts of violence or incitement to such acts, as well as the provision of any assistance to racist activities.

3.2.4.2. Paragraph (b)

The second subsection specifies that states must declare illegal and prohibit any organisations and propaganda activities that promote or incite racial discrimination. Participation in such organisations or activities is also to be considered a punishable offence by law.

3.2.4.3. Paragraph (c)

The third paragraph extends the prohibition of incitement to racial discrimination and its promotion to state institutions and authorities.[62] In General Recommendation No. 1 concerning States Parties' obligations, CERD found that the legislation of several State Parties did not include the provisions envisioned in Article 4(a) and (b) of the Convention, the implementation of which is obligatory under the Convention for all State Parties.[63]

As General Recommendation No. 35 points it out, Article 4 of ICERD is not self-executing, States parties are under an obligation to enact domestic legislation to address racist hate speech within its scope. Drawing on the Convention's provisions, General Recommendation No. 15, and General Recommendation No. 35, CERD urges states to criminalise specific forms of expression and conduct. These include the dissemination of ideas based on racial or ethnic superiority or hatred; incitement to hatred, contempt, or discrimination; threats or incitement to violence; expressions that amount to incitement through insult, ridicule, or slander; and participation in organisations that promote racial discrimination.[64]

Although Article 4 of the ICERD requires States Parties to criminalise certain forms of racist conduct, it does not provide detailed criteria for qualifying such conduct as criminal offences. According to the Committee, several contextual factors must be considered when assessing whether dissemination of ideas or incitement constitutes a criminal offence. These include: the content, form, and style of the speech; the prevailing social, economic, and political context, particularly where discrimination against specific groups is systemic; the speaker's status and influence;

62 General Recommendation No. 15 on art. 4 of the Convention (Contained in document A/48/18, 1993) reminds us that para. 2 of Art. 20 of The International Covenant on Civil and Political Rights adopted on 16th December 1966 prescribes similarly the prohibition of incitement to discrimination: '2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.'
63 CERD Committee, General Recommendation No. 1 concerning States parties' obligations, contained in document A/87/18 (1972).
64 Ibid., para. 13.

the reach and repetition of the message, especially through mass media or online platforms; and the intent of the speech. Notably, speech aimed at defending human rights should not be subject to criminal sanctions.[65]

3.2.5. Article 5 of the Convention

Article 5 of the Convention aims to identify and outline various categories of rights that should be available to individuals without discrimination based on race, colour, nationality, or ethnic origin. While the list provided appears comprehensive, it is not considered exhaustive, as indicated by the use of the word "notably" in the introductory paragraph. This interpretation is further supported by the *travaux préparatoires* and General Recommendation No. 20, which clarifies that the rights and freedoms mentioned in Article 5 do not constitute an exhaustive list.[66] Thus, the article can be seen as a broad catalogue of human rights.[67]

Paragraph (a) stipulates that access to justice must be available without discrimination: *The right to equal treatment before the tribunals and all other organs administering justice.*

Paragraph (b) outlines the state's obligation to protect citizens from all forms of violence based on discrimination: *The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.*

Paragraph (c) mandates the non-discriminatory assurance of political rights in an open list format. It specifically mentions the rights to vote and be elected, to participate in any public affairs, and to have equal access to public services.

Paragraph (d) enumerates nine civil rights: the right to freedom of movement and residence within the borders of the State; the right to leave any country, including one's own, and to return to one's country; the right to nationality; the right to marriage and choice of spouse; the right to own property alone as well as in association with others; the right to inherit; the right to freedom of thought, conscience, and religion; the right to freedom of opinion and expression; the right to freedom of peaceful assembly and association.

Paragraph (e) specifies six economic, social, and cultural rights: the rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, and to just and favourable remuneration; the right to form and join trade unions; the right to housing; the right to public health, medical care, social security, and social services; the right to education and training; the right to equal participation in cultural activities.

At the time of writing, the most recently issued General Recommendation No. 37 (2024) is closely linked to the right to health set out in paragraph (e) (iv). In the

65 Ibid., para. 15.
66 CERD, General Recommendation No. 20 on Art. 5 of the Convention, Forty-eighth session (1996). Contained in document A/51/18.
67 DH-MIN(2006)021; Henrard, 2006, p. 4.

context of the ICERD, the right to health is interpreted in accordance with Article 12(1) of the International Covenant on Economic, Social and Cultural Rights, which defines it as the highest attainable standard of physical and mental well-being. This understanding is increasingly influenced by ecocentric perspectives, aligning with Indigenous Peoples' conceptions of health that emphasise both individual and collective dimensions. These include spiritual well-being, traditional healing systems, biodiversity, and the interconnectedness of all life – elements that are inherently tied to the right to self-determination and reinforced by the United Nations Declaration on the Rights of Indigenous Peoples. As outlined in General Recommendation No. 37, the right to health encompasses not only access to healthcare services, but also access to the broader determinants of health: clean water, adequate food and housing, sanitation, a healthy environment, and information and education, including sexual and reproductive health. Meaningful participation in decision-making processes at the local, national, and international levels is also essential. Public health efforts prioritise the prevention of illness, improvement of social and environmental conditions, and fostering trust between communities and health institutions. Healthcare includes timely and appropriate preventive, curative, rehabilitative, and palliative services, while social welfare systems play a critical role in addressing racial disparities in health outcomes.[68]

The last *paragraph (f)* guarantees access without discrimination to all public or private services available to the general public: *The right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres, and parks.* The phrase *such as* indicates that this list is not exhaustive.

3.2.6. Article 6

Article 6 not only emphasises effective protection against and remedies for racial discrimination but also recognises the need for adequate reparation or satisfaction for any damage suffered as a result of such discrimination. The personal scope of this article extends beyond citizens, as it applies to anyone who is within the jurisdiction of the state. It is important to note that the ICERD, by providing not only an effective remedy but also reparation or satisfaction, goes beyond the standards set by the Universal Declaration of Human Rights (Article 8), the Covenant on Civil and Political Rights (Article 2), and the Declaration on the Elimination of All Forms of Racial Discrimination (Article 7(2)).

General Recommendation No. 26 on Article 6 emphasises that the CERD believes that acts of racial discrimination and racial insults harm the victim's perception of his or her own worth and reputation; therefore, punishing the perpetrator of discrimination does not compensate for the victim's loss. In the opinion of the CERD, courts and

68 General Recommendation No. 37 (2024) on equality and freedom from racial discrimination in the enjoyment of the right to health adopted by the Committee at its 113th session (5–23 August 2024), para. 6.

other competent authorities should consider awarding financial compensation for the material or moral damage suffered by a victim whenever appropriate.[69]

3.2.7. Article 7

Article 7 advocates for immediate and effective measures in the fields of teaching, education, culture, and information with a view to combating prejudices that lead to racial discrimination. According to this article, states must fight against the prejudices underlying racial discrimination. General Recommendation No. 5 (1977) noted with regret that

> 'few States parties have included, in the reports they have submitted in accordance with Article 9 of the Convention, information on the measures they have adopted to implement the provisions of Article 7 of the Convention, and that this information has often been general and perfunctory'.[70]

Based on the reporting guidelines for the CERD-specific document to be submitted by States parties under Article 9,[71] states have the following obligations based on Article 7.

3.2.7.1. Education and Teaching

States must ensure that the school curriculum and the training programmes for teachers and other professionals promote the development of tolerance and cooperation among groups, as well as an understanding of human rights. During this training, participants should be made aware of the values and principles found in the UN Charter and the Universal Declaration of Human Rights. Similarly, states must review educational materials to ensure that textbooks and other resources do not reinforce prejudices and stereotypes against different groups. Additionally, the history and culture of groups protected under the Convention should be included in textbooks and the media, potentially in their own languages.[72] The obligations in the field of education also extend to law enforcement officials, whose training must incorporate respect for human dignity and the protection of human rights, regardless of race, colour, or national or ethnic origin.[73]

69 CERD, General Recommendation No. 26 on art.6 of the Convention, Fifty-sixth session (2000).
70 CERD, General Recommendation No. 5 concerning reporting by States parties (art. 7 of the Convention), Fifteenth session (1977). Contained in document A/32/18.
71 CERD/C/2007/1, Guidelines for the CERD-specific document to be submitted by states parties under Art. 9, para. 1 of the Convention, pp. 14–15.
72 See: CERD, General Recommendation No. 27 (2000) on discrimination against Roma, para. 26.
73 See: CERD, General Recommendation No. 13 (1993) on the training of law enforcement officials in the protection of human rights.

3.2.7.2. Culture

National culture and cultural products can represent values regarding relationships between different groups. For this reason, the Convention encourages states to be supportive of interculturality in the cultural sphere, promoting cooperation among creators from different cultural backgrounds and showcasing cultural diversity, including support for the use of minority languages.

3.2.7.3. Information

In the field of communication, states must pay particular attention to how they communicate in cases of incidents that reinforce prejudices against the groups protected by the Convention, ensuring that such communication does not exacerbate existing negative biases and stereotypes.[74] Furthermore, the media has a responsibility to inform the public about the culture, way of life, and social presence of these groups.

In the second part of the article, states are instructed to promote understanding, tolerance, and friendship among nations and racial or ethnic groups, as well as to propagate the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.[75]

4. The Committee on the Elimination of Racial Discrimination

The CERD is an unprecedented innovation within the UN human rights system, being the first human rights treaty monitoring body established to oversee and monitor the extent to which State Parties fulfil their commitments under the ICERD. Since the establishment of the CERD, an additional nine treaty monitoring bodies have been created.[76] To ensure the professionalism and impartiality of the CERD, the State Parties elect, by secret ballot, eighteen experts of high moral standing and recognised impartiality in the field of human rights from among their nationals, who will serve in their personal capacity.

Members are elected for a term of four years, taking into account equitable geographic distribution, representation of different forms of civilization and legal

74 See for example: General Recommendation No. 27 (2000) on discrimination against Roma, para. 37.

75 For more details on the significance of art. 7, see: Farrior, 1999, pp. 291–299.

76 UN treaty monitoring bodies and the year of their first meeting: Committee on the Elimination of Racial Discrimination (CERD, 1970), Human Rights Committee (HRC, 1977), Committee on the Elimination of Discrimination Against Women (CEDAW, 1982), Committee on Economic, Social and Cultural Rights (CESCR, 1987), Committee Against Torture (CAT, 1988), Committee on the Rights of the Child (CRC, 1991), Committee on the Rights of Migrant Workers (CMW, 2004), Subcommittee on Prevention of Torture (SPT, 2007), Committee on the Rights of Persons with Disabilities (CRPD, 2009), Committee on Enforced Disappearances (CED, 2010).

systems, and balanced gender representation.[77] In 1969, at the first election of the eighteen members, the mandates of nine members were set to expire after two years. As a result, every two years, half of the four-year-long mandates come to an end, ensuring continuity and the transfer of institutional knowledge within the Committee. After the expiration of a mandate, it is not prohibited to obtain a new term.

Originally, the CERD assessed through three mechanisms the extent to which the legislative, judicial, administrative, or other measures adopted by states comply with their commitments under the ICERD. These assessments are catalysed by the following mechanisms: 1) State Reports, 2) Inter-state communications, and 3) Individual communications. In the 1990s, the CERD derived new tasks from its original mandate, establishing the so-called 4) early warning and urgent action procedure.[78]

4.1. State Reports

The process of State reporting is cyclical:[79] Drafting and submission of the State Report by the State Party → Appointment of a Country Rapporteur and compilation of the list of themes → Consideration of the State Report → Drafting of the Concluding Observations by CERD → Follow-up procedure to concluding observations → Implementation of the Concluding Observations by the State Party → Preparation of the next State Report by the State Party (the beginning of the new cycle) → *Drafting and Submission of the State Report by the State Party.*

By Article 9, paragraph 1, State Parties undertake to submit a report to the Secretary-General of the United Nations on the legislative, judicial, administrative, or other measures which they have adopted that give effect to the provisions of this Convention: (a) within one year after the entry into force of the Convention for the state concerned, and (b) thereafter every two years, and whenever the Committee so requests, or whenever the Committee may request further information.

According to the reporting guidelines[80] published by the CERD, State Reports should consist of two parts: a common core document that includes general information about the reporting state, the general framework for the protection and promotion of human rights, as well as general information on non-discrimination and equality and effective remedies; and a treaty-specific document. The common core document should include information on the demographic composition[81] of the

77 We note that balanced gender representation is not mentioned in Art. 8; however, it does appear on the CERD website. See: https://www.ohchr.org/en/treaty-bodies/cerd/membership (Accessed: 20 May 2025).

78 For more details on the shift in approach, see: Michael Banton: op. cit., pp. 142–171.

79 ICERD and CERD: A Guide for Civil Society Actors [Online]. Available at: https://www.ohchr.org/sites/default/files/documents/HRBodies/CERD/ICERDManual.pdf (Accessed: 20 May 2025).

80 CERD/C/2007/1.

81 This is particularly important because, in some cases, states may report on the existence of various groups but refuse to categorise them as victims of racial discrimination, as they do not recognise them as racial groups. In light of the data, CERD can influence how states approach the situation of these groups.

population referred to in the provisions of Article 1 of the Convention.[82] The treaty-specific document should contain detailed information on the legislative, judicial, administrative, or other measures which they have adopted that give effect to the provisions of the substantive articles (Articles 1–7) of the Convention.

4.1.1. Appointment of a Country Rapporteur and Compilation of the List of Themes

Once states have submitted their reports, the CERD assigns a country rapporteur to each report. The country rapporteur is responsible for formulating the 'List of Themes', reviewing the State Report, and writing the 'Concluding Observations'. The CERD established the practice of the "list of themes" during its 77th session. These themes are issues raised by the rapporteur to each state, serving as a call for the states to address these themes in their subsequent state report.

4.1.2. Consideration of State Reports

The CERD invites representatives of states to Geneva to participate in discussions of the State Report, allowing for an "interactive dialogue" to take place. During this discussion, the state representative presents the report, after which the country rapporteur provides feedback and asks additional questions. Other members of the CERD can share their opinions and ask questions. If the National Human Rights Institute (typically the ombudsman or a human rights commissioner in the CCE region) is present, it may also participate in the dialogue to share its insights and respond to questions.

4.1.3. Drafting of the Concluding Observations

After the interactive dialogue, the Country Rapporteur drafts the complete Concluding Observations, which are then discussed by the full membership of the CERD. The document approved by the CERD is submitted for further review by the state, which is given another opportunity to clarify the CERD's position. Taking into account the state's observations, the CERD ultimately publishes the Concluding Observations regarding the state. The state's previously expressed comments are also included in the CERD's annual report.

A review of the most recent ten Concluding Observations of the Central and Eastern European (CEE) states[83] reveals that these documents consistently follow a structure composed of the following sections: A. Introduction, B. Positive Aspects, C. Concerns and Recommendations, and D. Other Recommendations. The issues addressed in the Concluding Observations typically relate to statistics, national

82 CERD, General Recommendation No. 4 concerning reporting by States parties (art. 1 of the Convention), Eighth session (1973). Contained in document A/90/18.

83 Hungary (2019, CERD/C/HUN/CO/18-25), Lithuania (2019, CERD/C/LTU/CO/9-10), Czechia (2019, CERD/C/CZE/CO/12-13), Poland (2019, CERD/C/POL/CO/22-24), Estonia (2022, CERD/C/EST/CO/12-13), Slovakia (2022, CERD/C/SVK/CO/13), Croatia (2023, CERD/C/HRV/CO/9-14), Bulgaria (2023, CERD/C/BGR/CO/23-25), Albania (2024, CERD/C/ALB/CO/13-14), Bosnia and Herzegovina (2024, CERD/C/BIH/CO/14-15).

human rights institutions, the anti-discrimination legal framework and its enforcement, complaints of racial discrimination, racist hate crimes, racist hate speech, racially motivated crimes, the situation of Roma, and the situation of asylum seekers, migrants, and refugees. It is noteworthy that the Observations on Estonia also highlight concerns regarding the new language policy that adversely affects minority languages. Thornberry highlights that even the 2010 Concluding Observation on Estonia[84] addressed language as a key component of integration. He notes that recommended integration policies are often shaped by specific sectors and available information, and when appropriate, influenced by cultural factors that can both guide and constrain the Committee's recommendations. In Estonia's case, the Committee criticised the integration strategy for placing excessive emphasis on language, urging the State to reconsider laws limiting the use of minority languages in public services to regions where minorities constitute at least half the population.[85] Furthermore, it is significant that all Concluding Observations issued after the publication of General Recommendation No. 36 (2020) on preventing and combating racial profiling by law enforcement officials include a dedicated subsection addressing this issue.

4.1.4. Follow-up Procedure to the Concluding Observations[86]

The CERD may request a State Party to submit an additional report or information on specific topics after reviewing its State Report, in line with Article 9 of the ICERD and rule 65 of the Committee's rules of procedure. This request is typically included in the Concluding Observations, with a set deadline, usually one year.

To enhance the follow-up process, the Committee added a second paragraph to Rule 65 during its 64th session (2004), appointing two members of the Committee as follow-up coordinators to work with the Country Rapporteur. The coordinators monitor the states' follow-up on CERD's recommendations and report progress back to the Committee, which may adopt formal recommendations or decisions on further action based on the coordinators' findings. These findings are discussed in closed meetings and included in the CERD's annual report.

Drawing on his experience as a Committee member, Thornberry notes that only a few states have submitted such comments, even though they often reflect substantial disagreements with the Committee.[87]

4.1.5. Review Procedure

Due to several states submitting their State Reports late or not at all, the CERD adopted a Review Procedure at its 39th session (1991), enabling a review in the absence of an up-to-date State Report. Under this procedure, the CERD collects information from other UN organs and NGOs.

84 See: CERD/C/EST/CO/8-9, para 13.
85 Thornberry, 2016, p. 351.
86 See: CERD/C/66/Misc. 11/Rev. 2.
87 Thornberry, 2016, p. 45.

4.2. Inter-State Communications

States that believe another state party is not complying with the Convention may bring the issue before the CERD. The Committee forwards the complaint to the accused state, which must respond within three months (Article 11.1). If a satisfactory resolution is not achieved through negotiations within six months, either state may refer the matter back to the Committee (Article 11.2). The Committee will only consider the case if all available domestic remedies have been exhausted to address the alleged violation that is the basis of the complaint. An exception is made if the remedy has been unreasonably delayed (Article 11.3). In cases referred to the Committee, it may request additional information from the states involved (Article 11.4). The affected states may participate in the proceedings before the Committee regarding their case without voting rights (Article 11.5).

Once the Committee has gathered the relevant information, the Chair appoints an ad hoc Conciliation Commission of five members (with unanimous agreement from the disputing states) to seek an amicable resolution. For members on which the disputing parties could not agree, the CERD will designate members from among its own members. The established Commission will adopt its own rules of procedure, and the costs will be shared equally between the disputing parties (Article 12).

After the Conciliation Commission has prepared its report on the disputed issue, it sends it to the disputing parties, the states. The states must inform the Chair of the Committee within three months whether they accept the recommendations made in the Commission's report. Finally, the Chair communicates the Commission's report and the statements of the affected states to the parties involved (Article 13).

Any dispute between two or more States Parties regarding the interpretation or application of this Convention that cannot be resolved through negotiation or the procedures specifically outlined in Articles 11–13 shall be referred to the International Court of Justice for a decision, upon the request of any disputing party, unless the parties agree to an alternative method of settlement (Article 22).

During the half-century since the adoption of the Convention, states have never utilised this complaint mechanism. However, on March 8, 2018, the CERD received two inter-State communications for the first time during its operations: *Qatar v. Kingdom of Saudi Arabia* and *Qatar v. United Arab Emirates*. On April 23, 2018, the state of Palestine submitted a complaint to the CERD against Israel.[88] The *Palestine v. Israel* case led to the publication of a report by the Ad Hoc Conciliation Commission, released by CERD on 21 August 2024.[89] This case represents the first time in UN treaty body history that the inter-State communications procedure has been carried through in its entirety. Despite the historic nature of the case, conciliation proved impossible due to the dispute's complexity and Israel's refusal to cooperate or recognise the Commission's jurisdiction. The report addresses alleged racial discrimination by

88 See: https://www.ohchr.org/en/treaty-bodies/cerd/inter-state-communications (Accessed: 20 May 2025).
89 See: CERD/C/113/3.

Israel in the Occupied Palestinian Territory, specifically the West Bank (including East Jerusalem) and Gaza. It also notes a core disagreement: while Israel contests the Convention's applicability beyond its borders, the Committee affirms it applies to all areas under Israel's effective control. The occupied Syrian Golan, though included in this interpretation, was not part of the communication.[90]

Gay McDougall correctly points out how the decision on jurisdiction in the Inter-State Communication submitted by the State of Palestine against Israel proves the unique nature of the Convention. Unlike the communication procedures found in most other human rights treaties – except for the Convention on the Prevention and Punishment of the Crime of Genocide – under Articles 11 to 13 of this Convention, States Parties are not required to grant explicit consent for CERD to consider Communications alleging non-compliance with the Convention. This mechanism operates automatically, even in cases where Israel does not recognise the State of Palestine as a State. The obligations imposed on states under Articles 11 to 13 serve the shared goal of ensuring the effective prohibition of racial discrimination, which is considered an *erga omnes* norm, benefiting the entire international community and impervious to derogation by the unilateral actions of any one State Party (Decision, paragraph 3.43).[91]

4.3. Individual Communications

According to Article 14, in addition to signing the Convention, states may make a specific commitment to allow individuals or groups under their jurisdiction to submit complaints to the CERD. Therefore, individuals or groups can only file complaints against a particular state for violations of the commitments outlined in the ICERD if that country has made a supportive statement regarding the option for individual communications. As David Keane points out, the ICERD was very similar to the European Convention on Human Rights (ECHR) in this respect, since the individual petition under ex-Article 25 of the ECHR was optional at the time of the creation of ICERD.[92]

Complaints must be submitted within six months after the exhaustion of the last available domestic remedy. The acceptance of a complaint does not require that the case has not been referred to any other human rights forum. Decisions on individual complaints are not legally binding court rulings but advisory opinions.[93] Of the 182 countries that have ratified the ICERD, 59 have recognised the CERD's competence in relation to individual communications submitted under Article 14.[94] The Central and Eastern Europe (CEE) countries that have made such declarations are Slovenia, Slovakia, Serbia, Romania, Moldova, Poland, North Macedonia, Hungary, Estonia, Czech Republic, Bulgaria, and Austria. To date, seven complaints have been filed under Article 14 against these states. Among these, five complaints were filed against

90 CERD/C/113/3, para. 5.
91 McDougall, n.d.
92 Keane, 2024, p. 22.
93 Keane and Waughray, 2017, p. 44.
94 As of September 2024.

Slovakia,[95] one against Serbia and Montenegro,[96] and one against Estonia.[97] In the communications against Slovakia and Serbia and Montenegro, the complainants invoked racial discrimination on the basis of their Roma origin in all six cases. In the case of Estonia, the petitioner claimed discrimination based on being a member of the Russian minority. Of the seven complaints, the CERD found five to be well-founded. Below, we will briefly review these five cases.

4.3.1. Miroslav Lacko v. Slovak Republic, Communication No. 11/1998, CERD/C/59/D/11/1998

In *Miroslav Lacko v. Slovak Republic*, Lacko, a Roma person was refused service at a restaurant because of his ethnicity. He sought legal remedies from the Slovak General Prosecutor, County Prosecutor, Railway Police, and Inspectorate of Commerce, but none found evidence of discrimination. Lacko argued that Slovakia's failure to address racial discrimination violated Articles 2–5, and 6 of the ICERD, particularly his right to access public services without racial discrimination and Slovakia's obligation to ensure effective legal remedies. Slovakia responded that the petition was inadmissible due to the non-exhaustion of domestic remedies and that its legal system already included consumer protection and anti-discrimination laws. Following an order from the General Prosecution Office of the Slovak Republic, the Regional Prosecution Office of Košice examined Mr. Lacko's communication. The Regional Office found that the actions of the restaurant could be considered incitement to racial hatred under Section 198a of the Penal Code but did not classify it as a criminal act. The General Prosecution Office disagreed with the legal opinion of the Regional Prosecution Office, asserting that the restaurant had committed a crime of instigation to national and racial hatred. As a result of the indictment from the General Prosecution Office, the restaurant was found guilty and received a fine of 5,000 SKK or a term of three months' imprisonment. The Committee evaluated this newly established legal situation as fulfilling the effective remedies required under Article 6 of the ICERD, ensuring effective remedies against racial discrimination. Therefore, although the CERD admitted the case, it found no violation of the Convention.

4.3.2. Anna Koptova v. Slovak Republic, Communication No. 13/1998, CERD/C/57/D/13/1998

Anna Koptova, a Slovak citizen of Roma ethnicity and the director of the Legal Defence Bureau for Ethnic Minorities of the Good Romany Fairy Kesaj Foundation in Košice, submitted a complaint to the CERD, alleging violations of Articles 2–5, and

95 See: Communications No. 011/1998, No. 013/1998, No. 056/2014, No. 031/2003, No. 70/2019. In the case of Communication No. 70/2019, the Committee concluded that the petitioners have not exhausted domestic remedies, therefore the communication is inadmissible.
96 See: Communication No. 029/2003.
97 See: Communication No. 64/2018. CERD found that the petitioner did not present sufficient indications to demonstrate that he was a victim of racial discrimination. Therefore, CERD decided that the communication was inadmissible.

6 of the Convention. The petition explained that the Slovak Republic was unable to annul two resolutions by local authorities that expelled and prohibited the settlement and entrance of Roma people from the Municipalities of Rokytovce (Resolution No. 21 of June 8, 1997) and Nagov (Resolution No. 22 of June 16, 1997). After the complaint was submitted, on April 8, 1999, the Municipal Councils of Nagov and Rokytovce held extraordinary meetings, also attended by the District Prosecutor of Humenné, and decided to revoke the resolutions. The CERD decision recommended 'that the State Party take the necessary measures to ensure that practices restricting the freedom of movement and residence of Romas under its jurisdiction are fully and promptly eliminated'.[98]

4.3.3. Ms. L. R. et al. v. Slovakia, Communication No. 31/2003, CERD/C/66/D/31/2003

On March 20, 2002, the municipality of Dobšiná adopted a proposal to construct low-cost houses for its 1,800-strong Roma community due to their "appalling" living conditions. This decision sparked outrage among some residents of Dobšiná and the surrounding villages, leading a five-member petition committee to draft a petition stating:

> 'I do not agree with the building of low-cost houses for people of Gypsy origin on the territory of Dobšiná, as it will lead to an influx of inadaptable citizens of Gypsy origin from the surrounding villages and even from other districts and regions'.

Over 2,700 residents of Dobšiná signed the petition. As a result of the petition, the city council unanimously voted to reject the original plan and abandon the construction of housing for the Roma community.

Following this situation, Ms. L. R. and twenty-six other Slovak citizens of Roma ethnicity residing in Dobšiná filed a petition to the CERD, claiming violations of: Article 2 paragraph 1(a), because the municipal council unanimously endorsed the petition, the State Party failed to refrain from engaging in acts or practices of racial discrimination. Article 2, paragraph 1(c), by failing to 'nullify any laws or regulations which have the effect of creating or perpetuating racial discrimination'. The District Prosecutor found that 'the resolution in question was passed by the Dobšiná Town Council exercising its self-governing powers; it does not constitute an administrative act performed by public administration, and as a result, the prosecution office does not have the competence to review the legality of this act or to take prosecutorial supervision measures in a non-penal area.'The Constitutional Court could not identify any fundamental rights that were violated. Article 2 paragraph 1(d) and Article 4 paragraph(a), by failing to effectively investigate and prosecute the authors of the petition. Article 5 paragraph (d) (III), since the State Party could not safeguard the

98 *Anna Koptova v. Slovak Republic*, Communication No. 13/1998: Slovakia. 01/11/2000, CERD/C/57/D/13/1998, para. 10.3.

rights of Roma inhabitants to adequate housing. Article 6, by failing to provide an effective remedy.

The Committee recognised the violation of Article 3 paragraph 1(a), Article 5 paragraph (d) (III), and Article 6 of the Convention. Regarding effective remedies, the CERD urged the State Party to restore the petitioners to a situation that existed before the discrimination, effectively returning them to their pre-complaint status. Additionally, the Committee called on the State Party to present within 90 days the steps taken to give effect to the Committee's Opinion and to give wide publicity to the opinion.

4.3.4. V. S. v. Slovakia, Communication No. 56/2014, CERD/C/88/D/56/2014

Similar to previous Slovak cases, the complainant V. S. was a Slovak citizen of Roma ethnicity. V. S., a history teacher with a university degree, applied for a position at I. B. Zoch Elementary School in Revúca in June 2009. She claimed that when she submitted her job application, the school's head teacher insultingly told her that instead of seeking employment, she should have children, like other Roma women. In July, the head teacher informed her in a letter that there were no vacancies at the school but that her application would be kept on record for future openings. In September 2019, she learned that there was a vacancy, and a non-Roma woman had been hired for the position, despite having lower qualifications and less experience than her.

Suspecting she had fallen victim to discrimination, V. S. first initiated proceedings at the Equity Centre and then at several judicial forums to establish the fact of discrimination and seek redress. While the school claimed that its financial capabilities did not allow for hiring more qualified personnel for the position, the Ministry of Education stated that the lack of resources could not be considered a valid reason for hiring an underqualified person over a candidate with a university degree. After exhausting national legal remedies, V. S. turned to the CERD. The CERD found that

> 'the facts before it disclose a violation of the petitioner's right to work without distinction as to race, colour, national or ethnic origin, in violation of the State party's obligation to guarantee equality in respect of the right to work, as enshrined in Article 5 (e) (i) of the Convention'.

Additionally, it noted that the court's insistence that V. S. should prove the intent of discrimination was incompatible with the Convention's prohibition of any conduct having a discriminatory effect and the principle of shifted burden of proof. The CERD concluded that the petitioner's rights under Articles 2 (1) (a), (c), 5 (e) (i), and 6 of the Convention had been violated.

4.3.5. Mr. Dragan Durmic v. Serbia and Montenegro, Communication No. 29/2003, CERD/C/68/D/29/2003

In this case, in February 2000, two Serbian citizens of Roma descent were prevented from entering a nightclub. Although the security personnel claimed it was a private

party and entry was only allowed with an invitation, the circumstances clearly indicated that non-Roma individuals were allowed entry without an invitation. Following the incident, one of the Roma men, D. D., filed a criminal complaint to the Public Prosecutor's Office in Belgrade, asserting that his rights and those of the other Roma individuals to equality, human dignity, and equal access to places intended for public use were violated. After prolonged inaction, in October 2001, the Public Prosecutor concluded, in cooperation with the police, that they could not identify who was guarding the entrance but concluded that it was indeed a private party, and therefore no crime had been committed. In January 2002, D. D. filed a petition with the Federal Constitutional Court, arguing that by failing to identify the perpetrators and dismissing the criminal complaint, the Public Prosecutor had prevented him and the alleged victim from prosecuting the case on their behalf. More than 15 months passed without a response from the Federal Constitutional Court.

The CERD assessed D. D.'s complaint, finding that due to the lack of a timely response from the Federal Constitutional Court, D. D. had exhausted his legal remedies. Additionally, the CERD noted that the State Party had failed to promptly, thoroughly, and effectively investigate whether the petitioner's right to access any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres, and parks, had been violated. As a result, the CERD determined that the State Party had violated Article 6 of the Convention.

4.4. Early Warning and Urgent Action Procedure

The direct source of these two procedures is not explicitly found in the Convention. The political transformations of the 1990s allowed the CERD to move beyond its reactive role and implement preventive mechanisms. This process began with the adoption of the working paper on the 'Prevention of Racial Discrimination, including Early Warning and Urgent Procedures' in 1993.[99] In 2007, during the Committee's 71st session, this working paper was replaced by new guidelines.[100] Under these new rules, a working group of up to five members is established, which meets during the CERD sessions and at other appropriate times. The members of the working group are elected for a renewable two-year term, respecting the principle of equitable geographical representation. The working group should make recommendations to the Committee and may draft decisions or formulate letters to States Parties.

4.4.1. Indicators

The primary goal of the early warning and urgent action procedures is to prevent or promptly halt serious violations of the ICERD and the escalation of processes leading to severe conflicts between groups. The guidelines set out the following indicators,

99 See: Prevention of Racial Discrimination, including Early Warning and Urgent Procedures, UN Doc. A/48/18 (1993), Annex III.

100 See: Guidelines for the Early Warning and Urgent Action Procedure, UN Doc. A/62/18 (2007), Annex III.

which signal the escalation of racial discrimination: a) a persistent and significant pattern of racial discrimination, reflected in social and economic indicators; b) increasing racial hatred, violence, or racist propaganda promoted by individuals, groups, or organisations, particularly elected or State officials; c) the adoption of new discriminatory regulations; d) policies of segregation or de facto exclusion of a group from political, economic, social, or cultural life; e) lack of an adequate legislative framework defining and criminalising all forms of racial discrimination, or lack of effective mechanisms, including lack of recourse procedures; f) practices or policies of impunity regarding: (1) violence against individuals based on race, colour, descent, or ethnic origin, perpetrated by State officials or private actors; (2) public statements by political leaders or prominent figures condoning or justifying such violence; (3) the formation of militias or extremist political groups promoting racist agendas; g) significant refugee or displaced populations, particularly from specific ethnic groups; h) encroachment on indigenous peoples' traditional lands or forced displacement for resource exploitation; i) polluting or hazardous activities that disproportionately affect certain racial or ethnic groups.

4.4.2. Possible Measures to be Taken

Under the early warning and urgent action procedures, the Committee may take the following measures: a) request urgent information from the State Party about the situation; b) ask the Secretariat to gather data from OHCHR field offices, UN agencies, national human rights institutions, and NGOs; c) adopt a decision expressing concerns and recommendations to: 1) the State Party concerned; 2) special Rapporteurs on racism, indigenous rights, or minority issues; 3) other relevant human rights bodies or the Human Rights Council's special procedures; 4) regional organisations and human rights mechanisms; 5) the Human Rights Council; 6) the Special Adviser on genocide prevention; 7) the Secretary-General, through the High Commissioner, with a suggestion to refer the issue to the Security Council; d) offer to send Committee members to the State to assist in implementing international standards or provide technical assistance for building a human rights infrastructure; e) recommend that the State Party utilise the advisory services and technical support from the OHCHR.

Within the framework of the early warning and urgent measures procedure, the CERD has adopted decisions, issued statements, and sent letters to State Parties. These have all addressed severe violations or the risk of such violations.

For example, in 2023, the CERD adopted two decisions: one concerning the lack of equitable and non-discriminatory access to COVID-19 vaccines,[101] and another on Israel and the State of Palestine.[102]

When reviewing the statements issued by the CERD, it becomes evident that both the issue of Israel and the COVID-19 vaccine distribution had previously been

101 CERD, Decision 1 (2023).
102 CERD, Decision 2 (2023).

addressed in statements: *Statement on Israel and the State of Palestine*[103] *and Statement on the lack of equitable and non-discriminatory access to COVID-19 vaccines*.[104]

The CERD also drafts letters to states. For instance, on May 10, 2019, the CERD sent a letter to Latvia regarding new regulation No. 716 on pre-school education, adopted on November 21, 2018. According to the new regulation, the primary medium of communication in play-lessons should be Latvian, except during activities aimed at learning minority languages and ethnic culture. The CERD expressed concerns that this regulation might be discriminatory towards national minorities.[105]

Slovakia is the only other CEE state to which the CERD addressed letters. Between 2010 and 2012, there were a total of four exchanges where the CERD communicated concerns about the forced eviction of 105 Roma families in Plavecký Štvrtok due to the proximity of a gas pipeline.[106]

4.5. Discrimination against Roma

As we have seen, any examination of the ICERD's application in Central and Eastern European states must address the issue of discrimination against Roma, as Roma communities are 'among those most disadvantaged and most subject to discrimination in the contemporary world'.[107]

Claud Cahn, following Marcia Rooker's analysis of the region, divides CERD's approach to the Roma issue into two major periods.[108] The first period lasted until 1992, the fall of the communist bloc. Until that time, the communist bloc states typically denied the existence of the Roma community or its specific situation. From the second half of the 1990s, CERD began to receive credible data from many countries on the condition of Roma communities within the framework of country reports. The fieldwork and research findings of the international NGO, the European Roma Rights Centre (ERRC), also became a crucial source for the problems of Roma people. The influence of the ERRC on legal practice is also evidenced by the individual communications discussed before. CERD's experiences with the Roma issue in the 1990s culminated in the adoption of General Recommendation No. 27 on Discrimination against Roma in 2000.[109] Its structure reflects CERD's 1990s experience, highlighting the main types and areas of discrimination faced by Roma.

The first section, General Measures, states that to combat racial discrimination against Roma, governments should review and amend relevant laws, adopt national strategies, ensure non-discriminatory citizenship policies, and address the

103 CERD, Statement 5 (2023).
104 CERD, Statement 2 (2022).
105 CERD/EWUAP/98th session/Latvia/JP/ks.
106 See: Supplement No. 18 (A/66/18): Report of the Committee on the Elimination of Racial Discrimination, para. 29.
107 General Recommendation No. 27 on Discrimination against Roma, para. 49.
108 Cahn, 2017, pp. 108–115.
109 Adopted at the Fifty-seventh session of the Committee on the Elimination of Racial Discrimination, on 16 August 2000 (Contained in document A/55/18, annex V).

intersectional discrimination faced by Roma women. They should foster dialogue between Roma and non-Roma communities, protect Roma immigrants and asylum-seekers, provide effective remedies for rights violations, and promote tolerance and respect through education. GR 27 significantly contributed to the recognition of the deportation and genocide of Roma during the Second World War, by recommending that the harm done to Roma during the Second World War should be acknowledged and potentially compensated. The second section deals with police and civil violence targeting Roma. It also emphasises that states must do everything to prevent both violence against Roma and their eviction in post-conflict areas. The third section addresses problems in education, mentioning issues such as high dropout rates, particularly for Roma girls, the problem of segregation in education, the question of mother-tongue education, the recruitment of Roma teachers, the elimination of harassment against Roma students, access to education for adult Roma, and the teaching and mediatising of Roma culture and history. The fourth section focuses on Roma housing issues. States are encouraged to prohibit discrimination in employment and all discriminatory practices in the labour market, promote the employment of Roma, prevent housing segregation, create campsites for nomadic groups, ensure Roma have access to health care and social security services, and establish programmes that take into account the health issues arising from the extreme poverty, lack of education, and the cultural differences of Roma. It also calls for ensuring that public spaces and services are accessible to Roma. The fifth section discusses the media's role in combating prejudice. The sixth section states that governments should ensure equal opportunities for Roma participation in public life, involve them in decision-making, promote their active engagement in society, and provide training for Roma officials and representatives to enhance their political and administrative skills.

Cahn, however, rightly points out that certain specific Roma issues are not included in GR 27. For instance, there is no mention of the coercive sterilisation of Roma women, an issue CERD has addressed in the case of the Czech Republic, Slovakia, and Hungary in the 2000s or the mass expulsion of Eastern European Roma from Western European countries.[110]

As one of the most vulnerable and historically disadvantaged ethno-cultural groups in Europe, Central and Eastern European Roma are a central focus of CERD's work. Understanding the multifaceted discrimination they face is essential for anyone seeking to understand CERD's work in Europe. However, a more detailed presentation of this goes beyond the scope of this chapter.[111]

4.6. Efforts to Develop Complementary Legal Instruments to ICERD

While the main focus of this subchapter is on the functions and procedures of CERD, this section highlights related international efforts aimed at supplementing

110 Cahn, 2017, p. 112.

111 For a more comprehensive analyse of the work of CERD regarding the situation of the Roma community, see: Cahn, 2017, pp. 106–120.

ICERD with additional legal instruments. These efforts, closely linked to CERD's mandate, represent a significant development in the international legal framework against racism.

Efforts to supplement ICERD through additional legal instruments began gaining momentum following the 2001 World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR) held in Durban, South Africa. Paragraph 199 of the resulting Durban Declaration and Programme of Action (DDPA) explicitly recommended the development of new international standards to reinforce the existing framework addressing racism and related forms of intolerance.[112] In response, the United Nations Commission on Human Rights established the Intergovernmental Working Group on the Effective Implementation of the Durban Declaration and Programme of Action (IGWG) in 2002 to follow up on the implementation of the Durban outcomes and to explore the need for new legal provisions.[113] Building on the deliberations of the IGWG,[114] the Human Rights Council took a more direct role in 2006 by mandating further studies on possible legal developments to address identified gaps. In its resolution 1/5 of 30 June 2006, the United Nations Human Rights Council tasked a group of five independent experts with developing a base document containing concrete recommendations on how to address both procedural and substantive shortcomings in the existing international framework. The resolution explicitly listed among the options the drafting of an optional protocol to ICERD or the adoption of new legal instruments, such as conventions or declarations.[115] Pursuant to this mandate, the expert group submitted a study identifying substantive legal gaps in combating racism, racial discrimination, xenophobia, and related intolerance.[116] Concurrently, the CERD provided a parallel report proposing procedural enhancements to improve implementation and oversight under ICERD.[117] The responsibility for drafting complementary standards was ultimately transferred to the newly created Ad Hoc Committee of the Human Rights Council on the Elaboration of Complementary Standards.[118] The Committee was instructed to begin its work

112 Durban Declaration and Programme of Action, para. 199, adopted at the 2001 WCAR (United Nations, 2001).
113 Commission on Human Rights resolution 2002/68, para. 7, establishing the Intergovernmental Working Group.
114 The Human Rights Council's resolution 1/5 (30 June 2006) followed the recommendations and discussions of the Intergovernmental Working Group (IGWG), particularly concerning the existence of legal gaps in international instruments and the need for further study by experts and CERD. See also A/HRC/4/WG.3/6, para. 1; and A/HRC/4/WG.3/7, para. 2.
115 Human Rights Council, Resolution 1/5, Elaboration of complementary standards to the International Convention on the Elimination of All Forms of Racial Discrimination, 30 June 2006.
116 Human Rights Council, Report on the study by the five experts on the content and scope of substantive gaps in the existing international instruments to combat racism, racial discrimination, xenophobia and related intolerance, A/HRC/4/WG.3/6, 27 February 2007.
117 Human Rights Council, Study by the Committee on the Elimination of Racial Discrimination on possible measures to strengthen implementation through optional recommendations or the update of its monitoring procedures, A/HRC/4/WG.3/7, 27 February 2007.
118 Human Rights Council, Decision 3/103, A/HRC/DEC/3/103, 27 September 2006.

using all previously submitted materials and to prioritise the development of draft instruments for negotiation.[119] This process was politically motivated by the desire to enhance protections for individuals and communities in the post-9/11 context, with a particular focus on strengthening safeguards for religious minorities.[120]

By the time of its 15th session in April 2025, the Ad Hoc Committee had made notable progress toward an optional protocol to ICERD aimed at criminalising acts of a racist and xenophobic nature, as noted by Deputy High Commissioner Nada Al-Nashif during the commemoration of ICERD's 60th anniversary.[121]

It should also be noted that, although the DDPA is not a legally binding document but rather a political commitment, it has become a key reference point in the work of the CERD. For example, in General Recommendation No. 36 (2020) on preventing and combating racial profiling by law enforcement officials, the term "racial profiling" was defined – for the purposes of the recommendation – in line with the DDPA, as the practice whereby police or other law enforcement officials rely, to any degree, on race, colour, descent, or national or ethnic origin as a basis for subjecting individuals to investigatory actions or for determining whether an individual is engaged in criminal activity.[122]

5. Conclusion

As we have seen, the unanimous support for the International Convention on the Elimination of All Forms of Racial Discrimination largely stemmed from a misunderstanding by states in the 1960s, namely that the condemned practice of "racial discrimination" was a phenomenon exclusively found in the relationship between colonial powers (white populations) and the oppressed non-white populations. The unprecedented UN treaty body, the Committee on the Elimination of Racial Discrimination, deserves considerable credit for expanding the concept of "racial discrimination" to encompass unjust intergroup relations found within Europe as well. This achievement would not have been possible if the Convention had centred around the concept of "race" rather than "racial discrimination". The latter term allowed for a much broader interpretation of the scope of the Convention, encompassing not only racial but also colour, descent, national or ethnic origin-based discrimination, and their combinations. The expanded conceptual framework, along with CERD's continuous dialogue with State Parties, facilitated the prohibition of racial discrimination to become an *erga omnes* norm, benefiting the entire international community, embedded in national laws and in the legal consciousness of our societies.

119 Ibid.
120 Lennox, 2009, p. 218.
121 Statement by Nada Al-Nashif, 15th session of the Ad Hoc Committee, 10 April 2025.
122 See: DDPA, para. 72; General Recommendation No. 36, para. 18.

However, the low number of cases invoking CERD mechanisms within the Central and Eastern European region seems to contradict the notion that the ICERD approach has gained widespread recognition and application in these societies. Since CERD's establishment, only seven complaints have been submitted from the CEE region via the individual communications mechanism, involving three State Parties (Slovakia, Serbia and Montenegro, and Estonia). When examining the legal representation of complainants, we see that the five cases leading to substantive decisions were backed by highly qualified attorneys specialising in anti-discrimination law or by human rights NGOs. Although the number of cases is insufficient to form a representative picture of the region's challenges, the fact that six out of seven complaints concerned grievances affecting the Roma community clearly suggests that the Roma population is one of the most frequently targeted groups by racial discrimination within the CEE region. The gravity of the issue is further underscored by CERD's General Recommendation No. 27 which specifically addresses the problem of discrimination against Roma.

The complaints examined also point to another aspect, less explored in this chapter: the critical role of NGOs in the protection of human rights and the fight against discrimination. NGOs not only participate in the reporting cycle by submitting shadow reports and meeting with CERD representatives, but they also play a pivotal role in initiating individual communications on behalf of affected groups and lobbying CERD to draw states' attention to the dangers of discriminatory practices through formal letters.

As a final thought, I encourage the reader to consider the new challenges that may arise in a world where discriminatory social practices meet self-learning artificial intelligence (AI). For example, how can legal tools regulate the seemingly "neutral" pricing algorithms of bank loans to prevent reinforcing and amplifying social inequalities? How can AI-generated, audience-targeted content be regulated to avoid strengthening biases against disadvantaged groups? Or how can AI-driven, increasingly accessible instant translation technologies be used to support the social integration, political participation, and cultural life of national minorities facing linguistic disadvantages? Last but not least, how can we avoid racial profiling in a data capitalism-driven online world?

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| Chapter 9 |

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

Mario Vinković

ABSTRACT

CEDAW is the most important universal source of protection of women's rights, which has influenced the emergence of a number of regional legal sources in the last four and a half decades. This chapter is dedicated to the importance and significance of CEDAW both in the global context of protection of women's rights, and in relation to relevant regional legal sources, primarily of the Council of Europe. The nomotechnical architecture of CEDAW is a kind of novum that has shifted processes and normative momentum from a symmetrical approach to the protection of women's rights to an asymmetrical and gender-focused track, and has post festum influenced the nomotechnical architecture and approaches of a number of relevant international, regional and national legal sources.
The chapter also focuses on relevant decisions of the CEDAW Committee from a regional perspective.

KEYWORDS

CEDAW, women, discrimination, gender equality, regional legal sources, Istanbul Convention

1. Introduction

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[1] was adopted by the United Nations General Assembly on 18 December 1979 and entered into force, in accordance with its Article 27(1), on 3 September 1981. It represents not only one of the most ratified universal sources of human rights protection created under the auspices of the United Nations, but certainly also the most important international instrument for the protection of the human rights of women and girls at the global level. Despite the criticism that the Convention has suffered, both from certain feminist backgrounds and from circles that consider it partly outdated, it undoubtedly leaves the deepest mark in the protection of women's rights and

1 Convention on the Elimination of All Forms of Discrimination against Women, United Nations, Treaty Series, vol. 1249, p. 13.

Mario Vinković (2026) 'The 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)' in Kovács, P., Béres, N. (eds.) *The Universal Protection Of Human Rights*. Miskolc–Budapest: Central European Academic Publishing, pp. 337–366. https://doi.org/10.71009/2026.pknb.uphr_9

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significantly pushes the boundaries of perception, understanding and interpretation of human rights in recent decades. As the only universal legal source, it was the first to focus, *inter alia*, on women's reproductive rights. In its preamble, it emphasised the belief in fundamental human rights, the dignity and worth of the human person and in the equal rights of men and women.[2]

The Convention specifically emphasised the fact that discrimination against women violates not only the principle of equal rights, but also constitutes an obstacle to the participation of women, on an equal basis with men, in the political, social, economic and cultural life of their countries, hindering the progress of society and the family,[3] and hindering the development of women and their ability to participate in the service of their countries and all of humanity.[4] Thanks to the Convention, an international legal framework for the protection of women's human rights has been developed, which is accepted as part of international human rights law. To date, 189 states have ratified the Convention, but numerous reservations that states have made in the process of national ratification[5] confirm the fact that many segments of women's human rights in certain parts of the world are still threatened, unrealised or in serious danger as a result of social relations, cultural differences, political instability, specific interpretations of certain religious dogmas or (quasi)theocratic entities. In other words, although unquestionably globally significant, a large number of reservations with its ratification reflect the non-acceptance of the principles of equality and non-discrimination of women in numerous areas of private and public life.[6]

Below, we shall focus on the historical context and importance of the adoption of CEDAW, its relationship with relevant regional sources at the European level, its content structure, the role of the Committee on the Elimination of Discrimination against Women, as well as its decisions relevant to our discussion.

2. Historical Context and Significance of the Adoption of CEDAW

In the process of drafting the CEDAW text, its creators started from the premise that the "gender-neutral and symmetrical" approach to gender-based discrimination in previous international sources did not adequately address the problem of pervasive and deep-rooted discrimination against women, so an "asymmetrical and gender-specific" approach was necessary *pro futuro*.[7] The result of such an approach is a "gender-specific" legal source, which accepts the deficits of the previous human rights

2 Ibid., point 1 of the Preamble.
3 Ibid., point 7 of the Preamble.
4 Ibid.
5 See: Status of ratifications on January 1 2025 [Online]. Available at: https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-8&chapter=4&clang=_en (Accessed: 20 January 2025).
6 Šimonović, 2014a, p. 86.
7 Hellum and Sinding Aasen, 2013, p. 2.

protection systems on a universal level, adopts approaches to the indivisibility of all human rights and their applicability in the private and public sphere, and has the potential to ensure 'substantive gender equality for women',[8] as assessed by 'optimist and constructive feminist legal scholars'.[9]

The text of the Convention, finalised in 1979, clearly points to the specifics of the geopolitical relations and social patterns of the time, as the preamble focuses both on the belief in the establishment of a new international order based on fairness and justice that will contribute to the promotion of equality between men and women,[10] and on the fact that women in conditions of poverty have the least access to education and employment, food and health.[11] Moreover, the text of the Convention was drafted taking into account all the negative consequences of apartheid, racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination, and interference in the internal affairs of states, the eradication of which is necessary for the full enjoyment of the rights of women and men,[12] which clearly portrays social relations, global political problems, but also processes what the international community was actively facing at the time.

The historical steps in the creation of CEDAW are inseparable from the history of the Commission on the Status of Women, which began working within the United Nations in 1946, after Eleanor Roosevelt previously addressed "the women of the world" in an open letter at the inaugural meeting of the United Nations General Assembly in London, calling on national governments to empower women to take a more active role in national and international relations, but also to become more actively involved in peace building and post-war reconstruction.[13] For more than a decade, the respective Commission has been gradually working on ensuring the basis of gender equality within the United Nations system, strengthening relations with NGO's, and cooperation with other commissions within the system (Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Social Commission/Commission for Social Development), as well as other international organisations associated with the United Nations (UNESCO and ILO). It declared its fundamental postulate: 'to raise the status of women, regardless of nationality, race, language or religion, to equality with men in all fields of human enterprise, and to eliminate all discrimination against women in the provisions of statutory law, in legal maxims or rules, or in interpretation of customary law'.[14] In addition to facing numerous challenging tasks, the Commission advocates for the elimination of discrimination against women in marriage, which arises from the existing unequal treatment of women and men in national legislation concerning

8 Ibid.
9 Ibid.
10 CEDAW, point 9 of the Preamble.
11 Ibid., point 8 of the Preamble.
12 Ibid., point 10 of the Preamble.
13 Hannan, Iiyambo and Brautigam, 2019, p. 4.
14 Ibid., p. 5.

residence, marriage and divorce; it also works to ensure women's universal access to political rights. Furthermore, the Commission played a significant role in the drafting process, and later in the transition from the Declaration on the Elimination of Discrimination against Women (1965/1967) to CEDAW.[15] Focusing on the problems of women in developing countries in the sixties of the last century, the Commission on the Status of Women devoted itself inter alia to the position of women in the community and rural development, family planning, work in agriculture and participation in scientific and technological progress.[16] In 1963, the General Assembly requested the Commission to start preparing the Declaration on the Elimination of Discrimination against Women, which was accepted in 1967. As a consequence of the Declaration, which introduced only voluntary reporting procedures, and consequently its legal nature, which resulted in limited implementation, it soon became clear that *pro futuro* would be a necessary legally binding source of protection of women's rights.[17] After 1975 was declared as International Women's Year, within the framework of which the World Conference of the International Women's Year was held in Mexico City, the period from 1976 to 1985 was declared by the United Nations, thanks to the follow-up of the world conference, as the United Nations Decade for Women. During this period, the most important task of the Commission on the Status of Women was the drafting of CEDAW, which the Commission entrusts to a working group within itself. The first text was completed in 1976, but intensive work on the final text took until 1979 along with the acceptance of the final text of CEDAW by the 130 Member States in the General Assembly.[18] As referred to in the Introduction, the Convention entered into force on September 3, 1981, after it was previously signed and ratified by 20 countries. In terms of content, it is clear that the Convention focused on three key areas – civil rights, reproductive rights and gender relations.[19]

The text of the Convention defined discrimination against women on a global level for the first time, with a provision that can be partially identified with the basic premise that guided the Commission on the Status of Women from its inception, namely:

> 'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.[20]

15 Ibid., pp. 5–7.
16 Ibid., p. 7.
17 Ibid.
18 Ibid., p. 9.
19 Moinet, 2023, p. 759.
20 CEDAW, Art. 1.

The definition summed up this way clearly points to the conclusion that CEDAW did not initially operationalise the term "gender equality", because it will only be introduced and affirmed later in many universal and regional legal sources dedicated to (women's) human rights. In addition, the nomotechnical structure suggests three fundamental principles of the Convention: non-discrimination, substantive equality and state obligation.

It is assessed that CEDAW provided women with a "powerful advocacy tool", consequently influenced the drafting of national legislation, constitutional provisions, court decisions and relevant national policies in many countries, and its implementation strengthened the rights-based approach to women's empowerment and development.[21] The global acceptance of the Convention is confirmed by the fact that it has been ratified by almost all countries of the world to date, with the exception of the United States and Palau, which signed it but did not ratify it, and Iran, Niue, Somalia, the Holy See, Sudan and Tonga, which are not signatories. In relation to the deficient and voluntary monitoring mechanisms that were previously introduced with the Declaration on the Elimination of Discrimination against Women, CEDAW introduces a special body of independent experts "of high moral standing and competence in the field covered by the Convention"[22] – The Committee on the Elimination of Discrimination against Women (CEDAW Committee), which as an operational body has been monitoring the implementation of the Convention on the territory of the States Parties since 1982, which will be discussed *infra*.

CEDAW is also designated as a universal source with almost the largest number of reservations made upon its ratification. Reservations are possible in accordance with Article 28 of the Convention if they are compatible with its object or purpose, and can be withdrawn at any time by notification to the Secretary-General of the United Nations.[23] Among human rights defenders, such reservations are often assessed today as a sign that a particular state is unwilling to comply with international sources, choosing an approach that does not have to comply with certain international obligations in the long term, but rather maintain the *status quo*. Especially when one considers the reservations relating to the core provisions of Articles 2 and 16 of CEDAW in the context of the right to marriage and divorce, as well as in relation to the right to work, family planning, children, property and inheritance, which individual states primarily highlighted due to the influence of Sharia law,[24] undemocratic standards or the fact that they consciously ratified the Convention knowing that they would *de facto* not change anything in national legislation and social practices.[25]

The last four and a half decades of CEDAW's existence have been marked by the adoption of complementary universal and regional legal sources that have in a way supplemented it and at the same time provided a new dimension in its interpretation

21 Bayefsky, 2000, p. 198.
22 CEDAW, Art. 17(1).
23 CEADW, Art. 28(1)–(3).
24 Ahlgren, 2021.
25 Ibid., Keller, 2014, p. 313.

and implementation. Not least, this process has been assisted by the significant role of the CEDAW Committee itself, which has published 40 of its own general recommendations by December 2024. Among the sources that elaborated and supplemented the CEDAW framework at the universal level, the following are notable: United Nations 1993 Declaration on the Elimination of Violence against Women, Beijing Declaration and Platform for Action from 1995, United Nations Security Council Resolution 1325 on Women, Peace and Security from 2000 (which calls for the participation of women in decision-making at all levels; protection of girls and women from gender-based violence, including in emergency and humanitarian situations such as in refugee camps; prevention of violence against women including strengthening women's rights under national law; relief and recovery measures to address international crises through a gendered lens), and 2030 Agenda for Social Development (with goal 5 – achieve gender equality and empower all women and girls). The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women on the right to petition for women victims of discrimination which came into force on December 22, 2000 is also of great importance on a practical level.[26] At the regional level, this series of legal sources is supplemented by: Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol),[27] which entered into force in 2005, the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará),[28] which entered into force in 1995, and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention),[29] which entered into force in 2014. The regional sources that strengthened and partially improved the original CEDAW geographically cover the area of the American, African and European continents, i.e. the Member States of the Organization of American States (OAS), members of the African Union (AU) and members of the Council of Europe (COE), with the possibility of certain mentioned regional sources being accessed by countries that are not members of the relevant regional international organisations. In relation to the global focus and wording of CEDAW, the aforementioned regional sources view discrimination against women through the discourse of specific regional disparities, normative deficits, problems and social constructs, while simultaneously addressing pressing issues of women's protection in local and regional conditions.

A retrospective review of the language of other relevant universal and regional legal sources predating CEDAW clearly suggests that they are all written in gender-neutral language and have a symmetrical approach to human rights regimes. This particularly applies to the International Covenant on Civil and Political Rights

26 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, adopted by General Assembly Resolution A/54/4 on 6 October 1999 and opened for signature on 10 December 1999.
27 African Union, 2003.
28 Organization of American States, n.d.
29 Council of Europe, 2011a.

and International Covenant on Economic, Social and Cultural Rights of the United Nations, but also to the European Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe, as well as to part of the relevant anti-discrimination directives of the European Union adopted subsequently.[30] For our discussion and focus at the moment, the most significant complementary sources of European provenance are primarily the Istanbul Convention and other sources of the Council of Europe, which are dominated by a symmetrical approach to discrimination based on gender.

3. CEDAW and Regional Legal Sources of the Council of Europe and European Union

At the time of the adoption of the Istanbul Convention, secondary sources indicated that almost 15% of women over the age of 16 had experienced some form of violence in their relationships, including physical and sexual violence from their partners, even after the relationship ended.[31] Recent European Union statistics indicate that one in three women in the EU-27 had experienced physical and sexual violence or threats in their adult age.[32] One in five women had experienced sexual or physical violence from a partner, relative or household member,[33] one in three women had experienced sexual harassment at work, while among younger women, aged 18 to 29, the rate of sexual harassment at work was more than 41%.[34] Statistical indicators, the frequency of various forms of violence against women (including *inter alia* economic violence, blackmails, humiliating treatments, threats, rapes etc.), as well as numerous *prima facie* unforeseeable consequences for the psychophysical health of victims, are indisputable evidence of the necessity of adopting and implementing this complementary source to CEDAW. The CEDAW Committee identified violence against women as a phenomenon of global proportions in its General Recommendation on violence against women No. 19 back in 1992, simultaneously designating gender-based violence against women as a form of discrimination against women.[35]

The prevailing attitude in Europe regarding violence against women, including domestic violence against children, the elderly and men, imposed the need to adopt an adequate regional source that crowned the numerous activities of the Council of Europe in this area. After a series of resolutions passed by the Parliamentary Assembly of the Council of Europe on female genital mutilation (Resolution 1247(2001)), on domestic violence (Resolution 1582 (2002)), on "honour crimes" (Resolution 1327 (2003)), on femicide (Resolution 1654 (2009)), on rape of women, including marital

30 Hellum and Sinding Aasen, 2013, p. 5.
31 Council of Europe, 2011b, p. 1 para. 3.
32 FRA, EIGE and Eurostat, 2024, p. 14.
33 Ibid., p. 20.
34 Ibid., p. 36.
35 Council of Europe, 2011b, paras. 3 and 5.

rape (Resolution 1691 (2009)), as well as recommendations on forced and child marriages (Recommendation 1723 (2005)) and on sexual assaults linked to "date-rape drugs" (Recommendation 1777 (2007)),[36] the Istanbul Convention became the first effective regional source of protection that codified and further developed CEDAW standards.[37]

The Istanbul Convention does not address fundamental or constitutional principles as CEDAW does, but under our impression, rather serves as a source subordinated to the broader principles of CEDAW.[38] However, the content structure suggests that it rests on four fundamental pillars, as it follows from its Article 1(1) – prevention, protection, prosecution and coordinated policies.[39] The Istanbul Convention *expressis verbis* in Article 3(d) defines gender-based violence against women as 'violence that is directed against a woman because she is a woman or that affects women disproportionately', which undoubtedly means that it rests on a 'gendered understanding of violence against women and domestic violence'.[40] The Istanbul Convention is a legally binding regional instrument aimed at the prevention of violence against women and domestic violence, while CEDAW is a legally binding universal source that provides standards for the prevention and suppression of discrimination, as, we dare say, a higher concept, which sums up numerous emerging forms and practical threats. The CEDAW scope is aimed at all forms of discrimination against women in the political, economic, social, cultural, civil or any other area of life,[41] while the Istanbul Convention applies to all forms of violence against women and girls, including domestic violence, but leaves the States Parties free to decide to what extent its provisions will apply to men, the elderly and children victims of domestic violence.[42] CEDAW does not define "gender", "gender-based violence" or "violence against women". In contrast, the Istanbul Convention defines "gender", "domestic violence", "gender-based violence against women" and "violence against women".[43] At the same time, "violence against women" is *expressis verbis* specified as: psychological violence,[44] stalking,[45] physical violence,[46] sexual violence, including rape,[47] forced marriage,[48] female genital mutilation,[49] forced abortion and forced sterilisation[50] and sexual harassment.[51]

36 Ibid., paras. 1, 5.
37 Šimonović, 2014b, p. 606.
38 Orme, 2021, p. 19.
39 Ibid.
40 Šimonović, 2014b, p. 602.
41 CEDAW, Art. 1.
42 Istanbul Convention, Arts. 2(1) and 2(2).
43 Ibid., Art. 3.
44 Ibid., Art. 33.
45 Ibid., Art. 34.
46 Ibid., Art. 35.
47 Ibid., Art. 36.
48 Ibid., Art. 37.
49 Ibid., Art. 38.
50 Ibid., Art. 39.
51 Ibid., Art. 40.

Although the historical text of CEDAW did not operationalise the term "gender equality" at the time, it is undeniable that both of the aforementioned sources are dedicated to gender equality and non-discrimination. CEDAW aims to eliminate discrimination against women in order to achieve *de facto* equality and to condemn all forms of discrimination against women. Similarly, the Istanbul Convention focuses on eliminating violence against women, which is essential for achieving equality between women and men. Both conventions undoubtedly have different scopes, but they are not 'parallel legal instruments of a global and regional nature, but compatible overlapping instruments that complement and reinforce each other.'[52] This is supported by the fact that the European Court of Human Rights in its decisions used to refer to both cited sources, as an expression of the 'richness of the dialogic nature of international human rights law'.[53] On top of that, just like the CEDAW Committee, the Istanbul Convention also has an expert body that oversees its implementation, the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). To date, it has been ratified by 22 EU Member States, and the Council of the European Union approved the EU's accession to the Istanbul Convention in early June 2023, which was followed by ratification on June 28, 2023. The Convention is in force in 38 of the 47 Member States of the Council of Europe,[54] but in recent years it has been at the centre of controversies and political debates in some European states due to criticism that it promotes "gender ideology" and represents a threat to the traditional perception of the role of women and men in society.[55] This is primarily due to the provision of Article 3(c) of the Istanbul Convention, which legally defines "gender" as 'the socially constructed roles, behaviour, activities, and attributes that a given society considers appropriate for women and men'.[56]

Turkey has become the first Member State of the Council of Europe to withdraw from an international human rights convention – the Istanbul Convention, following a Presidential Decree published on 20 March 2021, explaining that it inter alia protects the family and Turkish culture. Bayar points out that the real *raison d'être* of Turkey's withdrawal lies primarily in 'authoritarian survival strategies of centralisation, legitimisation, and repression',[57] and only secondarily in some issues that the Convention may address. It is undeniable that withdrawing from such an important international instrument for the protection of women and girls from violence and domestic violence results in a regression in the level and quality of protection of women's human rights, as well as in the weakening of appropriate mechanisms for international and consequently national legal protection. In addition, violence and discrimination against women and girls, the causes of which most often lie in entrenched social stereotypes, social norms, conservative and patriarchal social

52 Šimonović, 2014a, p. 96.
53 Hennette Vauchez, 2023, p. 202.
54 See: Council of Europe, 2018.
55 Berthet, 2022, p. 676.
56 Berthet, 2022, p. 676; Istanbul Convention,Art. 3(c).
57 Bayar, 2023, pp. 22–42.

relations, are potentially significantly strengthened in the conditions of a deficit in international legal protection. Harsh criticism of the Istanbul Convention was once directed from Hungary and Poland, while the Constitutional Court of Bulgaria decided in 2018 that the Convention is unconstitutional because the use of the phrase "gender" as a social construct is contrary to the Bulgarian Constitution, which differentiates gender in the binary understanding of male and female gender determined by birth.[58] In 2020, the Hungarian Parliament refused to ratify the Istanbul Convention because it promotes "destructive gender ideologies" and "illegal immigration", with claims that the ideological approach in the text of the Convention is contrary to the Hungarian legal order.[59] In Poland, on the other hand, the political elites in power at the time pointed out that the Convention violates the rights of parents by requiring children to be taught "gender ideology" in schools, which is against the traditions of Polish families.[60] In contrast, when ratifying the Convention in April 2018, facing criticism in the public and media, Croatian Government added a limiting declaration, specifying that: 'the provisions of the Convention do not include an obligation to introduce gender ideology into the Croatian legal and educational system, nor the obligation to modify the constitutional definition of marriage'.[61] Krizsán, Roggeband and Zeller point out that the Croatian Government wanted to appease the harsh opponents of the Convention, but also that in Croatia there is successful feminist mobilisation and fruitful cooperation of non-governmental organisations with state bodies in the field of combating violence against women.[62] It is not out of place to mention that gender equality in Croatia is a constitutional category, because Article 3 of the Constitution defines it as one of the fundamental values of the constitutional order.[63]

In Central and Eastern Europe, Gwiazda and Minkova point out, the Istanbul Convention served as an ideological battlefield between opponents of gender and gender ideology, on the one hand, and advocates of liberal and feminist norms, on the other.[64] However, the phrase "cultural war", which is also used in that conflict, significantly exceeds the influence and debate on the Istanbul Convention, because it depicts not only the conflict between the two opposite visions of "nation" and "future", but also between the perceived threats to what in that context is designated as the "right way of life".[65] Attempting from a certain distance to analyse the respective conflicts in the interpretation and perception of the cited, at times disputed meanings, of the phrase "gender" in the Istanbul Convention, as well as the ideological conflicts between feminist and liberal circles, on the one hand, and conservative circles, strengthened by the influence and discourse of dominant religious dogmas and churches in Europe, on

58 Margolis, 2018.
59 See: Guardian, 2020.
60 Schaart, 2020.
61 See: Council of Europe, 2018.
62 Krizsán, Roggeband and Zeller, 2024, p. 29.
63 Vasiljević and Vinković, 2019, p. 41.
64 Gwiazda and Minkova, 2024, p. 47.
65 Ibid.

the other hand, we cannot escape the impression of a deliberate and constant potentiation of the high intensity of this conflict. Understanding the equality of women and men, as well as the gender equality, implies the distinction between "sex" as a biological assignment and "gender" as its social construction and manifestation. However, it is also undoubted that certain feminist circles in the rhetoric criticising "gender ideology" simultaneously see a threat and opposition to "gender equality", ignoring at the same time that "gender identity", as an integral part of these debates, has gone much further with extremely extensive interpretations than attempts at the legal protection of transsexual, intersex and transgender persons.[66] In Central and Eastern Europe, liberal feminists support pro-gender debates because of their solidarity with the LGBTQ+ community and because of their common resistance to opponents of "gender equality", compared to other cases where some liberal feminists could be qualified as "anti-gender" because of their position in relation to the recognition of trans women.[67]

The relationship between CEDAW and the European Convention on Human Rights (ECHR), which has been in effect since May 3, 1953, is primarily highlighted by the aforementioned references made by the European Court of Human Rights (ECtHR) to CEDAW's provisions. CEDAW serves as a specialised international instrument aimed at protecting women from violence. The European Convention on Human Rights is a symmetrical instrument for the protection of human rights, so the ECtHR relied quite widely on the CEDAW text regarding "gender-based violence" and the CEDAW definition of "discrimination against women" when in the case of *Opuz v. Turkey*[68] stated that the treatment of domestic violence as a private matter is not possible for the States Parties to the ECHR,[69] thus providing, in the sense of Article 14 of the Convention, women in South-eastern Turkey protection as a vulnerable group.[70] In the same case, the ECtHR also referred to two cases that were previously before the CEDAW Committee, which will be discussed in more detail below.[71] The strong interaction between the text of the ECHR and CEDAW in the case law of the ECtHR clearly demonstrates an interpretative potential[72] that intrinsically, in a broader sense, connects CEDAW, the ECHR, and the Istanbul Convention. This connection plays a significant role in the reasoning and implementation of the protection of women's human rights. We are talking about mutually complementary and undoubtedly intertwined international and European, universal and specialised legal sources. In addition, the practice of

66 Today, some operationalise with seven different gender identities including agender, cisgender, genderfluid, genderqueer, intersex, gender nonconforming, and transgender. Others point out that there are 72 gender identities, and according to some, this list is completely open because it leaves room for each person in that spectrum to identify with the one they consider most appropriate for themselves. See e.g.: Cordoba, 2022; Green et al., 2020; Cover, 2019.
67 Gwiazda and Minkova, 2024, p. 36.
68 ECtHR, Application No. 33401/02 *Opuz v. Turkey*, 2009.
69 Demir, 2021, p. 83.
70 Ibid.
71 CEDAW Committee *A. T. v. Hungary*, 2005; CEDAW Committee *Fatma Yildirim v. Austria*, 2007.
72 Blaker Strand, 2020, pp. 979–992.

the CEDAW Committee has the potential to point to possible inconsistencies in the compliance of the ECHR with other human rights law sources, especially considering the time difference in their adoption, as well as the possibility that the ECtHR may evolve in its interpretation of certain issues.[73]

Within the framework of the Council of Europe, CEDAW operates alongside the European Committee of Social Rights, which acts as a quasi-judicial body. The (ECtSR) supervises the implementation of the counterparts to the ECHR in the realm of economic and social rights, which are outlined in the European Social Charter[74] and the Revised European Social Charter.[75] This supervision applies to the State Parties involved. Both versions of the Charter are gender-symmetrical instruments for the protection of human rights, but the Revised European Social Charter contains far more provisions primarily aimed at the protection of women's rights – the right of men and women to equal pay for work of equal value (Article 4(3), the right of employed women to protection of maternity (Article 8), the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the ground of sex (Article 20), the right to dignity at work, covering both moral and sexual harassment (Article 26), and the right of workers with family responsibilities to equal opportunities and equal treatment (Article 27). The Revised European Social Charter also contains a new Article E which advanced the prohibition of discrimination from the Preamble of the 1961 European Social Charter, also covering *expressis verbis* the prohibition of discrimination on the grounds of sex. Namely, the 1961 European Social Charter was adopted long before CEDAW, but also before the period of intensive development of civil rights and of mobilising feminist movements, so in this sense the fact that it did not specifically address the prohibition of discrimination based on gender should be observed.[76] Despite the fact that the ECtSR did not have many collective complaints with an exclusive focus on gender equality, in its case law (including assessments related to reporting procedures) one can see due attention paid to the issue of discriminatory access to abortion and the adequacy of the measures by which the State Parties ensured the right to equal pay for women and men.[77] In addition, both texts of the charter were interpreted in practice by the ECtSR with a special focus on the principle of gender equality and the socioeconomically disadvantaged position of women in contemporary European societies, which indisputably imposes the need to observe women as a distinct group.[78] In relation to the quasi-judicial proceedings of the ECtSR and reasoning in the collective complaints procedure, the reference to CEDAW is especially noticeable, *inter alia*, in the cases of collective complaints filed by the NGO University Women of Europe (UWE) in 2016 against all the States Parties to the Supplementary Protocol on the Collective Complaints Procedure

73 Ibid., pp. 990–991.
74 Council of Europe, 1961.
75 Council of Europe, 1996.
76 Lukas and Ó Cinnéide, 2023, p. 226.
77 Ibid., p. 220.
78 Ibid., p. 225.

due to claims that the respective states have not effectively reduced or overcome the gender pay gap.[79,80] In addition, in the same procedure, the ECtSR referred to CEDAW and the interpretations of the CEDAW Committee in decisions on the merits regarding collective complaints: *European Roma Rights Center (ERRC) v. Bulgaria*,[81] *Association for the protection of All Children (APPROACH) Ltd v. Slovenia*,[82] *International Parenthood Federation – European Network (IPPF EN) v. Italy*[83] *and International Center for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia*.[84]

The European Union is not a signatory to CEDAW, so *stricto sensu* it is not bound by the Convention, but since all its Member States have ratified it, the Convention undoubtedly had an impact not only on the drafting of national legislation, but also on secondary EU sources.[85] Even before the European Union ratified the Istanbul Convention, the fight against violence against women outside its borders was implicitly addressed in European documents, especially in the context of sexual violence in conflicts since the European Security Strategy.[86] Equality between women and men, respect for human rights and non-discrimination are *inter alia* common values to the Member States.[87] The Union, in all its activities, aims to eliminate inequalities and to promote equality between men and women.[88] Equal pay for women and men for equal work and work of equal value[89] has been part of the EU legal order since the Roma Treaty, but it must be openly admitted that the integration of that article into the text of the Treaty of Rome, at that time, unfortunately, had no primary connection with

79 Ibid., p. 230.
80 See ECtSR decisions on the merits: *University Women of Europe (UWE) v. Belgium*, Collective Complaint No. 124/2016; *University Women of Europe (UWE) v. Croatia*, Collective Complaint No. 126/2016; *University Women of Europe (UWE) v. Bulgaria*, Collective Complaint No. 125/2026; *University Women of Europe (UWE) v. Cyprus*, Collective Complaint No.127/2026; *University Women of Europe (UWE) v. Czech Republic*, Collective Complaint No. 128/2016; *University Women of Europe (UWE) v. Finland*, Collective Complaint No. 129/2016; *University Women of Europe (UWE) v. France*, Collective Complaint No. 130/206; *University Women of Europe (UWE) v. Greece*, Collective Complaint No. 131/2016; *University Women of Europe (UWE) v. Ireland*, Collective Complaint No. 132/2016; *University Women of Europe (UWE) v. Italy*, Collective Complaint No. 133/2016; *University Women of Europe (UWE) v. the Netherlands*, Collective Complaint No. 134/2026; *University Women of Europe (UWE) v. Norway*, Collective Complaint No. 135/2016; *University Women of Europe (UWE) v. Portugal*, Collective Complaint No. 136/2016; *University Women of Europe (UWE) v. Slovenia*, Collective Complaint No. 137/2016; *University Women of Europe (UWE) v. Sweden*, Collective Complaint No. 138/2016.
81 ECtSR decision on the merits, Complaint 151/2017.
82 ECtSR decision on the merits, Complaint 95/2013.
83 ECtSR decision on the merits, Complaint 87/2012.
84 ECtSR decision on the merits, Complaint 45/2007.
85 Holtmaat and Tobler, 2005, pp. 399–425.
86 Badell and Barbé, 2025, p. 99.
87 See: Art. 2, Consolidated version of the Treaty on European Union, Official Journal of the European Union, C 326/13, 26 October 2012.
88 See: Art 8. Consolidated version of the Treaty on the Functioning of the European Union, Official Journal of the European Union, C-326/47, 26 October 2012.
89 Ibid., Art 157.

the fight for the equality of women and men, but with an attempt to prevent social dumping on the common market.[90]

At the level of secondary EU legislation, the equal treatment directives, which in their preambles refer to CEDAW and other universal sources of the United Nations, stand out – Directive 2000/78/EC[91] and Directive 2000/43/EC,[92] while Directive 2006/54/EC[93] defines harassment and sexual harassment as discrimination on the grounds of sex with respect to employment. In relation to the protection of women from violence at the EU level, in addition to ratifying the Istanbul Convention, the EU also adopted the recent Directive 2024/1385[94] on combating violence against women and domestic violence, important both for the suppression and prevention of violence against women, and for the criminalisation of certain forms of violence, including *inter alia*: female genital mutilation, forced marriage, non-consensual sharing of intimate or manipulated material, cyberstalking, cyber harassment and cyber incitement to violence or hatred by reference to gender.

A summary of the legal sources from the Council of Europe and the EU reveals their mutual, direct, and indirect connections with the CEDAW in promoting gender equality and combating discrimination against women. These legal frameworks work together to address civil, economic, and social rights, as well as to protect women from violence and domestic abuse. This demonstrates both the global significance of CEDAW and the complementary role of regional legal sources in advancing these goals. Thanks to CEDAW, the interpretative potential of regional bodies associated with the supervision and implementation of the aforementioned European legal sources has undoubtedly been improved and also developed further outside the contextual framework that CEDAW once outlined.

In addition to the previously analysed and differentiated provisions of CEDAW, in the next chapter we will attempt to briefly approximate its content structure.

90 Vinković, 2018, p. 11.

91 See: para. (4) of the Preamble of the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal of the European Communities, L303/16, 2 December 2000.

92 See: para. (3) of the Preamble of the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal of the European Communities, L 180/22, 19 July 2000.

93 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Official Journal of the European Communities, L 2004/23, 27 July 2006.

94 Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence, Official Journal of the European Union L 1/36, 24 May 2024.

4. Content Structure of the CEDAW – Analysis, Potential and Critics

The content and nomotechnical structure of CEDAW is divided into six parts. The first part of CEDAW, in addition to the definition of discrimination against women that we analysed *supra*, obliges the States Parties to include the principle of equality between men and women in their national constitutions and other relevant laws and to ensure the practical application of this principle; adopting appropriate legal and other measures, including sanctions, which prohibit discrimination against women; ensure the successful protection of women from any discrimination procedure through national courts and other public institutions; refrain from any procedure or practice of discriminating against women by ensuring the conditions for public authorities and institutions to act in accordance with the assumed international obligation; take all appropriate measures to change or abolish regulations, customs and practices that enable discrimination against women, and repeal all domestic criminal provisions that discriminate against women.[95] The adoption of temporary positive measures created with the aim of accelerating the achievement of *de facto* equality between women and men, as well as the protection of motherhood, in accordance with the provisions of Article 4, will not be considered as discrimination. In order to change social and cultural patterns of behaviour between men and women, and with a view to eliminating prejudices, customs and any other practices which are based on the idea of the inferiority or superiority of one sex over the other, or on stereotyped roles for women and men, States Parties shall take all appropriate measures, including an appropriate understanding of motherhood and the shared responsibility of men and women in the upbringing and education of their children.[96] In relation to extreme forms of exploitation of women, States Parties shall take all legislative and other measures with a view to suppressing all forms of trafficking in women and exploitation of prostitution of women.[97]

The second part of the Convention is devoted to the civil and political rights of women, namely the elimination of discrimination against women in political and public life by ensuring, on equal terms with men, the right: to vote in all elections and public referenda; to participate in the formulation and implementation of government policies and to hold public office and positions at all levels of government; participate in the work of non-governmental organisations concerned with the public and political life of their country.[98] On an equal basis with men, women should be able, without discrimination, to represent their governments at the international level and to participate in the work of international organisations.[99] With regard to the citizenship status of women, States Parties should enable women on an equal basis to

95 CEDAW, Art. 2.
96 Ibid., Art. 5.
97 Ibid., Art. 6.
98 Ibid., Art. 7.
99 Ibid., Art. 8.

acquire, change or lose their nationality, and should ensure that marriage to a foreign national or a change in the nationality of their husband during the marriage does not automatically change a woman's nationality, force her to assume the nationality of her husband or leave her stateless.[100] States parties should recognise equal rights for women and men with regard to the nationality of their children.[101]

Preventing discrimination against women and taking appropriate measures for equality between women and men in the fields of education, work, healthcare, and other areas of economic and social life is the substantive focus of Part III of CEDAW. States Parties should therefore take all appropriate measures to eliminate discrimination and ensure conditions for career development, professional guidance, access to studies, equal curricula, equal examinations, qualified teaching staff, and the same level and quality of school premises and equipment.[102] Eliminating stereotypical understandings of the roles of women and men at all levels and forms of education, through the promotion of co-education, revision of textbooks and school curricula, and the adaptation of teaching methods, is an obligation emphasised by the Convention.[103] States Parties should, inter alia, take appropriate measures to reduce the percentage of female students who leave school prematurely; ensure that they have the same opportunities to engage in sports and physical education, as well as access to information related to health insurance, well-being, and family planning.[104] Ensuring equal rights for women and men in the field of work and employment applies to the right to work as an inalienable right; the same employment opportunities, including the application of the same selection criteria during employment; the right to freely choose a title and occupation, professional training, retraining, internship; the right to equal remuneration and equal treatment for work of equal value; the right to social security in case of retirement, unemployment, illness, disability and old age; the right to health care and safety at work, which includes the preservation of reproductive functions.[105]

In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure the realisation of the right to work, States Parties should take appropriate measures to prohibit dismissal on the grounds of pregnancy (under threat of appropriate sanctions), introduce paid maternity leave or similar social benefits (without loss of previous employment, position or social benefits), encourage the establishment of necessary social services to enable parents to reconcile family and work responsibilities and participate in public life (in particular through the encouragement, establishment and development of a network of childcare facilities) and provide special protection to women during pregnancy in those workplaces that

100 Ibid., Art. 9 para. 1.
101 Ibid., Art. 9 para. 2.
102 Ibid., Art. 10 subparas. a)–b).
103 Ibid., subpara. c).
104 Ibid., subparas. f)–h).
105 Ibid., Art. 11 para. 1.

have been proven to be harmful to the health of pregnant women.[106] Protective legislation created in the context of the aforementioned rights will be subject to periodic reviews in the light of scientific and technological knowledge and, if necessary, may be revised, repealed or extended.[107] States parties should also take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure the availability of health services, including those related to family planning.[108]

Notwithstanding this, States Parties should also ensure appropriate health services for women in connection with pregnancy *ante* and *post natum*, free of charge where necessary, as well as adequate nutrition during pregnancy and lactation.[109] In addition, States Parties should take all appropriate measures to eliminate discrimination against women and to ensure the same rights, on the basis of equality of men and women, with regard to the right to family benefits, bank loans, mortgages and other types of credit, as well as the right to participate in recreational activities, sporting and cultural life.[110] Special attention should be paid to the problems of women in rural areas, the role that women play in the economic survival of their families, including their work in unpaid areas of the economy, in order to ensure adequate protection for women living in rural areas in the implementation of the provisions of the Convention.[111]

Part IV of the Convention focuses predominantly on the equal rights of women and men in civil matters, both in the context of the right to contract and the administration of property,[112] while all other contracts and private instruments of any kind that would restrict women's legal capacity are considered null and void.[113] States Parties have an obligation to recognise equal rights for women and men with regard to regulations related to the freedom of movement of persons, choice of residence and domicile.[114] With regard to marriage and family relations, states should take all appropriate measures to ensure, inter alia, that women and men have equal rights to marry; free choice of spouse and to enter into marriage with free will and full consent; equal rights throughout marriage and at its dissolution; equal rights and obligations of parents, in which case the interests of the children must be a primary consideration; equal rights in respect of custody, guardianship, administration of property, adoption of children and similar institutions.[115] The engagement and marriage of a child shall have no legal effect, and States Parties shall take legislative and other measures

106 Ibid., Art. 11 para. 2.
107 Ibid., Art. 11 para. 3.
108 Ibid., Art. 12 para. 1.
109 Ibid., para. 2
110 Ibid., Art. 13.
111 Ibid., Art. 14.
112 Ibid., Art. 15 paras. 1–2.
113 Ibid., para. 3.
114 Ibid., Art. 15 para. 4.
115 Ibid., Art. 15 para. 1 subparas. a) to f).

to establish a minimum age for marriage and to introduce the obligation to register marriages in official registers.[116]

The role of the CEDAW Committee, as well as the obligations of States Parties to it, is the subject of an entire Part V of the Convention. The Committee consists of 23 experts of high moral standing and competence in the field of the Convention, elected by States Parties from among their nationals for a term of four years, provided that their election shall be carried out with due regard to equitable geographical distribution and the representation of the principal legal systems. After the election, the members of the Committee act in a personal capacity.[117] In this context, the States Parties undertake to submit reports to the Secretary General of the United Nations on the legislative, administrative or other measures they have adopted for the implementation of the Convention, as well as on the progress achieved, first within one year of their entry into force, and thereafter at least every four years, or when the Committee considering them requests it.[118] However, the delay of the States Parties regarding the obligation of periodic reporting is common in practice and they clearly indicate that reporting in this regard is definitely not a state priority.[119] The Committee elects its officials for a two-year term, adopts the Rules of Procedure and generally meets for a period of no more than two weeks a year to consider the submitted Reports.[120] To date, the CEDAW Committee has developed a rather detailed instrument for monitoring the application of the Convention and interpretation of the Convention, clearly defining the rules on regular and special sessions, the place of the sessions, the agenda, the filling of vacancies, the solemn declaration by which the members must swear, the election of officials, the secretariat of the Committee, the working languages and languages of the documents it adopts, along with the powers of the Chairman of the Committee, the voting system, the Annual Report of the Committee and the distribution of reports and other documents.[121] When considering the application of those provisions of the Convention that fall within their scope of work, the specialised agencies of the United Nations are authorised to be represented at the meeting of the Committee, which may also invite them to submit reports on the application of the provisions of the Convention in the areas that are within their scope of work.[122] The Committee makes General recommendations for all countries, concluding observations for individual countries, and decisions in individual cases, i.e. Decisions in infringement investigations Convention.[123] After considering the national reports of the States Parties, the CEDAW Committee adopts by consensus individualised concluding observations for a specific country, in which the observed problems are

116 Ibid., para. 2.
117 Ibid., Art. 17.
118 Ibid., Art. 18.
119 Ahlgren, 2021.
120 CEDAW, Arts. 19–20.
121 See: United Nations, 2008.
122 CEDAW, Art. 22.
123 Šimonović, 2014a, p. 88.

highlighted and recommendations are made for their elimination.[124] However, at the very beginning of its work, the Committee first started with the adoption of general recommendations *erga omnes*, based on Article 21 of CEDAW, and since 1992 it has introduced the practice of concluding observations for each country.[125] General recommendations initially had a technical nature, related to reporting on the application of the Convention, and since the nineties of the last century they have begun to change in terms of content and character, because they begin to interpret the provisions of the convention or certain topics.[126] This role is further enhanced by the Committee's quasi-judicial function in specific cases of violation of the Convention by the States Parties. In these instances, the Committee's ability to interpret both the obligations of the States Parties and the provisions of the Convention itself, becomes particularly visible.[127] However, individual complaints can only be considered if the respective States Party has acceded to the Optional Protocol.[128]

Part VI relates to the process of signature and ratification,[129] entry into force,[130] reservations that are permitted,[131] and requests for amendments to the Convention that can be submitted by any state, nonetheless it is the General Assembly that will decide on any steps in this regard.[132]

5. Monitoring – The Committee for Elimination of All Forms of Discrimination against Women

Through its more than four-decade activity, the CEDAW Committee adopted a significant number of General Recommendations, which we previously mentioned to some extent in the context of the interpretation of the Convention or its individual provisions. Some of the recommendations and concluding observations are marked, Purvis points out, as very controversial, such as those regarding "Mother's Day" in the USA or "Mother Award" in Belarus, about which the Committee expressed concern, because they strengthen the traditional roles of women. The then USA Assistant Attorney General Bryant reacted to this by pointing out *mutatis mutandis* that the CEDAW Committee exploits the text of the Convention with the aim of promoting positions contrary to American laws and sensibilities.[133] It is similar to the concluding obser-

124 Ibid., p. 89.
125 Ibid.
126 Ibid.
127 Ibid.
128 Purvis, 2011, p. 3.
129 CEDAW, Art. 25.
130 Ibid., Art. 27.
131 Ibid., Art. 28.
132 Ibid., Art. 26.
133 Purvis, 2011, p. 5.

vations which in 1998 urged Croatia to protect the legal right to abortion,[134] which was *nota bene* guaranteed by domestic legislation, more liberal than in many other countries, but the financial pressure on hospitals could have an impact on women's right to legally perform an abortion (The CEDAW Committee had never addressed that question in the case of Croatia later on).[135]

The Convention is marked as the first universal international source, as we have referred to earlier, of an asymmetrical approach and focus directed at the protection of women's rights, but some circles today criticise it for the fact that, with its binary approach to sex, it is, in their opinion, insufficiently inclusive for all female identities.[136] Such opinions impose the need to consider the criticisms in question from the perspective of legal philosophy and various concepts that need to be scientifically explained. Especially in the context of our cultural determinants, the determination of sex, as a biological fact and its social construct – gender. Namely, if the term "woman" is insufficiently inclusive, in other words, this could mean that certain persons, *inter alia*, cannot identify with women's identity as a "higher concept/identity" (at least in a broader sense), the logical conclusion is that CEDAW is not a relevant legal source for them (at all). On the other hand, there are no known criticisms and positions that the term "man" is not sufficiently inclusive for all identities that (all) men could possibly be identified with in other (relevant) legal sources, as CEDAW is undoubtedly an asymmetrical legal source based on a binary approach to gender and dedicated exclusively to the protection of women and girls. CEDAW Committee General Recommendations 28[137] emphasises that discrimination against women based on gender and sex is inextricably linked with other factors, including sexual orientation and gender identity,[138] thus, as Moinet points out, CEDAW welcomes intersectionality.[139] CEDAW General Recommendation 28, according to Del Gobbo, ensures that States Parties legally recognise and prohibit forms of intersectional discrimination and its effects on lesbian, trans and bisexual women, because they are covered by the CEDAW protection of gender equality.[140] In addition, Del Gobbo refers to Hodson's conclusions that equality rights for all LGBTQ+ people are not formally recognised in international sources such as CEDAW, because the Convention has a binary focus on biological sex, excludes gay and bisexual men from its scope and does not address trans, intersex and other "gender-nonconforming people".[141]

134 Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Croatia, 117, UN doc. A/53/38/Rev.1 (1998).
135 Purvis, 2011, p. 8.
136 Alvarez and Bauder, 2024, pp. 163–186.
137 Committee on the Elimination of Discrimination Against Women, General recommendation No. 28 on the core obligations of date parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28.
138 Moinet, 2023, p. 761.
139 Ibid., p. 760.
140 Del Gobbo, 2023, p. 83.
141 Ibid., p. 69; Hodson, 2023, pp. 175–196.

The CEDAW Committee also adopted a number of other important General Recommendations that address many (recent) problems of discrimination against women to which States Parties should pay extra attention: General Recommendation 18 on disabled women;[142] General Recommendation 26 on women migrant workers;[143] General Recommendation 24 on right to health,[144] which focuses particularly on the needs of girls, pregnant women, elderly women and refugee women; General Recommendation 29 on the economic consequences of marriage, family relations and their dissolution;[145] General Recommendation 30 on women in conflict prevention, conflicts and post-conflict situations;[146] General Recommendation 32 on the gender-related dimension of refugee status, asylum, nationality and statelessness of women,[147] in which the importance of the principle of non-refoulement and the obligation of the State Parties not to deport, extradite, exclude or otherwise remove persons if there are substantial grounds to believe that they will be exposed to the risk of irreparable harm;[148] General Recommendation 37 on climate change,[149] which is dedicated to crises that exacerbate pre-existing gender inequalities for women living in poverty, indigenous women, rural women, internally displaced women belonging to different minorities etc.; General Recommendation 38 on trafficking in women and girls in the context of global migration,[150] which identifies the structural nature of discrimination that implies the special vulnerability, exposure and experiences of women and girls victims of human trafficking,[151] and also the last General Recommendation 40, from October 2024,[152] which pleads for the equal and inclusive representation of women in all decision-making systems, through all sectors, with the aim of achieving systemic

142 Committee on the Elimination of Discrimination Against Women, General recommendation No. 18: Disabled women.
143 Committee on the Elimination of Discrimination Against Women, General recommendation No. 26 on women migrant workers, CEDAW/C/2009/WP.1/R.
144 Committee on the Elimination of Discrimination Against Women, General recommendation No. 24: Art. 12 of the Convention (women and health).
145 Committee on the Elimination of Discrimination Against Women, General recommendation on Art. 16 of the Convention on the Elimination of All Forms of Discrimination against women (Economic consequences of marriage, family relations and their dissolution), CEDAW/C/GC/29.
146 Committee on the Elimination of Discrimination Against Women, General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, CEDAW/C/GC/30.
147 Committee on the Elimination of Discrimination Against Women, General recommendation No. 32 on the gender-related dimension of refugee status, asylum, nationality and statelessness of women, CEDAW/C/GC/32.
148 Hodson, 2023, p. 191.
149 Committee on the Elimination of Discrimination Against Women, General recommendation No. 37 on Gender-related dimension of disaster risk reduction in a changing climate, CEDAW/C/GC/37.
150 Committee on the Elimination of Discrimination Against Women, General recommendation No. 38 on trafficking in women and girls in the context of global migration, CEDAW/C/GC/38.
151 Hodson, 2023, p. 182.
152 Committee on the Elimination of Discrimination Against Women, General recommendation No. 40 on equal and inclusive representation of women in decision-making systems, CEDAW/C/GC/40.

change (in relation to peace and political stability; sustainable, inclusive and human-rights based economy; climate change and environmental risks; technological progress and the use of artificial intelligence and the transformation and sustainability of management systems). Thanks to the cited and many other sources of the CEDAW Committee, clear legal indicators have been developed which the Committee uses to identify guarantees of equality and non-discrimination in the national systems of the States Parties, prohibition of discrimination, legal protection of women, institutional mechanisms of implementation and monitoring, regulation of domestic violence, rape and other forms of sexual assault, conflict-related sexual and gender-based violence, human trafficking, exploitation of prostitution, but also with regard to many other political, civil, economic and social rights of women and girls.

In reviewing the individual complaints, we will focus primarily on those related to the area of Central and Eastern Europe. One is under the impression that cases related to family and gender-based violence are the most frequent or among the most numerous overall. Therefore, it is worth mentioning the decision on the merits of the CEDAW Committee in the case of *A. T. v Hungary*[153] of 2005. The Committee concluded that Hungary did not do everything necessary to protect women from domestic violence, because it is clear that the legal and institutional mechanisms in Hungary were not at the level to ensure internationally expected, coordinated, comprehensive and effective protection and support for the victims of domestic violence (paragraph 9.3).[154] Namely, it was clear from the case that Hungary did not provide shelter protection to the victim of domestic violence and her disabled child, as well as that at that time there were no protection or restraining orders under Hungarian Law (paragraph 2.1). The Committee requested Hungary to provide maximum legislative protection for women facing domestic violence, acting on the basis of appropriate assessments in order to prevent, but also to respond appropriately to violence against women (paragraph 9.6.b).[155]

In the case of the *Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice on behalf of Banu Akbak, Gülen Khan, and Melissa Özdemir v. Austria*,[156] the CEDAW Committee concluded in 2007 that the Austrian authorities knew or must have known that the situation of Fatma Yildirim was extremely dangerous (paragraph 12.1.4) and that Austria failed to detain her husband in order to protect Fatma from death and severe forms of harassment (paragraph 12.1.5). Due to the response of the Austrian authorities, who pointed out that an arrest warrant for the husband would represent a disproportionate violation of his rights, because he had no criminal record and was socially integrated (paragraphs 8.14 and 9.3), and such a procedure would represent interference in his private and family life and the presumption of innocence (paragraph 8.14), the Committee asserted that the

153 Views of the Committee on the Elimination of Discrimination against Women, 2005.
154 Ibid.
155 Ibid.
156 Views of the Committee on the Elimination of Discrimination against Women, 2007.

rights of the perpetrator cannot prevail the woman's human right to life and physical and mental integrity (paragraph 12.1.5). Fatma Yildirim was a victim of long-term abuse in her marriage, and threats that her husband would kill her because she requested a divorce. Her husband repeatedly physically attacked her and threatened her. She did everything in her power to try to obtain protection by reporting to the authorities, but also by moving in with one of her daughters to protect herself. Unfortunately, she was killed, and her husband is serving a life sentence in Austria. The case was brought before the court on behalf of her descendants by the above-mentioned Austrian organisations.[157]

In the case of *S.B. and M.B. v. North Macedonia*[158] of 2020, the Committee established the existence of discrimination against women of Roma ethnicity in the context of the inability to access gynaecological services, the refusal of private health institutions to register them as patients due to their ethnicity and the deficiency of the gynaecological protection network in the area where they lived. This is especially because the national authorities, inter alia, failed to take appropriate positive measures to eliminate discriminatory practices and provide legal remedies, and without taking into account the financial, cultural and physical barriers that Roma and rural women face when trying to obtain gynaecological services (paragraph 7.4).[159]

In the case of discrimination in the field of labour relations *D. S. v. Slovakia*[160] of 2016 the CEDAW Committee concluded that the national court interpreted the Slovakian Antidiscrimination Act very narrowly when it did not shift the burden of proof to the employer, thereby violating the right to an effective legal remedy (paragraph 7.5). It was concluded that D.S. presented a prima facie case (paragraphs. 7.2 and 7.5) and that the principle of equal treatment was violated (paragraph. 7.3). The Committee recommended that the States Party provide the applicant compensation for lost earnings, moral damages, legal costs and expenses and fully implement the national antidiscrimination legislation. It was a case in which, after returning from maternity and parental leave, the woman's employment contract was terminated due to an alleged surplus of employees (paragraphs. 2.2 and 2.3) and the employer's alleged intention to rationalise costs. In addition, the employer alleged that she would not be able to fulfil the work tasks due to her two small children (paragraph 2.4). However, after her dismissal, two other people were hired for the same position. She claimed that her employment contract was terminated on prohibited discriminatory grounds and that she was a victim of discrimination based on gender and family status.[161]

The case of domestic violence and failure to provide adequate diplomatic and consular protection to a female citizen in a foreign country where she married, whose language she did not speak sufficiently, and where Sharia law was applied,

157 Ibid.
158 Views of the Committee on the Elimination of Discrimination against Women, 2019.
159 Ibid.
160 Views of the Committee on the Elimination of Discrimination against Women, 2016.
161 Ibid.

summarises the case of *O. M. v. Ukraine*[162] The case involved a Ukrainian woman who married a Jordanian citizen who studied medicine in Ukraine, and with whom she then moved to Jordan. She gave birth to two children who acquired Ukrainian citizenship, too. In her marriage, she was exposed to serious physical and psychological violence, economic violence, denial of healthcare at the time of childbirth (paragraph 2.3), because her husband did not want to pay for health services, so she gave birth at home with his assistance (although he did not have a specialisation in gynaecology) and put potential risk to her life and the life of the baby. After the second birth, he kept her locked and subjected her to almost daily violence (paragraph 2.4). Her husband insulted her and accused her of not being able to raise Jordanian children properly, being an Orthodox Christian (paragraph 2.4). Although she managed to contact the Ukrainian Embassy by phone and ask for help in leaving Jordan and going to Ukraine with one of her daughters, she was not provided with any help, or rather, they claimed that they could not interfere in family conflicts (paragraph 2.5). Only after her parents managed to contact the Ukrainian authorities did the Embassy in Amman, under the influence of Kiev, help her with the procedure for reporting domestic violence under Sharia law, but no one from the Embassy monitored the procedure, nor did they help her or provide her with an interpreter or lawyer (paragraph 2.6). The Committee emphasised that the national authorities of Ukraine cannot be held responsible for discrimination that was not committed under their jurisdiction (9.2), but also emphasised that consular assistance has an extremely important role in gender-based or domestic violence cases and child custody cases (paragraph 9.4). Especially, when it comes to our own citizens who suffer or are at risk of suffering, and having their rights violated while staying abroad (paragraph 9. 4). The Committee's conclusions in this case also had a broader general function, as they addressed the obligation to provide consular protection to Ukrainian women victims of violence, ensure their access to justice and all guarantees of legal protection, including cases of gender-based discrimination and child custody disputes (paragraph 11.)

Numerous individual cases from around the world also address issues of discrimination against women in the context of migration and immigration, pension and health insurance, marriage and guardianship, custody, property rights, citizenship, and autonomy in the context of forced sterilisation and other unwanted medical procedures. Some cases also address issues of discrimination against women with drug addiction and HIV status. However, the Committee has declared a number of contently interesting cases inadmissible, most often because the requirement of exhaustion of national protection procedures has not been met (although the Committee has exceptions to the general rule in specific situations).

162 Views of the Committee on the Elimination of Discrimination against Women, 2019.

6. Instead of a Conclusion

CEDAW is undoubtedly the most important universal, international source of protection for the rights of women and girls. Over a 45-year period, the Convention had an immeasurable impact on national, local and international protection mechanisms, social processes and legal sources. In addition, it has been frequently cited not only in the reasoning of international and European courts, but also of national legal systems and quasi-judicial bodies (some of which are mentioned in this text).

The social momentum in which it was adopted at the time, the long-term historical process of struggle and efforts to have women recognised as equal members of the family, society and community, which preceded it, as well as the desire to ensure their international legal protection in such conditions, are facts that should not be underestimated in assessments of the Convention. The Convention, on the one hand, reflects the global social issues that led to its adoption, highlighting the dire state of women's rights at that time, and, on the other hand, it represents the aspirations that various movements and thinkers have sought to address through the Convention over the past 45 years. Criticisms regarding the Convention's lack of inclusiveness, its perceived obsolescence, and its role stem from a conflict between how it is perceived and true understanding of its global significance. There is often an underestimation of CEDAW Committee's role, as well as a broader agenda that often tends to overlook the critical question: Do all the possible identities that the Convention aims to represent fit under the essential "identity of women", or are some identities fundamentally incompatible with that definition? In summary, this response aims to address the neglect of facts regarding the international environment in which the Convention was adopted, as well as its role what we confidently refer to as a "living instrument". Additionally, it considers the recent "wish list" put forth by (some) critics.

Like any other international instrument that has existed for such a long time, it is definitely not a perfect legal mechanism, impervious to criticism, but it is certainly not one that does not have a global historical role in the transformation, deconstruction and alleviation of many social stereotypes, prejudices and inequalities that women continuously encounter in all aspects of family and social life.

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| Chapter 10 |

The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)

Martin Faix – Petr Stejskal

ABSTRACT

The chapter provides a comprehensive analysis of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("UNCAT"), focusing on its legal context, key provisions, and the challenges in implementing its obligations. The UNCAT, a cornerstone of international human rights law, addresses the prohibition and prevention of torture by articulating specific duties for States Parties, including the criminalisation of torture, providing redress for victims, and ensuring universal jurisdiction over offenders. The chapter delves into the historical backdrop of torture and the legal developments that led to the adoption of the UNCAT, emphasising its importance in strengthening the prohibition of torture, which was already recognised in customary international law. The chapter further explores the structure of the UNCAT, focusing on its substantive obligations, such as the principle of non-refoulement, the duty to investigate and prosecute acts of torture, and the establishment of a monitoring body, the Committee against Torture. It also highlights issues with implementation of the prohibition of torture and explains the relevance of the Optional Protocol to the Convention, which introduced new mechanisms for preventing torture through national preventive measures and regular monitoring visits. In addition to explaining the legal framework of the Convention, the chapter includes a selection of key cases, particularly those involving Central and Eastern European States, which have shaped the interpretation and enforcement of the UNCAT provisions. These cases demonstrate the evolving understanding of the obligations under the UNCAT and the importance of state accountability in the fight against torture.

KEYWORDS

torture, ill-treatment, universal jurisdiction, country-visit, Committee against Torture

1. Introduction

Torture is considered as one of the gravest forms of violation of human rights. It represents a direct attack to personal integrity and human dignity, it has no excuse

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in human society.[1] Also for this reason, the prohibition of torture or other cruel, inhuman or degrading treatment or punishment ("ill-treatment") is widely accepted and forms a cornerstone of contemporary international law and international human rights law. It is part of customary international law, is enshrined in several universal and regional human rights treaties and belongs to the rules of peremptory character. However, despite wide acceptance of the rule and its importance in international law, international community have been witnessing the use of torture and ill-treatment in many regions of the world. For this reason, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("UNCAT") was adopted in 1984 and was later ratified or acceded to by a majority of states. Even decades after the entry into force of the UNCAT and despite its wide membership, there are still challenges to the endeavour to eradicate and prevent all forms of torture and ill-treatment. Nevertheless, the UNCAT represents an important human rights treaty, complementing other international mechanisms.

The UNCAT entered into force on 26 June 1987 and it currently has 174 States Parties.[2] It consists of a Preamble and thirty-three articles divided into three thematic parts. Its primary objective is to make more effective the struggle against torture and ill-treatment by articulating specific substantive obligations of States Parties that should prevent acts of torture from happening. It also prescribes monitoring procedures and establishes a monitoring body, the Committee against Torture ("Committee"). At the time of adoption, the UNCAT brought some novel features into the field of human rights. However, it needs to be understood as one of several mechanisms available to combat torture and ill-treatment as both on a universal[3] and regional level,[4] as there are also other conventions and mechanisms that reinforce each other.[5]

This chapter provides the reader with a systematic overview of a complex issue of the prohibition of torture, with particular focus on the UNCAT. Chapter 2 will firstly explain the historical and legal context in which the UNCAT was developed and adopted. It will also describe the status of the prohibition of torture and its distinct features. Chapter 3 then focuses on obligations stemming from the UNCAT, mirroring its structure. After explaining how torture is defined in the UNCAT, substantive obligations are addressed. This is followed by an analysis of monitoring procedures and the mandate of the Committee. Chapter 4 contributes with a brief analysis of the implementation of the UNCAT. After providing general remarks on the effectiveness of the UNCAT in the struggle against torture, it explains the main features of the

1 Nowak and Monina, 2018, para. 1.
2 United Nations Treaty Collection, 2024.
3 International Covenant for Civil and Political Rights, UN Human Rights Council, UN Special Rapporteur on Torture.
4 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Inter-American Convention to Prevent and Punish Torture, European Convention on Human Rights, International Covenant on Civil and Political Rights, American Convention on Human Rights, African Charter on Human and Peoples' Rights.
5 For an overview of international protection against torture, see for example: Birk and Nowak, 2020.

Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ("OPCAT") which was adopted in 2006 to complement and reinforce the UNCAT provisions. Finally, Chapter 5 offers a selection of the decisions of the Committee that contributed to the understanding and development of some of the central issues pertaining to the Convention.

2. Historical and Legal Context

2.1. Historical Context and Adoption of the Convention

A practice of torture can be traced back to different historical periods and various social and cultural settings. Examples include ancient Rome and the torture of slaves and Christians, the torture of criminal suspects or inquisition in medieval times, the torture of African slaves in Americas or the harassment of peoples by colonial powers in Africa, Asia and Latin America. The practices of torture persisted during the eighteenth and nineteenth centuries and were also massively used by totalitarian regimes in Europe or Asia in the twentieth century.[6] With the development of international human rights law after the Second World War, efforts to combat practices of torture were given a strong momentum in a form of development of international regulatory framework. However, torture was systematically practiced even in the 1960s and 1970s in many parts of the world. Literature refers to French practices of torture in Algeria, Portuguese conduct in its former African colonies or of military dictatorships in Latin America, including the practices of the Pinochet regime in Chile.[7]

For these reasons, the United Nations General Assembly ("UNGA") put the issue of torture and ill-treatment as a standing item on its agenda already in 1973.[8] Another important step was the adoption by the UNGA of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Declaration) in 1975. Even though the Declaration is a non-binding document, it formed an important basis of the UNCAT.[9] Finally, in December 1977, the UNGA entrusted the then-existing Commission on Human Rights with the complex task to draft the text of a new convention 'in the light of the principles embodied in the Declaration (..)'.[10] An inter-sessional Working Group was formed by the Commission to pursue this task. Between 1978 and 1984, the Working Group managed to reach compromise on most of the substantial issues associated with the design and scope of the draft Convention.[11] Two issues remained unresolved when the Working Group adopted the draft text in March 1984 and transmitted it to the UNGA

6 Novak, Birk and Monina, 2019b, p. 2.
7 Ibid.
8 Ibid.
9 See in detail: Novak, Birk and Monina, 2019a, pp. 19–20.
10 UN General Assembly, 1977. The Commission on Human Rights was replaced with the UN Human Rights Council in 2006.
11 Novak, Birk and Monina, 2019b, p. 4.

– power of the Committee to issue country specific comments and suggestions and to conduct mandatory inquiry procedures. However, a compromise was reached when the draft text was amended to prescribe only general comments and an opting-out clause in relation to the inquiry procedure was inserted by the Third Committee of the UNGA.[12] Subsequently, on 10 December 1984, the UNCAT was adopted by the UNGA.[13] The Convention was adopted and opened for signature, ratification and accession by the UNGA Resolution 39/46 of 10 December 1984. It entered into force on 26 June 1987, currently having 174 States Parties.[14] It consists of a Preamble and thirty-three articles divided into three thematic parts.

Adoption of the UNCAT was an important milestone in combatting torture and ill-treatment. Notably, it was not a goal of the UNCAT to establish the prohibition of torture and the obligation to prevent it. In fact, nowhere in the UNCAT is a prohibition of torture or ill-treatment. This is because the prohibition of torture and ill-treatment has already been part of international law already then, as will be explained below. The primary objective of the UNCAT is rather to make more effective the struggle against torture and ill-treatment as the mere prohibition was insufficient to combat these practices.[15]

2.2. Status of the Prohibition of Torture and Relevance of the Convention

As mentioned earlier, already at the time of the adoption of the UNCAT it was generally recognised that the prohibition of torture was part of customary international law.[16] It was articulated in the Universal Declaration of Human Rights from 1948 (art. 5). Notably, it also formed part of several human rights conventions, such as the four Geneva Conventions from 1949 in common Article 3, the European Convention on Human Rights from 1950 in Article 3 ("ECHR"), the International Covenant on Civil and Political Rights from 1966 in Article 7 ("ICCPR"), the American Convention on Human Rights from 1969 in Article 5 ("ACHR"), and the African Charter on Human and Peoples' Rights from 1969 in Article 5 ("ACHPR"). There are also specific regional conventions focusing directly on torture, such as the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment or the 1985 Inter-American Convention to Prevent and Punish Torture ("Inter-American Torture Convention"). Customary status of the rule means that states are obliged by this general prohibition irrespective of their membership in the UNCAT or the above-mentioned human rights treaties.

Apart from the general acceptance of this rule as part of international customary law followed by a rich treaty practice, the prohibition of torture is also distinct with respect to its legal nature. Because of the importance of the values it protects, the prohibition is considered to form part of peremptory norms of international law.

12 Ibid.
13 UN General Assembly, 1984.
14 United Nations Treaty Collection, 2024.
15 UNCAT Preamble.
16 *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, para. 99.

This means that it cannot be derogated from by States through international treaties.[17] At the same time, the prohibition of torture imposes upon states obligations *erga omnes*, that is, obligations owed towards the international community as a whole.[18] This means that states other than those directly injured by the breach of this prohibition may invoke responsibility of the wrongdoing state[19] as all states can be held to have a legal interest as concerns breaches of obligations of this character.[20] Prohibition of torture and ill-treatment are also human rights of absolute nature.[21] That means that it cannot be restricted or limited in any circumstances. Article 2, paragraph 2 of the UNCAT confirms this by stating that no exceptional circumstances, whether a state of war, threat of war, internal political instability or other public emergency may be invoked to justify torture.[22] Thus, for example, it is not possible to use physical force and other means of pressure amounting to torture in order to obtain critical information from terrorist suspects even if such information could thwart terrorist attacks.[23] The same applies to justifications based on religion or tradition.[24] Moreover, prohibition of torture and ill-treatment is a right from which derogation (in the sense of the law of treaties) is not possible even in times of war or public emergency.[25] For the sake of completeness, it must be highlighted that prohibition of torture and ill-treatment is also mirrored in the law of armed conflict, as well as in the international criminal law. This prohibition is applicable in both international and non-international armed conflicts.[26] At the same time, torture and ill-treatment may also constitute elements of crimes under international law, such as crimes against humanity[27] or war crimes.[28]

When it comes to the relevance of the adoption of the UNCAT in the light of the above-mentioned, the existence of the prohibition of torture and ill-treatment, despite its widespread acceptance and distinct legal features, was not sufficient to prevent torture and ill-treatment from happening on a large-scale and systematic basis in several regions of the world. The UNCAT therefore brings additional and more specific obligations which focus primarily on prevention. Some of the obligations were quite innovative, such as the establishment of universal criminal jurisdiction and the

17 Ibid. *Prosecutor v. Anto Furundzija*, para. 153.
18 *Prosecutor v. Anto Furundzija*, para. 151.
19 International Law Commission, 2001, draft Art. 48.
20 *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, p. 32, para. 33.
21 For the discussion why this conclusion applies both to the prohibition of torture as well as prohibition of ill-treatment, see: Kretzmer, 2022, para. 24.
22 This has been reiterated by the Committee against Torture in its General Comment No. 2. See: Committee against Torture, 2008, para. 5.
23 Kretzmer, 2022, para. 23.
24 Committee against Torture, 2008, para. 5.
25 See: ICCPR in Art. 4, ECHR in Art. 15 or art. 27 of the ACHR.
26 Just to mention only a few out of the many examples, see the already mentioned common art. 3 to the Geneva Conventions, art. 12 of the Geneva Convention I, art. 75 of the Additional Protocol I to the Geneva Conventions or art. 4 of the Additional Protocol II to the Geneva Conventions.
27 See, for example: Art. 7 of the Rome Statute.
28 Art. 8 of the Rome Statute.

introduction of an inquiry procedure with the possibility to conduct country visits (albeit with some limitations, as will be explained later).[29] Substantive (preventive) obligations and procedures enabling international monitoring are therefore aimed at strengthening the implementation of the general prohibition. Moreover, Article 1 of the UNCAT was the first provision in international law that contained the legal definition of torture (even though subject to critical discussion in legal theory and practice).[30]

3. Structure of the Convention

3.1. Definition of Torture

Definition of torture for the purposes of the application of the UNCAT is provided in Article 1, paragraph 1. It contains four elements: a) severity of the pain or suffering, b) intention, c) specific purpose, and d) involvement of a public official. Prohibition of torture is part of customary international law. However, it does not necessarily apply to the definition of torture as formulated in the UNCAT, meaning that some of the elements of the definition may not be required in order for an act to be regarded as torture under other human rights mechanisms. In fact, whereas the Inter-American Torture Convention (Article 2) or the Rome Statute (Article 7, paragraph, 2 letter e)) contain the definition of torture, the ICCPR, the ACHR, the ACHPR, the Convention on the Rights of the Child and several other human rights treaties do not define torture despite the fact that they refer to it in some of its articles. However, with the exception of the Inter-American Torture Convention which does not refer to the severity requirement, severity of the pain or suffering and the intention seem to be common to most definitions of torture.[31]

In relation to the element of severe pain and suffering, the doctrine points to a rather case-by-case approach (sometimes short of appropriate reasoning) of the Committee in assessing this element.[32] But in general, severe pain and suffering relates equally both to physical as well as to mental suffering (caused for example by sleep deprivation, sensory deprivation or threats against life).[33] Torture as defined by the UNCAT refers only to intentional act or omission (for example purposeful deprivation of a detainee of food or medicine).[34] Purely negligent conduct does not meet this test (but could be eventually qualified as ill-treatment).[35] At the same time, objective determination of the facts is required when investigating allegations of torture, as elements of intent and purpose do not involve a subjective inquiry into the motivations of

29 Novak, Birk and Monina, 2019a, pp. 19–20.
30 Novak, Birk and Monina, 2019b, p. 7.
31 Kretzmer, 2022, paras. 8–10.
32 Zach, 2019a, paras. 81–89.
33 Ibid., paras. 91 and 93.
34 REDRESS, 2018, p. 9.
35 Zach, 2019a, para. 101.

the perpetrators.[36] In the sense of the UNCAT, torture must be inflicted for a specific purpose, examples of which are provided in a non-exhaustive list in Article 1 (punishment, soliciting information or confession, intimidation or coercion). As regards the element of involvement of a public official, a State Party is responsible not only for acts and omissions of its officials, but also its agents, private contractors and other persons acting in official capacity or otherwise on behalf of the State Party, in conjunction with the State Party, under its direction or control, or otherwise under colour of law. This means that the obligation to prevent torture applies to wide range of situations where people are under custody or control, such as hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled.[37] In this regard, due diligence test should be applied.[38]

Some distinction must be kept between torture and ill-treatment. In general, Article 2, paragraph 1 'is seen as an umbrella clause encompassing all the obligations to prevent torture as included in but not limited to the various provisions of the Convention,' whereas an obligation for States Parties to prevent ill-treatment is constituted in Article 16.[39] As seen by the reader of the UNCAT, most of the substantive articles of the UNCAT refer only to torture and not to ill-treatment. Article 16 stipulates that obligations included in Articles 10, 11, 12 and 13 apply to ill-treatment. The distinction between torture and ill-treatment is actually a thorny issue. It seems that in the practice of the Committee the distinguishing criterion is primarily the purpose and not the level of pain or suffering.[40] In particular, ill-treatment 'does not require proof of impermissible purposes.'[41] At the same time, powerlessness of the victim is also considered as an essential criterion of torture.[42] Even more challenging is the question if and to what extent the substantive obligations of the UNCAT also apply to the ill-treatment rather than torture only. As referred to earlier, Article 16 of the UNCAT specifies that obligations contained in Articles 10, 11, 12 and 13 apply to ill-treatment. However, the Committee expressed a more extensive approach when it claimed in its General Comment No. 2 that measures required to prevent torture must be applied to prevent ill-treatment. According to the Committee, the obligation of the prevention stipulated in Article 16 is not limited only to the articles listed therein as 'the obligation to prevent ill-treatment in practice overlaps with and is largely congruent with the obligation to prevent torture' and 'the definitional threshold between ill-treatment and torture is often not clear'.[43] Indeed, the use of the expression "in particular" in Article 16 indicates the non-exhaustive nature of the list.[44] However, interpretation

36 Committee against Torture, 2008, para. 9.
37 Ibid., para. 15.
38 Zach, 2019a, para. 131.
39 Zach, 2019b, para. 21.
40 Kretzmer, 2022, para. 21. For more detailed analysis, see: Zach, 2019a, paras. 67–80.
41 Committee against Torture, 2008, para. 10.
42 Zach, 2019a, paras. 117–121.
43 Committee against Torture, 2008, para. 3.
44 Zach and Birk, 2019, para. 13.

of Article 16 suggests that Articles 4 to 9 were intended to apply to torture only.[45] In contrast to the principle of non-refoulement as developed by the European Court of Human Rights or the UN Human Rights Committee ("HRC"), the obligations of Article 3 UNCAT also apply to torture only,[46] as acknowledged subsequently by the Committee.[47] However, ill-treatment not amounting to torture is not irrelevant in the context of Article 3 as the infliction of ill-treatment is an indication of a torture risk.[48] Articles 14 and 15 should be interpreted to extend to ill-treatment as well, despite the quite inconsistent positions of the Committee.[49]

3.2. Prevention of Torture – Substantive Obligations

The definition of torture in Article 1 of the UNCAT is followed by substantive obligations of States Parties in Articles 2–16. Article 2 generally obliges States Parties to take effective legislative, administrative, judicial and other measures to prevent acts of torture in any territory under their jurisdiction. The umbrella clause in Article 2, paragraph 1 requires States Parties to also take other effective measures aimed at preventing torture in addition to the preventive obligations explicitly enlisted in the UNCAT (and in the following text).[50] Article 16 constitutes the obligation for States Parties to prevent ill-treatment. Similarly to other core human rights obligations, states are obliged both to refrain from committing acts of torture and ill-treatment as well as to protect persons subject under their jurisdiction from being subject to these acts.

Moving to the preventive obligations specifically listed in the UNCAT, Article 3 follows the general obligation of Article 2 with an important principle known as *non-refoulement*. This clause obliges States Parties not to expel, return or extradite a person to another state where there are substantial grounds for believing that such a person would be in a danger of being subjected to torture. Apart from all relevant considerations, paragraph 2 of Article 3 requires States Parties to take into account the existence of the consistent patterns of gross, flagrant or mass violations of human rights in another State. The Committee has provided a list of further factors that should be considered.[51] Substantial grounds are present where the risk of torture is 'foreseeable, personal, present and real.'[52] In contrast to the UNCAT, the non-refoulement principle is not expressly mentioned in general human rights conventions, but is derived from the ICCPR, ECHR, ACHR and ACHPR's duty to protect people from torture and forms part of customary international law.[53]

45 Ibid., paras. 13–18; Katona, 2019, paras. 14–17.
46 See the analysis at: Zach and Birk, 2019, paras. 19–21.
47 Committee against Torture, 2017.
48 Ammer and Schuechner, 2019, para. 4.
49 See: Zach and Birk, 2019, paras. 22–23 and Kretzmer, 2022, para. 33.
50 Zach, 2019b, at para. 2.
51 See: Committee against Torture, 2018, para. 29.
52 Ibid., at para. 11.
53 Kretzmer, 2022, para. 38.

Article 4 obliges States Parties to ensure that all acts of torture are offences under national criminal law. It further stipulates that this applies to an attempt to commit torture and to complicity or participation in torture. These offences must be punishable by appropriate penalties. This obligation has been inspired by earlier counterterrorism treaties and at that time could be considered as a novel feature in the human rights domain.[54] Article 5, paragraph 1 follows with establishing grounds for jurisdiction over offences of torture – the flag principle, active nationality and passive nationality principle. However, paragraph 2 brings one of the most important aspects of the UNCAT – the establishment of the principle of universal jurisdiction for acts of torture. In particular, a State Party is required to establish in its national law jurisdiction to prosecute any person suspected of committing torture that is present in any territory under its jurisdiction and was not extradited pursuant to Article 8 of the UNCAT, even if the act of torture was committed elsewhere. This obligation must be read in conjunction with Articles 7 and 8 as obligations aimed at reducing the existence of *safe havens* for torture offenders.[55] Article 7 stipulates that the State Party in the territory under whose jurisdiction a person alleged to have committed crime of torture is found shall submit the case to its competent authorities for the purpose of prosecution if it does not extradite such person. Therefore, Article 7 can be understood as a manifestation of the principle *aut dedere aut iudicare* (prosecute or extradite).[56] Article 8 closes the circle by obliging States Parties to treat acts of torture that are criminalised in accordance with Article 4 of the UNCAT as extraditable offences. In other words, States Parties are obliged to prosecute or extradite any suspected offender of torture found in the territory under their jurisdiction, regardless of the nationality of the suspect or the victim, or the place where the act was allegedly committed. However, there are also convincing arguments for a third avenue that is not explicitly envisaged by the text of the UNCAT – surrendering the suspect to a competent international (or regional) criminal court, typically the International Criminal Court.[57] While prosecution constitutes an obligation for the forum state (irrespective of whether there was any request for extradition), there is no obligation (on behalf of other states having jurisdiction based on Article 5, paragraph 1) to request extradition. Nor is there any obligation on behalf of the forum state to comply with any request for extradition.[58] However, the forum state has to notify the territorial, flag, or national states of its actions towards the suspect. If any of these states request extradition, the forum state has the choice to decide whether it extradites the suspect or proceeds with the prosecution of the person before its domestic courts.[59] This choice is naturally limited by Article 3 of the UNCAT.

54 Novak, Birk and Monina, 2019b, p. 8.
55 REDRESS, 2018, p. 14.
56 Kretzmer, 2022, para. 30.
57 See: Schmidt, 2019b, paras. 61–64.
58 Ibid., at para. 5.
59 Art. 6 para. 4 UNCAT, see also: Schmidt, 2019a, para. 4.

Under Article 9, States Parties have an obligation to provide each other judicial assistance in connection with criminal proceedings by, for example, supplying all evidence at their disposal. This obligation will typically apply to the territorial and the national state of the alleged torturer. These states shall supply all evidence at their disposal necessary for the criminal proceedings to other States Parties that decided to exercise universal jurisdiction or jurisdiction based on the passive nationality principle.[60] Article 10 calls for safeguards in the prevention of torture – an obligation to include education and information regarding its prohibition in the training of law enforcement personnel, medical personnel, public officials and others who may be involved in the custody, interrogation or treatment of individuals subjected to any form of arrest, detention or imprisonment. Article 11 obliges States Parties to keep under systematic review interrogation rules, instructions, methods and practices for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment. Basic guarantees applied to persons deprived of their liberty should include, for example, the maintenance of an official register of detainees, the right to receive independent legal assistance, medical assistance, contact to relatives, impartial mechanism for inspections and visits of places of detention and confinement and the availability of judicial remedies.[61] According to Article 12, prompt and impartial ex officio investigation must be conducted if there are reasonable grounds to believe that an act of torture has been committed. This obligation should typically apply to police chiefs, prison directors, public prosecutors or prison doctors. It is an important obligation since victims of torture may be unable or unwilling (due to threats or fear) to report to the relevant authority.[62] At the same time, victims of torture have the right to complain and to have their case promptly and impartially examined by competent authorities, according to Article 13. In connection with this, victims and witnesses must be protected. These obligations are followed in Article 14 by the obligation of the States Parties to ensure that victims obtain redress and have enforceable right to fair and adequate compensation. Finally, Article 15 obligates States Parties to ensure in their legal systems that any statement which has been made as a result of torture shall not be invoked as evidence against any person (except against a person accused of torture). Inadmissibility of such evidence naturally applies not only to criminal, but also civil, administrative and other formal proceedings.[63]

3.3. Monitoring Procedures

Articles 17–24 form an important part of the UNCAT as they establish a monitoring body and procedures that are supposed to strengthen implementation of the preventative substantive obligations. This subchapter firstly describes the institutional setup and primary responsibilities of the monitoring body, the Committee against

60 Schmidt, 2019c, para. 11.
61 REDRESS, 2018, p. 15.
62 See for example: UN General Assembly, 2010, para. 55.
63 Kretzmer, 2022, para. 34.

Torture, focusing in a greater detail on the monitoring procedures conducted by the Committee.

3.3.1. Committee Against Torture

Article 17 provides for the establishment of the Committee, a UN human rights treaty body responsible for monitoring compliance with the UNCAT and cooperation with the States Parties. The Committee consists of ten experts of high moral standing and recognised competence in the field of human rights. They are elected for a term of four years by States Parties, from a list of candidates nominated exclusively by States Parties. In contrast to some other UN human rights treaties, the number of re-nominations and re-elections is not limited by UNCAT.[64] In comparison to the HRC (composed namely of experts with legal background), there is a more diverse composition of the Committee, involving professors of law and legal practitioners as majority members, but also including doctors of medicine, psychologists, political scientists or journalists to reflect the multidisciplinary task of combating torture and ill-treatment.[65]

The Committee works in sessions that take place three times a year and last for a period of three to four weeks.[66] Besides the procedural clauses contained in the UNCAT, the work of the Committee is also governed by the Rules of Procedure ("RoP") established by the Committee pursuant to Article 18, paragraph 2 UNCAT.[67] The RoP provides relatively detailed rules for the working methods of the Committee and for the procedures described in the following sections. Apart from the monitoring procedures that are briefly described in the following sections, the Committee may also prepare and adopt general comments on the provisions of the UNCAT with a view to promoting its further implementation or assisting States Parties in fulfilling their obligations. So far, the Committee has adopted only four general comments, General Comment No 4 replacing General Comment No 1. The Committee also has the obligation of submitting an annual report on its activities to the States Parties and to the UNGA.[68]

3.3.2. Reporting Procedure

Article 19 of the UNCAT requires States Parties to submit initial report on the measures they have taken to give effect to undertakings under the Convention. Subsequently, States Parties are required to submit periodic reports every four years on any new measures taken. In addition, Article 19, paragraph 1 of the UNCAT also allows the Committee to request a special ("other") report from a State Party, for example in emergency situations that require urgent response. However, this power is quite

64 Nowak and Monina, 2018, para. 11.
65 Ibid., para. 8.
66 For past and future sessions, see: UN Human Rights Treaty Bodies, 2024b.
67 For the latest version of the Rules of Procedure, see: UN Human Rights Treaty Bodies, 2024d.
68 Art. 24 UNCAT.

rarely used.[69] The terminology used in the Article 19, paragraph 1 of the UNCAT differs from the practice of the HRC and other treaty bodies.[70]

Periodic reports are examined by the Committee which may make general comments on the reports and forward them to the State Party concerned. During the examination of a particular report, the Committee engages in an interactive dialogue with the State Party's representatives.[71] After its consideration of each report, the Committee, in accordance with Article 19, paragraph 3 of the UNCAT, may make such general comments, concluding observations or recommendations on the report as it may consider appropriate and shall forward these to the state party concerned.[72] Concluding observations refer to positive aspects, subjects of concern and related recommendations.[73] The Committee may also decide to include any comments made by it, together with the observations received from the State Party concerned, in its annual report made in accordance with Article 24. In addition, to further the implementation of its recommendations, the Committee developed a follow-up procedure which includes the designation of a rapporteur to follow up with the State Party on its implementation of the recommendations identified by the Committee in its concluding observations. This procedure is currently an integral part of the reporting procedure.[74] Further details of the procedure are regulated by Rules 65–73 of the RoP.

The reporting procedure is a typical feature of the UN human rights conventions and also one of the most important competences of the Committee. It facilitates a monitoring process and provides a basis for dialogue between States Parties and the monitoring body.[75] Actually, most of the official meeting time of the Committee has been devoted to the review and assessments of these reports.[76] However, the Committee does not rely only on reports of States Parties in its monitoring. Civil society organisations, national human rights institutions as well as other international bodies provide an important input as well.[77] This is quite an important feature of the process given the fact that the problem of late reporting and non-reporting by States Parties is still present. Additionally, no penalty exists for late or no submission of a report (besides the wrongfulness of such a conduct and the power of the Committee to publicly note the delay of submission).[78] The Committee therefore invites non-governmental organisations to submit documentation and meet with its members before each interactive exchange with State Parties takes place,[79] making the reporting process more effective (source of information and advocation for the implementation

69 Monina, 2019a, para. 40.
70 See: Ibid., para. 36.
71 Rule 70 para. 2 RoP.
72 Rule 71 para. 1 RoP.
73 Nowak and Monina, 2018, para. 22.
74 Ibid., para. 23; Rule 72 of the RoP.
75 Nowak and Monina, 2018, para. 19.
76 Gaer, 2020, p. 133.
77 Nowak and Monina, 2018, para. 22.
78 Gaer, 2020, p. 134.
79 Ibid.

of the UNCAT).[80] In addition, to overcome the problem of late or non-reporting (the Committee being among the UN human rights treaty bodies with the lowest reporting rate),[81] a voluntary Simplified Reporting Procedure was developed by the Committee.[82] In particular, the Committee may submit to a State Party a list of issues prior to receiving its periodic report. If that State Party agrees to report under this reporting procedure, its response to the submitted list of issues replaces the report it would have to submit under Article 19.[83] A substantial fraction of States Parties accepted this simplified procedure.[84]

3.3.3. Inquiry Procedure

Another important power that the Committee is vested in is the inquiry procedure. According to Article 20 of the UNCAT, this procedure may be used if the Committee receives reliable information presenting well-founded indications that torture is systematically practised in the territory of a State Party. This procedure is also accompanied by Rules 75–90 of the RoP. When it comes to the subject-matter of this procedure, according to the Committee:

> 'torture is practised systematically when it is apparent that the torture cases (..) are seen to be habitual, widespread and deliberate in at least a considerable part of the territory of the country in question. Torture may in fact be of a systematic character without resulting from the direct intention of a Government. It may be the consequence of factors which the Government has difficulty in controlling, and its existence may indicate a discrepancy between policy as determined by the central Government and its implementation by the local administration. Inadequate legislation which in practice allows room for the use of torture may also add to the systematic nature of this practice'.[85]

After preliminary consideration of the information received as to the well-founded indications of the above-mentioned practice of torture (first phase), the Committee may determine that the threshold has been met. If that is the case, the State Party is invited to cooperate in the examination of the information and to submit observations (second phase). If the replies from the State Party are not satisfactory, the Committee decides to initiate an inquiry and conduct investigations (third stage).[86]

80 REDRESS, 2018, p. 22.
81 Monina, 2019a, para. 87.
82 Ibid., paras. 88–89.
83 Rule 66 RoP.
84 UN Human Rights Treaty Bodies, 2024c.
85 Committee against Torture, 1993, para. 39. In the practice of the Committee, this definition has not changed since its adoption in report concerning the inquiry of the situation in Turkey in 1994, as confirmed recently in the observations on the inquiry made on the situation in Belarus, see Committee against Torture, 2024, para. 43. However, for a brief analysis of the Commission's inquiries, see: Gaer, 2020, pp.143–146.
86 Nowak and Monina, 2018, para. 37.

It may designate one or more of its members to make a confidential inquiry and to report to the Committee urgently. The findings of the Committee are transmitted in a form of a report to the State Party concerned (fourth phase, terminating the inquiry). This contains comments and suggestions made by the Committee and terminates the inquiry. The whole procedure is based on cooperation and confidentiality.[87] But the Committee may decide to include a brief summary account of the results of the inquiry in its annual report.[88] After completion of the proceedings, the Committee is authorised (and has been doing so) to publish a summary account in its annual report even against the disagreement of the State Party concerned.[89]

What is quite a distinct feature and an important part of this procedure is the power of the Committee to conduct a country visit as part of the inquiry process. Such a visit includes meetings of the Committee's delegation with the state officials, victims, witnesses and NGOs. Importantly, it can also consist of inspections in the detention facilities, together with interviews with the detainees in private. The Committee has so far considered it necessary to conduct a country visit to all states under inquiry, requesting such a visit immediately after making a decision to conduct the inquiry and investigations.[90] However, the visit can be conducted only with the agreement of the State Party concerned (cf. below the OPCAT). In addition, Article 28 of the UNCAT provides the States Parties with the possibility to opt-out by means of a special reservation. Thus, in connection with confidentiality thorough the process, it is apparent that this procedure has been considerably watered down during the drafting of the UNCAT to reach a compromise among States.[91] But still, at the time of the adoption of the UNCAT, this procedure was innovative and has become a model for five other UN human rights treaties.[92]

Apart from being confidential and based on cooperation with the State Party concerned, this procedure is also reactive in nature. Therefore, an inquiry cannot be conducted in order to prevent torture.[93] Since its establishment in 1988, the Committee has carried out eleven inquiries.[94] Thus, the procedure is not used very frequently.[95] It is also quite a lengthy process as inquiry procedures so far conducted usually took four to six years.[96] Except for Sri Lanka, the Committee has found systematic

87 Ibid.
88 Art. 20 para. 5 UNCAT.
89 Monina, 2019b, paras. 79–80. See the overview of the inquiries at UN Human Rights Treaty Bodies, 2024a.
90 Monina, 2019b, para. 68.
91 Ibid., paras. 1–2.
92 Nowak and Monina, 2018, para. 35. See for example: Art. 11 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights or Art. 13 of the Optional Protocol to the Convention of the Rights of the Child.
93 Monina, 2019b, para. 36.
94 In Turkey (1994), Egypt (twice – 1996 and 2017), Peru (2001), Sri Lanka (2002), Mexico (2003), Federal Republic of Yugoslavia (2004), Brazil (2008), Nepal (2012), Lebanon (2014) and Belarus (2024).
95 For some considerations of probable causes, see: Gaer, 2020, pp. 143–146.
96 See the comparison at: Monina, 2019b, para. 37 (Table 1).

torture in all of the cases.[97] The consent to a country visit by the Committee's delegation was not given (only) by Egypt (both in 1996 and 2017) and Belarus (in 2024) which, of course, did not prevent the Committee from completing the inquiry on the basis of other sources of information at its disposal. Interestingly, in the majority of cases, the inquiry procedure was triggered by the initiative of NGOs (such as Amnesty International or Human Rights Watch) or national organisations that approached the Committee with relevant information.[98] And similarly to other UNCAT procedures, information submitted by these organisations are an important source of information for the Committee's examinations. Only in one case did the Committee initiate the procedure on its own initiative (Nepal).[99]

3.3.4. Individual Complaints Procedure

Article 22 of the UNCAT equips the Committee with quite another important competence – to receive and consider communications from or on behalf of individuals. Individual communication may be lodged by or on behalf of an individual who claims to be victim of a violation of the UNCAT. Article 22 prescribes several requirements for the Committee to be able to consider such communication (such as the prohibition of anonymous communications, obligation to exhaust all available domestic remedies or the condition that the matter has not been or is not being examined under another international procedure). Importantly, as with the UNCAT inter-State communications (as well as individual communications procedures in other UN human rights treaties), this is only an optional procedure. According to Article 22, paragraph 1, this competence of the Committee *vis-à-vis* a State Party is subject to a voluntary declaration by that State Party recognising such competence. By the time of the finalisation of this chapter, there were only 71 UNCAT States Parties that accepted the individual complaint procedure (Honduras being so far the last state accepting the procedure in July 2024).[100] This is quite a low number in comparison to the inquiry procedure (155 States Parties accepting the procedure) or UNCAT membership in general (174 States Parties). Interestingly, the majority of States Parties accepting the UNCAT individual communications procedure are states that are also subject to mandatory complaints procedures under regional human rights mechanisms, such as the ECHR or ACHR.[101]

97 For example, with respect to Belarus, the Committee concluded that 'The practice of torture has been documented as having been frequent in the aftermath of the 9 August 2020 election at the hands of law enforcement personnel, who often resorted to severe beatings and excessive use of physical force. It was routinely carried out as a deliberate practice to intimidate detainees, extract incriminating statements and punish political dissenters and peaceful protesters. Torture was perpetrated by police officers, prison guards and security officers in police stations, prisons and vehicles transporting detainees.' See: Committee against Torture, 2024, para. 45.
98 Monina, 2019b, para. 3.
99 Gaer, 2020, p. 142.
100 A current list of States accepting this procedure is available at UN Human Rights Treaty Bodies, 2024e.
101 Nowak and Monina, 2018, para. 25.

The procedure under Article 22 UNCAT is complemented and further elaborated on by a detailed set of rules in the RoP (Rules 102–121). Communications under Article 22 are examined by the Committee in closed meetings. It is a written procedure, however oral hearings are possible.[102] Also here, the Committee may consider information from other sources such as UN bodies or specialised agencies.[103] The findings on the merits are known as *decisions* or *views* of the Committee. A majority vote of all Committee members present is required to adopt a decision, however most decisions are adopted unanimously.[104] In practice, examining individual communications consumes quite a substantial amount of the Committee's meeting time and the Committee is being increasingly overloaded with cases at hand.[105] The great majority of cases dealt with do not concern allegations of the practise of torture or other forms of ill-treatment in a narrow sense but (potential) violations of the non-refoulement principle inArticle 3 of the UNCAT.[106]

Views and conclusions reached by the Committee are forwarded to the State Party concerned and to the individual.[107] From the legal point of view, decisions of the Committee lack binding force as the UNCAT does not explicitly oblige States Parties to implement them, a weakness that is also common to other UN individual complaints mechanisms.[108] However, its relevance is generally recognised due to its quasi-judicial character and functioning as the authoritative interpretation of the Convention.[109] Where a violation is found, the Committee typically asks the State Party to provide information within 90 days on the measures taken to remedy the situation. Typical remedies sought by the Committee towards the State Party concerned are compensation, legislative changes or symbolic reparations.[110] However, since most of the cases concern the non-refoulment principle, the most frequent remedy is avoidance of removal or deportation of the individual.[111]

3.3.5. Inter-State Communications

As with other human rights treaties, States Parties may formally complain about alleged violations of the UNCAT treaty by another State Party through the inter-State communication procedure that is prescribed by Article 21 of the UNCAT. However, this procedure is considered to be the weakest one as it is voluntary (subject to a

102 Rule 117 para. 4 RoP.
103 Rule 118 para. 2 RoP.
104 Nowak and Monina, 2018, paras. 30–31.
105 Gaer, 2020, pp. 147–148.
106 For possible reasons, see: Monina, 2019d, para. 5.
107 See: Art. 22 paras. 1–7 UNCAT.
108 Cf. for example with art. 46 of the ECHR giving a binding force to the judgements of the European Court of Human Rights.
109 Nowak and Monina, 2018, paras. 31–32.
110 Gaer, 2020, p. 148.
111 Ibid.

declaration accepting the power of the Committee to receive and consider these communications) and is not used by States Parties.[112]

4. Implementation of the Convention

4.1. General Remarks

An important question that somehow surrounds the topic of this chapter is how successful the UNCAT is in terms of implementation by States Parties. Naturally, this question requires a comprehensive, multidisciplinary analysis which this chapter cannot provide. At the same time, relevant UN mandate holders provide valuable information on this matter. This concerns concluding observations of the Committee and other treaty bodies, and reports of the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment ("UN Special Rapporteur on Torture"). There are also studies and analyses conducted by experts[113] and reports provided by relevant NGOs (notably the Human Rights Watch and Amnesty International). Nevertheless, this subchapter attempts to highlight at least the most important aspects of this question. Generally speaking, even though the status of the prohibition of torture in international law is quite firm and widely accepted, some authors still point to a deficiency gap between the unambiguous prohibition of torture and state practice.[114] It could be agreed that the prohibition of torture is fully-internationalised and influenced changes in the behaviour of states.[115] But still, according to many sources, torture is still practiced in a considerable part of the world.[116]

To provide a few examples in relation to particular UNCAT provisions, one of the core issues related to Article 4 obligations is the quality of the definition of acts that are criminalised in the sense of Article 4. Some states do not have specific criminal offence of torture in national criminal law, while some other states have definitions in their laws that are not in conformity with Article 1 of the UNCAT, are incomplete or otherwise insufficient.[117] Even though the text of the UNCAT does not explicitly require the inclusion of a specific crime of torture in national laws, the Committee is of the view that doing so helps to ensure that no instances of torture will fall between the gaps of other offences that were supposed to cover all prohibited acts.[118] In practice, related to Article 5 of the UNCAT, State Parties have been reluctant to exercise universal jurisdiction in torture cases. The authorities often even fail to arrest suspects,

112 Monina, 2019c, paras. 1–2.
113 Kelly, 2019; Gaer, 2020, pp. 130, 149–153; Nowak and Monina, 2018; Steiger, 2022; Kelly, 2009.
114 Kretzmer, 2022, para. 53.
115 Steiger, 2022, p. 161.
116 Human Rights Council, 2021, at para. 10. Amnesty International claims that it reported torture in 141 countries in the past five years. See Amnesty International, Torture.
117 REDRESS, 2018, p. 13.
118 Kretzmer, 2022, para. 28.

thereby providing them with an opportunity to leave the country.[119] The concept of universal jurisdiction can serve as a potent mechanism for combating impunity. This does not only apply in the context of fight against torture, but more broadly to crimes under international law. However, according to recent data, even on this general level (also covering other crimes against humanity or war crimes) states are not utilising the concept of universal jurisdiction as universally as they could.[120] Nevertheless, impunity can be a major factor leading to practices of torture.[121] To provide another example, in relation to safeguards for preventing torture in the sense of Articles 12–14 of the UNCAT, many countries lack clearly designated complaint mechanisms or there is a substantial gap between legal provisions and the reality.[122]

The insufficient record of state compliance also applies to procedural obligations stemming from the UNCAT. The lack of participation and cooperation of States Parties, the limited number of States Parties accepting the individual complaints procedure combined with the non-binding character of decisions of the Committee, but also limited financial and human resources are considered to be among the key problems hampering the effectiveness of the Committee's monitoring.[123] The low degree of cooperation and responsiveness of States Parties ongoing for decades has also been reported in relation to another human rights body – the UN Special Rapporteur on Torture.[124]

Nevertheless, the establishment of a monitoring organ that can authoritatively consider States Parties to be in violation of its obligations is an important feature of the UNCAT. It could be agreed that over the decades of its existence, the Committee has done a lot of work to advance the implementation of the UNCAT and to raise awareness about torture.[125] The periodic reporting procedure (imbued with a dialogue) in spite of the non-cooperation of many States Parties has its relevance in a wider context as well. One practical example is that that the dialogue process is webcast and archived on the UN webcast page, thus it can expose crimes and enable domestic or international authorities to take action.[126] The role of the Committee is also important in evolving effective measures to prevent torture (such as video

119 Schmidt, 2019a, para. 5.
120 Trial International, 2024 stating on p. 11 that 'In 2023, the number of investigations and prosecutions of international crimes opened before domestic jurisdictions under extraterritorial and universal jurisdiction continued to rise. (..) However, this upward trend is not uniform, and the use of this crucial prosecuting tool is not expanding evenly across countries. As long as cases continue to be concentrated in a few specific countries, the truly universal nature and potential impact of universal jurisdiction will remain unexploited.'
121 Kelly, 2019, p. 328.
122 See: UN General Assembly, 2021, referring to barriers and delays in the exercise of the right of detainees to contact a third party or to receive legal assistance, to access an independent medical doctor, preventing prompt detection and documentation or reliance on interrogation techniques heavily based on coercion and intimidation.
123 Nowak and Monina, 2018, para. 45.
124 See in particular: Human Rights Council, 2021, paras. 54–59 and 98–102.
125 Gaer, 2020, p. 153.
126 Ibid., p. 151.

surveillance) and identify appropriate (sometimes new) legal safeguards that should be applied by Member States to comply with the UNCAT.[127] According to the view of the authors of this chapter, the possibility of the CAT to make a public statement and publish the report of the subcommittee can also have an impact on the conduct of the States Parties due to reputational risk on an international level.

4.2. Optional Protocol to the Convention

From 2002 on, the text of the UNCAT is accompanied by the OPCAT. Although in legal terms it is a separate document binding only for its States Parties, its purpose is to complement and reinforce the UNCAT provisions.[128] It is therefore necessary to at least briefly describe this document that brings new features into the fight against torture.

The OPCAT was adopted by the UNGA Resolution A/RES/57/199 on 18 December 2002 and entered into force 22 June 2006. It currently has 94 States Parties.[129] It consists of a Preamble and thirty-seven articles divided into seven parts. In contrast to the UNCAT, the OPCAT reaffirms in the very first sentence of its Preamble that torture and ill-treatment are prohibited by international law. Article 1 stipulates the objective to establish a system of regular visits of places where people are deprived of their liberty, undertaken by independent international but also national bodies. In Articles 2 and 3, the OPCAT establishes a Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture ("Subcommittee") and obliges states to maintain, designate or establish the so-called national preventive mechanisms ("NPMs").

The work of the subcommittee is supervised by the Committee.[130] Articles 5 to 9 prescribe in some degree of detail the composition of the subcommittee and the process of nomination as well as the election of its members. The subcommittee consists of ten members, nominated and elected by States Parties at their meeting. Similarly to the Committee, it also adopts its own rules of procedure. The mandate of the subcommittee includes the power to visit places where persons are or may be deprived of liberty. It also makes recommendations to States Parties and assists them in relation to the activities of the NPMs. The subcommittee can also maintain direct and confidential contact with the NPMs, advise and assist them and offer them training and technical assistance.[131] With respect to the country visits, an important feature of the OPCAT is that these are not optional as is the case with the UNCAT. According to Article 12 of the OPCAT, a State Party is obliged to receive the subcommittee in

127 See: Gaer, 2020, p. 152.
128 Nowak and Monina, 2018, para. 44.
129 United Nations Treaty Collection, 2024b. For the historical background of its adoption, see: Novak, Birk and Monina, 2019b, pp. 5–6.
130 For ways in which the work of the Committee and the Subcommittee interrelate, see: Arts. 10 paras. 3 and 16 para. 3 OPCAT, as well as Rules 62 and 63 RoP. For comparison of the work of the Committee and the Subcommittee, see Steiger, 2022, pp. 161–162.
131 Art. 11 OPCAT.

its territory and grant it access to the places of detention. It also has to provide the subcommittee with all relevant information requested and the opportunity to hold private interviews with persons deprived of liberty.[132] According to Article 16, the subcommittee communicates its observations and recommendations confidentially to the State Party. If the latter refuses to cooperate in the process of the country visit or to take steps in improving the situation in light of the recommendations, the Committee is given a mandate to decide (upon the request of the subcommittee) to make a public statement on the matter or to publish the report of the subcommittee (Article 16, paragraph 4).

Articles 17–23 are focused on the NPMs. These national bodies must be given functional independence. Articles 19 and 20 provide for minimum powers to be granted to NPMs in domestic laws which to certain extent mirror the range of powers of the subcommittee. NPMs have to be granted access to all information concerning the number of persons deprived of their liberty in places of detention, as well as the number of such places and their location, all information referring to the treatment of those persons and conditions of detention. States Parties must provide access to all places of detention and the opportunity to have private interviews with the persons deprived of their liberty or with any other person who may supply relevant information to the NPM. NPMs have the liberty to choose the places of visit and persons to be interviewed and person or organisation communicating with NPMs must not be sanctioned in any way (Article 21).

In contrast to the UNCAT, the OPCAT explicitly allows for no reservations or opt-out mechanisms. Only the implementation of its parts dealing with the mandate of the subcommittee and NPMs can be postponed for a few years by way of declaration.[133]

5. Selected Decisions of the Committee

The Committee has made an important contribution to the understanding of the Convention through its elaboration of the general comments and also through its decisions. According to the Annual Report,[134] as of 10 May 2024, the Committee had registered 1,211 complaints concerning 45 States Parties since 1989. Of those, 406 complaints had been discontinued and 145 had been declared inadmissible. The Committee had adopted final decisions on the merits in 495 complaints and found violations of the Convention in 206 of the cases. Some 164 complaints were pending consideration. The aims of the Convention are threefold: to establish specific obligations for States Parties to prevent torture and to assist victims of torture; to require the use of criminal law and jurisdiction to fight impunity of torturers; and to provide for stronger measures of international monitoring of states' compliance with the absolute

132 See: further details in Arts. 12–15.
133 See: Arts. 30 and 24.
134 Committee against Torture, 2024, para. 52.

prohibition of torture.[135] Given these primary aims, it is somewhat surprising that the vast majority of decisions on the merits do not concern allegations of the practise of torture or other forms of ill-treatment itself, but allegations of the violation of the non-refoulement principle in Article 3 of the UNCAT.

5.1. Decisions of the Committee Against Torture

The following cases represent a selection of decisions, which contributed to the understanding and development of some of the central issues pertaining to the Convention.

5.1.1. Definition of the Term "Torture" and Related Obligations of States under the CAT

Article 1 CAT stipulates that torture must be 'inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity.' Consequently, without the involvement of government authorities in acts of torture or ill-treatment, no violation of the UNCAT can occur. In the case of *G.R.B. v. Sweden*,[136] the complainant argued that deportation to Peru would expose her to the risk of torture by a Peruvian rebel group, thereby breaching Article 3 of the UNCAT. However, the Committee rejected the claim arguing that torture committed by non-governmental rebel groups does not fall under the definition of torture in Article 1. The Committee further noted that the Peruvian government could not be said to "acquiesce" to the actions of a terrorist group it was actively combatting.

Roitman Rosenmann v. Spain[137] concerned the saga of the proposed extradition of General Pinochet from the UK to Spain (from 1998–2000) to face allegations of torture perpetrated upon Spanish citizens in Chile. The complainant alleged that Spain violated its obligations under the Convention Against Torture by failing to pursue the extradition of former Chilean dictator General Pinochet from the United Kingdom for alleged acts of torture committed in Chile. The main legal issue focused on whether Spain was obligated under the Convention to seek the extradition of an alleged torturer and whether Spain's failure to do so violated the Convention's provisions regarding universal jurisdiction over torture. The Committee found that the Convention does not impose an obligation on a state party to insist on extradition or to continue to seek extradition when political or diplomatic decisions intervene. The Committee emphasised that while Spain exercised its discretion to seek extradition initially, it was not legally required to continue once the UK government declined to extradite Pinochet for health reasons. The Committee concluded that Spain had not violated its obligations under the Convention, as there is no mandatory requirement to pursue extradition indefinitely under international law.

135 Monina, 2019e, para. 27.
136 *G.R.B. v. Sweden*, Communication No. 083/1997, CAT/C/20/D/83/1997.
137 *Roitman Rosenmann v. Spain,* Communication No. CAT/C/28/D/176/2000.

5.1.2. Non-Refoulement (Article 3)

In the case *Z.Z. v. Canada*,[138] Z.Z., a citizen of Afghanistan, challenged his deportation from Canada, arguing that it violated Article 3 of the UNCAT due to the risk of torture in Afghanistan. However, after being convicted of drug offenses, he was deemed a danger to the public and deported in 1998. Z.Z. argued that his deportation placed him at a significant risk of torture due to his Tajik ethnicity and Afghanistan's unstable political environment under the Taliban. The key legal issue addressed was whether Z.Z. had demonstrated a personal risk of torture upon return. The individual must show that he or she is personally at risk, which in this case Z.Z. did not provide sufficient evidence of. General information about the situation in Afghanistan was insufficient to substantiate his claim.

The non-refoulement obligation under Article 3 is considered absolute. The case of *Gorki Ernesto Tapia Paez v. Sweden*[139] before the Committee concerned Sweden's decision to expel Tapia Paez, a Peruvian national and member of the Shining Path (Sendero Luminoso), a group linked to terrorism. Tapia Paez argued that returning to Peru would expose him to a real risk of torture, violating Articlr 3 of the Convention against Torture. While his mother and sisters were granted asylum, his request was denied due to his involvement in violent activities. The UNCAT emphasised that Article 3 provides "absolute protection"[140] against refoulement, meaning the risk of torture must be assessed independently of the individual's past activities. The 'nature of the activities in which the person is engaged is not a relevant consideration' for the purposes of non-refoulement. The Committee concluded that despite Tapia Paez's connection to violent actions, his deportation would expose him to a foreseeable risk of torture, making Sweden's decision inconsistent with Article 3. The case reinforced the absolute nature of the non-refoulement principle, underscoring that no exceptions can justify exposing a person to the risk of torture.

In Agiza v. Sweden,[141] the Committee reaffirmed the absolute nature of the non-refoulement principle under Article 3 of the UNCAT, even in cases involving national security concerns. Ahmed Agiza, an Egyptian national and terrorism suspect, sought asylum in Sweden but was swiftly deported to Egypt in December 2001 despite concerns over the risk of torture. Sweden defended its actions by citing diplomatic assurances from Egypt that Agiza would not be subjected to ill-treatment, and by allowing embassy staff to monitor him upon his return. However, Agiza was reportedly tortured and held under harsh prison conditions. The Committee found Sweden in breach of Article 3, as the swift deportation deprived Agiza of the opportunity to appeal, and the risk of torture was foreseeable given his high national security rating. The diplomatic assurances were deemed insufficient, as Swedish monitors were unable to interview Agiza alone. Additionally, the Committee found Sweden in violation of Article 22 for

138 *Z.Z. v. Canada*, Communication No. 123/1998, CAT/C/26/D/123/1998.
139 *G.E.T. Paez v. Sweden*, Communication No. 39/1996, CAT/C/18/D/39/1996.
140 Ibid., para. 14.5.
141 *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, Communication No. 233/2003, CAT/C/34/D/233/2003.

failing to fully cooperate with the Committee during the case's review. The decision emphasised that the absolute prohibition of torture under Articles 1 and 3 applies regardless of national security concerns or the "war on terror".

In *Brada v. France*,[142] the complainant challenged his deportation to Algeria, asserting that he faced a risk of torture if returned. He was deported before exhausting all available domestic remedies in France. Subsequently, a French appellate court ruled that the deportation violated French law. The Committee determined that France's actions constituted a breach of Article 3 of the UNCAT. The case raised concerns about whether the premature deportation and failure to comply with interim measures requested by the Committee violated France's obligations under the Convention.

Where a complainant provides a certain level of detail and information, the burden of proof may then shift to the States Party. In *A.S. v. Sweden*,[143] the complainant feared being stoned to death for adultery if deported to Iran. She provided detailed evidence regarding her forced marriage and arrest, including names, dates, and other verifiable information, which shifted the burden of proof to the state. Additionally, she submitted evidence of the poor human rights conditions for women in her situation in Iran. The Committee found that Sweden's failure to sufficiently investigate and follow up on the evidence, rather than any lack of detail from the complainant, led to the rejection of her claim. The Committee concluded that deporting her to Iran would violate Article 3 of the UNCAT.

5.1.3. Prompt and Impartial Investigation

In *Blanco Abad v. Spain*,[144] the Committee stressed the importance of prompt investigations into torture claims to ensure the cessation of such acts and prevent the loss of physical evidence. The complainant, held incommunicado and allegedly tortured, had sufficient evidence, including medical reports, to warrant immediate investigation. However, a 14-day delay before judicial action and an 18-day delay before the investigation commenced were found to violate Article 12 of the UNCAT. The Committee clarified that under Article 13, a formal complaint is not necessary; it suffices for the victim to inform a state authority for an investigation obligation to arise. In *Blanco Abad*, the investigation was slow and incompetent, with delays in accessing crucial evidence and the failure to call key witnesses. The Committee concluded that the court's failure to admit pertinent evidence and its overall mishandling of the case breached the obligation to conduct an impartial investigation, violating Article 13.

142 *Brada v. France*, Communication No. 195/2002, CAT/C/34/D/195/2002.
143 *A.S. v. Sweden*, Communication No. 149/1999, CAT/C/25/D/149/1999.
144 *Encarnación Blanco Abad v. Spain*, Communication No. 59/1996, CAT/C/20/D/59/1996.

5.1.4. Universal Jurisdiction

In *Guengueng et al. v. Senegal*,[145] the complainants, victims of torture in Chad between 1982 and 1990 by agents of then-president Hissène Habré, alleged breaches of Article 5, paragrap 2 and Article 7 of the UNCAT. After Habré sought refuge in Senegal in 1990, the complainants initiated legal action there in 2000, but the Senegalese courts dismissed the case, citing lack of jurisdiction over acts committed in Chad. The Committee found Senegal in breach of Article 5, paragraph 2, which requires states to establish jurisdiction over torture when the alleged offender is present in their territory and is not extradited. The Committee held that Senegal had failed to comply with this obligation within a reasonable time since ratifying the UNCAT in 1986. Additionally, the Committee found a breach of Article 7, paragraph 1, clarifying that the obligation to prosecute an alleged torturer does not depend on the existence of an extradition request. Therefore, Senegal was required to prosecute Habré unless there was insufficient evidence, regardless of an extradition request.

5.2. Cases Against CEEC

As of 29 September 2024, with regard to sixteen Central and Eastern European States,[146] 3 complaints had been discontinued and 2 had been declared inadmissible. The Committee had adopted final decisions on the merits in 12 complaints. The review reveals that the most common issue arising in the complaints is the states´ obligation to conduct proper and impartial investigation (Articles 12–14 UNCAT). In the following, an overview of the cases, in which the Committee had adopted final decisions, will be presented.

The earliest two cases were decided against Yugoslavia, *Ristic v. Yugoslavia* and *Dzemajl et al. v. Yugoslavia*. In *Radivoje Ristic v. Yugoslavia*,[147] the petitioner claimed that his son, Milan Ristic, was killed by police during an arrest in 1995, and that the authorities failed to conduct a proper investigation into the incident. Local courts ruled the death as suicide, despite conflicting forensic evidence. The case centred on Yugoslavia's obligations under the UNCAT, particularly Articles 12, 13, and 14. The Committee found that Yugoslavia violated Articles 12 and 13 by failing to conduct an effective investigation. Key issues included inconsistencies in medical reports, failure to order a new autopsy, and the absence of judicial oversight during the investigation. The Committee emphasised that six years had passed since the incident without a proper investigation. Without this, it was impossible to assess compensation claims under Article 14. The Committee urged Yugoslavia to carry out a proper investigation and provide remedies to the petitioner's family.

In *Hajrizi Dzemajl et al. v. Yugoslavia*,[148] the case revolved around the racially motivated destruction of a Roma settlement in Danilovgrad in 1995, following the

145 *Guengueng et al. v. Senegal*, Communication No. 181/2001, CAT/C/36/D/181/2001.
146 Albania, Bulgaria, Croatia, Czech Republic, Hungary, Poland, Romania, Slovakia, Slovenia, Estonia, Latvia, Lithuania, Bosnia and Herzegovina, Montenegro, North Macedonia, and Serbia.
147 *Radivoje Ristic v. Yugoslavia*, Communication No. 113/1998, U.N. Doc. CAT/C/26/D/113/1998.
148 *Dzemajl et al. v. Yugoslavia*, Communication No. 161/2000, CAT/C/29/D/161/2000.

alleged rape of a local girl by two Roma minors. The Roma residents were warned by police to flee, as their safety could not be guaranteed. Despite being fully aware of the impending violence, the police failed to take any preventive actions. Soon after, a large mob of non-Roma residents gathered and then proceeded to raze the settlement using arson, Molotov cocktails, and other weapons. The police, although present, did not intervene, allowing the violence and destruction to unfold for several hours.

The central legal issue in the case was whether the inaction of the police constituted a violation of the UNCAT, particularly under Article 16. The Committee determined that the police's failure to act amounted to "acquiescence" in the violence, as defined in both Articles 1 and 16 of the UNCAT. Article 1 requires that torture be inflicted by, or at the instigation of, or with the consent or acquiescence of a public official or person acting in an official capacity.

In interpreting the meaning of "acquiescence," the Committee emphasised that the police's knowledge of the immediate risk to the Roma residents and their failure to take reasonable steps to prevent or stop the violence was a clear violation. Although the violence was perpetrated by non-state actors (the mob), the police, as public officials, had an obligation to intervene. Their passive role and lack of action were considered acquiescence, making the state responsible under Article 16. This finding aligned with previous decisions where the Committee expressed concern about law enforcement officials failing to protect individuals from racially motivated attacks.

The Committee found Yugoslavia in violation of Article 16 due to the racial motivations behind the attack and the state's failure to protect the Roma residents, constituting cruel, inhuman, or degrading treatment. Additionally, the Committee ruled that the state had violated Articles 12 and 13 of the UNCAT by failing to conduct a proper investigation and inform the victims. The Committee highlighted that a state's failure to act, even in cases involving private actors, could still lead to accountability under the Convention if public officials failed to prevent or address such violence.

The Committee's decision confirmed that States Parties have a duty not only to refrain from direct involvement in torture or ill-treatment but also to prevent such acts, especially when public officials are aware of the threat and fail to intervene. The case underscores the broader interpretation of "acquiescence" in international human rights law, establishing that failure to protect individuals from racially motivated violence by private actors can amount to a violation of the state's obligations under UNCAT.

Most of the other cases decided upon by the Committee concern complaints against Serbia and/or Serbia and Montenegro. In *Dragan Dimitrijevic v. Serbia and Montenegro*,[149] the complainant, a Romani man, was arrested in 1999 and subjected to severe physical abuse by police officers, including racial insults. Dimitrijevic sustained serious injuries but did not seek medical help due to fear of reprisals. Despite filing a criminal complaint in 2000, no investigation or action was taken by the authorities.

149 *Dragan Dimitrijevic v. Serbia and Montenegro*, Communication No. 207/2002, CAT/C/33/D/207/2002.

The key legal issues centred on the failure of the state to investigate and provide redress for the alleged torture. The Committee found that the state violated Articles 2, 12, 13, and 14 of the Convention Against Torture, determining that the treatment Dimitrijevic endured constituted torture. The Committee concluded that the state failed to conduct a prompt and impartial investigation into the allegations, effectively preventing Dimitrijevic from seeking private prosecution or compensation.

In *Jovica Dimitrov v. Serbia and Montenegro* (Communication No. 171/2000), the complainant, a Roma man, alleged that he was subjected to severe physical abuse by police officers during detention in 1996, with no justification or formal charges. Despite filing a criminal complaint, no investigation was taken on for over three years. The legal issues revolved around the state's obligations under the UNCAT, particularly regarding prompt and impartial investigations, redress, and compensation under Articles 12, 13, and 14. The Committee found that the treatment Dimitrov endured constituted torture under Article 1, given the physical abuse inflicted by public officials. Furthermore, the state failed to fulfill its obligations under Articles 12 and 13 by not conducting a timely and impartial investigation, which prevented Dimitrov from pursuing private prosecution. The Committee also ruled that the absence of criminal proceedings deprived Dimitrov of the ability to seek compensation, constituting a violation of Article 14.

In *Danilo Dimitrijevic v. Serbia and Montenegro*,[150] the complainant, a Roma man, was subjected to physical abuse by police during detention in 1997 without an arrest warrant. Despite filing a criminal complaint, no investigation ensued for several years. The legal issues centred on the state's obligations under the UNCAT, specifically under Articles 2, 12, 13, and 14. The Committee found that the treatment Dimitrijevic suffered constituted torture under Article 1 of the Convention due to the severe pain inflicted by public officials. The Committee also determined that Serbia and Montenegro failed to meet its obligations under Articles 12 and 13, as it did not conduct a prompt or impartial investigation into the allegations, effectively preventing the complainant from pursuing private prosecution. Furthermore, the state's failure to initiate criminal proceedings deprived Dimitrijevic of his right to seek compensation, violating Article 14.

In *Nikolic and Nikolic v. Serbia and Montenegro*,[151] the complainants, parents of the deceased N. N., claimed that the state failed to properly investigate the circumstances of their son's death, which they alleged involved torture by police officers. N. N. died after falling from a tenth-floor window while trying to evade arrest. The police claimed it was an accidental fall, while the complainants suspected foul play and asserted that N. N. was subjected to prior torture, citing inconsistencies in the autopsy report and forensic findings. The Committee found that there were reasonable grounds to investigate the allegations of torture, but the investigation was inadequate and biased, particularly as the same forensic experts responsible for the autopsy were tasked with

150 *Danilo Dimitrijevic v. Serbia and Montenegro*, Communication No. 172/2000, CAT/C/35/D/172/2000.
151 *Nikolic and Nikolic v. Serbia and Montenegro*, Communication No. 174/2000, CAT/C/35/D/174/2000.

investigating inconsistencies in their own report. The Committee concluded that the state violated Articles 12 and 13 of the Convention and urged an impartial investigation into N. N.'s death.

In *Kostadin Nikolov Keremedchiev v. Bulgaria*,[152] the complainant alleged that he was subjected to excessive force by police officers during his arrest in 2003 and that Bulgaria failed to conduct a proper investigation. The main legal issues revolved around the state's obligations under Article 12 of the UNCAT to investigate allegations of torture by state agents and whether the treatment Keremedchiev endured amounted to torture under Article 1 or cruel, inhuman, or degrading treatment under Article 16, paragraph 1 of the UNCAT. The Committee determined that, while the force used did not meet the threshold for "torture" under Article 1, the physical injuries – including bruising and kidney damage – amounted to cruel, inhuman, or degrading treatment under Article 16. Furthermore, the Committee found that the state's investigation was not impartial, noting the lack of consideration of key medical evidence and witness testimony. As a result, the Committee concluded that Bulgaria violated Articles 12 and 16 of the UNCAT.

In *Besim Osmani v. Serbia*,[153] the complainant, a Roma resident, alleged that during a forced eviction by police in New Belgrade, he and others were physically abused by officers. His subsequent attempts to identify the perpetrators and pursue legal action were thwarted by the state's failure to provide necessary information. The key legal issues in the case concern the question whether the state's inaction, particularly its failure to conduct a prompt and independent investigation, violated Articles 12, 13, and 16 paragraph 1 of the UNCAT. The Committee determined that Serbia had failed to meet its obligations under Articles 12 and 13, as it did not investigate the alleged cruel, inhuman, or degrading treatment adequately or facilitate the complainant's ability to pursue legal remedies by identifying the responsible parties. Additionally, the Committee found that the state's failure to investigate the police officers' conduct amounted to acquiescence to cruel, inhuman, or degrading treatment under Article 16, paragraph 1.

In *Cevdet Ayaz v. Serbia*,[154] the complainant, a Kurdish political activist, alleged that his extradition from Serbia to Turkey violated his rights under Article 3 of the UNCAT, as he faced a real risk of torture in Turkey due to a politically motivated conviction based on a confession obtained under torture. The key legal issues included whether Serbia failed to properly assess the personal risk of torture upon extradition, and whether Serbia violated its obligation to prevent refoulement under Article 3. The Committee found that Serbia had failed to carry out an individualised risk assessment of the danger of torture Ayaz would face in Turkey, violating Article 3. Additionally, the Committee determined that Serbia violated Article 22 by ignoring the Committee's interim measures request to suspend the extradition while it reviewed the case. The

152 *Kostadin Nikolov Keremedchiev v. Bulgaria*, Communication No. 257/2004, CAT/C/41/D/257/2004.
153 *Besim Osmani v. Serbia*, Communication No. 261/2005, CAT/C/42/D/261/2005.
154 *Cevdet Ayaz v. Serbia*, Communication No. 857/2017, CAT/C/67/D/857/2017.

extradition, which occurred despite warnings from the Committee, was deemed a breach of Serbia's international obligations. The Committee urged Serbia to provide redress, including compensation, and to monitor Ayaz's detention conditions in Turkey to prevent further violations of the Convention.

In *A v. Bosnia and Herzegovina*,[155] the complainant, a victim of rape during the Bosnian war in 1993, claimed that Bosnia and Herzegovina violated her rights under Article 14, paragraph 1 in conjunction with Aticle 1, paragraph 1 of the UNCAT. The complainant, who suffered severe physical and psychological harm, was awarded compensation in 2015, but could not enforce the judgement due to the perpetrator's inability to pay. The key legal issues in this case concerned the state's failure to provide effective mechanisms for victims of war crimes to receive compensation and redress, as required by Article 14 of the UNCAT. The Committee found that the acts inflicted on the complainant constituted torture under Article 1 of the UNCAT and that Bosnia and Herzegovina had failed to fulfil its obligation to provide the complainant with adequate redress, including compensation, rehabilitation, and satisfaction. The Committee concluded that the state's domestic laws and practice, including the lack of subsidiary liability, effectively deprived the complainant of her right to compensation, breaching Article 14. The Committee urged the state to ensure fair compensation, medical care, and legal reforms.

In *Cubrilov v. Serbia*,[156] the complainants, family members of Bozidar Cubrilov, alleged that Mr. Cubrilov was tortured while in detention in 1996, leading to his death, and that the state failed to properly investigate his death. The legal issues concerned Serbia's obligations under Articles 2, 12, 13, and 14 of the UNCAT, particularly the state's duty to conduct a prompt and impartial investigation and provide redress to the victims. The Committee found that Serbia violated Articles 2, 12, and 13 by failing to conduct a proper investigation into Mr. Cubrilov's death, despite strong evidence of torture. The Committee also highlighted the state's responsibility to investigate acts of torture ex officio, even without a formal complaint. However, it did not find a violation of Article 14, as the complainants had already received compensation for emotional suffering. The Committee urged Serbia to conduct a thorough investigation, prosecute those responsible, and implement measures to prevent similar violations in the future.

In *Lucia Černáková v. Slovakia*,[157] the complainant, a woman with intellectual disabilities, alleged that she was unlawfully restrained in a cage bed at a state-run social care facility in 2006. The key legal issues of the case concerned Slovakia's obligations under Article 2 paragraph 1, Article 4 paragraph 1, Articles 11–12, Article 14 paragraph 1 and Article 16 paragraph 1 of the UNCAT, specifically the state's duty to prevent ill-treatment, conduct a prompt and impartial investigation, and provide compensation. The Committee found that the use of the cage bed constituted cruel,

155 *A v. Bosnia and Herzegovina*, Communication No. 854/2017, CAT/C/67/D/854/2017.
156 *Cubrilov v. Serbia*, Communication No. 939/2019, CAT/C/72/D/939/2019.
157 *Lucia Černáková v. Slovakia*, Communication No. 890/2018, CAT/C/72/D/890/2018.

inhuman, or degrading treatment under Article 16 paragraph 1, as it was not medically justified and inflicted severe psychological harm. The Committee concluded that Slovakia violated its obligations under Article 12 for failing to conduct a prompt and independent investigation and under Article 14 for not providing adequate compensation and rehabilitation. The Committee urged Slovakia to provide redress, including compensation, and take measures to prevent similar incidents in the future, such as stricter regulations on restraints in social care facilities.

6. Conclusion

The UNCAT is a specialised human rights treaty body that was adopted in 1984 in response to widespread and systematic practice of torture and ill-treatment in Latin America and other regions.[158] Its main purpose is to contribute to efforts to combat torture namely by stipulating specific preventative obligations for States Parties and monitoring procedures. The central feature of the UNCAT monitoring procedures is state reporting. Indeed, human rights monitoring lies at the heart of the UN human rights system. Given that it lacks means of enforcement, the monitoring process is above a practice of knowledge production.[159] Nevertheless, the UNCAT also established individual communication or inquiry procedures, but with certain procedural limitations. In several aspects, the UNCAT served as a model for other UN-based human rights treaties. The OPCAT brings even more advanced obligations, however suffers from the lower number of States Parties.

Given the political situation and differences between the Western and Eastern block at the time, the adoption of the text of the UNCAT in its current form could be considered a success. However, there are still serious deficiencies in the universal observance of the UNCAT. Torture or ill-treatment is far from being eradicated, with many violations of the UNCAT documented (and probably far more even undocumented).

158 Novak, Birk and Monina, 2019b, p. 6.
159 Kelly, 2009, p. 799.

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Chapter 11

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

Márta Benyusz

ABSTRACT

The *1989 Convention on the Rights of the Child* (hereinafter referred to as CRC) is the most widely ratified human rights treaty in the world. Declaring the rights of children on a universal level filled the gap of child protection within the framework of international human rights treaties. The CRC not only established the specialised protection of children but also shifted the approach towards children from being objects of protection to subject of rights. The CRC is the catalogue of children's rights incorporating the full range of human rights, i.e. civil, political, economic, social and cultural rights of children. The CRC was adopted by the UN General Assembly on 20 November 1989 and entered into force in September 1990.

KEYWORDS

Declaration of the Rights of the Child, United Nations, 1989 Convention on the Rights of the Child, children's rights, Committee on the Rights of the Child

1. History of the Declaration of the Rights of the Child

1.1. Cornerstones leading to the Convention on the Rights of the Child

For a long time in history the vulnerability of children was not recognised by law. Children were considered as objects who were placed in a hierarchical setting in their family, where – for a long time – the sole right holder was the father. It was at the end of the nineteenth century and the beginning of the twentieth century when the so-called child rights movements started to push lawmakers both on a national and international level to adopt laws which recognise the special nature of childhood and address the special needs of children. This process was accompanied by the unfolding psychological research[1] on human behaviour. As our understanding of the complexities of childhood grew, so did the need to address these issues through legal means. Apart from the development of psychology, the end of the nineteenth and

1 Wilhelm Wundt (1832–1920) founded the first laboratory dedicated exclusively to psychological research at the University of Leipzig in 1879. In Europe, this date is considered the beginning of modern psychological science.

Márta Benyusz (2026) 'The 1989 Convention on the Rights of the Child (CRC)' in Kovács, P., Béres, N. (eds.) *The Universal Protection Of Human Rights*. Miskolc–Budapest: Central European Academic Publishing, pp. 401–429. https://doi.org/10.71009/2026.pknb.uphr_11

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the beginning of the twentieth century humanity faced tragic events that prompted lawmakers to officially recognise human rights.

Firstly, the laws adopted in favour of children reacted to the horrifying reality of the industrial revolutions in the nineteenth century and introduced the first ban on child labour in parallel with compulsory education, and the generally available schooling for children on national levels. Nevertheless, these laws did not expressly aim to declare the rights of children in general, but instead, were a step forward in the recognition of childhood as being an important, yet extremely sensitive issue and an imprinting period of a human's life. This approach was also supplemented by the recognition of children being "at risk". These children were those who presented a "threat" to the social order, such as orphans, abandoned or neglected children, children from marginalised social classes, street children, and working or delinquent children; later, the category broadened.[2] Eventually, most Western States became concerned with all children within their boundaries, irrespective of their social origin or individual condition.[3]

The first document declaring children's rights in general was the *Declaration of the Rights of the Child*, widely known as the *Declaration of Geneva* (hereinafter referred to as the *Geneva Declaration*), adopted by the League of Nations in 1924. It also symbolised that the cause of children went beyond national borders and turned into a "universal conscience".[4] The text of the Geneva Declaration was drafted by Eglantyne Jebb, who was also founder of Save the Children Fund in 1919. The founding of the Save the Children Fund and the necessity to draft a declaration on children's rights was driven by the heart-breaking situation children were in after the First World War. The Geneva Declaration covered 17 principles: children were asserted as persons with rights; ownership of children by parents, state, or society was denied. The Declaration announced the participatory right of children in making decisions that affect them, being thus a precursor of the right of the child to express views (as later formulated in Article 12 of the CRC).[5] The Geneva Declaration was a legally binding document; however, it lost its binding nature at the moment of the dissolution of the League of Nations.[6]

As the roles of the League of Nations were taken over by the United Nations, in 1946, the Social Commission mandated the secretariat of the United Nations to examine the question of whether to reaffirm the Declaration of Geneva or adapt it, creating a United Nations Charter on the Rights of the Child.[7] The stakeholders involved decided to use the Geneva Declaration as a basis for the United Nations Children's Charter but

2 Moody, 2015, p. 3.
3 Ibid.
4 Moody, 2015, p. 4.
5 Hrabar, 2024, pp. 23–38.
6 The League of Nations was formally disbanded on April 19, 1946, and its powers and functions were transferred to the United Nations, which had been established on October 24, 1945.
7 Moody, 2015, p. 7.

they agreed to draft a new document. The *United Nations Declaration of the Rights of the Child* was definitively adopted in 1959, but it never became legally binding.

Both the Geneva Declaration and the UN Declaration of the Rights of the Child were a step forward towards the universal protection of children's rights. Nevertheless, these documents considered children to be objects of protection and not subjects of their right. Recognising children as rights holders was a step forward.

1.2. History of the UN Convention on the Rights of the Child

The year 1979 was proclaimed to be the *International Year of the Child* to follow up the Declaration of the Right of the Child, adopted 20 years earlier. It was a year celebrated throughout the world and was a pinnacle of an international effort to promote the needs and rights of children and to provide an unprecedented level of services and support for the children of the poor.[8] It was also an important year in terms of the universal declaration of the rights of the child, as subjects of these rights. The occasion of the upcoming International Year of the Child was seized by Poland, who as the initiator of the Convention on the Rights of the Child, presented the draft of the Convention to the Human Rights Council on February 7th, 1978.[9] The draft text of the CRC was written by Professor Tadeusz Smyczynski, a Polish family law professor, who aimed to create a document that was child and family-centred to the highest extent. The Polish touch is noticeable also in terms of the concept of the child being behind the CRC, as it is linked to a Polish pediatrician Janusz Korczak, whose view of a child was incorporated into the CRC. After the presentation of the draft of the CRC, a Working Group was set up by the Commission on Human Rights and accordingly, the ten-year-long drafting process started. The Working Group met once a year officially and went through the draft systematically, striving to reach an agreement. The drafting process – as commonly the case in the drafting of international agreements – was shaped through complex negotiations, ideological divides, and the need to reconcile diverse legal, cultural, and political traditions. Children were, are and will be the hope of nations, regions and the whole humanity, therefore the global consensus and the values on which this consensus is reached bear high importance.

One of the most fundamental debates concerned the scope and character of the rights to be enshrined in the CRC.[10] Early discussions revealed divergent views about whether children should be granted only economic, social, and cultural rights, or whether civil and political rights should also be included. Some delegations, particularly from the then socialist states, initially opted for focus on social and economic provisions, while others, especially from Western Countries, advocated for a more comprehensive approach.[11] Ultimately, the CRC incorporated both sets of rights, making it the first major human rights treaty involving children. This holistic

8 Jupp, 1989, p. 31.
9 The delegation was led by Adam Lopatka.
10 Quennerstedt, 2018.
11 Ibid.

approach set a new standard for the recognition of children as full rights-holders, rather than passive recipients of protection.

The drafting process was guided by the principle of consensus, requiring broad agreement among participating states.[12] This approach, while facilitating widespread support, often necessitated the use of ambiguous or flexible language, especially in areas where deep disagreements persisted. Such linguistic compromises allowed the Convention to accommodate a wide range of legal systems and cultural practices, but also introduced interpretative challenges and, at times, internal inconsistencies. The resulting text reflects a deliberate balance between universality and adaptability, ensuring the UNCRC near-universal ratification.[13]

The final text of the UNCRC did not emerge from a single, coherent philosophical tradition. Instead, its drafters brought varied – and many times conflicting – conceptions of childhood, family, and the role of the state. The CRC's provisions were shaped more by pragmatic negotiation than by adherence to a unified theory of children's rights. This lack of a singular theoretical justification and emphasising and recognising the practical realisation of rights rather than their philosophical underpinnings did contribute to wide ratification and support.

Significant innovation during the drafting was the acknowledgment of children's evolving capacities. The CRC recognises that children's ability to exercise rights increases with age and maturity, challenging traditional notions of children as being merely vulnerable or dependent. This principle is particularly evident in articles concerning participation, such as the right to be heard in matters affecting the child. The inclusion of evolving capacities marked a shift towards recognising children as active agents, capable of contributing to decisions that shape their lives.

Another persistent issue was the challenge of reconciling universal standards with respect for cultural diversity. Some states expressed concern that certain rights – such as those related to family life, education, or protection from harmful practices – might conflict with local customs or religious beliefs. To address these concerns, the Convention's language was sometimes deliberately imprecise, and the drafters anticipated the development of regionally specific instruments, such as subsequently the African Charter on the Rights and Welfare of the Child. This approach allowed for broader acceptance of the CRC while acknowledging the legitimacy of cultural variation.

Specific rights generated particularly intense debates. The prohibition of sexual exploitation, the determination of the minimum age of criminal responsibility, and the treatment of abortion and the rights of the unborn were all highly controversial. Negotiations around these topics often resulted in compromises, with the final text reflecting a careful balance between competing moral, legal, and cultural considerations.

12 Ibid.

13 The UNCRC is, to this day, the most widely ratified human rights treaty in the world and all countries of the world ratified the Convention except for the United States of America.

The question of how to address sexual exploitation and abuse of children was among the most delicate matters debated by the drafters. While there was near-universal agreement on the need for robust protection, the challenge lay in articulating standards that would be acceptable across divergent legal systems and cultural contexts. Article 34, which obligates States Parties to protect children from all forms of sexual exploitation and abuse, emerged as a carefully worded compromise. It sets out the principle of protection but leaves considerable discretion to states regarding the mechanisms of enforcement and the precise definitions of prohibited conduct. This approach allowed for global agreement while also accommodating significant differences in national law and social attitudes.[14]

Another issue that generated intense debate was the determination of a minimum age of criminal responsibility. While the concept of shielding young children from criminal prosecution was widely accepted, opinions varied dramatically regarding the appropriate age threshold. Some delegations, reflecting their domestic legal traditions, advocated for a low MACR (Minimum Age of Criminal Responsibility) while others, informed by contemporary understandings of child development, argued for a higher age.[15] The Convention ultimately refrained from specifying a particular age, instead requiring states to establish a minimum age themselves (Article 40). This solution reflected a pragmatic recognition of the impossibility of consensus and resulted in considerable variation among states in the age at which children can be held criminally liable.[16]

Perhaps the most politically and ethically charged controversy centred on the status of the unborn child and the issue of abortion. The drafting process revealed deep divisions, with some states and religious groups advocating for explicit recognition of the rights of the unborn child, while others invoked reproductive rights and health of women and girls. Rather than risk a breakdown in negotiations, the drafters opted to avoid direct reference to abortion or rights of unborn children in the CRC. This omission allowed states to interpret the Convention's provisions in line with their own legal and moral frameworks and was instrumental in securing the broad ratification of the treaty.[17] Nevertheless, it is worth underlining that some State Parties, such as for instance the Holy See, did ratify the CRC with the reservation that the life of the child starts from the moment of conception.

The CRC also encountered resistance from certain religious and ideological quarters, particularly regarding provisions perceived as challenging traditional family structures or religious values. Concerns were raised about the Convention's recognition of the rights of children born outside marriage and its emphasis on the evolving capacities of the child. In response, the drafters emphasised the central role of the family and parental responsibilities, while maintaining the universality of children's

14 Detrick, 1999; Freeman, 2020.
15 Kilkelly, 2019.
16 Tobin, 2019.
17 Detrick, 1999; Freeman, 2020.

rights. This balancing act was necessary to ensure the CRC's acceptability across diverse cultural and religious contexts.[18]

The need to reconcile these divergent perspectives led to the adoption of a language that was, at times, intentionally broad or ambiguous. The drafting committee frequently sidestepped intractable disputes by omitting contentious details or by framing obligations in general terms. This strategy of constructive ambiguity was instrumental in forging a near-universal treaty but has left some provisions open to divergent interpretation and ongoing debate.[19]

2. Concept and Definition of the Child under the Convention on the Rights of the Child as a Subject of Rights

The CRC established the notion of global child. The CRC's creation of the "global child" represents a paradigm shift in international law and policy. It universalises childhood as a protected, rights-bearing stage of life and establishes a common benchmark by which the dignity, development, and participation of all children are to be respected and promoted, regardless of borders or backgrounds.

Article 1 of the CRC defines a child as 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'. This definition balances universal applicability with respect for national legal systems, reflecting a compromise between international standardisation and state sovereignty.[20] The CRC establishes 18 as the global benchmark for childhood, grounded in scientific consensus on physical, emotional, and cognitive development. This threshold ensures consistent protection for adolescents, particularly in areas like education, labour, and criminal justice. States may set a lower age of majority (e.g., 16 or 17) for specific rights or responsibilities, such as voting, marriage, or criminal liability. However, the CRC Committee emphasises that such exceptions must not undermine protections for all under the age of 18. For example, even if a country permits marriage at 16, the CRC still classifies individuals under 18 as children entitled to safeguards against exploitation. The CRC establishes the upper boundary of childhood but does not directly specify a starting point. It is up to the State Parties to define the beginning of life. Some – as for instance the Holy See – opted for a reservation to make their position clear and underline the beginning of childhood from the moment of conception.

When discussing the concept of the child it is inevitable to mention the name of Janusz Korczak, a Polish-Jewish physician, educator, and writer, who made foundational contributions to the modern concept of the child, particularly as it relates to children's rights and dignity.

18 Kilkelly, 2019.
19 Tobin, 2019.
20 Ibid.

Janusz Korczak's legacy in shaping contemporary understandings of childhood is both profound and multifaceted. His pioneering work, spanning the early twentieth century, challenged prevailing notions of children as mere dependents or future adults, instead advancing a vision of the child as a person with present rights, agency, and dignity (Godawa, 2024).

Korczak's approach marked a significant departure from traditional, adult-centric models of child-rearing. He argued that children are not simply passive recipients of adult care or socialisation, but individuals who possess their own perspectives, emotions, and entitlements. His assertion that children are "people of today" (Lifton, 1988) laid the groundwork for the recognition of children as autonomous rights-holders, a principle now central to international child rights law.

A hallmark of Korczak's educational philosophy was his emphasis on genuine respect for children's opinions and experiences. He implemented innovative practices in his orphanages, such as children's councils and peer courts, which provided young people with real opportunities to participate in decision-making and resolve conflicts collaboratively (Council of Europe, 2007). These democratic structures anticipated the participatory ethos enshrined in Article 12 of the UNCRC, which guarantees children the right to express their views in matters affecting them.

Korczak viewed the child as a complex being whose development encompasses emotional, intellectual, and moral dimensions. He advocated for environments that nurture curiosity, independence, and empathy, while also ensuring robust protection from harm. His insistence on balancing children's need for guidance with their right to self-expression resonates with the UNCRC's focus on both protection and empowerment (Mikayilli, 2025). The resonance of Korczak's ideas is evident in the foundational principles of the UNCRC, particularly regarding respect for the child's dignity, the right to participation, and the imperative of non-discrimination. The Polish government's reference to Korczak's legacy during the drafting of the Convention underscores his enduring impact on global child rights discourse (Godawa, 2024).

The CRC's approach to the child as a subject of rights is characterised by a careful equilibrium between the recognition of children's inherent dignity and the preservation of traditional family authority. The UNCRC does not envision children as isolated rights-bearers independent of their familial context. Rather, it places the child within the protective and formative environment of the family, affirming the family as 'the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children'.[21] This perspective is reinforced throughout the CRC, particularly in provisions such as Article 5, which underscores the role of parents (and, where applicable, extended family) in providing guidance and direction appropriate to the child's evolving capacities. The CRC's general principles are thus interpreted through a lens that prioritises the child's gradual acquisition of autonomy within a supportive family structure turning the child's right to grow up in a loving and caring family environment into an interpretative principle of

21 Preamble to the CRC.

the CRC. Crucially, the CRC does not seek to supplant parental authority or diminish the centrality of the family.[22] Instead, it recognises that the realisation of children's rights is most effective when anchored in the family unit, with the state playing a subsidiary and supportive role. The UNCRC emphasises that while children are indeed subjects of rights, these rights are exercised in harmony with the guidance, values, and responsibilities imparted by their families.

3. Principles of the Convention on the Rights of the Child

The CRC is guided by five principles, the principle of *non-discrimination* (Article 2), the principle of the *best interest of the child* (Article 3), the *child's right to life, survival and development* (Article 6), the *viewpoint of the child* and the *right to live in a loving and caring family environment* from which four are also confirmed by the Committee on the Rights of the Child (hereinafter referred to as CRC Committee).[23]

3.1. Non-discrimination (Article 2)

The principle of non-discrimination constitutes a *foundational element* of the CRC, representing not only a core right but also a guiding principle that permeates the interpretation and implementation of all other rights under the Convention.[24] Article 2 of the CRC explicitly obligates States Parties to

> 'respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status'.

This provision ensures that every child's enjoyment of rights is protected, regardless of individual or familial characteristics.

The obligation to ensure non-discrimination is both negative and positive in nature. States must not only refrain from discriminatory practices but also take proactive measures to eliminate discrimination and ensure equal access to rights for all children. This includes protecting children from adverse treatment based on the status, activities, expressed opinions, or beliefs of their parents, legal guardians, or family members. The principle thus extends beyond the child's own attributes, recognising the potential for children to face discrimination due to circumstances beyond their control.[25]

22 Kilkelly, 2019.
23 UN Committee on the Rights of the Child, 2003.
24 Daly, Stern and Leviner, 2022.
25 Ibid.

Non-discrimination is recognised as one of the four[26] general principles of the CRC, alongside the best interests of the child, the right to life, survival and development, and the right to participate and be heard. These principles are interdependent and must be considered collectively in the application of the CRC. The CRC Committee has emphasised the particular importance of non-discrimination for traditionally disadvantaged groups, such as girls, ethnic minorities, and children with disabilities, and has called for greater attention to its explicit inclusion in law, policy, and practice.[27]

Discrimination, as defined in the context of the CRC, encompasses both direct and indirect forms. Direct discrimination occurs when a child is treated less favourably because of a protected characteristic, while indirect discrimination arises when a seemingly neutral policy or practice disproportionately affects certain groups of children. The CRC's approach to non-discrimination is also notable for its recognition of affirmative action: special measures aimed at remedying historical or structural discrimination are permissible, provided they are temporary and cease once their objectives are achieved.

The CRC allows for considering children with special needs and status.[28] It was the first international convention that covered the principle of non-discrimination in terms of disability which allowed children with disabilities to become more visible.

The principle of non-discrimination in the CRC establishes a comprehensive and proactive duty on states to ensure that every child enjoys all rights under the Convention without distinction, and to create conditions that foster genuine equality of opportunity and protection for all children, especially those most vulnerable to exclusion and marginalisation.

3.2. Best Interest of the Child (Article 3)

The principle of the best interests of the child, enshrined in Article 3(1) of the CRC, represents a foundational value and a guiding norm that permeates every aspect of the Convention. According to this principle, 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the *best interests of the child shall be a primary consideration*'. This requirement applies not only to individual decisions affecting specific children but also to the formulation and implementation of laws, policies, and programmes that impact children collectively.

The principle of the best interests of the child functions on multiple levels within the legal framework of the CRC. First, it acts as a substantive right, obligating decision-makers to base their actions on what is most beneficial for the child's well-being nd development. Second, it serves as an interpretative principle: where legal provisions are ambiguous or open to more than one interpretation, the interpretation

26 We consider the right to live in a loving and caring family environment as a plus one principle of the CRC.

27 Daly, Stern and Leviner, 2022.

28 Wedeł-Domaradzka, 2024, p. 66.

that most effectively serves the child's best interests should prevail. Third, it operates as a procedural rule, ensuring that decision-making processes involving children are transparent, participatory, and reasoned, with children's views being duly considered and their interests explicitly articulated.[29]

The CRC Committee, in its General Comment No. 14,[30] emphasises that the best interests of the child is a dynamic concept, requiring a contextual assessment tailored to the specific circumstances of each child or group of children. This assessment must take into account the child's identity, background, needs, and views, as well as the broader context in which the child lives. The principle is thus both flexible and adaptable, but it cannot be manipulated or used to override other rights guaranteed by the Convention.

Importantly, similarly to the principle of non-discrimination, the best interests of the child is recognised as one of the four plus one general principles of the CRC. These principles are interdependent and must be considered collectively in the application of the Convention. The principle of the best interests of the child is not absolute in the sense that it always overrides all other considerations; rather, it is a primary consideration that must be given significant weight in any balancing of interests involving children.

In summary, the principle of the best interests of the child under the CRC is a multifaceted legal norm that requires decision-makers – whether in public or private sectors – to prioritise the child's well-being and development in all actions affecting children. It demands a contextual, rights-based, and participatory approach to decision-making, ensuring that children's interests are not overlooked or subordinated to other concerns.

3.3. The child's Right to Life, Survival and Development (Article 6)

This principle imposes a dual obligation on States Parties: to recognise every child's inherent right to life and to ensure 'to the maximum extent possible' the child's survival and development. Unlike other human rights instruments that focus solely on the right to life, the CRC uniquely integrates survival and development as inseparable components of this right, reflecting the Convention's child-centred approach. Article 1 paragraph 1 of the CRC obliges State Parties to act on children in particularly vulnerable situations, including children with disabilities, any form of sickness, victims of violence etc.[31]

The obligation to ensure survival and development extends beyond mere physical existence. The CRC Committee emphasises a holistic understanding of development, integrating physical, intellectual, emotional, social, and moral dimensions. The provision of Article 6 paragraph 2 is quite general in its sense, allowing states to

29 Ibid., p. 71.
30 UN Committee on the Rights of the Child, 2013, Art. 3 para. 1.
31 Wedeł-Domaradzka, 2024, p. 75.

adapt its fulfilment to their economic possibilities, development level, culture and traditions.[32]

3.4. The View of the Child (Article 12)

The principle of the child's right to express their views – commonly referred to as the "view of the child" principle – is a cornerstone of the CRC, expressly enshrined in Article 12. This principle establishes that every child capable of forming their own perspective has the right to express those views freely in all matters affecting them, and that these views must be given due weight in accordance with the child's age and maturity. This right is not limited to formal legal or administrative proceedings but applies broadly to all contexts of a child's life, including family, school, and community settings.[33]

The CRC's approach marks a significant shift from viewing children as passive recipients of adult decisions to recognising them as active subjects with agency. The principle of Article 12 is closely linked to other participation rights, such as the freedom of expression (Article 13), the freedom of thought, conscience, and religion (Article 14), and the freedom of association (Article 15), which collectively ensure children's visibility and respect in society.[34]

States parties are required to create legal and practical frameworks that facilitate children's effective participation in decision-making processes. This includes providing children with appropriate information, ensuring that their views are heard directly or through a representative, and giving feedback on how their input has influenced outcomes. The right to express views is not an obligation; children cannot be forced to participate but must be informed of their right to do so and to withdraw at any time.[35]

The view of the child principle is essential for realising the best interests of the child, as decisions about children's lives can only be made with a full understanding of their perspectives. The principle is also fundamental for empowering children, promoting their development, and fostering a culture of respect and inclusion.[36]

3.5. The Right to Live in a Loving and Caring Family Environment

The *right to live in a loving and caring family environment* is both a guiding principle and a core objective of the CRC. The Convention places the family at the heart of children's rights, requiring states to protect, support, and assist families in their responsibilities, while also ensuring that children deprived of family care receive appropriate alternative protection and support. This principle is fundamental to the CRC's vision of ensuring every child's right to develop to their fullest potential in an atmosphere of happiness, love, and understanding.

32 Ibid., p. 76.
33 Simovic, 2024, pp. 137–158.
34 Ibid.
35 Ibid.
36 Ibid.

While the CRC does not explicitly codify a standalone "right to a family" in a specific article, its preamble and provisions underscore the family's fundamental role as the natural setting for a child's growth, well-being, and development. The Preamble affirms that

> 'the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community'.

It further states that 'the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding'.

Within the body of the CRC, several articles reinforce this principle. Article 18 recognises that parents or legal guardians have primary responsibility for the upbringing and development of the child, and that the best interests of the child are paramount. States are required to support parents and guardians in fulfilling these responsibilities and to ensure the development of institutions, facilities, and services that support family care. Article 20 addresses situations where a child is temporarily or permanently deprived of a family environment, mandating that the state provide special protection and assistance, and ensure alternative care that respects the child's background and needs.

4. Selected rights of the Convention on the Rights of the Child

The CRC includes 54 articles, covering civil, political, economic, social, and cultural rights essential for the well-being, development, and protection of children under 18 years of age. The first 41 articles focus on the rights themselves, while articles 42–54 focus on how governments and adults should work together to make sure all children can enjoy their rights.

The categorisation of children's rights under the CRC is essential for both understanding and implementing its provisions. Over the years, several models have emerged to organise these rights into coherent frameworks, each offering unique insights and practical advantages.

Perhaps the most widely recognised is the 3P model, which groups children's rights into three main pillars: provision, protection, and participation. Under this model, provision refers to the rights that ensure that children have access to essential resources such as healthcare, education, and a decent standard of living. Protection covers safeguards against abuse, exploitation, neglect, and harmful practices. Participation emphasises the right of children to express their views, be heard in matters that

affect them, and participate actively in their communities.[37] This model is valued for its clarity and practicality, making it preferred among policymakers and advocates who need to translate complex legal provisions into actionable strategies.

However, some scholars and practitioners argue that the 3P model can be somewhat limited, as it does not explicitly address the need for preventing rights violations before they occur. In response, the 4P model was developed, adding prevention as a fourth pillar. Prevention focuses on proactive measures to address root causes such as poverty, discrimination, and social exclusion, which can lead to the violation of children's rights. This expansion reflects a growing recognition that effective child rights advocacy must not only respond to harm but also work to eliminate the conditions that make children vulnerable in the first place.[38]

Other frameworks have emerged that categorise children's rights in slightly different ways. For example, some models describe children's rights as falling into four dimensions: survival, development, protection, and participation. Here, survival and development are separated (rather than combined under "Provision"), highlighting the distinction between basic needs and the broader opportunities necessary for a child's growth. Protection and participation remain as in the 3P model, but the framework is often used as an educational tool to help children and adults understand the full scope of their rights.

Critics of the 3P and 4P models point out that participation can sometimes be reduced to mere consultation rather than meaningful involvement in decision-making. There have also been calls for even more expansive models, such as the 5P framework, which might include pillars like Promotion (actively advocating for children's rights) or Policy (ensuring that legal and institutional frameworks support children's rights). However, these extensions are less standardised and not as widely adopted as the 3P and 4P models.[39]

In practice, the choice between these models depends on the context and goals of the work. The 3P model is particularly useful for advocacy and monitoring, offering a straightforward way to organise and assess efforts to protect and promote children's rights. The 4P model is especially relevant in situations where addressing systemic risk factors is crucial, such as in post-conflict settings or in efforts to combat child trafficking and exploitation. Meanwhile, four-dimensional frameworks are often used in educational settings to help children and adults understand the interconnected nature of their rights.

Ultimately, all these models recognise that children's rights are indivisible and interdependent. The fulfilment of one right often depends on the achievement of others, and effective child rights advocacy requires a holistic approach that considers both immediate needs and long-term structural change.

37 Lansdown, 2005.
38 Bellamy and UNICEF, 2004.
39 Tobin, 2019.

In this chapter three rights (group of particular type of rights) are analysed in a deeper manner, based on the 3P model, (I) from Protection, the *right of the child to freedom from all forms of violence,* (II) from Provision, *the right of the child to education,* (III) from Participation, *the right to free expression of views and the right to be heard.*

4.1. The Right of the Child to Freedom from all Forms of Violence

The right of the child to freedom from all forms of violence is a cornerstone of the CRC and is most explicitly articulated in Article 19. This provision obligates States Parties to take all appropriate legislative, administrative, social, and educational measures to protect children from every form of physical or mental violence, injury, abuse, neglect, negligent treatment, maltreatment, or exploitation – including sexual abuse – while in the care of parents, legal guardians, or any other person responsible for the child's care. The CRC's approach is comprehensive, recognising that violence is not limited to physical harm but also encompasses psychological abuse, verbal aggression, intimidation, and exposure to harmful environments etc.

Article 19 further requires states to establish effective procedures for supporting children and caregivers, as well as for the prevention, identification, reporting, referral, investigation, treatment, and follow-up of instances of child maltreatment. Judicial involvement is also mandated when appropriate. This framework highlights the necessity of a multi-sectoral response that combines legal, social, and educational strategies to ensure children's safety and well-being. The CRC's provisions are reinforced by other articles, such as Article 37, which prohibits torture and cruel, inhuman, or degrading treatment or punishment of children, and Article 28, which requires school discipline to be consistent with the child's human dignity.

General Comment No. 13 (2011) by the UN Committee on the Rights of the Child provides detailed guidance on the interpretation and implementation of Article 19. It emphasises that the prohibition of all forms of violence against children is absolute and leaves no room for legalised violence, including corporal punishment. The General Comment also stresses the importance of a holistic, child rights-based approach that integrates prevention, protection, and rehabilitation, ensuring that children's rights to survival, dignity, well-being, health, development, participation, and non-discrimination are upheld. The Committee calls for coordinated national frameworks and international cooperation to address violence, with particular attention to the vulnerability of specific groups, such as children with disabilities.

The CRC establishes a robust legal and policy framework for the protection of children from all forms of violence. The right to freedom from violence is recognised as essential for children's dignity, development, and participation in society. States are required to adopt comprehensive measures to prevent, respond to, and eliminate violence, ensuring that children grow up in environments that respect and uphold their rights.

Violence against children, as expressly prohibited by Article 19 of the CRC, is not only a violation of children's immediate safety but also a profound threat to the attainment of their broader rights. When children experience physical, emotional,

or sexual violence – whether in homes, at school, or in the community – it creates ripple effects that undermine their development, health, education, and participation in society.

The CRC is founded on the principle that children's rights are indivisible and interdependent. This means that when one right is violated, other rights are often compromised as well. For example, a child who suffers abuse or neglect is at risk of having their right to survival and development (Article 6) severely curtailed. The trauma and physical harm associated with violence can impair a child's growth, limit their potential, and even threaten their life.

Violence also directly impacts a child's right to health (Article 24). Physical injuries from abuse require medical attention, and the psychological toll – such as anxiety, depression, or post-traumatic stress disorder – can have lasting effects on mental well-being. Children exposed to violence may also develop behavioural issues, such as substance abuse or self-harm, further endangering their health.

In the context of education (Article 28), violence disrupts a child's ability to learn and thrive in school. Children who experience violence at home or in educational settings often struggle with concentration, attendance, and academic performance. They may also be subject to humiliating or degrading disciplinary practices, which contradict the CRC's requirement that school discipline respect a child's dignity.

The right to participation (Article 12) is another casualty of violence. Children who live in fear of retaliation or further abuse are less likely to express their views or participate in decisions affecting their lives. This silencing effect undermines their agency and self-esteem, making it difficult for them to advocate for themselves or engage with their communities.

Violence against children is also closely linked to exploitation (Articles 34–36). Children who are abused or neglected are more vulnerable to sexual exploitation, child labour, and trafficking. The trauma of violence can make it harder for them to seek help or escape exploitative situations, perpetuating cycles of harm.

The right to a family environment is also at risk when violence is present. In cases where children are removed from abusive homes, inadequate alternative care systems can compound their trauma. Moreover, exposure to violence within the family can disrupt healthy attachments and lead to intergenerational cycles of abuse.

Violence disproportionately affects marginalised children (Article 2, non-discrimination), including girls, children with disabilities, and those from minority backgrounds. These children often face compounded risks and barriers to accessing protection and support, further violating their right to non-discrimination.

Finally, violence restricts children's right to play and leisure (Article 31). Traumatised children may withdraw from social activities, and unsafe environments can deprive them of opportunities for recreation and cultural participation.

Violence against children is a systemic issue that threatens the full spectrum of their rights under the CRC. Protecting children from violence is not only a legal obligation but a prerequisite for building societies where all children can grow, learn, and thrive in safety and dignity.

4.2. The Right of the Child to Education

The right of the child to education is a central pillar of the CRC, articulated most comprehensively in Articles 28 and 29. The CRC establishes education not only as a fundamental right but also as an essential means for achieving children's broader development, empowerment, and participation in society.

Article 28 of the CRC obliges States Parties to recognise the right of every child to education, with the aim of achieving this right progressively and on the basis of equal opportunity. Specifically, it mandates that primary education be made compulsory and available free to all children. It further requires states to encourage the development of various forms of secondary education – including general and vocational – and to make these accessible to every child, with appropriate measures such as the introduction of free education and financial assistance where needed. Higher education should be made accessible to all on the basis of capacity through every appropriate means. The article also calls for educational and vocational information and guidance to be available and accessible to all children, and for measures to encourage regular school attendance and reduce dropout rates. Importantly, it stipulates that school discipline must be administered in a manner consistent with the child's human dignity and in conformity with the Convention. Finally, states are to promote and encourage international cooperation in matters relating to education, with particular attention to the needs of developing countries.

Article 29 complements Article 28 by defining the aims of education. It states that education should be directed to the development of the child's personality, talents, and mental and physical abilities to their fullest potential. Education should also foster respect for human rights and fundamental freedoms, as well as for the principles enshrined in the Charter of the United Nations. It must develop respect for the child's parents, cultural identity, language, and values; for national values and those of civilizations different from the child's own; and for the natural environment. Education should prepare children for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national, and religious groups, and persons of indigenous origin. The article also recognises the liberty of parents to choose the kind of education for their children and the liberty to establish and direct educational institutions, provided these adhere to minimum state standards.

The CRC's approach to the right to education is both expansive and nuanced. It recognises education as a right in itself and as a key enabler of other rights, such as the right to participation, freedom of expression, and protection from exploitation. Education empowers children to understand and exercise their rights, to develop critical thinking, and to become active and responsible members of society. The CRC also acknowledges the practical challenges faced by states, allowing for progressive realisation and recognition of the need for flexibility in implementation, especially in resource-constrained settings. The Convention's provisions reflect a global commitment to ensuring that every child has the opportunity to learn, grow, and thrive in a supportive and empowering environment.

4.3. The Right to Free Expression of Views and the Right to be Heard

Article 12 of the CRC provides that

> '1. State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
> 2. For this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law'.

Paragraph 1 is about the *right to free expression of views* in all matters affecting the child which is linked to a capability of forming views, but apart from the mere possibility of expressing views, it is strongly about the genuine consideration of these views and giving them due weight in accordance with age and maturity.

Paragraph 2 is about the *right to be heard* in formalised, namely judicial and administrative proceedings, where he or she is affected.

Both rights are obligations on the side of the state, indirectly on the side of adults i.e. parents, and a right on the side of the child, being individual or belonging to a group of children. This right can never turn into an obligation on the side of the child and must always remain a free choice of the child, where he or she receives all the necessary information in order to be able to make this free choice as safely as possible in the given situation.

The child's right to express their views in all matters affecting them, with those views given due weight according to the child's age and maturity has five key attributes that shape its interpretation and implementation.[40]

First, the phrase "shall assure" places a clear obligation on states to take all necessary legislative, administrative, and practical measures to actively solicit children's views and ensure these are considered in all relevant matters. The state's role is not passive; it must create opportunities and mechanisms for children to be heard.

Second, 'capable of forming his or her own views' is to be interpreted broadly, with the presumption that every child has the capacity to form opinions. The CRC Committee insists that there should be no minimum age for this right, warning against laws or practices that introduce age limits, as these can unjustly restrict children's participation. The Committee also emphasises the importance of recognising diverse forms of communication – such as play, art, and body language – so that very young children and those with disabilities are not excluded from expressing themselves. Furthermore, efforts must be made to ensure that children from minority, indigenous, or migrant backgrounds, or those who do not speak the majority language, are not marginalised in this process.

40 UN Committee on the Rights of the Child, 2009.

Third, 'the right to express those views freely' means that children must be able to share their opinions voluntarily, free from manipulation, undue influence, or coercion. This requires creating a safe environment where children feel comfortable expressing themselves and are provided with sufficient, age-appropriate information. Parents and guardians should also be informed and supported to facilitate the child's participation.

Fourth, 'in all matters affecting the child' is to be understood as broadly as possible. The drafters of the CRC deliberately rejected any attempt to limit this to a specific list of issues, emphasising that children's views should be taken into consideration in any context that impacts them, with the only limitation being the principle of the child's best interests.

Fifth, 'being given due weight in accordance with the age and maturity of the child' requires that children's views are not only heard but are also seriously taken into account. The weight given to a child's opinion should be determined by an assessment of both age and maturity, not age alone. The CRC Committee research highlights that a child's capacity to form views is influenced by factors such as information, experience, environment, and cultural context, and should be evaluated on a case-by-case basis.

The child's right to be heard in any judicial or administrative proceeding that affects them is a right defined by three essential attributes.[41] First, the right applies to "any" such proceeding, a deliberate choice by the drafters to ensure the broadest possible scope. This means the provision covers not only official court processes but also alternative dispute resolution mechanisms such as arbitration and mediation. The right is relevant in a wide range of contexts, including parental separation, custody, care and adoption, children in conflict with the law, child victims of violence or abuse, health care, social security, unaccompanied children, asylum seekers, refugees, and children affected by armed conflict or emergencies. Administrative proceedings may involve decisions about education, health, environment, living conditions, or protection. Importantly, the right applies regardless of who initiated the proceedings – whether it is the child or someone else.

To ensure effective and genuine implementation, the environment in which the child is heard must be safe, sensitive, and appropriate to the child's age and maturity. This necessitates proceedings that are accessible and child-friendly, with attention paid to providing child-appropriate information, support for self-advocacy, appropriately trained staff, and the careful design of physical spaces, such as courtrooms and waiting areas. Measures like sight screens and separate waiting rooms help reduce stress and create a more supportive environment for children.

The second attribute specifies that the child may be heard 'directly, or through a representative or an appropriate body'. The choice between direct participation or representation should be made by the child whenever possible, and the CRC Committee recommends that children be given the opportunity to be heard directly whenever

41 Ibid.

feasible. If the child is not heard directly, the selection of a representative becomes crucial. Parents or guardians may serve as representatives if there is no conflict of interest. However, in cases where such a conflict exists – such as disputes between the child and parent – alternative representatives such as lawyers (child attorneys) or social workers should be appointed. All representatives must prioritise the child's interests above those of any other person or institution.

The third attribute requires that the right be exercised 'in a manner consistent with the procedural rules of national law'. However, these rules should not restrict or limit the child's right to be heard; rather, they should facilitate the broadest possible application of Article 12(2). National laws and procedures should be designed to support and empower children's participation, not to create barriers.

The right to be heard must be exercised on a voluntary basis, meaning the child should not be forced to participate. The child's choice to exercise this right – and the way of doing so – must be respected.

5. Committee on the Rights of the Child

Article 43 of the CRC provided for the establishment of a committee that in its competence is examining the progress made by States Parties in achieving the realisation of the obligations undertaken in the CRC. Upon this provision, the Committee on the Rights of the Child was established on 27 February 1991. The CRC Committee consists of eighteen experts of high moral standing and recognised competence in the field covered by the CRC. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, as experts, consideration being given to equitable geographical distribution, as well as to the principal legal systems.[42] The CRC Committee is the specialised United Nations body established to monitor the implementation of the CRC and its Optional Protocols by States Parties. The Committee operates as a treaty-based mechanism under articles 43, 44, and 45 of the CRC.

The primary mandate of the CRC Committee is to review the periodic reports submitted by the States Parties regarding the measures taken to implement the CRC and its Optional Protocols. All States that have ratified the Convention are required to submit an initial report within two years of ratification and subsequent reports every five years thereafter. During its regular sessions – typically held three times a year – the CRC Committee examines these reports, engages in dialogue with government delegations, and issues *concluding observations*. These concluding observations highlight progress, identify concerns, and provide recommendations for legal, policy, and practical improvements to better protect children's rights.

In addition to reviewing state reports, the CRC Committee issues interpretations of the Convention through *General Comments*. These documents clarify the meaning

42 Article 43 para. 2 of the CRC.

and scope of specific provisions as it is understood by the Committee, offering their guidance to States Parties and stakeholders on how to implement the CRC. The Committee's General Comments are widely referenced in academic, legal, and policy discussions on children's rights, nevertheless they are not legally binding documents.

With the coming into force of the Third Optional Protocol on a Communications Procedure (hereinafter referred to as OPIC) in 2014, the CRC Committee gained new competencies. It now has the authority to consider individual complaints alleging violations of children's rights under the Convention and its first two Optional Protocols, provided certain conditions are met. The Committee can also conduct inquiries into grave or systematic violations of children's rights, further strengthening its role in holding States accountable. The CRC Committee exercises these competencies only towards State Parties that ratified OPIC, which is the least ratified Optional Protocol of the CRC.

Through its monitoring, reporting, and complaint mechanisms, the CRC Committee plays a central role in advancing the realisation of children's rights worldwide. It promotes legislative and policy reforms, encourages international cooperation, and provides a platform for civil society and children themselves to participate in the monitoring process.

6. The Optional Protocols to the Convention on the Rights of the Child

The CRC established a comprehensive framework for the protection, promotion, and fulfilment of children's rights. Over time, however, it became clear that certain critical issues either required further elaboration or were not sufficiently addressed in the original text. To respond to these evolving challenges and to strengthen the implementation of children's rights, the international community developed three Optional Protocols, each targeting distinct areas of concern and expanding the obligations of States Parties beyond those set out in the CRC itself.

Optional Protocols are supplementary treaties that allow states to address new or more detailed issues that were either not covered or not fully developed in the main treaty. The adoption of these protocols is voluntary, meaning that states must separately sign and ratify each one, thereby accepting additional responsibilities and international oversight mechanisms. The three Optional Protocols to the CRC are: the Optional Protocol on the Involvement of Children in Armed Conflict, the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, and the Optional Protocol on a Communications Procedure.

6.1. Optional Protocol on the Involvement of Children in Armed Conflict

The protection of children during armed conflict is addressed by two main bodies of international law: international humanitarian law and international human rights law. International humanitarian law, rooted in the Geneva Conventions of 1949 and their Additional Protocols of 1977, sets minimum standards for the protection of

civilians, including children, distinguishing between military and civilian targets and emphasising special protections for children due to their vulnerability.[43] The Fourth Geneva Convention, in particular, offers extensive safeguards for children, reflecting the horrors witnessed during the Second World War. International humanitarian law treats children as a category deserving special protection, recognising their immaturity and the need to shield them from the consequences of war, including their involvement in hostilities and the offences they may commit under duress.

International human rights law further reinforces these protections through instruments such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Elimination of All Forms of Discrimination against Women. However, the most significant treaty for children's rights is the Convention on the Rights of the Child (CRC), adopted in 1989, which sets the age of majority at 18 and obliges states to protect children from all forms of violence and exploitation.[44] Despite these protections, Article 38 of the CRC, which addresses children in armed conflict, was criticised for only prohibiting the direct participation of children under 15 in hostilities and allowing recruitment from age 15, falling short of the "straight-18" principle advocated by child rights activists.[45]

Recognising these gaps, the international community developed the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OPAC), adopted in 2000.[46] The OPAC was the result of years of advocacy and negotiation, driven by organisations such as the International Committee of the Red Cross, UNICEF, and the Coalition to Stop the Use of Child Soldiers, and was advised by influential reports such as the 1996 Machel report, which highlighted the severe impact of armed conflict on children. The OPAC aims to strengthen the prohibition against the recruitment and use of children in hostilities, raising the minimum age for compulsory recruitment to 18 and requiring states to take all feasible measures to prevent children under 18 from direct participation in hostilities.[47]

The OPAC underlines that states must take "all feasible measures" to ensure that members of their armed forces under 18 do not take a direct part in hostilities.[48] It sets out that compulsory recruitment of persons under 18 is prohibited.[49] It provides for states to raise the minimum age for voluntary recruitment, with stringent safeguards to ensure that recruitment is genuinely voluntary and informed, and with parental consent required for minors.[50] It establishes that non-state armed groups are prohib-

43 Garayová, 2024, p. 210.
44 Ibid., p. 211.
45 Ibid.
46 Ibid., p. 213.
47 Ibid.
48 OPAC, Art. 1.
49 OPAC, Art. 2.
50 OPAC, Art. 3.

ited from recruiting or using children under 18 in hostilities under any circumstances, and states must take all feasible measures to prevent such practices.[51]

Despite these advances, the OPAC is a product of compromise. The use of the phrase "all feasible measures" in Article 1, rather than a strict prohibition, allows for some flexibility and has been criticised for not providing absolute protection. Additionally, OPAC only prohibits direct participation in hostilities, leaving open the possibility of children being used in indirect roles, such as messengers or porters, which still exposes them to significant risks[52]. OPAC also requires states to demobilise and rehabilitate child soldiers, providing physical and psychological recovery and supporting their social reintegration. The OPAC also includes provisions for international cooperation and support for the rehabilitation and reintegration of child soldiers, recognising the need for technical and financial assistance, especially in conflict-affected countries.[53]

While the OPAC represents significant progress, challenges remain. Many states still permit voluntary recruitment of children aged 16 or 17, and non-state armed groups continue to recruit and use children in large numbers.[54] The Protocol's effectiveness depends on robust national implementation, international cooperation, and ongoing advocacy to uphold the "straight-18" principle. The international community must remain vigilant and committed to ensuring that children are protected from the devastating effects of armed conflict and that their rights are fully realised.[55]

6.2. Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography

The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, adopted in 2000 and in effect since 2002, stands as a landmark international instrument aimed at addressing severe forms of child exploitation that persisted despite the protections offered by the CRC itself.[56] The Protocol was developed in response to ongoing concerns raised by monitoring bodies such as the Committee on the Rights of the Child and the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, who highlighted the need for stronger legal frameworks to combat the commercial sexual exploitation of children, including trafficking, prostitution, and pornography.[57]

At its core, the Optional Protocol requires States Parties to prohibit and criminalise a range of exploitative practices. The sale of children is defined broadly as any act or transaction where a child is transferred for remuneration or any other consideration,

51 OPAC, Art. 4.
52 Garayová, 2024, p. 210.
53 Ibid.
54 Ibid., p. 236.
55 Ibid.
56 Stajnko and Fetai, 2024, p. 182.
57 Ibid., p. 183.

specifically targeting situations such as sexual exploitation, organ transfer for profit, forced labour, and improperly induced consent in adoption processes.[58]

The Protocol also mandates the criminalisation of child prostitution, defined as the use of a child in sexual activities for remuneration or any other consideration, and child pornography, which is any representation of a child engaged in real or simulated explicit sexual activities or the depiction of a child's sexual parts for primarily sexual purposes.[59] The legal framework established by the Protocol is more specific and detailed than the general obligations under the CRC, requiring states to ensure that not only direct perpetrators but also intermediaries and accomplices are held accountable, and that legal persons (such as corporations) may also be liable for offenses.

A significant area of controversy and complexity arises in the interpretation and application of these definitions. For example, the Protocol's approach to commercial adoption focuses on the improper inducement of consent by intermediaries, but does not explicitly address other criminal acts in the adoption process, such as kidnapping. Similarly, the Protocol's stance on commercial surrogacy is ambiguous. While some argue that commercial surrogacy should be considered a form of child sale, the Protocol does not explicitly cover this practice, leaving it to the states to regulate or prohibit surrogacy according to their own legal frameworks and international obligations.

In the area of child pornography, the Protocol criminalises the production, distribution, and possession of such material, but leaves some questions unresolved, particularly regarding the criminalisation of mere possession, the treatment of virtual or fictional pornography, and the boundaries between prohibited material and permissible artistic expression. The Protocol's definition is intended to be interpreted narrowly, with the Committee on the Rights of the Child encouraging states to avoid overcriminalisation and to consider the context and intent behind the creation and dissemination of material. However, the Protocol's broad language has led to debates about the criminalisation of self-generated sexual content by minors, with some arguing that the Protocol's approach is overly paternalistic and fails to recognise the agency of older children.

Jurisdictional issues are also addressed by the Protocol, which requires states to establish jurisdiction over offenses committed within their territory and encourages them to extend jurisdiction to offenses committed by their nationals or against their nationals abroad. The Protocol also facilitates international cooperation through provisions on extradition, mutual legal assistance, and the seizure and confiscation of assets used in or derived from offenses. Notably, the Protocol does not require the freezing of assets, which some commentators view as a missed opportunity for more effective asset recovery.

The rights and protection of child victims are a central concern of the Protocol. States are required to design criminal procedures that protect the rights and interests

58 Ibid., pp.183–184.
59 Ibid., pp.188–196.

of child victims, ensure their safety and privacy, and provide for their physical and psychological recovery and social reintegration. The Protocol also emphasises the importance of preventive measures, including awareness-raising, education, and support for vulnerable families, as well as international cooperation to address root causes such as poverty and underdevelopment.

Despite its strengths, the Protocol has been criticised for certain omissions and ambiguities. For example, it does not set a uniform age for the protection of children, allowing states to define the age of majority according to their own laws, which can lead to uneven protection across jurisdictions. The Protocol also does not explicitly address emerging issues such as live-streamed child sexual abuse or grooming, and its provisions on prevention are considered by some to be too vague.

The Optional Protocol represents a significant advance in the international legal framework for protecting children from commercial sexual exploitation, trafficking, and abuse. It provides detailed and enforceable obligations for states to criminalise and combat these practices, while also emphasising the rights and needs of child victims. However, its effectiveness depends on robust national implementation, ongoing international cooperation, and careful interpretation to avoid overreach or unintended consequences.

6.3. Optional Protocol on a Communications Procedure[60]

The Optional Protocol to the United Nations Convention on the Rights of the Child (UNCRC) on a Communications Procedure (hereinafter referred to as OPIC), adopted in December 2011 and having entered into force in April 2014, represents a significant development in the international protection of children's rights by establishing a mechanism for individual complaints to be brought before the CRC Committee.[61] The core objective of OPIC is to enhance children's access to effective remedies at the international level, filling a longstanding gap in the UN treaty body system. With OPIC's adoption, all core UN human rights treaties now have procedures for individual communications, but despite the broad ratification of the UNCRC and its first two Optional Protocols, OPIC has a notably low rate of ratification among states.[62]

The need for a communications procedure was recognised during the drafting of the UNCRC between 1978 and 1989, but initial proposals were set aside due to concerns about the justiciability of economic, social, and cultural rights and the perceived overreach of empowering the CRC Committee with quasi-judicial authority. The idea resurfaced in the late 2000s when the UNCRC remained the only core human rights treaty without a communications mechanism. Advocacy by the CRC Committee Chairperson and non-governmental organisations led to an in-depth study and ultimately the drafting of OPIC. The drafting process, which began in 2009, was marked by debates over the added value of the Protocol, the CRC Committee's workload and

60 Benyusz, 2024, pp. 241–257.
61 Ibid., p. 243.
62 Ibid.

legal expertise, the scope of the Protocol, the legal capacity of children to submit complaints, and the implications for national sovereignty.[63]

OPIC is structured into a preamble and four main parts: General Provisions, Communications Procedure, Inquiry Procedure, and Final Provisions.[64] The preamble, while not legally binding, provides an interpretative framework that emphasises the special vulnerability of children, the importance of child-sensitive procedures, and the best interests of the child. The General and Final Provisions set out the principles and rules governing OPIC, while the Communications and Inquiry Procedures detail the three key mechanisms: individual communications, inter-state complaints, and the inquiry procedure.[65]

The individual communications procedure allows the submission of complaints to the CRC Committee alleging violations of rights under the UNCRC or its first two Optional Protocols, provided domestic remedies have been exhausted or no effective action has been taken within a reasonable time. Individuals, who were children at the time of the alleged violation, may also submit complaints.[66] The procedure is confidential, child-sensitive, and includes safeguards to prevent manipulation and protect the safety of complainants. Interim measures may be requested in cases of potential irreparable harm, and the Committee may seek information from various sources during its examination. The procedure allows for friendly settlements, and if no settlement is reached, the Committee issues views and recommendations, which the State Party is expected to implement and report on within six months.

The inter-state complaint mechanism allows State Parties to OPIC to bring complaints against other State Parties for alleged violations, but this mechanism is optional and, as of now, has never been used.[67] The inquiry procedure, which is accepted upon ratification unless a State Party opts out, enables the CRC Committee to investigate reliable information indicating grave or systematic violations of children's rights.[68] This procedure may involve confidential cooperation with the State Party, additional information gathering, and, if necessary, visits to the country. The Committee issues findings and recommendations, and the State Party is required to respond within six months.

OPIC does not address the legal representation or capacity of children in detail, leaving open questions about genuine child participation and the risk of manipulation by representatives.[69] The Rules of Procedure emphasise child-sensitive processes and the need to give due weight to children's views, but do not provide comprehensive safeguards against conflicts of interest or improper influence. The CRC Committee submits biennial reports on its activities under OPIC, and States Parties are required

63 Ibid.
64 Ibid., p. 244.
65 Ibid.
66 Ibid., p. 247.
67 Ibid., p. 251.
68 Ibid.
69 Ibid., p. 253.

to disseminate information about the Protocol and facilitate access to it for children and adults.

Despite its innovative features, OPIC has faced challenges. The ratification rate remains low, and there are ongoing debates about the CRC Committee's capacity to act as a quasi-judicial body, the adequacy of safeguards for children's participation, and the extent to which the procedure is genuinely adapted to children's needs.

7. Concluding Remarks

The CRC stands as a landmark achievement in international law, heralding a paradigm shift in how society views and protects children. By recognising children not merely as objects of adult protection but as rights-holders in their own right, the CRC has fundamentally transformed the legal, social, and cultural landscape concerning childhood. Its near-universal ratification underscores the global consensus on the importance of safeguarding children's dignity, well-being, and development, and it provides a comprehensive framework that integrates civil, political, economic, social, and cultural rights specifically tailored to children's needs.

The CRC's drafting process was marked by a spirit of compromise and inclusivity, seeking to balance universal standards with respect for cultural diversity and national sovereignty. This approach enabled the Convention to achieve broad acceptance, but it also introduced certain ambiguities and necessitated ongoing interpretation and adaptation. The CRC's core principles – non-discrimination, the best interests of the child, the right to life, survival and development, and the right to participate and be heard and the right to live in a loving family environment – serve as both substantive rights and guiding norms that shape the implementation and interpretation of all other provisions. These principles underscore the CRC's holistic vision of children's rights, emphasising the interdependence and indivisibility of rights and the need for a child-centred perspective in all actions affecting children.

The CRC's definition of the child as every human being below the age of eighteen, unless national law provides otherwise, reflects a compromise between international standardisation and respect for national legal systems. This definition, together with the Convention's emphasis on the evolving capacities of the child, acknowledges that children are not a homogenous group but individuals whose agency and autonomy develop over time. The legacy of Janusz Korczak, whose ideas profoundly influenced the CRC, continues to inspire efforts to empower children and ensure their participation in decisions affecting their lives. The same applies to the legacy of Professor Tadeusz Smyczynski, the initial drafter of the CRC, whose family-centred approach is there behind each provision of the CRC.

Over time, the CRC has been complemented by three Optional Protocols, each addressing critical gaps and emerging challenges in the protection of children's rights. The Optional Protocol on the Involvement of Children in Armed Conflict strengthens protections against the recruitment and use of children in hostilities, while the

Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography provides detailed obligations to combat commercial sexual exploitation and abuse. The Optional Protocol on a Communications Procedure, although less widely ratified, represents a step forward in ensuring children's access to justice at the international level by enabling them to submit complaints about rights violations.

The CRC and its Optional Protocols are underpinned by the work of the Committee on the Rights of the Child, which monitors implementation, interprets the Convention's provisions, and provides guidance to States Parties.

Despite these achievements, significant challenges remain. The CRC's principles and provisions require robust national implementation, ongoing international cooperation, and a genuine commitment to child participation. The effectiveness of the CRC and its Optional Protocols depends not only on legal and policy reforms but also on societal attitudes and practices that recognise and respect children's agency, dignity, and evolving capacities.

Ultimately, the CRC and its Optional Protocols represent a collective commitment to the future of humanity – a commitment to uphold the rights and dignity of every child, everywhere. Their success will be measured not only by the laws and policies they inspire but by the lived experiences of children whose lives are shaped by the promise of the Convention and its vision of a world in which children's rights are fully realised.

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| Chapter 12 |

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

Filip Bojić

ABSTRACT

When it comes to the protection of the rights of migrant workers and members of their families, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families represents an undeniably important international source of law. As one of the main reasons for the adoption of this document, highlighted in the preamble, the importance and extent of the migration phenomenon, which involves millions of people and affects a large number of States in the international community, is stated therein. In this work, the author will point to the long-term struggle that preceded the entry into force of the Convention itself. Although detailed in the regulation of the rights guaranteed to migrant workers and members of their families, it seems that from the point of view of protection for this category of persons, the most important thing is that certain provisions of the Convention apply to migrant workers who do not have a regulated position, as well as to special categories of migrant workers, such as frontier worker, seasonal worker, seafarer, worker on an offshore installation, itinerant worker and project-tied worker. Also, the author will point out a very worrying fact in the paper, which is that this Convention has been ratified by a rather small number of member states of the United Nations Organisation, noting that the United States of America, Canada, Australia, Russia, China, the United Kingdom, as well as no member states of the European Union have done so. Therefore, in the research, this author, along with a detailed analysis of the provisions of the Convention, will pay special attention to discovering the reasons for this insufficient acceptance of the Convention, and will try to find solutions that would lead to its wider acceptance, and to prevent the protection of migrant workers and members of their families from being implemented only *de iure*, but not *de facto*.

KEYWORDS

migrant workers, members of the family, United Nations Organisation, International Labour Organisation, The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families

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1. Introductory Remarks

Since its establishment in 1945, the United Nations has focused special attention on the protection of basic human rights and freedoms. Despite the fact that in 1948 the General Assembly of the United Nations adopted the Universal Declaration of Human Rights, which guaranteed basic civil, political, economic and social rights, over the years the body tried to draft international conventions addressing specific groups and rights beyond its Universal declaration.[1] After the preparation and then the adoption of the International covenant on economic, social and cultural rights (1966), The International covenant on Civil and Political Rights (1966), The Convention on the elimination on all forms of Racial Discrimination (1965), the Convention on the Elimination of all forms of Discrimination Against Women (1979), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1984), preparations were started for the adoption of the Convention which would regulate the protection of the rights of all migrant workers and members of their families.[2] One of the main reasons for the adoption of this document, is the importance and extent of the migration phenomenon, which involves millions of people and affects a large number of States in the international community, with an emphasis on the rights of migrant workers and members of their families that have not been sufficiently recognised everywhere and therefore require appropriate international protection. Bearing in mind the importance of this source of law, as well as the problem reflected in the insufficient number of ratifications of this Convention by the member states of the United Nations Organisation, this chapter will point out the significance of this Convention and its historical context, followed by its adoption, relevance and implementation. A special review will be given to the comparison of this Convention with other relevant international, especially conventions of the International Labour Organisation, and regional documents, as well as to the analysis of the structure of the Convention. Finally, before any conclusions are presented, the question of the monitoring and role of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families will be pointed out.

Migration is a global phenomenon, which implies a change of place of residence due to the movement of individuals or groups of individuals, which can be of a temporary or permanent nature.[3] According to a certain number of authors, international population migration is a phenomenon identified with the emergence of capitalism.[4] It is considered that 'one of the major forces that has transformed world history since the 1500s is the large scale movements of peoples from their homelands to other areas of the world to work and settle, whether temporarily or permanently'.[5] During the

1 Hune, 1985, p. 570.
2 Ibid.
3 Krstić, 2018, p. 11.
4 Šunderić, 2001, p. 275.
5 Hune, 1991, p. 800.

17th and 18th centuries, migrations were linked to political, religious and national circumstances, and towards the end of the 19th and the beginning of the 20th century, migrations began to be linked to events or phenomena of a large-scale economic nature, and as a result, the working population mainly migrated from weaker developed countries towards the industrially developed countries of Northern and Western Europe and the United States of America.[6] Migrations of the working population, which occur when a person resides in a foreign country for the purpose of performing a job, are designated as voluntary migration.[7] According to certain statistics 'world voluntary migration from 1500 to 1980 is placed at more than 200 million', while at the beginning of the 21. century, more precisely in 2005, the number of people who have settled down in a country other than their own was estimated at around 191 million, which represents more than 3% of the world's population.[8] It is noticeable that mass migration sometimes escapes the control of the governments of host countries, especially when it comes to illegal migration, as well as the migration of refugees and displaced persons, who in a large number of cases move to the territory of another country, not only fleeing armed conflicts, poverty, persecution , terrorism, violations of human rights, but also searching for suitable employment, as well as migrations that occur as a combination of several reasons, which are labelled as mixed migrations.[9] Regardless of the reason for migration, migrants who are employed in the territory of another country, which is not their country of origin, need to be provided with adequate protection and equal rights that would be guaranteed to domestic citizens. Therefore, it was necessary to establish an appropriate normative framework at the international level, in order to ensure the effective protection of migrant workers and their family members.

Pécoud and De Guchteneire state that 'historically, non-nationals have enjoyed very little legal protection and the dominant idea has long been that rights were connected to nationality and citizenship, and therefore aliens hardly had any rights and used to be mainly protected by the diplomatic services of their country of origin'.[10] Before international conventions were adopted under the auspices of international organisations that guaranteed the protection of migrant workers, the rights of these categories of workers were secured by concluding bilateral agreements between two

6 Šunderić, 2001, p. 275.
A record movement of workers and family members took place in the period between 1815 and 1914, when labour moved from peripheral to core areas. As Hune states, 'Segal and Marston have noted five primary movements amongst other secondary ones in this period that were intercontinental scope: 1) 60 million Europeans left for the Americas, Oceania and south and east Africa; 2) about ten million Russians moved to Siberia and central Asia; 3) one million southern Europeans went to north Africa; 4) some 12 million Chinese and 6 million Japanese relocated to eastern and southern Asia; and 5) 1, 5 million Indians resettled in South-east Asia and south and east Africa.' Hune, 1991, p. 801.
7 Krstić, 2018, p. 11.
8 Hune, 1991, p. 800; De Guchteneire and Pécoud, 2010, p. 2.
9 Krstić, 2018, p. 14.
10 Pécoud and De Guchteneire, 2006, p. 243.

countries. The first contracts regulating the protection of migrant workers mostly related to ensuring their social security, and the first such contract was concluded on 15th April 1904 between Italy and France.[11] According to Professor Šunderić, 'the norms of this contract regulate the protection of workers and insurance against accidents at work, old age, unemployment, as well as the work of women and children, the organization of inspections and other relations'.[12]

A special contribution to the protection of the rights of migrant workers and their families was made by the International Labour Organisation, which, since its foundation in 1919, has devoted considerable attention to the protection of this category of workers. In the Constitution of this organisation, as one of the goals, the 'protection of the interests of workers employed outside their homeland' is singled out, and at the first session of the International Labour Conference, held in Washington, the issue of the normative protection of migrant workers was raised.[13] During the same session, the International Labour Conference adopted two recommendations, which regulate, among other things, the position of migrant workers. Recommendation No. 1 on unemployment regulates the employment of foreign workers, while Recommendation No. 2 on reciprocity and treatment of foreign workers establishes that states should, on the basis of reciprocity, provide foreign workers with protection as prescribed by the law of the country where the work is performed.[14] Despite the above, according to the views of certain authors 'beginnings were difficult, as the ILO's attempts to create standards in the recruitment and treatment of foreign workers found little support in the pre-Second World War context, characterized by economic crises and strong nationalist/protectionist tendencies'.[15]

However, the situation changed a lot after the end of the Second World War, when some of the most important international standards regulating the protection of the rights of migrant workers and their family members were adopted. The Convention concerning Migration for Employment (No. 97) and the Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (No. 143) stand out as the more significant sources of law, adopted under the auspices of the International Labour Organisation. As Professor Šunderić states, both conventions define the meaning of the term migrant worker, and they also specify certain categories of persons to whom their provisions do not apply.[16] It is noticeable that this concept was retained by the creators of the United Nations Convention, and a special connection is found with Convention No. 143, because it regulates the equality of opportunity and treatment, i.e. Article 10 of this Convention foresees that

11 Šunderić, 2001, p. 280.
12 Ibid.
13 Ibid., p. 283.
14 Ibid.
15 De Guchteneire and Pécoud, 2010, p. 6.
16 Šunderić, 2001, 285.

> 'each Member for which the Convention is in force undertakes to declare and pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory'.[17]

Therefore, it can be concluded that the creators of the United Nations Convention adopted a large number of principles contained in the standards of the International Labour Organisation, when it comes to the protection of the rights of migrant workers and their family members. The above is also a logical solution, if one takes the attention paid to the protection of migrant workers within the scope of the activities of the ILO into account. However, despite the fact that, as Professor Kovaćević states,

> 'the writers of the Convention on the Protection of Migrant Workers and Members of Their Families were largely inspired by ILO standards, the biggest difference between these universal instruments exists in terms of the subjects of irregular migration, which also represents the biggest contribution to improving the position of migrant workers in the international community'.[18]

Based on all of the above, we can accept the views of certain authors who justifiably claim, linking the activities of the United Nations Organisation and the International Labour Organisation regarding the protection of migrant workers, that 'the evolutionary process which shaped the body of ILO standards on migrant workers was crucial to the elaboration of the UN Convention'.[19] The above coincides with the claim that 'without the ILO or the UN there would be no international standards pertaining to migrant workers'.[20]

17 The Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (No. 143), Art. 10.
18 Also, it should be borne in mind that for certain categories of workers, the standards of the International Labor Organization provide wider protection than was done by the United Nations Convention, which indisputably regulates certain rights of migrant workers in more detail, than was done by Convention No. 97 and Convention No. 143. The above can best be seen when it comes to the rights of seasonal workers, to which all the provisions of convention no. 97 and No. 143 are applied, while according to the provisions of the OUN Convention, the protection of seasonal workers can be limited. A similar provision is made for border workers, as well as for workers who are engaged in a specific project. Quoted from: Kovačević, 2021, pp. 834–835.
19 Hasenau, 1991, p. 696.
20 Pécoud, 2017, p. 69.

2. Adoption of Convention

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families was adopted on 18th December 1990 by the United Nations General Assembly. As stated in the Fact Sheet from 2005, of the Office of the United Nations High Commissioner for Human Rights, the adoption of the convention was preceded by many years of discussions, reports and recommendations on the subject of migrant' rights.[21] Almost twenty years before the adoption of this Convention in 1972, the United Nations openly declared its concern about the endangered rights of migrant workers for the first time, when the Economic and Social Council, within its resolution 1706 (LIII) expressed alarm at the illegal transportation of labour to some European countries, and at the exploitation of workers from some African countries in conditions resembling slavery and forced labour.[22] In the same year the General Assembly, within resolution 2920, condemned the ubiquitous cases of discrimination against foreign workers and called upon Governments to end such practices and to improve conditions for the reception of migrant workers in host States.[23]

There is a widespread opinion in the scientific and professional literature that the adoption of The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families represents a great success of the international community, especially of the United Nations.[24] The aforementioned stems from the efforts of this organisation, which have been to recognise, both *de facto* and *de iure,* the need for the legal protection of the rights and dignity of millions of migrants who contribute to the well-being and development of the countries of their reception, as well as the countries of their origin, and therefore cannot deny that with the adoption of the Convention, significant progress has been made in terms of ensuring adequate legal protection for migrant workers, especially if one takes into account the fact that the basic provisions of the Convention apply to all migrant workers, regardless of their legal status.[25]

According to the views of certain authors, the 'Convention represent the most comprehensive international treaty protecting migrants' rights and is therefore a crucial instrument in fostering respect for migrants human rights throughout the world'.[26] This sourcing of rights rather than establishing new rights offers a more precise interpretation of human rights in the case of migration.[27] It is indisputable that most of the rights guaranteed by the Convention were also recognised by other

21 United Nations Office of the High Commissioner for Human Rights, 2005, p. 2.
22 Ibid.
23 Ibid.
24 Kovačević, 2007, p. 225.
25 Ibid.
26 Pécoud and De Guchteneire, 2006, p. 242.
27 Ibid., p. 246.

conventions that had as their subject the regulation of the rights of migrant workers, but their application to non-nationals had not been specified.[28]

It is interesting that the Convention entered into force only on 1st July 2003, a full 13 years after its adoption by the General Assembly of the United Nations. Twenty ratifications were needed for the Convention to enter into force, as some authors state that the 'Convention had the slowest progress between adoption and entry into force and it has the smallest number of participating countries'.[29] The above is confirmed by the fact that until today (October 2024) the convention has been ratified by only 62 member states of the United Nations, which is less than one third of the members of the United Nations Organisation.[30] However, what is noticeable is that this Convention was mostly ratified by the member states of the United Nations, which represent the home states, that is, the states from which migrant workers leave. This document has not been ratified by the countries to which the largest number of migrant workers arrive to, such as the United States of America, Canada, Australia, Russia, China, the United Kingdom and every member state of the European Union. It is noticeable that the states that have ratified the convention, according to Peourd and de Guchteneire, are 'the countries that are home to only a very small percentage of the world's total migrant population, implying that most migrants are currently not protected by the ICRMW'.[31] It should be noted that the obligation of the state that decides to ratify is to do so to the Convention in its entirety, which means that the state may not exclude the application of any Part of it, or exclude any particular category of migrant workers from its application.[32] This practice differs from the practice applied in the ratification of International Labour Organisation standards, where there is flexibility in the ratification of a significant number of conventions, among others the Convention

28 Ibid.

29 The Convention stipulates that the Convention shall be open for signature by all States. But, as Pécoud and Guchteneire state 'a signature does not establish a state's consent to be bound by the treaty, but it expresses its willingness to continue the treaty-making process; it enables the signatory state to proceed to ratification and is usually done by the executive branch of government'. De Guchteneire and Pécoud, 2010, p. 11; Battistella, 2010, p. 47.

30 The Convention was ratified by the following countries as of September 2024: Albania, Algeria, Argentina, Azerbaijan, Bangladesh, Belize, Benin, Bolivia, Bosnia and Herzegovina, Burkina Faso, Cabo Verde, Chad, Chile, Columbia, Congo, Cote d'Ivoire, Ecuador, Egypt, El Salvador, Fiji, Gambia, Ghana, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Indonesia, Jamaica, Kirgizstan, Lesotho, Libya, Madagascar, Malawi, Mali, Mauritania, Mexico, Morrocco, Mozambique, Nicaragua, Niger, Nigeria, Paraguay, Peru, Philippines, Rwanda, Saint Vincent and the Grenadines, Sao Toma and Principe, Senegal, Seychelles, Sri Lanka, Syrian Arab Republic, Tajikistan, Timor-Leste, Togo, Türkiye, Uganda, Uruguay, Venezuela and Zimbabwe.

31 Pécoud and De Guchteneire, 2006, p. 249.

32 The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Art. 88.

concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (No. 143).[33]

In the scientific literature, one of the main reasons for the non-ratification of the Convention is the protection of migrant workers in an irregular position, because many states consider that the corresponding provisions violate the principle of state sovereignty and the exclusive right of each state to regulate the entry and stay of foreigners on their domestic territory, as well as their protection regime.[34] However, as Professor Kovačević points out,

> 'it seems that this objection is not firmly founded, since the Convention itself provides that 'nothing in this Part of the Convention (Part III of the Convention) shall be interpreted as implying the legalization of the position of migrant workers and members of their families who do not have documents or are in an irregular situation or the right to such legalization of their situation, nor does it affect measures aimed at ensuring healthy and fair conditions for international migration'.[35]

Also, according to the views of some authors, an additional reason for not ratifying the convention is that 'migrants' rights are already dealt with by other international treaties, including notably two ILO Conventions and the European Convention on the Legal Status of Migrant Workers'.[36] As another possible reason, the fact that the focus of this Convention is not on civil and political rights, but on social and economic rights, being known as the rights of the second generation of human rights, the effective implementation of which require significantly more resources than with the first generation of human rights.[37]

33 Convention no. 143 stipulates that 'Any Member which ratifies this Convention may, by a declaration appended to its ratification, exclude either Part I or Part II from its acceptance of the Convention'. The Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (No. 143), art. 16, para. 1.

34 Kovačević, 2007, p. 226.

35 Ibid.

36 Pécoud and De Guchteneire, 2006, p. 256.
The European Convention on the Legal Status of Migrant Workers from 1977 regulates the most important aspects of the legal status of migrant workers, with the aim of ensuring equal living and working conditions, as well as of domestic citizens. This source of law includes the rules on the employment of foreigners, their medical and professional testing during employment, the issuance of residence permits and work permits, the right to re-employment in case of involuntary unemployment and no-fault unemployment, as well as the services of national employment services. This Convention was ratified by only 11 member states of the Council of Europe (Albany, France, Italy, Netherlands, Norway, Portugal, Republic of Moldova, Spain, Sweden, Turkey and Ukraine). More details at: Kovačević, 2021, p. 839 [Online]. Available at: https://www.coe.int/en/web/Conventions/full-list?module=signatures-by-treaty&treatynum=093 (Accessed: 15 February 2026).

37 Pécoud, 2017, p. 60.

Regarding the member states of the European Union, the reason for not accepting the convention is often EU membership itself, despite the fact that the authoritative sources of EU law set only minimum standards and do not prevent the member states from accepting more advanced standards.[38] However, a large number of member states perceive the extent of European integration in the field of immigration policy as an obstacle to accessing universal international instruments in this area.[39] There are also legal obstacles, that refer to situations in which national laws would not be compatible with the Convention's provisions and would therefore need to be changed in the event of ratification.[40] Also, as Pécoud states,

> 'the non-ratification of the ICMW can also be interpreted as a purely political (or electoral) problem, because as foreigners, migrants are not citizens and (usually) cannot vote; ratification would then happen only in migrants' interests are understood as close to citizens', or if electorates were to express a solidarity with migrants and to call upon their governments to grant them rights'.[41]

It is also stated that 'given the small number of states that have ratified Convention, many countries fear to be among the first in their region to ratify it'.[42] Standing out amongst the strongest arguments against the ratification of the Convention, are the views of certain Governments in industrialised countries who have claimed that the Convention is far too detailed and ambitious, and that states' lack of interest showed that they question its relevance and usefulness.[43]

Finally, the information about the acceptance of the individual complaint's procedures under article 77 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families is devastating. Based on the available statistics, only seven member states of the Organisation of the United Nations have accepted this possibility, which does not allow individuals to submit individual complaints to the Committee on the Protection on the Rights of All Migrant Workers and Members of Their Families, because according to the Convention, the provisions of Article 77 will enter into force only when ten member states have accepted these individual complaints procedures.[44]

As a result of the previous analysis, and in connection with the problem of the insufficient number of ratifications of the Convention, the views of the authors who

38 Kovačević, 2021, p. 835.
39 Ibid.
40 De Guchteneire and Pécoud, 2010, p. 17.
41 Pécoud, 2017, p. 67.
42 Pécoud and De Guchteneire, 2006, p. 258.
43 De Guchteneire and Pécoud, 2010, p. 12.
44 The following countries accepted the individual complaints procedures under the Article 77 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families: Chad, Ecuador, El Salvador, Guatemala, Mexico, Turkey and Urugay.

consider this international document as one of the most neglected treaties in international human rights law seem more than justified.[45]

3. An Analysis of the Convention Structure

3.1. Introduction

The Convention, not counting the preamble, consists of nine parts: part I – Scope and Definition; part II – Non-discrimination with Respect to Rights; part III – Human Rights of All Migrant Workers and Members of their Families; IV – Other Rights of Migrant Workers and Members of their Families who are Documented or in a Regular Situation; part V– Provisions Applicable to Particular Categories of Migrant Workers and Members of their Families; part VI – Promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families; part VII – Application of the Convention; part VIII – General provisions and part IX – Final Provisions.

It could be said that the key sections of the Convention are Parts Three and Four, since these parts regulate the fundamental rights of migrant workers. Of particular importance is Part Three of the Convention, entitled 'Human Rights of All Migrant Workers and Members of Their Families'. Part Four of the Convention is dedicated to other rights of migrant workers and members of their families who have appropriate documents or regular status, and that is exactly what it is entitled. From the very wording of the titles of Parts Three and Four of the Convention, it can be concluded that Part Three applies to all migrants, regardless of their migration status, while the application of the provisions of Part Four of the Convention is reserved exclusively for migrants (and members of their families) who have appropriate documents or regular status.

3.2. Preamble

In the preamble of the Convention, the creators of the Convention refer to some of the most important international standards, adopted under the auspices of the United Nations and the International Labour Organisation, which also contain provisions on the protection of migrant workers. Provisions are highlighted for the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child. Relevant instruments that were elaborated within the framework of the International Labour Organisation have also been taken into account, especially the Convention concerning Migration for Employment (No. 97), the Convention concerning Migrations in Abusive Conditions and the

45 Pécoud, 2017, p. 57.

Promotion of Equality of Opportunity and Treatment of Migrant Workers (No. 143), the Recommendation concerning Migration for Employment (No. 86), the Recommendation concerning Migrant Workers (No. 151). The preamble also highlighted the importance of the work done, in connection with migrant workers and members of their families in various organs of the United Nations, such as among others, the Commission on Human Rights and the Commission for Social Development and the United Nations Educational, Scientific and Cultural Organisation.[46] The importance and extent of the migration phenomenon, which involves millions of people and affects a large number of States in the international community, is particularly emphasised, as well as the fact that the rights of migrant workers and members of their families have not been sufficiently recognised everywhere and therefore require appropriate international protection. It is also stated that migrations often cause serious problems for the members of the families of migrant workers as well as for the workers themselves, in particular because of the scattering of the family. Also, the creators of the convention pointed out that workers who are non-documented or in an irregular situation are in a particularly unfavourable position, because these categories of migrants are often employed under less favourable conditions of work than other workers and that certain employers take this as an inducement to seek such labour in order to reap the benefits of unfair competition. It has also been taken into account that recognition of the much broader fundamental rights of all migrant workers will affect the reduction of the desire for employment under unfavourable conditions of migrant workers who are in an emergency situation and, moreover, that granting certain additional rights to migrant workers and members of their families in a regular situation will encourage all migrants and employers to respect and comply with the laws and procedures established by the State concerned. Based on everything stated in the preamble, it is concluded that there is a need to ensure the international protection of the rights of all migrant workers and members of their families, reaffirming and establishing basic norms in a comprehensive convention which can be universally applied.

3.3. Part One of the Convention

The first part of the Convention mostly contains norms which determine the field of application of the Convention. Within it, basic subjects are defined, whose rights are recognised in the following parts. The first article states that the Convention is applicable to all migrant workers and members of their families without distinction of any kind, including sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.[47] This confirms the principle of equal chances and treatment, as one of the basic principles promoted in the standards of the

46 The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Preamble.
47 The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 1.

United Nations Organisation, and above all in the framework of the Universal Declaration of the UN which foresees, in an almost identical way as the Convention, that

> 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty'.[48]

In addition to the above, it is determined that the Convention shall apply during the entire migration process of migrant workers and members of their families, which comprises preparation for migration, departure, transit and the entire period of stay and remunerated activity in the State of employment as well as return to the State of origin or the State of habitual residence.[49] The aforementioned solution was not well received by the professional public, and as some authors stated, 'Even during the drafting of the text of the Convention, developed countries were against establishing such a broad field of application of the Convention, while underdeveloped and poor countries wholeheartedly supported such a solution'.[50] The above can be considered as another reason for the insufficient number of ratifications of the Convention, bearing in mind that the creators of the Convention accepted the solution advocated by the developing countries, from which the majority of migrant workers originate.

A migrant worker is defined as a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.[51] As Professor Kovačević states,

> 'taking into account the importance of this UN instrument in the system of international instruments for the protection of human rights, it can be expected that the aforementioned definition will be universally accepted, especially for the reason that the relevant convention recognizes the right of all migrant workers to enjoy human rights regardless of their legal status'.[52]

In addition to the term migrant worker, the terms seasonal worker, seafarer, worker on an offshore installation, itinerant worker, project-tied worker, specified-employment worker and self-employed worker, all of which refer to a migrant worker who is

48 Universal Declaration, Art. 2.
49 The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Art. 1, para. 2.
50 Kovačević, 2021, p. 833.
51 The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Art. 1.
52 Kovačević, 2021, p. 832.

engaged in a remunerated activity otherwise than under a contract of employment and who earns his or her living through this activity normally working alone or together with members of his or her family, and to any other migrant worker recognised as self-employed by applicable legislation of the State of employment or bilateral or multilateral agreements.

The term 'members of the family' refers to persons married to migrant workers or having a relationship with them that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognised as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned.[53] Both migrant workers and members of their families are expected to have the above status provided that they are authorised to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party.[54] However, the status of migrant workers and members of their family will also be given to those who do not have valid documents or regular status, and because they do not meet the conditions established in the previous paragraph.

Finally, this part defines the terms of country of origin, country of reception and country of transit. The term State of origin is defined as the State of which the person concerned is a national, while the term state of employment is defined as 'a State where the migrant worker is to be engaged, is engaged or has been engaged in remunerated activity, as the case may be'.[55] Finally, the term 'State of transit' means 'any State through which the person concerned passes on any journey to the State of employment or from the State of employment to the State of origin or the State of habitual residence'.[56]

3.4. Part Three of the Convention

This section contains provisions that at first glance could be called 'variegated', bearing in mind that they regulate the most diverse human rights guaranteed to migrants, both civil and political, as well as economic and social. It might even be argued that the sequence of the aforementioned provisions could not be considered systematic, but rather that the provisions guaranteeing the most diverse rights to migrant workers and members of their families are listed without any clear order. On the one hand, many of these articles, specify the application of rights spelled out in the International Covenants on Civil and Political Rights and on the International Covenants on Economic, Social and Cultural Rights. On the other hand, the Convention also includes a number of rights addressing specific protection needs and providing additional guarantees in the light of the particular vulnerability of

53 The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Art. 4.
54 Ibid., Art. 5.
55 Ibid., Art. 6.
56 Ibid., Art. 6.

migrant workers and members of their families.[57] Therefore, within the third part of the Convention, we can speak of two groups of provisions, which are unfortunately mixed: firstly, those that guarantee respect for migrants' fundamental human rights and secondly, those that assume that migrants are a vulnerable group, and that they may be particularly endangered in certain situations – therefore, they prescribe the protection of those rights that may be violated precisely in those specific situations in which migrant workers and members of their families may find themselves.

3.4.1. The First Group of Provisions within Part Three of the Convention

The *first* group of provisions includes the provision of Article 9, which guarantees migrants and their family members the right to life, which is stipulated as protected by law. At this point, it is not very clear which law is meant. It should also be noted that the guarantee of the right to life should be stipulated in the first place as one of the basic human rights, and not after the article that protects other rights of migrants, namely those that we have placed in the rights regulated by the second group of provisions (rights reserved for migrants as a specific group).

Article 12 paragraph 1 of the Convention stipulates that migrant workers and members of their families have the right to freedom of thought, conscience and religion, while Article 13 paragraph 1, specifies the right to hold opinions without interference. Furthermore, Article 14 lays down the right to the privacy of migrant workers and members of their families, as the cited article states that

> 'no migrant worker or member of his or her family shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home, correspondence or other communications, or to unlawful attacks on his or her honour and reputation (...)'.

Article 15 of the Convention stipulates that 'no migrant worker or member of his or her family shall be arbitrarily deprived of property, whether owned individually or in association with others'. The cited article primarily protects the property rights of migrants and their family members, although the concept of property is much broader than the concept of property rights. We can make this conclusion based on the fact that the article states that the right to property will be protected regardless of whether it is owned individually or in community with another person, which we interpret to mean that the right to property will be protected regardless of whether the migrant (or a member of his or her family) is the exclusive owner of a movable or immovable property or, on the other hand, he or she is only one of the owners – either a co-owner or a joint owner – of a specific property. In the event of a migrant worker or a member of his or her family being deprived of their property rights through an expropriation procedure, they will, as is the rule, have the right to appropriate compensation. Article 32 should also be cited here, as it guarantees the right of migrant workers and

57 United Nations Office of the High Commissioner for Human Rights, 2005, p. 5.

members of their families to transfer their earnings and savings and their personal effects and belongings after the end of their stay in the State of employment.

Article 24 states that 'every migrant worker and every member of his or her family shall have the right to recognition everywhere as a person before the law'. Regarding the term 'person', the drafters of the Convention probably meant a legal entity in the sense of a natural person as a person with legal capacity, that is, someone with the ability to be the holder of all rights and obligations recognised by the legal order.

As the Convention includes in its title members of the families of migrant workers, it is not surprising that two articles are dedicated exclusively to children of migrant workers, in the sense that 'each child of a migrant worker shall have the right to a name, to registration of birth and to a nationality'.[58] Also, every child of a migrant worker shall have the right of access to education on the basis of the equality of treatment with nationals of the State concerned – access to public pre-school educational institutions and schools – regardless of the fact that in a specific case, their status is unregulated in relation to the residence or employment of either parent, or that their status is possibly unregulated in relation to the residence of the child him or herself, and also in the country of employment. The latter, that children are recognised as having the right to education regardless of the regularity or irregularity of the parents' status, was not necessary to state in the text of the article itself, since the entire third part of the Convention indicates by its title that these are rights guaranteed to all migrants and members of their families, where 'all' refers precisely to the fact that it is irrelevant whether a particular migrant worker or a member of his or her family has a regular residence or employment status or not.[59]

Migrant workers and members of their families are also guaranteed the right to medical treatment when necessary.[60] This article again emphasises that such emergency medical care shall not be refused to them for any irregularity with regards to their stay or employment.[61] The same criticism could be levelled at this article as at Article 30 of the Convention, for the same reason that has already been stated. Namely, in Art. 28 and 30 it is emphasised that the rights contained in these articles are guaranteed to all migrant workers and members of their families regardless of the regularity of their status in terms of residence and employment, which is unnecessary considering the title of the entire third part in which the cited articles are located. However, perhaps the creators of the Convention decided on such formulations since they are dealing with matters of vital importance for the lives of migrants in a foreign country, namely medical services and access to the education system, and therefore they believed that it should be emphasised that these rights are available to everyone without exception.

58 The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Art. 29.
59 Ibid., Art. 30.
60 Ibid., Art. 28.
61 Ibid., At. 28.

3.4.2. The Second Group of Provisions within Part Three of the Convention

The *second* group of provisions includes those that guarantee migrants the rights they need to be protected in any specific situations they may find themselves in, given their situation, and above all the fact that they are outside the territory of their country of origin. Hence, migrant workers and members of their families are guaranteed the right to leave any country, including their country of origin, as well as the right to enter at any time and remain in their country of origin;[62] as well as the right to respect for their cultural identity.[63] The Convention also guarantees this group of persons that they will not be subjected to mass expulsions, except in cases provided for by law.[64] In the event of expulsion, but also in all other cases where the rights recognised in the Convention are in doubt, migrant workers (and members of their families) shall have the right to seek assistance from the consular and diplomatic missions of their State of origin or from the State representing the interests of their State of origin.[65]

Within this second group of provisions, several subgroups of provisions can be distinguished. The first subgroup includes those provisions that are dedicated to the protection of the physical integrity of migrant workers and members of their families, and the protection of migrants from violence in any form. Thus, Article 16 of the Convention stipulates that migrant workers and members of their families shall have the right to the liberty and security of person; that they shall be entitled to effective protection by the State against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions; that they shall not be subjected individually or collectively to arbitrary arrest or detention. Article 10 stipulates that no migrant worker or member of his or her family shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment, which is in line with the provisions of the United Nation Convention against Torture and Other Cruel, Inhuman or Degrading Treatment.

With the same aim Art. 11 of the Convention was formulated, which guarantees that migrant workers and members of their families will not be held in slavery. At first glance, the cited provision seems outdated, since the institution of slavery does not exist today. However, given that there are cases which actually took place, the creators of the Convention believed that this provision should belong in such a text. The same article prohibits forced or compulsory labour except in exceptional and justified situations specified in this Convention. Therefore, prohibition of forced or compulsory work shall not exclude cases where imprisonment with hard labour may be imposed as the punishment for a crime, the performance of hard labour in pursuance of a sentence to such a punishment by a competent court, or any work or service normally required of a person who is under detention in consequence of a lawful order of a court or of a person during conditional release from such detention,

62 Ibid., Art. 8 paras. 1–2.
63 Ibid., Art. 31.
64 See: Ibid., Art. 22.
65 Ibid., Art. 23.

any service exacted in cases of emergency, of calamitous threat of life, or of the well-being of the community and any work or service that forms part of normal civil obligations so far as it is imposed also on citizens of the State concerned.[66] The aforementioned part of Article 11, which refers to the prohibition of compulsory and forced labour, seems more than justified, bearing in mind that migrants are often exposed to forced labour and exploitation, and it is important that states systematically and continuously combat these phenomena.[67] It is particularly important to bear in mind that these phenomena are also prohibited by other relevant standards of the United Nations, as well as by the International Labour Organisation conventions No. 29 and No. 105, which have been included in the fundamental conventions of this organisation since 1998 and have been ratified by a large number of member states. Finally, the prohibition of forced and compulsory work is also established in Art. 4 of the European Convention on Human Rights and Fundamental Freedoms, and the case law of the European Court of Human Rights is also an indispensable source.

Another special subgroup of provisions could be distinguished, which guarantees the protection of migrant workers and members of their families in situations where they are deprived of their liberty due to arrest, detention or imprisonment. In this case, the Convention guarantees them all rights that, at the current stage of development of almost every society and of human rights in general, are regularly guaranteed to persons deprived of their liberty.[68]

The third subgroup of provisions, all within the second group, would include those provisions of the Convention that guarantee certain rights to migrant workers during trials (the right to equality with nationals of the state in which the migrant worker is being tried; the right to a fair and public hearing; the right to the presumption of innocence; the right to be brought before a court without delay; the right to legal assistance; the right to a free interpreter; the right to legal remedies, etc.).[69] These rights, which can be condensed to the right of migrants to access justice, are of particular importance for migrant workers, considering that they are in an even more disadvantaged situation, because in addition to their lack of knowledge of the legal system and language, they often face trauma, disorientation and sensitivity, and therefore need additional help and support.[70] For this reason, it was necessary to regulate these rights in detail, all with the aim of ensuring effective legal protection.

In the fourth subgroup of provisions (within the second group), we would place the provisions of Articles 25, 26 and 27 of the Convention, which regulate the fundamental rights of migrant workers in the field of work and social security, all with the aim of applying to them the same treatment as domestic citizens. According to the provisions of the Convention, migrant workers are guaranteed some of the most

66 Ibid., Art. 11.
67 Krstić, 2018, p. 33; For more details: Costello, 2015, pp. 189–227.
68 See: Art. 16 paras 5–9. and art. 17 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.
69 See: Ibid., Art. 18.
70 Krstić, 2018, p. 37.

important individual labour rights, such as the right to remuneration; the right to limited working hours; weekly rest, holiday with pay; the right to protection at work, and health care, as well as rights related to protection from termination of employment. Equal treatment of domestic workers and migrant workers in terms of employment has also been foreseen in areas such as, the minimum age of employment, the restriction on working from home, and any other matters which according to national law and practice, are considered a term of employment.[71]

In addition to individual rights, migrant workers, as well as their family members, are guaranteed the following collective rights: to take part in meetings and activities of trade unions and of any other associations established in accordance with law, with a view to protecting their economic, social, cultural and other interests, subject only to the rules of the organisation concerned, and to seek aid and assistance of any trade union and of any such association.[72] They are also guaranteed to freely join any trade union or any such association, which fits into the concept of a positive form of freedom of association, guaranteed by the relevant standards of both the United Nations and the International Labour Organisation.

Finally, when it comes to social security rights, the Convention stipulates that migrant workers and members of their families shall enjoy the same treatment granted to nationals in the State of employment, so long as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties, with a note that the competent authorities of the State of origin and the State of employment can at any time establish the necessary arrangement to determine the modalities of application of this norm.[73] It is also foreseen that where the applicable legislation does not allow migrant workers and members of their families a benefit, the States shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances.[74]

3.4.3. Criticism of Part Three of the Convention

As we have already pointed out at the beginning, the main criticism of Part three of the Convention is the lack of systematicity of the guaranteed rights, which are regulated by the provisions of this Part of the Convention, which follow one after the other without any particular or logical sequence. Therefore, we have attempted to make some kind of systematisation of the cited provisions, according to the criterion of the similarity of the rights guaranteed by them. In this way the analysis of Part three of the Convention has been carried out in this part of the paper.

Another criticism is about the content of individual provisions, and can be formulated through the question: Were individual provisions really necessary and does

71 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Art. 25.
72 Ibid., Art. 26.
73 Ibid., Art. 27 para. 1.
74 Ibid., Art. 27 para. 2.

the large number of provisions lead to member states of the United Nations refusing to ratify this convention? Thus, as an example, we can take the provision of Art. 29, paragraph 1, which stipulates that 'no migrant worker or member of his or her family shall be imprisoned merely on the ground of failure to fulfil a contractual obligation'. The intention, and above all the fear, of the creators of the Convention when creating this text is clear. An awareness of the vulnerability of the group of people to whose protection the text of the Convention is dedicated has led to the fact that in several places it may even be 'excessive' in prescribing the measures of that protection. One example is the provision just quoted, which stipulates that no one shall be deprived of his liberty in the event of a failure to perform a contractual obligation. The question could arise concerning under which legal system the creators of the Convention saw that in the event of the non-performance of a contractual obligation, the contractor could be sentenced to imprisonment. Such a sanction is not possible in civil law, since in that field of law all sanctions are of a property nature. Hence, the sanction for non-performance of a contractual obligation could be a request for performance, or the right to terminate the contract and the right to compensation for damages. Of course, we are aware that members of vulnerable groups can be victims in many situations, but unfortunately, this cannot be prevented using this method. On the contrary, such formulations become meaningless and deservingly become the subject of harsh criticism from lawyers.

The third criticism would be similar to the second, in that it could again be asked whether the protection of migrant workers (and their family members) has perhaps been 'overdone'. But here we are referring to 'overdoing' that has gone in a completely different direction from that described in the previous paragraph. Let us take, for example, Art. 19, para. 2 of the Convention. It stipulates that 'humanitarian consideration related to the status of a migrant worker, in particular with respect to his or her right of residence or work, should be taken into account in imposing a sentence for a criminal offence committed by a migrant worker or a member of his or her family'. It could be said that with this provision, the creators of the Convention not only 'overdid' their efforts in protecting migrant workers but also entered illegal territory. Instead of criticising this position, we can ask the question: Can we be surprised that leading European countries do not accept the Convention? If we only look at the text of the provision that stipulates that when sentencing a migrant worker or a member of their family who has committed a criminal act, the humanitarian aspect of their status will be taken into account, which we interpret as also being taken into account as a mitigating circumstance, which means placing migrant workers who are the perpetrators of criminal acts in a more favourable position compared to citizens of the receiving countries.

3.5. Part Four of the Convention

Unlike Part three of the Convention, which contains provisions regulating the rights reserved for all migrant workers and members of their families regardless of the regularity of their migration status, Part four of the Convention is dedicated only to those

migrant workers (and members of their families) who have appropriate documents or a regular status. Thus, for persons with regular status, i.e. appropriate documents, in addition to the rights regulated by Part three of the Convention, a whole series of rights are reserved for and guaranteed to them.[75]

In Part Four of the Convention, several provisions have been included that have as their primary objective the protection of the families of migrant workers, since within the meaning of Article 44, paragraph 1 of the Convention, Member States recognise that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. It is precisely for this reason that the Convention imposes on States Parties the corresponding duties – to take appropriate measures to ensure the integrity of the families of migrant workers,[76] as well as measures aimed at facilitating the reunification of migrant workers with their spouses, persons who have a relationship with migrant workers that, under positive legislation, has the character of a marital union (obviously, this refers to extramarital partners), and their unmarried children whom they support.[77]

When it comes to family members of migrant workers, the Convention stipulates that they shall have equal treatment in the country of employment with that of nationals of that country. This means equal treatment in terms of access to, educational institutions and services, vocational guidance and training institutions and services, social and health services, cultural life and their right to participate in it.[78] With the aim of further protecting the families of migrant workers, the Convention also predicts that migrant workers shall have the right to transfer their earnings and savings, in particular those funds necessary for the support of their families, from the State of employment to their State of origin or to any other State.[79]

Furthermore, the Convention also regulates the right to the temporary absence of migrant workers and members of their families, without consequences on their residence and work permits, which they will be able to exercise especially when they have certain obligations in their country of origin;[80] on the other hand, in the case of the death of a migrant worker or the dissolution of their marriage, the State of employment shall favourably consider granting family members of that migrant worker residing in that State, on the basis of family reunion, an authorisation to stay.[81] When making a decision, the State of employment shall take into account the length of time they have already resided in the host State. In the event that family members do not receive a residence permit, they will be allowed a reasonable period of time in order to enable them to settle their affairs in the State of employment.[82]

75 Ibid., Art. 36.
76 Ibid., Art. 44 para. 3.
77 Ibid., Art. 44 para. 3.
78 Ibid., Art. 45 para. 1 items a–d.
79 Ibid., Art. 47.
80 Ibid., Art. 38.
81 Ibid., Art. 50 para. 1.
82 Ibid., Art. 50 para. 2.

Special attention is paid to the care of children of migrant workers, for whom it is necessary to facilitate their integration in the local school system (particularly with respect to teaching them the local language) as well as teaching them their mother tongue and culture.[83]

Several articles of the Convention are only devoted to migrant workers and not to their families members, either because they guarantee rights that are already provided by another article to family members of migrant workers, or because they concern matters that concern migrant workers exclusively. In all these cases, it is also provided that migrant workers shall be treated equally to nationals of the State of employment. Thus Article 43 stipulates that migrant workers shall enjoy equality of treatment with nationals of the State of employment with respect to their access to educational institutions and services subject; with respect to their access to vocational training and retraining facilities and institutions; with respect to social and health services; with respect to access to housing, including social housing schemes, and protection against exploitation with respect to rents and with respect to their access to and participation in cultural life.[84] Furthermore, when it comes to the articles of the Convention dedicated only to migrant workers, and not to members of their families, which provide migrant workers with the same equal treatment as that for nationals of the State of employment, Articles 54 and 55 of the Convention should also be mentioned. They provide that migrant workers will be equal to domestic citizens in terms of protection against dismissal, unemployment benefits, and access to alternative employment in the event of loss of work or termination of other remunerated activity,[85] as well as when performing paid activities.[86] In connection with the mentioned rights, it is stipulated that

> 'if a migrant worker claims that the terms of his or her work contacted have been violated by his or her employer, he or she shall have the right to address his or her case to the competent authorities of the state of employment'.[87]

In addition to the previously cited articles, Part four of the Convention prescribes some other rights for migrant workers, namely: the right for them to be informed regarding their admission to the country of employment, and in particular regarding the stay and remunerated activities they may engage in.[88] When it comes to paid activities carried out by migrant workers in the territory of the State of employment,

83 Ibid., Art. 45 paras. 2–3.
84 Ibid., Art. 43 para. 1 items a, b, c, d, e and g. Cf. Art. 43 para. 1 with Art. 45 para. 1. Their content is somewhat similar; the first article regulates the rights of migrant workers, while the second is dedicated to the protection of family members of migrant workers.
85 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Art. 54 para. 1 items a–d.
86 Ibid., Art. 55.
87 Ibid., Art. 54 para. 2.
88 Ibid., Art. 37.

it should be noted that the Convention devotes several articles to this issue. Namely, where separate authorisations to reside and to engage in employment are required by national legislation, the States of employment shall issue an authorisation of residence to migrant workers for at least the same period of time as their authorisation to engage in remunerated activity.[89] A migrant worker who ceases to perform paid work before the expiration of his/her work permit shall not be considered a person with an irregular status, nor will he or she lose his or her residence permit.[90] This is the case in countries of employment where the migrant worker can freely choose which paid activity they wish to perform.[91]

3.6. Part Five of the Convention

Part five of the Convention contains provisions that apply exclusively to special categories of migrant workers and members of their families. Within the so-called special categories of migrants, the Convention distinguishes six groups of workers: frontier workers, seasonal workers, itinerant workers, project-tied workers, specified-employment workers and self-employed workers. The Convention devotes a separate article to each of these groups of workers, regulating their position. However, the definitions for each of these categories of workers are contained, as previously stated, in Article 2, paragraph 2 of the Convention.

The term frontier worker means a migrant worker who retains his or her habitual residence in a neighbouring State to which he or she normally returns every day or at least once a week.[92] The specificity of the position of this category of migrant workers, on the one hand, is that they are indisputably present in some way in the territory of the State of employment, since they work there, but on the other hand they do not have a permanent residence in the State of employment. This is precisely why the question arises as to whether the provisions of Part Four of the Convention can be applied to them at all, since as has already been discussed, they are reserved only for those migrant workers (and members of their families) who have the appropriate documents or a regular position. Therefore, Article 58, paragraph 1 expressly stipulates that this category of migrant workers will have those rights provided for in the aforementioned Part of the Convention that can be applied to them due to their work and presence in the territory of the State of employment, taking into account that they do not have a permanent residence in that State.

A seasonal worker is defined by the Convention as a migrant worker whose work by its character depends on seasonal conditions and is performed only during a part

89 Ibid., Art. 49 para. 1.
90 Ibid., Art. 49 para. 2.
91 Ibid., Art. 49 para. 2. For States of employment in which a migrant worker is allowed to freely choose his remunerated activity, in addition to the cited Art. 49, see also Art. 52 of the Convention. For States of employment in which a migrant worker is not allowed to freely choose his remunerated activity, see: Art. 51 of the Convention.
92 Ibid., Art. 2 para. 2 item a.

of the year.[93] As in the case of frontier workers, the Convention also reserves the possibility of applying the provisions of Part Four to seasonal workers, which regulates those rights that may be applied to them by reason of their presence and work in the territory of the State of employment, and that are compatible with their status in that State as seasonal workers, taking into account the fact that they are present in that State for only a part of the year.[94]

The third category of migrant workers, and within the broader group, is the so-called special categories of migrant workers, includes itinerant workers. It is a migrant worker who, having his or her habitual residence in one State, has to travel to another State or States for short periods, owing to the nature of his or her occupation.[95] These workers shall enjoy those rights under Part Four of the Convention, due to their presence and work in the territory of the State of employment, which is consistent with their status as a migrant workers in that State.[96]

The most detailed regulation is the position of so-called project-tied workers. The term refers to a migrant worker admitted to a State for a defined period to work on a specific project being carried out in the State by his or her employer.[97] It should be noted that in the case of regulating the position of frontier, seasonal and itinerant workers, which was written about previously, the drafters of the Convention have not made mention of members of their families, while they do so in the case of so-called project-related workers. However, when it comes to this category of migrant workers, although protection is extended to members of their families, the range of provisions from Part Four of the Convention that apply to them is narrowed (which was not the case with the previous categories). Namely, the provisions that would guarantee this category of workers' rights are those in relation to access to vocational guidance and placement services; those in relation to their access to vocational training and retraining facilities and institutions, and access to housing, including social housing schemes and protection against exploitation in respect of rents.[98] Also, this category of migrant workers will not, by the very logic of this process, and because they are workers working on a specific project, be subject to the provisions of the Convention applying to those migrant workers who perform certain paid activities (provisions regarding the limitations and conditions under which these activities can be chosen, provisions providing protection against dismissal, and protection in the event of unemployment, etc.).[99] With regards to members of their families, they will not enjoy, while under employment in the State, equality of treatment with nationals of the State, in relation to access to vocational guidance and training institutions and services.[100]

93 Ibid., Art. 2 para. 2 item b.
94 Ibid., Art. 59 para. 1.
95 Ibid., Art. 2 para. 2 item e.
96 Ibid., Art. 60.
97 Ibid., Art. 2 para. 2 item f.
98 Ibid., Art. 43 para. 1 items b–d.
99 Ibid., Arts. 52–55.
100 Ibid., Art. 45 para. 1 item d.

Within the category of 'specified-employment worker', the Convention distinguishes three groups of workers. The first subgroup consists of migrant workers who have been sent by their employer for a restricted and defined time period to a State of employment to undertake a specific assignment or duty. The second subgroup consists of migrant workers who engage for a restricted and defined time period in work that requires professional, commercial, technical or other highly specialised skills. And finally, the group referred to as specified-employment worker includes migrant workers who, upon the request of their employer in the State of employment, engage for a restricted and defined period of time in work whose nature is transitory or brief and who are required to depart from the State of employment either at the expiration of their authorised period of stay, or earlier if they no longer undertake the specific assignment or duty or engage in the work that they were engaged for.[101] All the provisions of Part Four of the Convention shall apply to this category of migrant workers, except those provisions which provide for access to vocational guidance and placement services, access to vocational training and retraining facilities and institutions, and access to housing, including social housing schemes and protection against exploitation in respect of rents.[102] Additionally, provisions regulating the conditions and restrictions under which paid activities can be chosen in the country of employment,[103] as well as provisions guaranteeing national treatment to migrant workers in terms of access to alternative employment in the event of loss of work or termination of other remunerated activity[104] will not be applied in this category. As for the members of the families of migrant workers, they will have all the rights provided for in Part Four of the Convention (of course, those reserved for family members, not for migrant workers themselves), except for those provided for in Article 53, which regulates the possibility of carrying out remunerated activities.

The last category is the so-called self-employed worker, which refers to a migrant who is engaged in a remunerated activity not under a contract of employment and who earns his or her living through this activity normally working either alone or with members of his or her family, as well as to any other migrant worker recognised as self-employed by the applicable legislation of the State of employment or bilateral or multilateral agreements.[105] This kind of worker shall be entitled to the rights provided in part IV with the exception of those rights which are exclusively applicable to workers having a contract of employment.[106]

101 Ibid., Art. 2 para. 2 item g.
102 Ibid., Art. 43 para. 1 items b–d.
103 Ibid., Art. 52.
104 Ibid., Art. 54 para. 1 item d.
105 Ibid., Art. 2 para. 2 item h.
106 Ibid., Art. 63 para. 1.

3.7. Part Six of the Convention

Part Six of the Convention is dedicated to promoting fair, equitable, humane and full conditions of the international migration of workers and members of their families,[107] without prejudice to the provision of Article 79 of the Convention, which stipulates that nothing in the Convention shall affect the right of each State Party to establish criteria for the admission of migrant workers and members of their families. This means, first of all, that when it comes to migrant workers and their families, due attention should be paid not only to the conditions and needs of work, but also to all other social, economic, cultural and other needs of these persons.[108] These objectives will be achieved, *inter alia*, by establishing appropriate services to deal with issues related to the international migration of workers and their families such as, for example, providing information on policies, laws and regulations relating to migration and employment, on relevant agreements that have been concluded, and providing information and appropriate assistance to these persons on the necessary permits concerning the departure, travel, arrival, residence, working and living conditions in the country of employment.[109]

When it comes to migrant workers who do not have a regular status, State Parties, including States of transit, shall collaborate with a view to prevent and eliminate illegal or clandestine movements and the employment of migrant workers in an irregular situation. The measures that states will take to this end are: measures against the dissemination of misleading information; measures to detect and eradicate illegal or clandestine movements of migrants and measures to impose effective sanctions on persons, groups or entities which organise, operate or assist in organising or operating such movements, as well as measures to impose effective sanctions on persons, groups or entities which use violence, threats or intimidation against migrants workers (and their families).[110] Also, States of employment will combat the employment of migrant workers who do not have a regular status, by eliminating employment and applying sanctions on employers of such workers.[111] The goal of all member states, when it comes to migrant workers with an irregular status, is the same – to strive to keep such a situation as short as possible.[112]

On the other hand, when it comes to migrant workers who have a regular status, the Convention imposes on member states the duty to treat such persons in the same way as nationals, and in terms of taking measures to ensure working and living conditions complying with standards of fitness, safety, health and principles of human dignity.[113]

107 Ibid., Art. 64 para. 1.
108 Ibid., Art. 64 para. 2.
109 Ibid., Art. 65.
110 Ibid., Art. 68 para. 1 items a–c.
111 Ibid., Art. 68 para. 2.
112 Ibid., Art. 69 para. 1.
113 Ibid., Art. 70.

4. Monitoring: The Committee on the Protection on the Rights of All Migrant Workers and Members of Their Families

4.1. Introduction

The Part seven of the Convention is entitled Implementation of the Convention. A special body was established to monitor the implementation of the Convention – the Committee on the Protection on the Rights of All Migrant Workers and Members of Their Families.[114] The members of the Committee are elected by the Member States themselves, by secret ballot, from a list of candidates proposed by the Member States themselves.[115] The Secretary-General of the United Nations shall ensure the necessary staff and conditions for the effective work of the Committee, whose members shall receive their remuneration directly from the United Nations.

4.2. Committee's Competence

4.2.1. Competence of the Committee with Regard to Reports Submitted by Member States

Article 73 of the Convention requires States Parties to submit to the Secretary-General of the United Nations reports on the legislative, judicial, administrative and other measures they have taken to put into force the provisions of the Convention. The reports submitted are considered by the Committee. There are two types of these reports: the first must be submitted within one year of the date of entry into force of the Convention for each State Party individually; within the second type of report, we can distinguish two sub-types of reports – the first sub-type consists of those reports that we could call 'regular' because they are regularly submitted every five years, while the second sub-type consists of those reports that could be called 'upon request' because they are obliged to be submitted by States Parties only at the request of the Committee. All these reports, provided for in the aforementioned Article 73 of the Convention, must contain two types of information: firstly the difficulties that exist in connection with the implementation of the Convention, if of course, there are any at all, and secondly, information on the characteristics of the migration flows in which the State Party, the reporting party, is involved. The Committee is obliged to consider each report received and if it considers it necessary for some reason, to send comments on the report to the reporting party, but possibly also to request additional information from it.[116]

Based on the analysis of all reports received during the period of a year, the Committee will prepare its report on the implementation of the Convention, which it will submit to the United Nations General Assembly.[117]

114 Ibid., Art. 72 para. 1 item a.
115 Ibid., Art. 72 para. 2 item a.
116 Ibid., Art. 74 para. 1.
117 Ibid., Art. 74 para. 7.

Requirements regarding the form and contents of initial reports are contained in The Provisional Guidelines regarding the form and contents of initial reports to be submitted by States parties under Article 73 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.[118] While when writing the so-called periodic reports, the provisions of the Guidelines for the Periodic Reports to be submitted by States Parties under Article 73 of the Convention must be respected, in terms of form and content.[119]

Several problems may arise with regard to the prescribed obligation to submit the aforementioned obligations. Firstly, it is possible that individual states do not fulfil their obligation or at least do not fulfil them within the prescribed deadline. The second problem concerns the quality of the written reports, primarily in terms of content. This leads to the fact that individual states are thus subject to review by the Committee, unlike others that by not submitting reports, avoid this type of control by the Committee, or are controlled to a somewhat lesser extent due to the more modest content of the reports submitted.[120]

4.2.2. Competence of the Committee with Regard to Applications Submitted by Member States

In addition to its proficiency in considering reports from States Parties, the Committee also has the competence to receive and consider communications from States Parties in which the submitting State Party claims that another State Party is not fulfilling its obligations under the Convention.[121]

The condition for a State party to submit a complaint against another State party to the Committee is that it accepts this competence of the Committee, that is, it accepts that it too could be 'reported' for the violation of a provision of the Convention. However, the submission of a complaint to the Committee by a State party, in relation to the conduct of another State party, more precisely concerning its failure to fulfil the obligations undertaken by its ratification the Convention, is considered a last resort. In other words, the Convention prescribes a procedure, in the form of a sequence of steps, that must be followed before the complaint can be received and considered by the Committee. Namely, if one State party considers that another State party is not fulfilling its obligations under the Convention, it should first try to resolve the matter by addressing the specific State party in writing. Within three months of the date of receipt of the application by another State, the State receiving the application should send to the State sending the application an explanation regarding the matter in question, and any information regarding the domestic procedures and remedies that have

118 See: https://documents.un.org/doc/undoc/gen/g05/415/17/pdf/g0541517.pdf (Accessed: 10 June 2025).
119 See: https://documents.un.org/doc/undoc/gen/g08/421/36/pdf/g0842136.pdf (Accessed: 10 June 2025).
120 For more details: Chetail, 2020, pp. 601–644.
121 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Art. 76 para. 1.

been or may be taken in relation to the specific case.[122] If the problem is not resolved at the level of direct communication between the two Member States, then either of the two Member States concerned shall have the right to refer the matter to the Committee within six months of receipt of the first application.[123] In addition to this prior direct communication between the two Member States, there is another condition that must be met in order for the Committee to consider a received application.[124] It is necessary that all domestic legal remedies would have been exhausted first.

The Committee shall consider all applications in closed sessions.[125] During these sessions it may invite the States Parties concerned to submit any relevant information.[126] The States Parties concerned shall also have the right to submit oral and written submissions during the consideration of the case by the Committee.[127] The Committee shall submit its report within twelve months of the receipt of the case.[128] The content and scope of the report shall depend on whether the case has been settled in a 'friendly' manner, as the text of the Convention itself states.[129] Therefore, if the case has been settled amicably between the two States Parties, with the assistance of the Committee and with a view to respecting all the obligations undertaken under the Convention, the Committee's report shall contain only a brief statement of the facts established and the solution reached.[130] Otherwise, the Committee shall set out in its report the relevant facts relating to the question between the States Parties, together with written evidence and records of the oral statements made by the representatives of the States Parties.[131]

4.2.3. The Committee's Competence over Individual Applications

The Committee also has jurisdiction to receive and consider communications from individuals who claim that one of their rights as guaranteed by the Convention has been violated by a State party. In order for the Committee to receive such a communication in the first place, it is necessary that the State within whose jurisdiction the applicant is located has declared that it accepts the Committee's jurisdiction to consider such communications.[132]

In order for the Committee to consider the aforementioned application, the following conditions must be met: firstly, that the same issue has not been the subject of another international investigation procedure,[133] and secondly, that the

122 Ibid., Art. 76 para. 1 item a.
123 Ibid., Art. 76 para. 1 item b.
124 Ibid., Art. 76 para. 1 item c.
125 Ibid., Art. 76 para. 1 item e.
126 Ibid., Art. 76 para. 1 item f.
127 Ibid., Art. 76 para. 1 item g.
128 Ibid., Art. 76 para. 1 item h.
129 Ibid., Art. 76 para. 1 item d.
130 Ibid., Art. 76 para. 1 item h, subpara i.
131 Ibid., Art. 76 para. 1 item h, subpara ii.
132 Ibid., Art. 77 para. 1.
133 Ibid., Art. 77 para. 3 item a.

individual submitting the application has first exhausted all available legal remedies before the authorities of his or her own State.[134] The Committee shall transmit any communication received from the State Party alleged to be violating the provisions of the Convention, which should have been submitted to the Committee within six months, explanations concerning the problem itself, and any remedies which might be available.[135] On the basis of an application submitted by an individual, the Committee will consider the case in closed sessions and address its views, based on all the information received from both the individual and the 'accused' Member State, to the individual and the Member State concerned.[136]

4.3. Development of the Committee's Functions

For the Committee on Migrant Workers, neither the inter-State communications procedure nor the individual complaint mechanism have yet entered into force. Article 76 gives the Committee competence to receive and consider communications by a State Party alleging violations of the Convention by other State Parties who had made the necessary declaration under article 76. But this inter-State complaint mechanism will become operative when ten States Parties have made the necessary declaration under article 76. Article 77 of the Convention gives the Committee the ability to receive and consider individual communications alleging violations of the Convention by States parties who had made the necessary declaration under article 77. Furthermore, this individual complaint mechanism will become operative when ten States Parties have made the necessary declaration under article 77.

In addition to the functions performed by the Committee with regards to the reports received from Member States, as well as the functions with regards to the applications submitted by Member States and individuals, another of its functions can be distinguished. It is true that it is not as clearly distinguished in the provisions of the Convention as the three functions described above. It concerns the adoption of general comments with the aim of interpreting the Convention.[137] This function arises from Article 74, paragraph 7 of the Convention, which provides that 'the Committee shall present an annual report to the General Assembly of the United Nations on the implementation of the present Convention, containing its own considerations and recommendations, based, in particular, on the examinations of the reports and any observations presented by States Parties'.

134 Ibid., Art. 77 para. 3 item b.
135 Ibid., Art. 77 para. 4.
136 Ibid., Art. 77 paras. 5–7.
137 For more details: Chetail, 2020, pp. 601–644.

5. Conclusion

We are free to conclude that the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families was created as a response to the perceived necessity of creating an appropriate normative framework functioning on an international level, with the aim of ensuring the effective protection of migrant workers and their families. In other words, there was a need to provide necessary protections to migrants who are employed in the territory of another country (i.e. one that is not the country of their origin) and enable them to exercise those rights that are guaranteed to domestic citizens as well.

Although it is obvious that the creators of the Convention were inspired by the standards of the International Labour Organization, and adopted a large number of principles contained in them, it can be noted that this Convention went a step further when it comes to the protection of this category of persons, namely, it covers and migrants with irregular status.

It is interesting that the adoption of the Convention was preceded by many years of discussions, reports and recommendations on the subject of migrants' rights, and that as early as 1972 the United Nations, for the first time, expressed open concern about the endangered rights of migrant workers, when the Economic and Social Council, within resolution 1706 (LIII), expressed alarm at the illegal transportation of labour to some European countries, and at the exploration of workers from some African countries in conditions that resembled that slavery and forced labour. It is even more interesting that the Convention entered into force only in 2003, that is, 13 years after its adoption by the General Assembly of the United Nations, since the condition for the Convention to enter into force was that it was ratified by twenty states. Because of the long road that was covered until the Convention entered into force, the prevailing opinion in the scientific and professional literature is that it represents a great success of the international community, since it is the result of the struggle to provide legal protection to millions of migrants, both *de jure* and without distinction in relation to their legal position.

However, if we take into account that the Convention was ratified by only 62 member states of the United Nations, which is less than one third of the members of the United Nations Organisation, the question arises as to how important it is *de facto* on the international scene. What is also noticeable is that this Convention was largely ratified by the member states of the United Nations, which represent the home states, i.e. the states from which migrant workers depart, while the states to which the largest number of migrant workers arrive, namely the United States of America, Canada, Australia, Russia, China, the United Kingdom, and all the member states of the European Union, have not ratified this document.

There are many possible reasons for not accepting the Convention. We will mention only some of them. Firstly, the obligation of the state that decides to ratify is that it must ratify the Convention in its entirety, which means that the state may not

exclude the application of any Part of it, or exclude any particular category of migrant workers from its application. Secondly, many states believe that the corresponding provisions violate the principle of state sovereignty and the exclusive right of each state to regulate the entry and stay of foreigners in their domestic territory, as well as the regime of their protection. Thirdly, migrants' rights are already dealt with by other international treaties. Fourth, the focus of this Convention is not on civil and political rights, but on social and economic rights, as the rights of the second generation of human rights, for the effective realisation of which significantly larger funds are required. Fifth, with regards to the member states of the European Union, membership of the EU is often cited as the reason for not accepting the Convention. Sixth, non-ratification of the Convention can also be interpreted as a purely political (or electoral) problem, because as foreigners, migrants are not citizens and (usually) cannot vote; ratification would then happen only in migrants' interests. Seventh, it is also stated that 'given the small number of states that have ratified the Convention, many countries fear to be among the first in their region to ratify it'; In the end, it could also be stated that the Convention is too detailed when it comes to the need to protect migrants and their family members, to the extent that it sometimes 'overdoes' the protection itself – either in terms of provisions that may not have been necessary, either in regard to the matter itself in which excessive protection is provided, it seems.

The information about the acceptance of the individual complaint's procedures under article 77 of the Convention is also devastating, bearing in mind that only seven member states of the Organisation of the United Nations accepted it, which did not enable single subjects to submit individual complaints to the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families. It would be of particular importance if a greater number of member states accepted these individual complaints procedures, which would certainly ensure a better and more effective protection of the rights of migrant workers and their family members.

Almost thirty-five years after the adoption of the Convention, the United Nations should undertake more serious activities, which would contribute to a greater number of ratifications of the Convention. It would be especially desirable if these activities were undertaken in receiving countries, such as the member states of the European Union, where in recent years there has been an increasing number of migrant workers, very often without regulated status. As another possible solution, the revision of the article of the Convention is proposed, which overlooks the obligation of the UN member state that accedes to ratification to ratify the entire text of the Convention without the possibility of selecting individual parts, as provided for by a large number of International Labor Organisation conventions. This would surely encourage individual countries to accede to the Convention, because they would have the opportunity to choose the parts that they would implement in their national legal systems without obstacle.

As a result of all the above, and in connection with the problem of the insufficient number of ratifications of the Convention, the views of the authors who consider this

international document as one of the most neglected treaties in international human rights law seem more than justified.

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| Chapter 13 |

Implementation of the 2006 UNCRPD in Central and Eastern Europe: A Comparative Overview with Special Reference to Bosnia and Herzegovina

Igor Milinković

ABSTRACT

Persons with disabilities constitute one of the most vulnerable groups in society, frequently experiencing social stigma, discrimination, and marginalisation. Even in countries with a strong tradition of upholding human rights, individuals with disabilities continue to face significant discrimination, social exclusion, and inequitable treatment. They tend to have lower income and educational attainment, higher rates of unemployment, precarious housing conditions, and poorer health outcomes compared to persons without disabilities. These challenges are further exacerbated in countries in transition, such as Bosnia and Herzegovina (BiH), where ongoing social, political, and economic changes often intensify these vulnerabilities. The paper examines the application of the provisions of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) in countries of Central and Eastern Europe, with special reference to BiH (which ratified the Convention and its Optional Protocol in 2010). It explores the current status of the Convention's application across the region, as well as the communication procedures initiated before the Committee on the Rights of Persons with Disabilities concerning the Central and Eastern European countries. The study also presents the legal framework for the protection of the rights of persons with disabilities in BiH (its entities – the Republic of Srpska and the Federation of Bosnia and Herzegovina). Special attention is given to the realisation of rights whose implementation in BiH has faced challenges in the past, as well as those rights that are particularly difficult to ensure in transition economies.

KEYWORDS

United Nations, Convention on the Rights of Persons with Disabilities, Central and Eastern Europe, Bosnia and Herzegovina, disability rights, Article 12, legal capacity, employment, education, political participation

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1. Introduction: Relevance of the Convention on the Rights of Persons with Disabilities and its Optional Protocol for Disability Rights Protection

People with disability constitute the largest definable disadvantaged group in the world. The World Health Organisation (WHO) estimates that more than one billion individuals, or approximately 15% of the world's population, have some form of disability.[1] If their relatives and friends are included, it is safe to say that most lives on the planet are touched by disability in one way or another.[2]

The concept of disability is complex and multidimensional, encompassing physical, mental, sensory, and cognitive impairments that limit individuals' ability to engage in everyday activities and fully participate in society. According to Article 1, paragraph 2 of the United Nations (UN) Convention on the Rights of Persons with Disabilities (UNCRPD), persons with disabilities are individuals 'who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.[3] Some authors claim there are two main approaches to understanding disability, one grounded on an individual bio-medical view and the other based on a social, structural and contextual perspective.[4] The former, a traditionally prevalent approach to disability ('medical model of disability') 'regards disability as an impairment that needs to be treated, cured, fixed, or rehabilitated'.[5] The latter, a more recent approach ('social model of disability') 'shifts the attention from the individual and the impairment to the environment and the impact of cultural, social, and environmental barriers'.[6] The social model of disability conceptualises disability as a social construct shaped by discrimination and oppression, shifting the focus from the individual to society. It distinguishes between impairment and disability: impairment refers to a condition affecting the body or mind of an individual, while disability is understood as the outcome of the interaction between the impairment and the attitudinal or environmental barriers that restrict full and effective participation in society. Exclusion of persons with disabilities from society is thus analysed through a political lens, attributing it to barriers and discriminatory practices.[7]

The UNCRPD is the first legally binding international treaty to provide a comprehensive framework for the protection and promotion of disability rights.[8] It was adopted by consensus at the UN General Assembly on 13 December 2006 and was formally opened for signature and ratification in March 2007. On the day of its opening,

1 Davy et al., 2022, p. 2.
2 Shakespeare, 2018, p. 1.
3 United Nations, 2006a.
4 Traustadottir, 2009, p. 8.
5 Degener, 2017, p. 42.
6 Traustadottir, 2009, p. 8
7 Degener, 2017, p. 41.
8 Lang et al., 2011, p. 208.

over eighty UN Member States signed the UNCRPD (a record number for the first day of signature of any UN Convention so far). This marked a paradigm shift, recognising people with disabilities as active 'subjects' of human rights rather than passive 'objects' of charity or pity. It represented the culmination of a long and successful campaign led by the international disability movement and was celebrated globally as a catalyst for advancing human rights and disability inclusion.[9]

Prior to the adoption of the UNCRPD, legal frameworks that addressed individuals with disabilities typically regarded them as objects of care rather than as autonomous legal subjects entitled to full respect and the complete range of human rights.[10] The development of the UNCRPD was achieved after decades of activism that challenged the prevailing perception of people with disability as dependent subjects of charity who require society to provide them with support to compensate for their incapacity.[11] Legal responses to disability and impairment embodied a mix of charity, paternalism and social policy rather than a human rights-based approach, viewing persons with disabilities as individuals who evoke sympathy, if not pity, and require societal protection and support to compensate for their inabilities (as an example, special education policies for children with disabilities have historically, and often continue to, emphasize specialised, segregated education based on the disability of the child, such as schools specifically for the blind).[12] A key benefit of the UNCRPD is that it provides an international human rights instrument that directly challenges these hitherto unquestioned assumptions about people with disability.[13] The Convention is explicitly grounded in the social model of disability, which understands disability in the context of the environmental and social conditions and structures that disadvantage individuals with impairments, and endorses a rights-based approach to inclusion.[14]

The UNCRPD encompasses the full spectrum of human rights – civil, political, social, economic, and cultural. Rather than establishing new rights, the Convention was designed to clarify how existing human rights apply to persons with disabilities. This clarification was necessary, as previous human rights instruments were insufficiently responsive to the specific needs of persons with disabilities. Consequently,

9 Davy et al., 2022, p. 2.
10 Ibid., p. 3.
11 It took several decades for disability to be recognised as a human rights issue within the UN. In retrospect, this development can be divided into four distinct phases. The first phase, from 1945 to 1970, was characterised by the invisibility of persons with disabilities in UN policy. This shifted in the second phase, from 1970 to 1980, when persons with disabilities were acknowledged primarily as subjects of rehabilitation. The third phase, spanning the years from 1980 to 2000, marked the recognition of persons with disabilities as objects of human rights. It was only in the new millennium, during the fourth phase, that persons with disabilities were fully recognised as subjects of human rights. Degener and Begg, 2017, p. 2.
12 Quinlivan, 2012, p. 73.
13 Ibid.
14 Davy et al., 2022, p. 4.

the UNCRPD complements existing human rights instruments by elucidating the application of established human rights norms in the context of disability.[15]

The UNCRPD is composed of a preamble with 25 paragraphs, 50 articles, and an Optional Protocol. The UNCRPD's preamble is by far the longest preamble among the core human rights instruments.[16] While its paragraphs are not legally binding, they provide interpretative guidance for the application of the Convention's provisions. Article 1 of the CRPD outlines the Convention's purpose, while key definitions are provided in Article 2. According to Article 1(1), the purpose of the Convention is 'to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'. Perhaps the most innovative aspects of the Convention are found in Articles 3–9, which are described as having a 'crosscutting' application, meaning they apply broadly to all provisions within the Convention. These general principles underpin every aspect of the Convention.[17] Articles 10–30 delineate the substantive rights, encompassing civil, political, economic, social, and cultural rights. Articles 31–40 establish the framework for implementation and monitoring, while Articles 41–50 contain provisions on the operation of the Convention.[18] The core international mechanism for monitoring the implementation of the UNCRPD is outlined in Articles 34–36 of the Convention. This mechanism is based on the establishment of the Committee on the Rights of Persons with Disabilities as the monitoring body[19] and requires States Parties to submit regular reports on the implementation of the UNCRPD. The Committee reviews these reports and provides recommendations to foster implementation of the UNCRPD's provisions. The Optional Protocol to the UNCRPD (OP-UNCRPD) supplements this mechanism by enabling the Committee to receive and examine individual complaints regarding alleged violations and to initiate inquiries in cases of serious violations by States Parties.[20]

The OP-UNCRPD[21] was adopted alongside the Convention on 13 December 2006. The Protocol grants the Committee on the Rights of Persons with Disabilities the authority to review individual complaints concerning alleged violations of the Convention by States Parties to the Protocol and to initiate inquiries when there is credible

15 Quinlivan, 2012, p. 75.
16 Lord, 2018, p. 3.
17 Quinlivan, 2012, p. 75.
18 Ibid.
19 According to Art. 34(2) of the UNCRPD, the Committee is composed of 18 experts. The selection process, outlined in Art. 34(3) of the Convention, requires that Committee members be of high moral character and possess recognised competence and experience in the field covered by the CRPD, though they are not necessarily required to be lawyers. States Parties are encouraged to nominate candidates through close consultation with organisations representing persons with disabilities and to actively involve persons with disabilities in the process. This selection procedure ensures the specialised expertise of Committee members, resulting in the great majority of members having personal experience of living with disabilities. In 2011, 16 out of 18 Committee members were living with disabilities. Uerpmann-Wittzack, 2018, pp. 37–38.
20 Ferrajolo, 2017, p. 708.
21 United Nations, 2006b.

evidence of serious and systematic violations of the Convention.[22] Concerning the scope of application of the procedure *ratione materiae*, there are thus no restrictions on the rights that may be asserted through an individual claim, as long as those rights are encompassed within the UNCRPD.[23]

The Optional Protocol reproduces the dual model of complaints and inquiry procedures established by the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.[24] The procedures for individual communications and inquiries represent the only optional mechanisms within the UNCRPD's monitoring framework. The obligation of States Parties to submit reports on the measures taken to fulfil their obligations under the Convention, as well as on the progress achieved, is enshrined in Article 35 and subsequent articles of the UNCRPD (it constitutes the sole mandatory international monitoring procedure of the UNCRPD; in addition, Article 33 of the UNCRPD establishes a national implementation and monitoring mechanism).[25] The Protocol recognises the right of individuals or groups of individuals to submit communications. Article 1 of the Protocol explicitly permits collective complaints, provided that the group can demonstrate they are victims of a violation. In other words, collective entities are not required to act through a specific individual, such as one of their members. However, the alleged violation must be linked to one or more identifiable victims. The Committee has further clarified that, for an individual to claim victim status under the Convention, they must demonstrate that an act or omission by the concerned States Party has already adversely impacted their enjoyment of a protected right, or that such an impact is imminent, for example, based on existing law or judicial, administrative decisions, or practices.

Article 1(1) provides for the possibility of introducing a complaint on behalf of individuals or groups of individuals (which represents a common practice in the UN treaty-based complaint procedures).[26] In cases where communications are submitted by a representative on behalf of a victim, the author must provide evidence of the victim's consent. The Committee has specified that individuals submitting communications on behalf of others without such evidence must provide a written justification explaining why the alleged victim is unable to submit the communication personally and why authorisation cannot be formally obtained.[27]

According to Article 1(2) of the OP-UNCRPD, complaints can only be directed against a States Party to both the Convention and its Optional Protocol. Above all, the victim must be subject to the jurisdiction of the States Party concerned. This principle underscores the obligation of States Parties to uphold the rights of individuals within their jurisdiction, which they must do through the exercise of their legislative, executive, and judicial authorities.

22 Stavrinaki, 2018, p. 1219.
23 Ferrajolo, 2017, p. 714.
24 Stavrinaki, 2018, p. 1219.
25 Ibid.
26 Ibid., p. 1223.
27 CRPD Committee, 2011, para. 7 cited in ibid., p. 1224.

Article 2 of the OP-UNCRPD sets forth the criteria, procedural and substantive, that a communication must satisfy to be admissible. According to this article, the Committee declares a communication inadmissible if: (a) the communication is anonymous, (b) it constitutes an abuse of the right to submit communications or is incompatible with the provisions of the UNCRPD, (c) the matter has already been or is currently being examined by the Committee or under another international investigation or settlement procedure, (d) all domestic remedies have not been exhausted, (e) the communication is manifestly ill-founded or insufficiently substantiated, or (f) the facts underlying the communication occurred prior to the entry into force of the Optional Protocol for the States Party concerned.

Proceedings on individual communications are conducted in closed meeting.[28] The fact that no oral hearings are provided for in the entire proceedings is explicitly confirmed by the Committee's Rules of Procedure (Rule 73 para. 1).[29] Pursuant to Article 3 of the Optional Protocol, the Committee submits any communication it has received to the States Party against which it is directed confidentially. The States Party is afforded a six-month period to provide a written response, including explanations and information regarding any remedies it has implemented, if any. Article 4 grants the Committee the authority to indicate interim measures to the States Party to prevent irreparable harm to the victim pending the adoption of a final decision on the merits of the case. Articles 6–8 of the Optional Protocol provide for an inquiry procedure, that the Committee initiates in the case that it has received reliable information indicating grave or systematic violations by a States Party of rights set forth in the UNCRPD[30]. Based on any observations submitted by the States Party and other reliable information available, the Committee may appoint one or more of its members to conduct an inquiry and report urgently to the Committee, which, if warranted and with the States Party's consent, may include a visit to its territory.[31] Upon assessment by the Committee, the findings of an inquiry are communicated to the state concerned, accompanied by the Committee's comments and recommendations (Article 6 paragraph 3). The States Party concerned is required to submit its observations to the Committee within six months of receiving the Committee's findings, comments, and recommendations, while the Protocol mandates that inquiry be conducted confidentially, ensuring the States Party's cooperation throughout all stages of the proceedings.[32]

The Optional Protocol does not specify whether decisions on communications should be adopted by consensus or by majority vote. In line with the practice of other treaty bodies, the UNCRPD Committee has adopted Rule 34 of its Rules of Procedure, which provides that decisions should be reached by consensus whenever possible. However, at the request of any member, the Chair is authorised to put the proposal

28 Art. 5 of the OP-UNCRPD.
29 Ferrajolo, 2017, p. 718.
30 Art. 6 para. 1 of UNCRPD.
31 Ibid., Art. 6 para. 2.
32 Ibid., Art. 6 paras. 4–5.

to a vote (when it is adopted by a simple majority).[33] The Optional Protocol does not include any provision on the legal status of the Committee's findings. Although the Committee's views, as those of other treaty bodies, are not legally binding, international human rights scholarship acknowledges that States Parties cannot simply disregard such findings and interpretations.[34]

2. The Status and Implementation of the UNCRPD in Central and Eastern Europe

All Central and Eastern European countries have ratified the UNCRPD. Hungary and Croatia ratified the Convention in 2007, Slovenia in 2008, the Czech Republic, Serbia, and Montenegro in 2009, Ukraine, the Slovak Republic, Moldova, and BiH in 2010, Romania and North Macedonia in 2011, Bulgaria and Poland in 2012, Albania in 2013, and Georgia in 2014. The majority of these countries have also ratified the OP-UNCRPD. Albania and Poland have not yet signed the Optional Protocol, while Romania has signed it but has yet to ratify it.[35]

The majority of these states have not put forward any reservations regarding the application of the Convention or its Optional Protocol. Poland has submitted an interpretative declaration regarding Article 12 of the UNCRPD. In this declaration, the Republic of Poland affirms that it will interpret Article 12 in a manner that permits the application of incapacitation measures, in the circumstances and in the manner set forth in domestic law, as a measure indicated in Article 12.4, when a person suffering from a mental illness, mental disability or other mental disorder is unable to control his or her conduct. Poland has also submitted a reservation to Article 23(1)(a) and (b), as well as Article 25(a) of the UNCRPD. The Republic of Poland interprets Articles 23(1)(b) and 25(a) as not establishing an individual right to abortion or imposing an obligation on States Parties to ensure access to abortion unless such a right is provided for under national legislation. Furthermore, pursuant to Article 46 of the Convention, Poland has reserved the right not to apply Article 23(1)(a) – which guarantees the right of persons with disabilities of marriageable age to marry and found a family based on free and full consent – until relevant domestic laws are amended. The Slovak Republic has entered a reservation to Article 27(1)(a) of the UNCRPD, pursuant to Article 46 of the Convention. In its declaration, the Slovak Republic affirms that it will apply the provisions of Article 27(1)(a) – which concerns the prohibition of discrimination on the basis of disability in employment – on the condition that this prohibition shall not extend to the recruitment, hiring, or continued employment of members of the armed

33 Stavrinaki, 2018, p. 1247.
34 Ibid., p. 1249.
35 See more: https://indicators.ohchr.org/ (Accessed: 11 September 2024).

forces, armed state security services, armed corps, the National Security Authority, the Slovak Information Service, and the Fire and Rescue Service.[36]

The implementation of UNCRPD-relevant legislation in European Union (EU) Member States is monitored by the European Commission. The first official report of the EU on the implementation of the UNCRPD was published in 2014, while internal reports on policy for and the situation of persons with a disability are issued annually by the Disability High Level Group (DHLG).[37] Since 2008, the European Commission and the DHLG have issued an annual joint report on the implementation of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). These reports provide detailed information on the progress achieved in establishing the governance structures and procedures envisaged under Article 33 of the UNCRPD, as well as in the development and implementation of national strategies and measures aimed at ensuring its effective application. Furthermore, the DHLG reports serve as a valuable tool for identifying and disseminating examples of good practice among Member States.[38]

The ratification of the UNCRPD was followed by corresponding reforms within national legal frameworks. These reforms included the enactment of relevant anti-discrimination legislation in countries where such provisions had not previously existed, as well as amendments to existing laws. In addition, a wide range of legislative changes was introduced across multiple sectors to ensure alignment with the principles and obligations set forth in the Convention. Nevertheless, despite the efforts undertaken in Central and Eastern European countries to implement the provisions of the UNCRPD, significant challenges persist in certain areas of social life. These obstacles will be examined in the following text through a brief analysis of the situation in a number of countries of this region, some of which have resulted in the submission of communications to the UN Committee on the Rights of Persons with Disabilities (which will also be analysed in the subsequent discussion).

Given the scope of the paper, it is not possible to provide a detailed analysis of reforms in all countries of the region. Instead, the analysis will present a selective overview of legislative developments in a number of states, with particular attention to provisions concerning the legal capacity of persons with disabilities, their rights to work and education, as well as their participation in public and political life.

Hungary was among first countries in the world to ratify the UNCRPD and submit a State Report reviewed by the UN Committee on the Rights of Persons with Disabilities (the Report was submitted in 2010). In its Concluding observations, the Committee welcomed Hungary's early reporting and its constructive engagement during the dialogue process. It welcomed the explicit prohibition of disability-based discrimination in the Hungarian Fundamental Law, the adoption of the National Programme of

36 Disability High-Level Group, 2016, pp. 6–9.
37 Bratan et al., 2020.
38 Disability High-Level Group, Eight Disability High Level Group Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities, 2016, p. 4.

Disability Affairs (2007–2013), the publication of the Convention in accessible formats (Braille, sign language, easy-to-read), and the adoption of legislation (Act CXXV of 2009) recognising Hungarian Sign Language.[39] On the other hand, the Committee criticised the fact that the Hungarian Report was grounded in a medical model of disability and excludes certain groups – such as those with psychosocial disabilities – from the UNCRPD's target population. No specific health programmes for persons with intellectual disabilities are described beyond awareness campaigns.[40] Following the publication of the UN Committee on the Rights of Persons with Disabilities' Concluding Observations on Hungary's Initial Report (October 2012), the Hungarian government adopted a series of legal, policy, and institutional measures to improve alignment with the Convention. Hungary revised Act XXVI of 1998 (Disability Act) in 2013 to incorporate a more inclusive, human rights-based definition of disability, while accessibility obligations were extended to all public services without delay. The structure of the National Disability Council was reformed to enhance its independence from the government. The national organisations of people with psychosocial disabilities and people with linguistic disabilities also became members of the Council. Progress was made in the deinstitutionalisation of children with disabilities: by 2014, 56% of children with disabilities in care were placed in foster families (up from 44.1% in 2011). Legal reforms strengthened the role of child protection guardians. However, institutionalisation remains an issue for children with complex needs. The education system has been restructured to better support inclusive and special education. Inclusive measures include flexible curricula, accommodations during exams, and development of a traveling teacher network.[41] One of the controversial issues, not only in Hungary but also in other countries of the region and around the world, is the implementation of the supported decision-making model as envisaged in Article 12 of the UNCRPD. The UNCRPD marks a 'paradigm shift' in the regulation of legal capacity by affirming the principle of universal legal capacity and requiring States Parties to transition from substitute to supported decision-making The Hungarian Civil Code (2013) preserves both plenary and partial guardianship, continuing to allow for the full or partial removal of an adult's legal capacity based on mental incapacity. These guardianship models constitute classical forms of substitute decision-making and are incompatible with Article 12 of the CRPD, as interpreted by General Comment No. 1 of the Committee on the Rights of Persons with Disabilities, which calls for the abolition of guardianship regimes.[42] In the field of employment, Act CXCI of 2011 on Benefits for Persons with Reduced Work Capacity introduced a disability employment quota system. Available research demonstrates that the sharp increase in the non-compliance levy led firms to employ more persons with disabilities. However, the overall impact on inclusion has remained modest, with a substantial proportion of quotas

39 Committee on the Rights of the Persons with Disabilities, 2012.
40 Brehmer-Rinderer et al., 2013, p. 29.
41 Disability High-Level Group, 2016, pp. 48–58.
42 Szerletics, 2022, pp. 89–91.

still unmet. Structural obstacles, including limited labour supply, high hiring costs, and significant regional disparities, continue to constrain the policy's effectiveness.[43] The right of persons with disabilities to participate in the electoral process has been subject to significant legal and political debate. The European Court of Human Rights in *Alajos Kiss v. Hungary* (2010) held that the automatic disenfranchisement of persons under guardianship violated the European Convention on Human Rights, prompting constitutional and legislative reforms that abolished blanket voting bans. Since 2012, the law requires an individualised judicial assessment of voting eligibility in guardianship proceedings. However, this approach remains inconsistent with Article 29 of the UNCRPD, as persons with intellectual and psychosocial disabilities may still be deprived of the franchise by court decision. In practice, additional barriers persist: although measures such as tactile templates, large-print materials, and sign-language information have been introduced, accessibility of polling stations is uneven, secrecy of the ballot is not always guaranteed, and independent voting is not systematically ensured. While cooperation between electoral authorities and disability organisations has been noted as a positive practice, the Hungarian framework continues to fall short of fully securing equal and independent participation in political and public life for persons with disabilities.[44]

Serbia ratified the UNCRPD and its Optional Protocol in 2009. The legislative framework for the protection of the rights of persons with disabilities includes several key statutes, notably the Law on Vocational Rehabilitation and Employment of Persons with Disabilities, the Law on the Prevention of Discrimination against Persons with Disabilities, and the General Anti-Discrimination Law. These laws, in principle, guarantee equal access to employment, education, and public services, while prohibiting all forms of discrimination on the basis of disability. In addition to legislative measures, Serbia has adopted technical standards and strategic documents aimed at enhancing physical and informational accessibility. However, as highlighted by several scholars, a persistent gap remains between normative commitments and their effective implementation. Persons with disabilities continue to encounter substantial barriers in accessing public institutions, transportation systems, healthcare services, and educational facilities. The accessibility of the built environment remains inconsistent, with pronounced disparities between urban and rural areas. Moreover, local authorities frequently lack the financial resources and administrative capacity necessary to effectively implement inclusive policies.[45] One of the unresolved issues concerns the implementation of Article 12 of the Convention. In Serbia, the continued application of both plenary and partial deprivation of legal capacity allows for the appointment of guardians, thereby reinforcing a substitute decision-making model (according to some estimations, the measure of full deprivation of

43 Kreko and Telegdy, 2025.
44 Rabitsch, Moledo and Lidauer, 2023.
45 Popivoda, 2017.

legal capacity is applied significantly more frequently than partial deprivation).[46] In this country, the political participation of persons with disabilities continues to be hindered by structural and institutional barriers, notwithstanding the country's ratification of the UNCRPD and the formal recognition of universal suffrage in national legislation. Although electoral law guarantees the right to vote and stand for election (with the exception of persons deprived of legal capacity),[47] the political participation of persons with disabilities remains limited, often reduced to formal rather than substantive involvement. Although organisations of persons with disabilities (OPDs) are occasionally consulted in policymaking processes, their influence is weakened by structural barriers, insufficient reasonable accommodation, and persistent stereotypes that frame persons with disabilities as passive beneficiaries rather than active stakeholders. Participation at the local level is particularly underdeveloped, with only a small number of municipalities establishing councils that involve OPDs, while internal fragmentation within the disability movement further diminishes collective advocacy. Persons with intellectual and psychosocial disabilities remain especially excluded, with very limited opportunities for self-representation. In addition, the reliance of OPDs on public funding and the broader restrictive civic environment undermine their independence, resulting in sporadic and inconsistent participation. These shortcomings indicate that Serbia has yet to realise the requirements of Article 29 of the UNCRPD in a meaningful way. The right to employment of persons with disabilities is likewise characterised by a substantial gap between legal guarantees and practical implementation. The Law on Professional Rehabilitation and Employment of Persons with Disabilities introduced an employment quota system and established a Budgetary Fund to support vocational rehabilitation, yet enforcement and monitoring remain inadequate. Employment rates among persons with disabilities remain very low, with systemic obstacles such as inaccessible workplaces, insufficient support services, limited development of supported employment schemes, and persistent stigma and discrimination in the labour market. Moreover, the management of the Budgetary Fund has been criticised for a lack of transparency and accountability, raising doubts about its effectiveness in promoting inclusion. As a result, the Serbian framework, while normatively aligned with the UNCRPD, continues to fall short of ensuring equal opportunities in the labour market and requires systemic reforms to achieve substantive compliance with Article 27 of the Convention.[48]

46 Kovaček, Stanić and Samardžić, 2023.

47 The electoral legislation of Serbia denies the right to vote for persons who have been fully deprived of legal capacity. In the case of individuals partially deprived of their legal capacity, the law provides that they retain the right to elect members of parliament and to stand for election, unless the court, by a decision on partial deprivation of legal capacity, has determined that they are incapable of exercising electoral rights. (Art. 3, Law on the Election of Members of Parliament, *Official Gazette of the Republic of Serbia*, No. 14/22; Art. 3, Law on the Election of the President of the Republic, *Official Gazette of the Republic of Serbia*, No. 14/22).

48 UNPRPD, 2024.

The Czech Republic ratified the UNCRPD in 2009, thereby committing to ensure the equal recognition of persons with disabilities before the law as set out in Article 12. Subsequent reforms sought to bring national legislation into closer alignment with these obligations, most notably through the 2014 recodification of civil law, which abolished plenary guardianship and introduced more flexible models of limited guardianship[49]. While these changes represent a step toward compliance, the legal framework continues to rely predominantly on substitute decision-making, with supported decision-making mechanisms remaining underdeveloped and insufficiently embedded in practice. As a result, many persons with disabilities continue to experience significant restrictions in exercising their legal capacity. This reflects the broader tension between legislative adaptation and the substantive realisation of the CRPD's transformative vision. Despite formal progress, further systemic reforms are necessary to secure genuine autonomy, equality, and effective participation for persons with disabilities in the Czech Republic. In this country, the participation of persons with disabilities in elections remains constrained by both legal and practical barriers. Although reforms have been introduced to strengthen inclusiveness, individuals placed under guardianship may still be deprived of their voting rights through judicial decision, a practice incompatible with Article 29 of the UNCRPD, which guarantees universal suffrage. Accessibility challenges persist, as not all polling stations are physically accessible, limiting independent participation for many voters with disabilities. At the same time, certain positive measures have been noted, such as the inclusion of QR codes on voting instructions, link to sign-language videos for deaf voters, and collaborative efforts between electoral authorities and organisations of persons with disabilities to prepare accessible materials. Nevertheless, the overall implementation remains uneven, as accessible information and independent voting are not systematically guaranteed. As a result, significant reforms are still required to ensure that the Czech Republic fully complies with its international obligations to secure equal political participation for persons with disabilities.[50] The most significant reform concerning the right to education was the 2016 amendment to the Education Act, which established a five-tier system of support measures and ensured state funding for inclusive practices in mainstream schools. This legislative innovation signalled a formal departure from the medical model of disability toward a social model, thereby strengthening the entitlement of children with disabilities to education in mainstream settings. Nonetheless, despite measurable progress in enrolment, the advancement of inclusive education remains hampered by systemic obstacles, including insufficient teacher preparation, a persistent reliance on external specialists, heavy administrative burdens, and prevailing societal and professional preferences for segregated schooling. Consequently, although Czech legislation has been formally aligned with the standards of the UNCRPD, the substantive realisation of the right to inclusive education is still constrained by structural and attitudinal barriers, casting

49 Hurdík and Selucká, 2014.
50 Rabitsch, Moledo and Lidauer, 2023.

doubt on the extent to which a genuine paradigm shift has occurred.[51] In Czechia, the right to employment of persons with disabilities has been strengthened through significant legislative reforms, most notably the 2016 amendment to the Labour Code, which abolished provisions allowing reduced minimum wages, and subsequent amendments to the Employment Act (Act No. 435/2004 Coll.) that expanded subsidies and introduced insurance incentives for employers. The National Plan for the Promotion of Equal Opportunities for Persons with Disabilities 2021–2025 further sought to stimulate employment in the open labour market. Despite these measures, the absence of measurable targets, weak monitoring, and insufficient guidance on reasonable accommodation continue to undermine effective implementation, leaving reforms fragmented and largely partial rather than comprehensive.[52]

2.1. Communication Procedures Before the Committee on the Rights of Persons with Disabilities Regarding Central and Eastern European Countries

The UN Committee on the Rights of Persons with Disabilities has considered several communications alleging violations of the rights of persons with disabilities by Central and Eastern European countries.

In *Nyusti and Takacs v. Hungary* (2013), the Committee examined a violation of Article 9 of the CRPD, which guarantees the right to accessibility. The case concerned two Hungarian nationals, Szilvia Nyusti and Peter Takacs, both of whom have visual impairments and encountered significant barriers in accessing automatic teller machines (ATMs) operated by OTP, a privately owned bank which offered services to the public. Under their contracts with OTP Bank, the complainants were entitled to use bank cards at ATMs and were charged annual fees identical to those paid by non-disabled customers. However, the lack of Braille markings on ATM keyboards and the absence of audible instructions or voice assistance rendered the ATMs inaccessible to them, preventing independent use. In 2005, the complainants' legal representative contacted OTP Bank to inquire about the availability of accessible ATMs near their residences and requested retrofitting if none were available, to enable equitable access. OTP acknowledged the absence of accessible ATMs in the specified areas but declined the retrofitting request. Consequently, Nyusti and Takács initiated a civil action against OTP, alleging that the bank had violated their right to equal treatment. While domestic courts initially ruled in favour of the complainants, identifying discrimination, higher courts overturned these decisions, citing principles of contractual freedom and concerns about user safety. The Committee ultimately concluded that Hungary had failed to fulfil its obligations under Article 9(2)(b) of the UNCRPD, underscoring the critical importance of ensuring accessible financial services for persons with disabilities.[53]

51 Vaďurová and Pančocha, 2023, p. 196.
52 European Commission, Employment of Persons with Disabilities: An Assessment of the Effectiveness of National Policies in Czechia. Brussels: European Commission, 2025.
53 Lawson, 2014.

The case *Zsolt Bujdosó v. Hungary* concerned six Hungarian nationals who challenged the automatic disenfranchisement of individuals under guardianship, asserting that this practice violated Articles 12 (equal recognition before the law) and 29 (participation in political and public life) of the UNCRPD. The complainants, all individuals with intellectual disabilities, had been placed under partial or general guardianship through separate judicial decisions. As an automatic consequence of their guardianship status, their names were removed from the electoral register in accordance with Article 70, paragraph 5, of Hungary's 1949 Constitution, which deemed individuals under guardianship ineligible to vote. Due to the direct application of this constitutional provision, and the restriction on their legal capacity, the complainants were disenfranchised and prevented from participating in the 2010 parliamentary and municipal elections. The Committee ruled in favour of the complainants, finding that the automatic disenfranchisement of individuals under guardianship constituted an act of discrimination. The Committee also recommended remedies for the complainants to redress the harm they experienced. It urged Hungary to reinstate their names on the electoral register, thereby restoring their right to vote. Additionally, the Committee emphasised the need to provide adequate compensation for the moral damage caused by their exclusion from the 2010 elections and to cover the legal costs incurred during the submission of the complaint. The Committee called for the repeal of Article XXIII, paragraph 6, of the Fundamental Law, as well as Article 26, paragraph 2, and transitional provisions of the legislation, as they contravene Articles 12 and 29 of the UNCRPD. Furthermore, the Committee stressed the need to enact legislation guaranteeing the right to vote for all persons with disabilities without subjecting them to capacity assessments. Such laws, it recommended, should include provisions for reasonable accommodation and support to ensure that individuals with disabilities can exercise their political rights independently and effectively. Finally, the Committee highlighted the necessity of making voting procedures, facilities, and materials accessible and easy to use for persons with disabilities.[54]

In *Rékasi v. Hungary*[55], the Committee addressed a complaint from a Hungarian citizen who alleged that her rights under Article 12 of the UNCRPD were violated when her guardian entered into a life insurance contract on her behalf without her consent. The Committee concluded that Hungary had failed to ensure adequate safeguards to respect the complainant's autonomy and will, recommending legal reforms to transition from substitute to supported decision-making systems.

In *O.B. v. Ukraine*[56], the complainant, a Ukrainian national with 'group II' disability, alleged a violation of Article 28 of the UNCRPD (adequate standard of living and social protection) due to the denial of social assistance based on income thresholds. The Committee found the case inadmissible due to insufficient substantiation.

54 Grobbelaar-Du Plessis, 2020.

55 *Rékasi v. Hungary,* Committee on the Rights of Persons with Disabilities (2021) [Online]. Available at: https://juris.ohchr.org/ (Accessed: 22 December 2024).

56 *O.B. v. Ukraine,* Committee on the Rights of Persons with Disabilities (2024) [Online]. Available at: https://juris.ohchr.org/ (Accessed: 22 December 2024).

3. Implementation of the UNCRPD in BiH

Persons with disabilities represent one of the most vulnerable groups in society, frequently experiencing social stigma, discrimination, and marginalisation. Even in countries with a strong tradition of upholding human rights, individu1als with disabilities continue to face significant discrimination, social exclusion and inequitable treatment. They generally have lower income and educational attainment, are more likely to be unemployed, live in precarious housing, and experience poorer health outcomes compared to individuals without disabilities.[57] These challenges are further exacerbated in countries in transition, such as BiH, where ongoing social, political, and economic changes often intensify the aforementioned vulnerabilities.

BiH ratified the UNCRPD and its Optional Protocol on 12 March 2010, without any reservations or statements. The Convention entered into force on 11 April 2010, on the thirtieth day after the instrument of ratification was deposited. By ratifying the UNCRPD, BiH committed itself to the implementation of the principles and obligations set out in the Convention, ensuring that persons with disabilities enjoy the same rights and freedoms as other citizens.

The implementation of the UNCRPD's provisions in BiH is largely influenced by the country's state structure. BiH is a complex state, often described in the literature as a federation with distinct confederal elements. It consists of two entities (federal units): the Republic of Srpska (RS), which is a unitary entity, and the Federation of Bosnia and Herzegovina (FBiH), which is organised as a federation comprising ten cantons.[58] The third subnational unit in BiH is the Brčko District (BD) of BiH, a special administrative unit of local self-government, as defined in Article 1.1 of the BD Statute, which possesses extensive legislative autonomy. Given that many competencies relevant to the effective realisation and protection of the rights of persons with disabilities fall under the jurisdiction of the entities (work and employment, education, social and health protection, etc.), the implementation of the Convention's provisions in BiH is the responsibility of various levels of the government (BiH, as well as entity and BD governments).[59]

As an affirmation of their commitment to the UNCRPD's principles, entity governments adopted strategies designed to improve the position of persons with disabilities. In 2010, the Strategy for Improvement of the Social Position of Persons with Disabilities in the RS (2010–2015) was adopted. In October 2011, the strategy was presented to the Equal Opportunities Council of the RS National Assembly. In line with the strategy's goals (Goal 1.2) to ensure effective coordination and implementation of

57 Davy et al., 2022, p. 10.

58 Some authors argue that BiH is an example of an asymmetric federation ('a mildly asymmetrical constitutional system'. (Sahadžić and Woelk, 2023, p. 371).

59 In the FBiH, certain responsibilities, such as social and health protection, are the joint competencies of the FBiH and its cantons, whereas others, such as education, fall exclusively under the jurisdiction of the cantons. (See: Arts. III 2 and III 4 of the FBiH Constitution.

strategic measures, the establishment of an Office for Persons with Disabilities was recommended. Subsequently, in October 2011, the RS Government adopted a resolution instructing the Ministry of Health and Social Protection, as well as the Ministry of Labour, War Veterans, and Disability Protection, to develop a project for the establishment of the aforementioned office. Similarly, the Government of the FBiH adopted the Strategy for the Equalisation of Opportunities for Persons with Disabilities in the FBiH (2011–2015). The implementation and monitoring of the FBiH strategy are supported by the establishment of the Office for Disability Issues within the Government of the FBiH.[60]

To facilitate activities related to advocacy, promotion, and enhancement of the implementation of the UN Convention on the Rights of Persons with Disabilities and its Optional Protocol, the Ministry of Human Rights and Refugees of BiH prepared the Decision on the establishment of the Council for Persons with Disabilities of BiH, which was adopted at the 135th session of the Council of Ministers of BiH on 19 October 2010. The decision provides for the creation of the BiH Council for Persons with Disabilities to ensure collaboration with the relevant entity authorities and associations of persons with disabilities. Representatives of organisations of persons with disabilities from across Bosnia and Herzegovina, including the RS, the FBiH, and the BD, are equally represented in the composition of the Council.[61] Additionally, in line with the Rulebook on Internal Organisation and Systematisation, the Human Rights Ombudsman of BiH established the Department for the Protection of the Rights of Persons with Disabilities as a distinct organisational unit aimed at promoting and more effectively safeguarding the rights of this demographic group.[62]

However, the scientific literature dedicated to the status of persons with disabilities in BiH point out to frequent violations of human rights of this category of the population, while improvements required for the adequate attainment of these rights have been described as unsatisfactory.[63] As a result, persons with disabilities often have difficulty exercising their rights, including the rights outlined in Article 5 of the Convention, which address equality and non-discrimination, as well as the right to equal access to the built environment, transportation, information and communication (Article 9), and the right to work and employment (Article 27). The obstacles to the full realisation of the right to education for persons with disabilities will also be pointed out below, as well as the legal framework of their participation in public life.

3.1. Equality and Non-Discrimination of Persons with Disabilities in BiH

The right to equality and non-discrimination represents a fundamental principle of international human rights law, embodying the core idea that all human beings are equal and, irrespective of their status or group membership, are entitled to a set of

60 Council of Ministers of Bosnia and Herzegovina, 2013, pp. 4–5.
61 Parliamentary Assembly of Bosnia and Herzegovina, 2011, p. 6.
62 Institution of the Human Rights Ombudsman of BiH, 2010, p. 5.
63 Gadzo-Sasic, 2023, p. 45.

rights.[64] The UNCRPD, as recognised in Articles 1 and 3, emphasises equality and non-discrimination as its 'leitmotif', reinforcing the aforementioned principles through multiple provisions.[65] It affirms that discrimination based on disability violates the inherent dignity of individuals, and recognises persons with disabilities as equally entitled to rights protection (Paragraph h of the Preamble). The UNCRPD also affirms the concept of equality of opportunity for persons with disabilities, requiring positive measures beyond equal treatment, and provides in Article 2 that denying reasonable accommodation is a form of discrimination, applicable across all contexts, not limited to employment matters.[66]

Article 5 of the UNCRPD establishes comprehensive obligations to States Parties to promote the equality of persons with disabilities and eliminate all forms of disability-based discrimination. According to Article 5(1), States Parties acknowledge that all individuals are equal before and under the law, with the right to equal protection and benefit of the law without any form of discrimination. Article 5(2) stipulates that they should prohibit all discrimination based on disability and ensure that persons with disabilities receive equal and effective legal protection against discrimination in all its forms. Additionally, to advance equality and eradicate discrimination, Article 5(3) requires States Parties to take appropriate measures to ensure the provision of reasonable accommodation. Because formal equality implies that the state should not favour any particular group and that individuals should be treated solely based on their merits, regardless of group affiliation, Article 5(4) establishes an exceptional basis for such preferences to achieve substantive equality.[67] As stated in Article 5(4), specific measures necessary to accelerate or achieve de facto equality for persons with disabilities shall not be regarded as discrimination under the provisions of the UNCRPD.[68]

The Constitution of BiH guarantees the highest standards of internationally recognised human rights. Under Article II(4) of the Constitution, all persons in BiH are entitled to enjoy all rights and freedoms set forth in Article II of the BiH Constitution or under the international agreements listed in Annex I to the Constitution. These rights and freedoms are guaranteed without discrimination based on sex, race, colour, language, religion, political or other opinions, national or social origin, affiliation with a

64 Cera, 2017, p. 158.

65 As emphasised by the Committee on the Rights of Persons with Disabilities: 'Equality and non-discrimination are at the heart of the Convention and run like a golden thread through all its substantive articles via the phrase 'on an equal basis with others''. (Draft General Comment No. 6/ the draft comment on Article 5 of the CRPD, cited in Corsi, 2018, p. 156).

66 Ibid.

67 Corsi, 2018, p. 167.

68 As noted by the Committee on the Rights of Persons with Disabilities, measures that involve adopting or maintaining certain advantages in favour of underrepresented or marginalised groups – such as outreach and support programmes, resource allocation or reallocation, targeted recruitment, hiring and promotion, and quota systems – are permissible under the CRPD when they aim to accelerate or achieve substantive equality. (Draft Comment (n 11) para 29, cited in Ibid., pp. 167–168).

national minority, property, birth, or any other ground (non-discrimination clause). The rights and freedoms enshrined in the European Convention on Human Rights (ECHR) and its protocols are directly applicable in BiH and take precedence over all other domestic legislation. Since Protocol No. 12 to the ECHR guarantees protection against discrimination with respect to all human rights recognised by the state's legal order, individuals are safeguarded against discrimination in the enjoyment of any right acknowledged by the legal framework of the state.[69]

The primary mechanism for protecting persons with disabilities from discrimination in BiH is the Law on Prohibition of Discrimination in BiH[70]. This law establishes a framework for ensuring equal rights and opportunities for all individuals in Bosnia and Herzegovina and regulates the system for protection against discrimination. Article 2(1) of the Law defines discrimination as any differential treatment, including exclusion, limitation, or preferential treatment, based on actual or presumed grounds such as race, skin colour, language, religion, ethnic affiliation, disability, age, national or social origin, association with a national minority, political or other beliefs, financial status, union membership or other associations, education, social status, gender, sexual orientation, or any other circumstance. Such treatment, whether intended or resulting in the prevention or restriction of equal recognition, enjoyment, or exercise of rights and freedoms in all areas of public life, is considered discriminatory.[71] The prohibition of discrimination applies to all public bodies, as well as to all natural and legal persons in both the public and private sectors, across all domains, particularly in employment, membership in professional organisations, education, training, housing, healthcare, social protection, access to goods and services designated for the public, public spaces, and the conduct of economic activities and public services (Article 2(2)).

The Law on the Prohibition of Discrimination outlines exceptions to the principle of equal treatment. Among these exceptions, measures and actions relating to persons with disabilities are not considered discriminatory if they involve unfavourable differentiation or differential treatment, provided they are based on objective and reasonable justification, serve a legitimate aim, and maintain reasonable proportionality

69 According to art. II(7) of the BiH Constitution, BiH will remain or become a contracting party to the international agreements listed in Annex I to the Constitution. Annex 1 to the BiH Constitution, entitled "Additional Human Rights Agreements to be applied in Bosnia and Herzegovina", lists 15 international human rights instruments. The position adopted by the BiH Constitutional Court is that the human rights contained in the international human rights instruments listed in Annex I have the character of constitutional rights and that applicants can refer to them, demanding their legal protection. In its decision in case U 9/09, the Court held that the International Covenant on Civil and Political Rights is part of the BiH Constitution and that the Court is, therefore, competent to decide whether the rights provided for in this Covenant have been violated by some act adopted by the BiH authorities. (Marković, 2021, pp. 156–157).

70 *Official Gazette of BiH*, no. 59/2009 and 66/2016.

71 The original version of the law did not explicitly include disability as a basis for discrimination. However, with the 2016 amendments, disability was incorporated as a recognised ground for discriminatory practices.

between the means employed and the intended goals (Article 5). As stated above, such exceptions are consistent with the UNCRPD.

The Law also establishes fines for misdemeanors provided by the Law. Protective measures of seizure of objects and prevention in carrying out a certain professional activities, business activities or duties can also be imposed for offences provided by the Law. According to Article 22(2), protective measures of seizure of goods shall be mandatory if misdemeanor is committed through the use of these goods, specifically when the goods were used with the intent of committing a minor offence or created as a result of the misdemeanors committed.

In all laws in the areas of health, social and veteran-disability protection, education, culture, sports, etc., there are general provisions prohibiting discrimination on the grounds of disability, as well as sanctions for violating them. On the other hand, the representatives of the organisations consider that the application of these provisions is superficial and inconsistent, and that in practice they encounter numerous forms of discrimination in all segments of society.[72]

Reports on the implementation of the UNCRPD in BiH, submitted to the Committee on the Rights of Persons with Disabilities, have identified several relevant steps towards eliminating elements of discrimination in BiH. As part of ongoing efforts to eliminate discrimination against persons with disabilities in the sphere of social protection, measures have been implemented to provide economic support, promote social integration, and advance the rights, needs, and opportunities of persons with disabilities. Specifically, the Law on the Basics of Social Protection, Protection of Civilian Victims of War, and Protection of Families with Children in the Federation of Bosnia and Herzegovina includes penal provisions for violations of its non-discriminatory regulations.[73] In the RS, an analysis was conducted to assess the compliance of all relevant legislation with provisions prohibiting discrimination on the grounds of disability, including multiple and cross-sectoral discrimination. These provisions prohibit discrimination based on disability, encompassing factors such as physical and mental health, as well as other characteristics not directly related to the nature of the employment relationship.[74]

Individuals with disabilities may seek protection of their rights against discrimination through the Human Rights Ombudsman of BiH or the RS Ombudsman for Children.

3.2. Application of Article 12 of the UNCRPD in BiH

One of the unresolved issues in the implementation of the UNCRPD in BiH concerns the application of Article 12 of the Convention. The relevant entity laws, as well as the BD legislation, still provide for the legal institutions of full and partial deprivation of

72 Council of Ministers of BiH, 2020, p. 7.
73 Council of Ministers of BiH, 2012, p. 11.
74 The Second and Third Report on Implementation of the United Nation's Convention on the Rights of Persons with Disabilities in BiH, p. 7.

legal capacity. The RS Family Law, the FBiH Family Law, and the Family Law of BD establish the institution of guardianship as a protective measure for adults who are unable or incapable of caring for themselves, their rights, or their interests.[75] The surrogate decision-making model remains predominant in the healthcare sector in BiH, which is governed by the legislation of the entities and the BD. According to Article 42 of the RS Health Protection Law[76], the consent to medical treatment for a person deprived of his/her legal capacity is given by his/her legal representative, either orally or in writing. Written consent is mandatory for invasive diagnostic procedures, surgical interventions, and medical procedures involving a person with mental health impairments, and must be provided by the patient, the parent or guardian of a child, or the legal representative of a person deprived of legal capacity. According to the FBiH Law on the Rights, Obligations, and Responsibilities of Patients[77], when a patient is a minor or has been deprived of his or her legal capacity, a medical intervention may be carried out only with the consent and notification of the patient's parent, legal representative, or guardian (Article 22.1). The surrogate decision making model is also prevalent in the field of medical research.[78]

3.3. Right to Work and Employment of Persons with Disabilities in BiH

Work is considered a 'crucial good'[79], valued not only because productive labour generates essential goods for both individuals and those under their care, but also for its role in developing a sense of membership to the community. Employment 'inspires a sense of achievement, self-esteem, as well as the esteem of the others'.[80] The opportunity for self-realisation through work, achieved by engaging with its physical and intellectual challenges, highlights the need for the right to work to encompass a positive aspect. Employment should be valued not only for the material benefits it provides or as a means of avoiding welfare dependency, but for its intrinsic worth as a source of personal fulfilment and development.[81] For individuals with disabilities, both of these aspects hold significant importance. The right to work not only enables them to obtain the resources necessary to meet their material needs, but also serves as a vital means of social integration and fostering a sense of self-respect.

Despite the critical importance of attaining the right to work for persons with disabilities, their position in the labour force remains deeply concerning. Although a substantial proportion of individuals experiencing disabilities are capable of work and participation in the labour market, their participation rates remain low in many countries (a challenge that is particularly pronounced in transitional economies, where overall employment rates tend to be relatively low). Research indicates that the

75 Miković, 2023, p. 76.
76 *Official Gazette of the Republic of Srpska*, No. 57/2022.
77 *Official Gazette of the Federation of Bosnia and Herzegovina*, No. 40/2010.
78 Milinković, 2024.
79 Mantouvalou, 2015, p. 1.
80 Ibid., p. 2.
81 Collins, 2015, p. 35.

employment rate of persons with disabilities is lower than that of individuals without disabilities. A study conducted by the Organisation for Economic Co-operation and Development (OECD) indicates that the employment rate for persons with disabilities in OECD countries is 44 percent, compared to 75 percent for individuals without disabilities.[82] Furthermore, when individuals with disabilities are employed, they often find themselves in low-paying jobs, occupying lower occupational positions, with limited opportunities for professional advancement and poor working conditions.[83] The barriers that persons with disabilities encounter in realising their right to work arise from both environmental causes and from their own impairment.[84] Environmental barriers include the lack of physical, communicative, and emotional accessibility to essential employment requisites, such as job interviews, workplace infrastructure, and social interactions with colleagues. Additionally, social and economic obstacles further hinder employment opportunities. Social barriers are often linked to negative attitudes, stigma, and stereotypes that persist within society.[85] Persons with disabilities are frequently perceived as unfit for the demands of the labour market and are incapable of performing the required tasks. Furthermore, the labour market often fails to recognise the broader contributions that employing persons with disabilities can offer, beyond mere productivity (which include the optimisation of human resources, the promotion of human dignity and social cohesion, and the accommodation of the growing number of individuals with disabilities within the working-age population).[86]

In response to the need to promote equality of persons with disabilities and to enable them to realise their potential in accessing the labour market, the right to work was established in Article 27 of the CRPD. According to Article 27, States Parties acknowledge 'the right of persons with disabilities to work, on an equal basis with others'. As it is stated in the same Article, this right encompasses 'the opportunity to gain a living by work freely chosen or accepted in a labour market and work

82 Albin, 2015, p. 65.
83 Ibid., pp. 65–66.
84 Ibid., p. 66.
85 Ibid.
86 A comprehensive study conducted by the World Health Organization (WHO) in 2011 identified four primary barriers that persons with disabilities encounter when seeking to enter the labour market: limited access, misconceptions about disabilities, discrimination, and the overly protective nature of certain labour laws. (Ibid., p. 66)

environment that is open, inclusive and accessible to persons with disabilities'.[87] The BiH Law on the Prohibition of Discrimination disallows discrimination, among other things, in the field of employment (Article 2(2)).

One of the primary types of measures employed to support persons with disabilities in securing employment are quota systems. These systems were first introduced after World War I (by the end of 1923, Austria, France, Germany, Italy and Poland adopted quota systems requiring employers to employ disabled war veterans).[88] After World War II, many other European countries adopted similar quota systems, largely in response to high unemployment rates among individuals with disabilities and the ineffectiveness of voluntary approaches. They were eventually expanded to include disabled civilians.[89]

All quota systems call for employers to hire a specified minimum percentage of employees with disabilities. However, significant variations exist between these systems, particularly regarding whether compliance is mandatory or voluntary, as well as the type and efficacy of sanctions imposed when employers fail to meet the requirement. Waddington divides quota systems in Europe into three basic models: 1. legislative recommendation with no sanction (where employers are not obliged to employ a set percentage of workers with disabilities, but it is recommended that they do so), 2. legislative obligation without effective sanctions, and 3. legislative obligation with sanctions.[90]

In the RS, the quota system has been established by the Law on Professional Rehabilitation, Training and Employment of Disabled Persons,[91] adopted in 2012. According to Article 2, paragraph 1 of the Law, a disabled person is a person with a physical, sensory or mental impairment, including mental retardation, which results in a permanent or temporary reduction in their ability to work and meet personal needs in everyday life, lasting for at least 12 months. As an exception to paragraph 1, a person with a disability whose work performance remains within expected limits may also be considered disabled if, based on an assessment of the reduction in their

87 Art. 27 further stipulates that States Parties must safeguard and promote the realisation of the right to work, including individuals who acquire a disability during employment, by taking appropriate measures, including through legislation. These measures include: a) prohibiting discrimination on the basis of disability, b) ensuring equal rights for persons with disabilities to just and favourable working conditions, c) guaranteeing their labour and trade union rights, d) providing effective access to general technical and vocational guidance programmes, placement services, and training, e) promoting employment opportunities and career advancement, f) fostering opportunities for self-employment and entrepreneurship, g) employing persons with disabilities in the public sector, h) encouraging the employment of persons with disabilities in the private sector through appropriate policies and measures, i) ensuring reasonable accommodations in the workplace, j) facilitating the acquisition of work experience in the open market, and k) supporting vocational and professional rehabilitation, job retention, and return-to-work programmes.

88 O'Reilly, 2007, p. 90.

89 Ibid.

90 Waddington, 1996, cited in O'Rilley, 2007, pp. 91–92.

91 *Official Gazette of the Republic of Srpska*, Nos. 37/2012 and 82/2015.

actual and estimated general capacities, it is deemed necessary to protect their physical, sensory, and mental well-being (Article 1, paragraph 3).

According to Article 21, paragraph 1 of the Law, a disabled person has the right to employment on the labour market under general or special conditions. The right to employment under general conditions is realised through the RS Employment Agency, employment agencies, or independently, in accordance with the conditions established by regulations governing employment mediation without the need for job or workplace adjustments.

Paragraph 3 of the same article stipulates that persons with disabilities, defined in Article 2 of the Law, who have a minimum of 40% disability, persons with at least 70% physical impairment, and those with mild to moderate mental retardation, have the right to employment under special conditions. The employment of persons with disabilities under special conditions is regarded as a mandatory requirement for republican administrative bodies, local self-government authorities, judicial institutions, public organizations and funds, as well as public enterprises not specifically established for the employment of disabled persons, in accordance with the provisions of this law.

Article 26 of the law establishes a mandatory employment quota for persons with disabilities in organisations and institutions where such an employment obligation exists. Authorities and other legal persons referred to in Article 25, paragraph 1 of this law are obliged to have at least one disabled employee for every 16 employees at the appropriate workplace, according to their own choice, under appropriate working conditions.

According to Article 27, paragraph 1 of the Law, employers who are not legally obligated to hire disabled persons may still employ such individuals in suitable positions in accordance with this law, thereby becoming eligible for certain incentives and benefits. Employers referenced in paragraph 1 of this article, who do not meet the required number of disabled employees as stipulated in Article 26, paragraph 1 of this law, are required to pay a special contribution.

The Law on Professional Rehabilitation, Training and Employment of Disabled Persons[92] of the FBiH stipulates that persons with disabilities are employed and work on the labour market under general and special conditions. Under general conditions, persons with disabilities are employed on the open labour market, in state bodies, judicial bodies, local government bodies, public services, institutions, funds, public companies, companies and other legal entities that were not established for the employment of persons with disabilities in accordance with the Law (Article 15(2)). Under special conditions, persons with disabilities may be employed in institutions or companies specifically established for the purpose of their employment. Employment under special conditions, as defined by this Law, also includes employment within organisations for persons with disabilities as well as self-employment, such as starting a trade, engaging in independent activities, or pursuing agricultural work as the

92 *Official Gazette of the Federation of Bosnia and Herzegovina*, No. 9/2010.

primary occupation (Article 15, paragraph 4 and 5). Persons with disabilities with at least 60% impairment, those with a physical impairment of at least 70% resulting in reduced working capacity as defined by Article 3 of the Law, and individuals with mild or moderate intellectual disabilities are entitled to employment under special conditions (Article 15(6)).

When employing persons with disabilities under general conditions, the entities specified in Article 15(2) of this Law are required to employ individuals with disabilities in proportion to their total workforce.[93]

The BD Assembly has not yet adopted a law governing professional rehabilitation, training and employment of persons with disabilities.

3.4. The Right of Persons with Disabilities to Education in BiH

According to Article 24 of the UNCRPD, States Parties recognise the right of persons with disabilities to education and commit to establishing an inclusive education system at all levels, as well as providing lifelong learning opportunities, directed at: a) fostering the full development of human potential, dignity, and self-worth, while strengthening respect for human rights, fundamental freedoms, and human diversity; b) promoting the development of the personality, talents, creativity, and mental and physical abilities of persons with disabilities to their fullest potential; and c) enabling effective participation of persons with disabilities in a free society. Article 24(2) of the Convention requires States Parties to ensure that persons with disabilities are not excluded from the general education system on the basis of disability and that children with disabilities have access to free and compulsory primary education, as well as secondary education, without discrimination. It further mandates that persons with disabilities be provided access to inclusive, quality, and free primary and secondary education on an equal basis with others within their local communities. States Parties are also obligated to provide reasonable accommodations to meet individual needs and to offer the necessary support within the general education system to ensure effective education for persons with disabilities. This includes individualised support measures aimed at maximising both academic and social development, consistent with the objective of full inclusion.

Article 24 provides not only that children with disabilities should not be discriminated against but also that they should be able to participate in general education.[94] In BiH, the entity, cantonal, and Brčko District authorities have adopted strategies

93 Specifically, the requirements were set as follows: by 31 December 2009, at least one person with a disability for every 39 employees; by 31 December 2010, at least one for every 32 employees; by 31 December 2011, at least one for every 24 employees; by 31 December 2012, at least one for every 19 employees; and by 31 December 2013, at least one for every 16 employees. Entities that fail to meet this obligation must calculate and pay a sum equivalent to 25% of the average salary in the FBiH for each person with a disability they were required to employ, to the Fund for Promoting Rehabilitation and Employment of Persons with Disabilities.

94 De Beco, 2014, p. 264.

aimed at improving the inclusion of children with disabilities in the education system. However, the effectiveness of these strategies has varied in practice.

In the past, courts in BiH have addressed cases involving violations of the right to education for persons with disabilities, finding breaches of the Law on the Prohibition of Discrimination. In the first known case under the BiH Law on the Prohibition of Discrimination, the Municipal Court in Mostar recognised disability as a prohibited ground for discrimination.[95] The court upheld the plaintiff's claim, ruling that the Ministry had discriminated against a minor by failing to ensure equal treatment in the educational process, specifically by not taking necessary measures for the inclusion of a minor with disability. Similarly, in another case, the court acknowledged disability as a basis for discrimination when the defendants did not implement legally required measures to facilitate the attendance of a student with special needs, including ensuring school accessibility without architectural barriers and providing classroom assistants. In case No. 43 0 P 077313 12 P, the Municipal Court in Zenica found that the Zenica-Doboj Canton and the elementary school had discriminated against a minor with special needs by failing to ensure accessibility to the school without architectural barriers, thereby violating the right to equal participation in education.[96]

To enhance the inclusion of children with disabilities in the educational system in the RS, the RS Ministry of Education and Culture, in collaboration with the Republic Pedagogical Institute, is implementing inclusive education in schools.[97] According to the law governing primary education and upbringing, students with disabilities receive education in regular schools – either in standard, combined, or special classes – or in schools specifically for children with disabilities. Since the 2010/2011 school year, the Ministry has funded assistants designated for students with autism or combined impairments involving autism, as well as for students with physical disabilities, including those with limited mobility or who are immobile. Students with other disabilities are assigned assistants based on the availability of funds allocated in the budget. These assistants provide support with mobility, hygiene, communication, social inclusion, and other needs, based on recommendations from teachers or the school's professional service.[98] However, the number of personal assistants is still insufficient to meet the demand for their participation in the educational process. The commitment to enhancing inclusive education is emphasised in the Strategy for Improving the Social Position of Persons with Disabilities in the Republic of Srpska

95 Decision in case no. P 58 0 P 056658 (06.07.2010), Municipal Court in Mostar, cited in Kadribašić, 2017, p. 13.

96 Ibid., pp. 13–14.

97 The obligation to facilitate inclusive education for children with disabilities, along with the provision of appropriate support for these students, is established by the RS Law on Primary Education and Upbringing (*Official Gazette of the Republic of Srpska*, No. 81/2002), and the RS Law on Secondary Education and Upbringing (*Official Gazette of the Republic of Srpska*, No. 41/2018, 92/2020, 55/2023).

98 The Second and Third Report on Implementation of the United Nation's Convention on the Rights of Persons with Disabilities in BiH, 2020, p. 28.

(2017–2026), adopted by the Ministry of Health and Social Welfare. This strategy outlines key educational goals, including improving inclusive and special education, promoting lifelong learning for persons with disabilities, advancing the professional development of educators and professionals working with children with disabilities, and providing adapted textbooks, literature, and teaching aids for children and youth with disabilities. The RS Education Development Strategy (2016–2021) also outlines goals for enhancing the education of children with disabilities, including creating conditions for their inclusion in institutional preschool education, ensuring comprehensive participation in compulsory nine-year primary education through continuous analysis and improvement of service quality, and supporting the inclusion of children with disabilities in secondary education.[99]

In the FBiH, the Strategy for Advancement of Rights and Status of Persons with Disabilities (2016–2021) set forth activities aimed at improving accessibility in inclusive education. Specific objectives include enhancing environmental accessibility by removing architectural and communication barriers (Specific Objective 2) and ensuring the equal participation of persons with disabilities in all areas of life, particularly in education, cultural, sporting, public, and political activities (Specific Objective 3). Inclusive education in the cantons of FBiH is implemented in compliance with various bylaws. While some cantonal ministries have adopted strategies for inclusive education, the Second and Third Report on Implementation of the United Nation's Convention on the Rights of Persons with Disabilities in BiH indicates that these strategies have not been adopted in all cantons, and several cantons still lack specific budget allocations for inclusive education. Architectural accessibility of the school environment in the FBiH varies across cantons, with some showing better accessibility than others. However, the situation is progressively improving, with ongoing efforts being made to enhance accessibility.[100]

3.5. The Right to Participate in Political and Public Life

The right to political participation is an internationally recognised human right.[101] The UNCRPD also provides for the right of persons with disabilities to engage in

99 Ibid.

100 Ibid., pp. 26–27.

101 The first human rights instrument addressing political participation is the Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948. Art. 21 of the Declaration asserts that "[e]veryone has the right to take part in the government of his country" and that the will of the people "shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures". The primary treaty affirming the right to political participation is the International Covenant on Civil and Political Rights (ICCPR), which establishes binding legal obligations for States Parties. Art. 25 of the ICCPR provides that every citizen has the right and opportunity, without discrimination or unreasonable restrictions, to vote and to be elected in genuine periodic elections conducted by universal and equal suffrage and held by secret ballot, ensuring the free expression of the electors' will. By extending rights to "every citizen", the ICCPR's protections encompass persons with disabilities. Waterstone, 2011, pp. 373–374.

political and public life. Article 29 of the UNCRPD stipulates that States Parties are obligated to guarantee that persons with disabilities enjoy political rights and opportunities on an equal basis with others. To achieve this, they must ensure that individuals with disabilities can fully and effectively participate in political and public life, either directly or through freely chosen representatives, including the right to vote and be elected. This entails making voting procedures, facilities, and materials accessible, appropriate, and easy to understand and use; protecting the right to vote by secret ballot in elections and referendums without intimidation; and enabling persons with disabilities to stand for election, hold office, and perform public functions at all levels of government. States must also facilitate the use of assistive and new technologies where applicable, guarantee the free expression of the will of persons with disabilities as electors, and, where necessary, provide assistance in voting by a person of their choice upon request. Additionally, States Parties must promote an inclusive environment where persons with disabilities can fully participate in public affairs without discrimination, fostering their involvement in public life. This includes encouraging participation in non-governmental organisations and associations related to public and political life, as well as in the activities and administration of political parties. Furthermore, states should support the formation and participation of organisations representing persons with disabilities at the international, national, regional, and local levels.

The right to participate in elections in BiH is regulated by the Election Law of BiH, which does not restrict persons with disabilities from voting or from being elected. Individuals with disabilities who require assistance or a mobile voting team are provided with the necessary support to facilitate their voting process. According to Article 5.19(1) of the BiH Election Law: 'Upon the request of voters who are blind, illiterate or persons with disability, the President of the Polling Station Committee shall approve the procedure wherein another person, selected by the voter concerned, may assist the voter in signing the excerpt from the Central Voters Register, and casting his or her ballot'.[102] The Rulebook on Methods for Implementation of Elections in BiH also stipulates that persons with disabilities may register and receive assistance in a manner most conducive to their needs.[103] According to Article 5.1(2) of the BiH Election Law, the Municipal Election Commission shall designate polling stations no later than sixty-five days prior to election day, considering the accessibility of polling stations for voters with disabilities as well as the technical requirements necessary for the operation of the election technology during the conduct of elections. If a Polling Station is equipped with election technologies that enable individuals with disabilities to vote independently, assistance from another person shall be excluded to ensure the secrecy of the vote (Article 5.19.5).

During the pre-election campaign, information is disseminated to all citizens through electronic media, sign language interpreters, print media, and other

102 Bosnia and Herzegovina, n.d.a.
103 Bosnia and Herzegovina, n.d.b.

accessible formats.[104] The Report on the Implementation of the United Nations Convention on the Rights of Persons with Disabilities in BiH (2012) notes that the RS and the FBiH Strategies for the Improvement of the Social Position of Persons with Disabilities have recognised the necessity of promoting the active participation of representatives of persons with disabilities in political parties, political life, and decision-making processes at all levels. Specifically, organisations representing persons with disabilities are encouraged to engage in public debates concerning documents of significance to the citizens.[105] However, as highlighted in the Report, while there is no specific legislation prohibiting individuals with disabilities from participating in political life, there are also no measures in place to actively encourage their involvement in political and public affairs.

According to the Second and Third Report on the Implementation of the United Nation's Convention on the Rights of Persons with Disabilities in BiH, covering the period from the beginning of 2013 to the end of 2019, several individuals with disabilities participated in the electoral process in the RS, with one individual (an amputee) obtaining a mandate in the RS National Assembly.[106]

4. Conclusion

Persons with disabilities represent one of the most vulnerable groups in society, frequently experiencing social stigma, discrimination, and marginalisation. Even in countries with a strong tradition of upholding human rights, individuals with disabilities continue to face discrimination, social exclusion and inequitable treatment. They tend to have lower income and educational attainment, higher rates of unemployment, precarious housing conditions, and poorer health outcomes compared to persons without disabilities. These challenges are further exacerbated in countries in transition, where ongoing social, political, and economic changes often intensify these vulnerabilities.

Although the countries examined in this study have ratified the UNCRPD, and most of them have also ratified its Optional Protocol, the process of implementing the Convention and establishing a system that enables the full and effective enjoyment of all human rights and fundamental freedoms by persons with disabilities, on an equal basis with others, is progressing at an uneven pace (as evidenced by the selected case studies). While the implementation of certain provisions of the UNCRPD is impeded by objective difficulties characteristic of transitional economies, such as high unemployment and limited financial resources, the application of specific articles, notably Article 12, gives rise to complex ethical dilemmas. These dilemmas

104 Report on the Implementation of the United Nations Convention on the Rights of Persons with Disabilities in BiH, pp. 49–50.
105 Ibid., p. 44.
106 The Second and Third Report on the Implementation of the United Nation's Convention on the Rights of Persons with Disabilities in BiH, p. 35.

concern the appropriate balancing of competing ethical values: namely, the principles of autonomy, self-determination, and human dignity, on the one hand, and the requirement of the protection of persons with disabilities, often interpreted through the 'best interests' standard, on the other.

Several shared problems are evident across the countries under review. Substitute decision-making regimes remain deeply embedded: plenary and partial guardianship continue to be applied in Hungary and Serbia, while in the Czech Republic, despite the abolition of plenary guardianship, substitute decision-making continues to dominate, with supported decision-making mechanisms still underdeveloped. In the field of employment, all countries under assessment have introduced quota systems or related measures intended to promote the labour market participation of persons with disabilities. Yet, their impact remains limited due to weak enforcement, inadequate monitoring, insufficient provision of reasonable accommodation, and persistent stigma among employers. The right to inclusive education has also seen uneven progress. While all these countries have undertaken steps toward educational inclusion, systemic barriers continue to obstruct implementation. These include insufficient teacher training, lack of resources for individualised support, complex administrative requirements, and entrenched social preferences. Finally, political participation by persons with disabilities remains constrained, both formally through legal restrictions and informally through practical barriers.

Similar challenges are evident in BiH. The ratification of the UNCRPD and its Optional Protocol marked an important step toward the development of a more comprehensive framework for the protection of the rights of persons with disabilities in BiH, leading to legislative changes across various levels of government. Although the adopted legal provisions include measures intended to improve the position of persons with disabilities, their implementation has often been slow and unsatisfactory, resulting in a disparity between the legal framework and practical outcomes. Despite notable progress, substantial systemic obstacles continue to impede the full realisation of the rights of persons with disabilities, including the domains of education, employment, political participation, and the exercise of legal capacity. These challenges reflect not only gaps in legislative implementation but also deeper structural and societal barriers that hinder the effective translation of legal requirements into practice. It is therefore essential for authorities at all levels of government to continue their efforts while consistently raising public awareness about the importance of respecting the rights of persons with disabilities. The lack of financial resources is not necessarily the primary obstacle to improving their position; rather, continuous engagement is required from not only government actors but also all members of society, including persons with disabilities themselves, which necessitates adequate support for associations representing people with disabilities.

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| Chapter 14 |

Protection of Human Rights in the UN from a Central European and Certain Eastern European States' Perspective

Bartłomiej Oręziak

ABSTRACT

This chapter will conduct a comparative analysis of the protection of human rights within the framework of the United Nations (UN) for 16 countries. The primary aim of the study is to identify similarities and differences in the approaches of Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Georgia, Hungary, Moldova, Montenegro, North Macedonia, Poland, Romania, Serbia, Slovakia, Slovenia, and Ukraine to the UN human rights protection system, including the implementation of international obligations arising from it. This overarching goal determines the subsidiary objectives of the study. First, the study will explore the historical development of human rights in the analysed countries. Second, it will examine the relationship or stance of the selected countries toward the UN from a human rights perspective. Third, it will analyse the scope of international obligations undertaken by the selected countries, identifying which UN human rights conventions each country is a State Party to. Fourth, the study will focus on the process and timeline of ratification, accession, or succession to the key UN human rights conventions. Fifth, it will assess the impact of these international legal acts on the domestic legal systems of the analysed countries. Sixth and finally, the study will review cases involving the analysed countries brought before UN treaty bodies concerning these key UN human rights conventions. The chapter will conclude with a consolidated presentation of all 16 countries in a single summary, finalising the study's primary objective.

KEYWORDS

Human Rights, United Nations, Central Europe, Eastern Europe, Comparative Law

1. Introduction

This chapter will provide a comparative analysis of human rights protection within the framework of the United Nations (hereinafter referred to as the UN) from the perspective of Central European and selected Eastern European countries. Sixteen countries were chosen for the analysis: Albania, Bosnia and Herzegovina, Bulgaria,

Bartłomiej Oręziak (2026) 'Protection of Human Rights in the UN from a Central European and Certain Eastern European States' Perspective' in Kovács, P., Béres, N. (eds.) *The Universal Protection Of Human Rights*. Miskolc–Budapest: Central European Academic Publishing, pp. 499–552. https://doi.org/10.71009/2026.pknb.uphr_14

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Croatia, Czech Republic, Georgia, Hungary, Moldova, Montenegro, North Macedonia, Poland, Romania, Serbia, Slovakia, Slovenia, and Ukraine. This constitutes a significant dataset for a comparative study, where it is scientifically and cognitively compelling to determine how human rights protections established under the UN system are reflected in these countries. The rationale for this comparative analysis is primarily based on the following factors: first, the selected countries are all UN member states; second, they are European countries that often share a common or similar historical background; third, many of the challenges stemming from international regulations are globally shared by all states; and fourth, the approaches of these countries to fulfilling their international obligations under specific UN treaties may vary significantly. It is therefore reasonable to determine, through comparison, how the countries selected for this analysis address the standards and requirements of human rights protection within the framework of their membership in the UN.

Nevertheless, the outlined objective of the study necessitates identifying subsidiary goals, the achievement of which will gradually bring the attainment of the main objective closer. In a sense, it involves structuring a comparative analysis that should effectively lead to achieving the primary goal of the study. The main objective of the study is to demonstrate the similarities and differences in the approaches of Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Georgia, Hungary, Moldova, Montenegro, North Macedonia, Poland, Romania, Serbia, Slovakia, Slovenia, and Ukraine to the UN human rights protection system, including the implementation of the resulting international obligations. This approach pertains to the relationship between subjects of international law, specifically the relationship between the State or States and the United Nations. The primary objective of the study determines the need to define subsidiary goals that support its achievement, thereby shaping the structure of the comparative analysis, which will focus on several key issues. These same issues will apply to each analysed country. The first issue will involve examining the historical development of human rights in the analysed states. The second issue will address the relationship or stance between the analysed states and the United Nations from the perspective of human rights. The third issue will concern the scope of international obligations of the analysed states, identifying the UN human rights conventions to which each state is a party. The fourth issue will involve the process and timeline of ratification, accession, or succession regarding the following UN conventions: The 1951 Convention relating to the Status of Refugees (hereinafter: CSR);[1] The 1966 International Covenant on Civil and Political Rights (hereinafter: ICCPR);[2] The 1966 International Covenant on Economic, Social and Cultural Rights (hereinafter: ICESCR);[3] The 1965 International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter: ICERD);[4] The 1979

1 United Nations, 1954, p. 137.
2 United Nations, 1983b, p. 171.
3 United Nations, 1983a, p. 3.
4 United Nations, 1971, p. 195.

Convention on the Elimination of All Forms of Discrimination against Women (hereinafter: CEDAW);[5] The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter: CAT);[6] The 1989 Convention on the Rights of the Child (hereinafter: CRC);[7] The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (hereinafter: ICMW);[8] The 2006 Convention on the Rights of Persons with Disabilities (hereinafter: CRPD).[9] The fifth issue will examine the influence of these international legal acts on the domestic laws of the analysed states. The sixth and final issue will address cases involving the analysed states brought before UN treaty bodies concerning the aforementioned international legal acts. It seems that the subsidiary goals defined in this manner, which simultaneously form the structure of the comparative analysis, will be sufficient to determine the similarities and differences in the approaches of Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Georgia, Hungary, Moldova, Montenegro, North Macedonia, Poland, Romania, Serbia, Slovakia, Slovenia, and Ukraine to the UN human rights protection system, including the implementation of the resulting international obligations.

When conducting comparative analyses, an appropriate research approach is of critical importance, particularly with attention to the substantive and methodological premises of legal comparative studies. Regarding the substantive premises, the first is the diversity of the research subject. The second is the openness to elements external to national laws and legal doctrines. The third is objectivity and academic rigor. As for the methodological premises, the first is the identification of the subject of comparison (standardisation). The second is the selection of comparative criteria. The third is the description of the comparison (similarities and differences). The fourth is the evaluation of the results of the comparison. This study will employ theoretical comparative analysis with elements of legal comparative studies. Depending on the need, both substantive and formal comparative methods will be applied, which can be framed as employing a global comparative analysis. Deductive reasoning will take precedence in this chapter, although the use of inductive reasoning is not excluded. In addition to the comparative method, typical methods used in legal scholarship, such as the linguistic-logical method and the theoretical-dogmatic method, will also be employed.

Additionally, for the purposes of such a broadly outlined comparative analysis, the selection of appropriate sources is of critical importance. These sources should enable the proper and thorough comparison described above, thereby facilitating the achievement of the primary objective of the chapter. This study will be based, though not exclusively, on information contained in academic articles that analyse issues identical to the subject matter of this research, but framed within the perspective of

5 United Nations, 1979, p. 13.
6 United Nations, 1984, p. 85.
7 United Nations, 1999, p. 3.
8 United Nations, 2004b, p. 3.
9 United Nations, 2008a, p. 3.

national law in the following countries: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Georgia, Hungary, Moldova, Montenegro, North Macedonia, Poland, Romania, Serbia, Slovakia, Slovenia, and Ukraine.[10]

2. The Historical Development of Human Rights

The purpose of employing the historical method is to demonstrate the path taken by the selected countries from the perspective of human rights protection. It is relatively uncontroversial to assert that this path has undoubtedly differed in its specific characteristics. This is after all, a matter of state entities that have independently worked towards their current and uniquely national levels of human rights protection. Nevertheless, it is possible to identify certain historical similarities that may help to explain the present perspective on human rights protections within independent structures. This primarily refers to the shared history of some of the countries selected for comparative analysis.

The historical development of human rights in Central and Eastern Europe reflects a diverse array of trajectories shaped by geopolitical changes, cultural influences, and specific institutional frameworks. The countries included in the analysis – Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Georgia, Hungary, Moldova, Montenegro, North Macedonia, Poland, Romania, Serbia, Slovakia, Slovenia, and Ukraine – can be categorised into four groups, each characterised by its unique context in the evolution of human rights. The first group consists of the former Yugoslav states, the second includes the post-communist countries of Central Europe, the third encompasses the post-Soviet states, and the fourth represents the unique case of Albania.

The first group – the former Yugoslav states – includes Bosnia and Herzegovina, Croatia, Montenegro, North Macedonia, Serbia, and Slovenia. These countries shared the common experience of operating within the framework of the Socialist Federal Republic of Yugoslavia (SFRY), where the legal system was predominantly subordinated to communist ideology.[11] Although the legal system of the SFRY formally provided for numerous social, economic, and political rights, it is undeniable that their practical significance was fundamentally constrained by the overarching ideology of the communist party's interests, as well as by state and systemic control over both public and private life.[12] Nonetheless, it is worth emphasizing that the SFRY differed from typically Soviet states due to its relative autonomy from the Union of

10 Milinković, 2025, pp. 333–360; Marcheva, 2025, pp. 263–300; Konjević, 2025, pp. 191–228; Matiaško, 2025, pp. 301–332; Bakhtadze, 2025, pp. 41–89; Kovács, 2025, pp. 229–262; Cazacu, 2025, pp. 9–48; Etinski, 2025, pp. 91–126; Karakamisheva-Jovanovska, 2025, pp. 145–190; Czepek, 2025, pp. 49–80; Nagy, 2025, pp. 361–395; Tubić, 2025, pp. 367–396; Hassanová, 2025, pp. 81–105; Ivaniuk, 2025, pp. 107–144.
11 Pejic, 1995, pp. 1–18.
12 Jambrek, 2020, pp. 177–201.

Soviet Socialist Republics (USSR). This distinction influenced the development of a somewhat more open model of socialism, though it did not significantly impact the actual implementation of human rights. The dissolution of the SFRY, which began in 1991, triggered a series of armed conflicts in the region, effectively suspending the application of an already limited system of human rights protection. Furthermore, this period was generally not marked by an adherence to the relevant norms of international humanitarian law.[13] Over time, the newly formed states resulting from the dissolution of the SFRY faced the consequences of widespread violations of human rights and international humanitarian law. In this context, the International Criminal Tribunal for the former Yugoslavia (hereinafter referred to as the ICTY) played a significant role, striving to hold perpetrators accountable for these violations.[14] Today, Bosnia and Herzegovina, Croatia, Montenegro, North Macedonia, Serbia, and Slovenia are striving to align with international legal standards, including those related to human rights. This pertains not only to the UN system but also to the Council of Europe (hereinafter referred to as the CoE) and the European Union (hereinafter referred to as the EU). Bosnia and Herzegovina has been a member of the UN since 1992, a member state of the CoE since 2002, and while not an EU member state, it holds candidate status for EU accession. Croatia has been a member of the UN since 1992, a CoE member state since 1996, and an EU member state since 2013.[15] Montenegro has been a member of the UN since 2006, a member state of the CoE since 2007, and is not an EU member state. North Macedonia has been a member of the UN since 1993, a member state of the CoE since 1995, and is not an EU member state but holds candidate status for the EU. Serbia has been a member of the UN since 2000, a member state of the CoE since 2003, and is not an EU member state but holds candidate status for the EU. Slovenia has been a member of the UN since 1992, a member state of the CoE

13 Orakhelashvili, 2008, pp. 161–182.

14 Aldrich, 1996, pp. 64–69.

15 Treaty between the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union), and the Republic of Croatia concerning the accession of the Republic of Croatia to the European Union, 2012. See more: *Official Journal of the European Union*, 2012/55, pp. 10–110 [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ%3AL%3A2012%3A112%3ATOC (Accessed: 26 December 2024).

since 1993, and an EU member state since 2004.[16] Although the states of the former SFRY have faced a challenging history in terms of the development of human rights protection, they are currently (at times successfully) striving to align their practices and legal systems with international standards, including not only those of the UN system but also those of the CoE and the EU. It is worth emphasising however, that these states are characterised by their unique specifics today, and grouping them together is justified by their shared history, including the history of the development of their human rights protection systems.

The post-communist countries of Central Europe, which include Bulgaria, the Czech Republic, Poland, Romania, Slovakia, and Hungary, were under the USSR's strong influence for many years.[17] This shaped their political and legal systems, including their human rights protection systems, which were significantly restricted by such influences. The level of Soviet oversight and control varied among these countries and changed over time, with these states gradually gaining broader autonomy. Nonetheless, during this period, human rights – though prominently enshrined in key legal acts, particularly social and civil rights – were treated as mere formal declarations. In practice, they were subordinated to national interests, socialism, and the preservation of the communist party's authority.[18] Widespread political repression, restrictions on civil and political freedoms, suppression of free speech, censorship, and the lack of an independent judiciary were characteristic features of the post-communist countries of Central Europe. As noted, the influence of the USSR on these states varied over time, with 1989 marking a pivotal turning point. In 1989, a systemic transformation occurred in this group of countries, which should be regarded as a key moment in the development of human rights in the region. This transformation gradually began opening their systems to international human rights protection standards, including not only those of the UN but also the CoE and the EU. Democratic and modern constitutions or fundamental laws were introduced, providing not only a catalogue of human rights' safeguards but also the mechanisms for their practical enforcement. After 1989, these countries initiated processes to address the legacy of the previous era and began implementing reforms, such as ensuring

16 Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, and the Slovak Republic concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, and the Slovak Republic to the European Union, 2003. See more: *Official Journal of the European Union*, 2003/46, pp. 17–930 [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AL%3A2003%3A236%3ATOC (Accessed: 26 December 2024).

17 Hassner, 1986, pp. 17–35.

18 Thomas, 2005, pp. 110–141.

judicial independence, protecting freedom of speech, and safeguarding minority rights.[19] As might be expected, there were certain differences among these countries in this regard, with systemic changes occurring relatively efficiently and peacefully in some cases, while in others, these processes were tumultuous and problematic. The latter primarily applies to Romania and Bulgaria, which had more authoritarian regimes during the socialist era.[20] Currently, all countries classified as post-communist states of Central Europe are actively striving to participate in the international cooperation on human rights protection, often making significant and independent contributions.[21] Bulgaria has been a member of the UN since 1955, a member state of the RE since 1992, and a member state of the EU since 2007.[22] The Czech Republic has been a member of the UN since 1993, a member state of the RE since 1993, and a member state of the EU since 2004. Poland has been a member of the UN since 1945, a member state of the RE since 1991, and a member state of the EU since 2004. Romania has been a member of the UN since 1955, a member state of the RE since 1993, and a member state of the EU since 2007. Slovakia has been a member of the UN since 1993, a member state of the RE since 1993, and a member state of the EU since 2004. Hungary has been a member of the UN since 1955, a member state of the RE since 1990, and a member state of the EU since 2004.

Georgia, Moldova, and Ukraine are classified as post-Soviet states, since they emerged following the collapse of the USSR, which began in 1988 in Estonia and concluded with the adoption of the declaration of the self-dissolution of the USSR in 1991.[23] The history of these states is marked by a challenging path of democratic transformation. During their time making up a part of the USSR, they experienced a loss of sovereignty and the inability to make autonomous decisions. Human rights during this period were largely formal provisions enshrined in legal acts, with little or no impact on practical realities or daily life in these regions.[24] Even when such legal norms were formally invoked, their implementation was drastically subordinated to state interests, the ideology of socialism, and the preservation of communist

19 Malfliet, 2002, pp. 163–186.

20 Verdery, 1993, pp. 179–203; Georgescu, 1987, pp. 69–93; Brunnbauer and Taylor, 2004, pp. 283–312; Creed, 1995, pp. 843–868.

21 Molloy, 2019, pp. 783–784.

22 Treaty between the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Republic of Bulgaria and Romania, concerning the accession of the Republic of Bulgaria and Romania to the European Union, 2005. See more: *Official Journal of the European Union*, 157/11, pp. 11–395 [Online] Available at: https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=celex:12005S/TXT (Accessed: 26 December 2024).

23 Dallin, 1992, pp. 279–302.

24 Osakwe, 1981, p. 249.

power, while any political opposition was harshly suppressed.[25] he democratisation process in the post-Soviet states was further hindered by numerous ethnic conflicts and the weakness of their relatively young public institutions. Prominent examples of this include the armed conflicts between Russia and Georgia in 2008,[26] and between Russia and Ukraine in 2014[27] and 2022.[28] Nevertheless from the moment they achieved sovereign status, states such as Georgia, Moldova, and Ukraine have moved toward participation in the international human rights protection system. This path has often been challenging and not always straightforward. It is a fact however, that Georgia has been a member of the UN since 1992, a member state of the RE since 1999, and is not an EU member state but holds candidate status for the EU. Moldova has been a member of the UN since 1992, a member state of the RE since 1995, and is not an EU member state but also holds candidate status. Ukraine has been a member of the UN since 1945, a member state of the RE since 1995, and is not an EU member state but holds candidate status. In the case of Ukraine, it is important to note that the ongoing armed conflict with Russia significantly and negatively impacts the implementation of human rights and international humanitarian law.

The fourth and final group consists of the unique case of Albania, which was one of the most isolated countries in Europe during the communist era. This isolation resulted from the extreme isolationist policies pursued by Enver Hoxha. Hoxha's rule of over 40 years was marked by isolation, aggressive state atheism, and a strict adherence to Stalinism.[29] The Albanian regime was characterised by the brutal suppression of political opposition, widespread surveillance, and an effective severance from international institutions. Human rights existed primarily in a formal sense, accompanied by the establishment of labour camps and the widespread repression of citizens.[30] As a result, Albania's actual systemic transformation began later than in other analysed countries. In 1991, during the first multiparty elections in socialist Albania, the Communist Party secured a majority in the interim government. The transformation process generally lasted until 1998, culminating in the adoption of a new constitution. This democratisation process and Albania's opening up to international institutions have improved the country's human rights protection framework, though many challenges remain. In this context, it is worth noting that Albania has been a member of the UN since 1955, a member state of the CoE since 1995, and, while not an EU member state, holds candidate status for EU accession.

A comparative analysis of the development of human rights in Central and Eastern Europe highlights the complexity of transformational processes and the diversity of historical experiences. The former Yugoslav states have grappled with the legacy of ethnic conflicts and war crimes, necessitating intensive reconciliation efforts and

25 Ersene, 2023, pp. 41–54.
26 Deibert, Rohozinsk and Crete-Nishihata, 2012, pp. 3–24.
27 Goldthau and Boersma, 2014, pp. 13–15.
28 Mbah and Wasum, 2022, pp. 144–153.
29 Reichman, 1988, pp. 57–89.
30 Dushnyck, 1975, pp. 377–443.

institutional reforms. Central European countries have focused on democratisation and EU integration, although they currently face challenges related to the weakening of democratic institutions. The post-Soviet states are contending with the Soviet legacy and ongoing conflicts, which are hindering a full implementation of reforms. Albania, due to its isolation and delayed start to transformation, represents a unique case that underscores the diversity of human rights development trajectories in the region. A shared goal across all these countries remains the pursuit of harmonisation with international standards and the implementation of effective human rights protection mechanisms.

3. The Relationship to the UN from a Human Rights Perspective

The relationships of the sixteen Central and Eastern European and Balkan states with the UN in the field of human rights protection often stem from their diverse histories, differing social contexts, and institutional conditions. In this regard, it is difficult to identify a fixed reference point that would easily indicate the level of a specific country's relationship with the UN. Such a fixed point cannot be the date of accession to the UN, including having the status of a founding member state, since practical evidence shows that, regardless of variations in these dates, they do not have a decisive influence on national relations with the UN in the area of human rights. Therefore, an analysis of these relationships requires a detailed examination of their engagement with international mechanisms, the implementation of standards, and their capacity to address key challenges. Based primarily on official UN[31] data and previously cited national academic studies, it is possible to propose a classification of all analysed states into four fundamental groups. Firstly, there are states that are actively and effectively cooperating with the UN, viewing the mechanisms of the universal system as an opportunity to strengthen their human rights protection model. Secondly, there are states that actively cooperate with the UN but with limited effectiveness, facing specific implementation challenges. Thirdly, there are states with an active yet standardised approach to cooperation with the UN, placing a greater emphasis on collaboration within regional human rights protection systems and improving their domestic legal frameworks in this area. Fourthly, there are states that are actively cooperating with the UN yet face significant challenges in implementing universal mechanisms in the practical application of law.

The group of states that are actively and effectively cooperating with the UN in terms of implementation includes the Czech Republic, Croatia, Slovenia, and Slovakia. These countries are striving to actively participate in UN mechanisms, particularly within the framework of the Universal Periodic Review (hereinafter referred to as

31 See: 'Documentation by country' [Online]. Available at: https://www.ohchr.org/en/hr-bodies/upr/documentation (Accessed: 26 December 2024).

the UPR),[32] as well as in the United Nations Human Rights Council[33] and other treaty-based monitoring bodies. States in this group can be characterised by their systematic reporting and undertaking of initiatives related to human rights protection under UN oversight. They adopt numerous recommendations resulting from the UPR, generally without challenging their validity, assuming that such validity is affirmed by the authority of the UN. These recommendations often concern the general nature of political and social rights but sometimes take a more specific form, addressing reparative actions or legal norms concerning issues such as violence against women, minority protection, social integration, social protection, judicial reform, or environmental protection. It is worth emphasising that the conclusions and recommendations arising from the UPR for each state in this group are characterised by their specificity, influenced by national histories and the problems or challenges individual states face as a legacy of their past. However, what unites states in this group is their broad acceptance of UN recommendations, aimed at the fullest possible integration of their domestic legal systems with UN international standards. This acceptance is generally granted without raising significant defensive arguments.

The group of states that actively cooperate with the UN but face specific implementation challenges includes Romania, Bulgaria, Moldova, Albania, North Macedonia, Montenegro, Serbia, and Bosnia and Herzegovina. Efforts by these states to integrate domestic law with international UN standards are constrained by internal systemic and political issues. On the one hand, there is a strong desire to participate in the international legal framework of human rights protection. This is evidenced by the content of constitutional norms that grant human rights treaties a significant position in the hierarchy of legal sources, and also by active participation in UN agency bodies, as well as by the utilisation of expert and institutional support, particularly for strengthening democratic legal frameworks, for example, through mechanisms such as the UPR. On the other hand, these states continue to face ongoing challenges rooted in their historical legacies. Firstly, issues related to discrimination against national minorities and domestic violence. Secondly, detention conditions and the marginalisation of ethnic groups remain significant concerns. Thirdly, challenges persist regarding human trafficking, corruption, and limited actual access to justice. Finally, a further set of problems includes limited institutional resources and political conflicts.

The group of states with an active but standardised approach to cooperation with the UN includes Poland and Hungary. These states place a significantly greater emphasis on collaboration within regional human rights protection systems, such as the EU and the RE. They do not adopt an uncritical stance toward UN recommendations, including those made within the framework of the UPR, citing the importance of maintaining a sovereign contribution to sensitive areas of national law, such as issues related to LGBT rights or child protection. These states engage in an active

32 Carraro, 2019, pp. 1079–1093.
33 Alston, 2006, pp. 185–224.

dialogue with the UN, where an analysis of its content suggests that not every human rights issue is suitable for the application of universal standards. In some cases, it is necessary to consider national history and heritage.[34] These relationships appear to reflect a balanced attempt to maintain equilibrium between respecting international obligations and protecting national interests.

Finally, there are states that actively cooperate with the UN but face significant challenges in implementing universal mechanisms in the practical application of law. This group includes Ukraine and Georgia. This situation has arisen because the difficult histories of these states remain unresolved. Armed conflicts on their territories severely hinder, or even prevent, the implementation of UN standards in the field of human rights. The application of international humanitarian law norms can also be called into question. Despite these states formally committing to numerous UN legal instruments, practice reveals significant difficulties in realising these commitments. During these times of armed conflict, Ukraine has been focussing its cooperation with the UN primarily on documenting violations of human rights and international humanitarian law, particularly in protecting civilian populations. Meanwhile, Georgia is actively collaborating with the UN, mainly in monitoring the situation in its occupied regions.

The comparison indicates that the relationships of the analysed states with the UN from a human rights perspective depend on their historical experiences, political priorities, and ability to integrate international standards into their domestic legal systems. Countries such as the Czech Republic, Croatia, Slovenia, and Slovakia maintain relationships with the UN based on active acceptance (a high level of acceptance of UN recommendations and active participation in its mechanisms and bodies). Romania, Bulgaria, Moldova, Albania, North Macedonia, Montenegro, Serbia, and Bosnia and Herzegovina maintain relationships with the UN based on internally burdened acceptance (a high level of acceptance of UN recommendations coupled with implementation challenges). Poland and Hungary maintain relationships with the UN based on active balancing (a measured acceptance of UN recommendations while advancing CoE and EU standards). Ukraine and Georgia maintain relationships with the UN based on limited intervention (armed conflicts and challenging internal conditions). The relationships of the analysed states with the UN in the area of human rights protection are therefore diverse, and their nature is closely tied to internal circumstances, political priorities, and historical burdens. Cooperation with the UN reflects both international aspirations and the constraints imposed by local realities.

34 As part of UPR, states submit national reports.

4. The Scope of International Obligations from the perspective of UN Human Rights Treaties

Each of the analysed states is a member of the UN, which grants them the opportunity to become a State Party to specific human rights treaties issued within this international organisation. However, the scope of international obligations undertaken by the analysed states as UN members may differ. This is because being a UN member does not automatically entail a commitment to adhere to the entire body of UN legal instruments. Moreover, UN membership does not oblige states to gradually adopt all UN treaties, including those related to human rights protection. National states, as sovereign entities under public international law, independently decide whether and when to become bound by specific UN legal instruments. For this reason, it is natural to observe both differences and similarities in this regard when conducting a comparative analysis of the 16 states. After presenting the historical development of human rights and the relationship to the UN from a human rights perspective, it is now appropriate to examine the scope of international obligations undertaken by the analysed states in the field of human rights protection within the UN system. This will reveal the extent of these states' engagement. In other words, whether these states would actively utilise the UN's legal framework to position themselves as proactive actors or beneficiaries in the arena of universal human rights standards, or whether the opposite is true.

The analysis in this regard encounters a preliminary issue, in that it is challenging to identify which UN treaties qualify as human rights treaties. Certainly, treaties listed in Chapter IV of the United Nations Treaty Collection (hereinafter referred to as the UNTC),[35] can be considered such, as the chapter is titled 'Human Rights'. However, the question arises, as to whether these are the only ones. It seems that the answer to this question should be negative. This is because at least one other chapter of the UNTC contains treaties that are crucial for human rights but have been categorised under a different topic. This primarily refers to Chapter V: 'Refugees and Stateless Persons'. As a result, the following section will present information regarding the catalogue of analysed states in comparison with the UN treaties listed in Chapter IV and Chapter V of the UNTC. The aim is to show which of the examined states have formally committed to adhering to specific UN treaties in the field of human rights.

Within Chapter IV – Human Rights, the following international treaties are listed along with their respective Treaty References:

35 United Nations, n.d.b.

Table 1. Chapter IV 'Human Rights' of United Nations Treaty Collection[36]

Treaty	Treaty Reference
Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9th December 1948 (dalej: CPPCG)[37]	IV-1
ICERD	IV-2
Amendment to article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination, New York, 15th January 1992 (dalej: AICERD)[38]	IV-2-a
ICESCR	IV-3
Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, New York, 10th December 2008 (dalej: OPICESCR)[39]	IV-3-a
ICCPR	IV-4
Optional Protocol to the International Covenant on Civil and Political Rights, New York, 16th December 1966 (OP1ICCPR)[40]	IV-5
Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, New York, 26th November 1968 (CWCCAH)[41]	IV-6
International Convention on the Suppression and Punishment of the Crime of Apartheid (ICSPCA)[42]	IV-7
CEDAW	IV-8
Amendment to article 20, paragraph 1 of the Convention on the Elimination of All Forms of Discrimination against Women, New York, 22nd December 1995 (dalej: ACEDAW)[43]	IV-8-a
Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, New York, 6th October 1999 (dalej: OPCEDAW)[44]	IV-8-b
CAT	IV-9
Amendments to articles 17 (7) and 18 (5) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 8th September 1992 (ACAT)[45]	IV-9-a
Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 18th December 2002 (OPCAT)[46]	IV-9-b
International Convention against Apartheid in Sports, New York, 10th December 1985 (dalej: ICAS)[47]	IV-10
CRC	IV-11

36 Źródło: opracowanie własne.
37 United Nations, 1951, p. 277.
38 See: Universal Declaration of Human Rights, Chapter IV. [Online]. Available at: https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&clang=_en (Accessed: 26 November 2024).
39 United Nations, 2013b, p. 29.
40 United Nations, 1976, p. 171.
41 United Nations, 1974, p. 73.
42 United Nations, 1976, p. 243.
43 United Nations, n.d.c.
44 United Nations, 2003, p. 83.
45 United Nations, n.d.d.
46 United Nations, 2006c, p. 237.
47 United Nations, 1953, p. 161.

Treaty	Treaty Reference
Amendment to article 43 (2) of the Convention on the Rights of the Child, New York, 12th December 1995 (dalej: ACRC)[48]	IV-11-a
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, New York, 25th May 2000 (dalej: OPCRCco)[49]	IV-11-b
Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, New York, 25th May 2000 (OPCRCpo)[50]	IV-11-c
Optional Protocol to the Convention on the Rights of the Child on a communications procedure, New York, 19th December 2011 (OPCRCpr)	IV-11-d
Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, New York, 15th December 1989 (dalej: OP2ICCPR)[51]	IV-12
ICMW	IV-13
Agreement establishing the Fund for the Development of the Indigenous Peoples of Latin America and the Caribbean Madrid, 24th July 1992 (dalej: AFDIPLACM)[52]	IV-14
CRPD	IV-15
Optional Protocol to the Convention on the Rights of Persons with Disabilities, New York, 13th December 2006 (dalej: OPCRPD)[53]	IV-15-a
International Convention for the Protection of All Persons from Enforced Disappearance, New York, 20th December 2006 (dalej: ICPAPED)[54]	IV-16

Within Chapter V – Refugees and Stateless Persons, the following international treaties are listed along with their respective Treaty References:

48 United Nations, 2002c, p. 210.
49 United Nations, 2004a, p. 222.
50 United Nations, 2000b, p. 227.
51 United Nations, 1991, p. 414.
52 United Nations, 2000a, p. 380.
53 United Nations, 2008b, p. 283.
54 United Nations, 2010b, p. 3.

Table 2. Chapter V 'Refugees and Stateless Persons' of United Nations Treaty Collection[55]

Treaty	Treaty Reference
Constitution of the International Refugee Organisation, New York, 15th December 1946 (terminated)[56]	V-1
CSR	V-2
Convention relating to the Status of Stateless Persons, New York, 28th September 1954 (dalej: CSSP)[57]	V-3
Convention on the Reduction of Statelessness, New York, 30th August 1961 (dalej: CRS)[58]	V-4
Protocol relating to the Status of Refugees, New York, 31st January 1967 (dalej: PSR)[59]	V-5

An analysis of subjects of public international law that have formally committed to participating in the above-mentioned UN human rights treaties, based on access to the 'Depositary Notifications (CNs) by the Secretary-General',[60] leads to the following observations regarding the catalogue of analysed states: Albania has not committed to the international obligations arising from the following treaties: AICERD, OPICESCR, ICSPCA, ACAT, ICAS, ACRC, AFDIPLACM and OPCRPD. This results in eight UN human rights treaties that do not apply to this country.

Bosnia and Herzegovina has not committed to the international obligations arising from the following treaties: AICERD, ACAT, ACRC, and AFDIPLACM. This results in four UN human rights treaties that do not apply to this country.

Bulgaria has not committed to the international obligations arising from the following treaties: OPICESCR, OPCRCpr, ICMW, AFDIPLACM, OPCRPD and ICPAPED. This results in six UN human rights treaties that do not apply to this country.

Croatia has not committed to the international obligations arising from the following treaties: AICERD, OPICESCR, ACAT, ICMW and AFDIPLACM. This results in five UN human rights treaties that do not apply to this country.

Czech Republic has not committed to the international obligations arising from the following treaties: OPICESCR, ACAT, ICMW and AFDIPLACM. This results in four UN human rights treaties that do not apply to this country.

Georgia has not committed to the international obligations arising from the following treaties: OPICESCR, ACAT, ICAS, ICMW, AFDIPLACM and ICPAPED. This results in six UN human rights treaties that do not apply to this country.

Hungary has not committed to the international obligations arising from the following treaties: AICERD, OPICESCR, ACEDAW, ACAT, ICAS, ACRC, OPCRCpr, ICMW, AFDIPLACM and ICPAPED. This results in ten UN human rights treaties that do not apply to this country.

55 Author's own work.
56 United Nations, 1948, p. 3.
57 United Nations, 1960, p. 117.
58 United Nations, 1975, p. 175.
59 United Nations, 1967, p. 267.
60 United Nations, n.d.

Moldova has not committed to the international obligations arising from the following treaties: AICERD, OPICESCR, ACAT, ICAS, ICMW, AFDIPLACM, and ICPAPED. This results in seven UN human rights treaties that do not apply to this country.

Montenegro has not committed to the international obligations arising from the following treaties: AICERD, ACAT, ICMW and AFDIPLACM. This results in four UN human rights treaties that do not apply to this country.

North Macedonia has not committed to the international obligations arising from the following treaties: AICERD, ACEDAW, ACAT, ICAS, OPCRCpr, ICMW, AFDIPLACM and ICPAPED. This results in eight UN human rights treaties that do not apply to this country.

Poland has not committed to the international obligations arising from the following treaties: OPICESCR, OPCRCpr, ICMW, AFDIPLACM, OPCRPD, ICPAPED, CSSP and CRS. This results in eight UN human rights treaties that do not apply to this country.

Romania has not committed to the international obligations arising from the following treaties: AICERD, OPICESCR, ICSPCA, ACEDAW, ACAT, ICAS, OPCRCpr, ICMW, AFDIPLACM, OPCRPD and ICPAPED. This results in 11 UN human rights treaties that do not apply to this country.

Serbia has not committed to the international obligations arising from the following treaties: AICERD, ACAT, OPCRCpr, ICMW and AFDIPLACM. This results in four UN human rights treaties that do not apply to this country.

Slovakia has not committed to the international obligations arising from the following treaties: ACEDAW, ACAT, ICAS, ICMW, and AFDIPLACM. This results in five UN human rights treaties that do not apply to this country.

Slovenia has not committed to the international obligations arising from the following treaties: AICERD, OPICESCR, ACAT, ICAS, ACRC, ICMW, AFDIPLACM, and CRS. This results in eight UN human rights treaties that do not apply to this country.

Ukraine has not committed to the international obligations arising from the following treaties: OPICESCR, ACEDAW, ICMW, and AFDIPLACM.[61] This results in four UN human rights treaties that do not apply to this country.

5. The Process and Time of Accession, Succession or Ratification of Certain UN Human Rights Treaties

In the above-presented comparative analysis of the scope of international obligations undertaken by the analysed states, a specific set of UN human rights treaties can be

61 A problematic issue is the ratification of the ICCPR by Ukraine. The search results in the Depositary Notifications by the Secretary-General indicate that Ukraine has not completed the act of ratification of the ICCPR. However, access through the United Nations Treaty Series Online reveals that Ukraine ratified the ICCPR on November 12, 1973. In this chapter, it has been considered appropriate to recognize that Ukraine has ratified the ICCPR. This is the only piece of data that has been adjusted compared to the information obtained from the Depositary Notifications by the Secretary-General.

identified, which can be considered the essence of human rights protection within the UN framework. This observation is further supported by positions frequently presented in the literature, which often attribute significant importance and influence on these treaties, based on the perception and implementation of human rights worldwide.[62] These treaties include CSR, ICCPR, ICESCR, ICERD, CEDAW, CAT, CRC, ICMW, and CRPD. Each of these treaties has introduced new and progressively transformative human rights standards, often serving as a basis for significant changes in national law. The CSR established key rules and principles for the protection of refugees, laying the foundation for most contemporary asylum law regulations.[63] The ICCPR and ICESCR jointly introduced an unprecedentedly broad catalogue of civil, political, economic, social, and cultural rights, reflections of which can be found in the modern legislation of contemporary states.[64] The ICERD and CEDAW, addressing the issues of racial discrimination and prejudice against women, significantly enriched the universal human rights protection system while simultaneously influencing anti-discrimination reforms in their State Parties.[65] The CAT strengthened the effective observance of the international prohibition of torture and other cruel, inhuman, or degrading treatment, which has resulted in the overwhelming majority of modern states including such regulations in their normative frameworks.[66] The CRC is regarded as a groundbreaking achievement in the field of human rights and children's rights, particularly because it guarantees and establishes minimum standards for the protection of children's rights in all areas.[67] The ICMW established important standards for migrant workers and their families, influencing immigration and labour law provisions in many national legal systems.[68] The CRPD, addressing the issues of persons with disabilities, has promoted their integration into social life, which is realised through national law.[69] It therefore appears, in light of the arguments presented, that the selection of such a catalogue of human rights treaties for further comparative analysis may be justified. Such an analysis will reveal differences and similarities in the process and time of the accession, succession, or ratification of the CSR, ICCPR, ICESCR, ICERD, CEDAW, CAT, CRC, ICMW and CRPD. Each of these instruments of international human rights law establishes fundamental and universal legal standards that are subject to implementation into national legal systems worldwide, ensuring that the law becomes more just.

62 Heyns and Viljoen, 2001, pp. 483–535; Gaer, 2003, pp. 339–357; Hill Jr., 2010, pp. 1161–1174; Egan, 2013, pp. 209–243; Kedzia, 2009, pp. 231–238; Alston and Mégret, 2020, pp. 1–39; Mingst, Karns, Lyon, 2022, pp. 1–63.
63 Fontaine, 2007, pp. 149–182.
64 Schrijver, 2016, pp. 457–464.
65 Diaconu, 2017, pp. 269–279; Englehart and Miller, 2014, pp. 22–47.
66 Baldinger, 2015, pp. 137–229.
67 Detrick, Doek and Cantwell, 1992, pp. 19–30; Reynaert, Bouverne-de-Bie and Vandevelde, 2009, pp. 518–534.
68 Venturi, 2018, pp. 17–43.
69 Steinert et al., 2016, pp. 1–14; Waddington and Priestley, 2021, pp. 1–15.

In light of the above, it is necessary to analyse which of the examined states have undertaken international obligations arising from the CSR, ICCPR, ICESCR, ICERD, CEDAW, CAT, CRC, ICMW and CRPD. To achieve this goal, it would be appropriate to examine each UN human rights treaty individually and indicate whether Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Georgia, Hungary, Moldova, Montenegro, North Macedonia, Poland, Romania, Serbia, Slovakia, Slovenia, or Ukraine are among the States Parties.

The ICERD has been adopted by all the analysed states. Bulgaria, Hungary, Poland, and Ukraine acceded to it through ratification, while Romania, the Republic of Moldova, Albania, and Georgia acceded to it through accession.[70] Slovenia, Croatia, Czech Republic, Bosnia and Herzegovina, Slovakia, North Macedonia, Serbia and Montenegro became parties to the ICERD through succession. The state that committed to the ICERD the earliest was Bulgaria, while the most recent was Montenegro.

Table 3. ICERD[71]

Time	Participant	Process
18/08/1966	Bulgaria	Ratification
23/05/1967	Hungary	Ratification
13/12/1968	Poland	Ratification
21/03/1969	Ukraine	Ratification
05/02/1971	Romania	Accession
28/10/1992	Slovenia	Succession
01/03/1993	Croatia	Succession
05/04/1993	Republic of Moldova	Accession
20/07/1993	Czech Republic	Succession
18/10/1993	Bosnia and Herzegovina	Succession
01/11/1993	Slovakia	Succession
29/06/1994	North Macedonia	Succession
21/07/1994	Albania	Accession
04/06/1999	Georgia	Accession
19/03/2001	Serbia	Succession
03/11/2006	Montenegro	Succession

70 Explanation: Succession is when a state takes over the rights and obligations of international treaties previously held by another state, such as after the dissolution of a state or regime change. Accession is the act by which a state joins an existing treaty without the need for prior signature, and it has the same legal force as ratification. Ratification involves a two-step process: first, the treaty is signed, and then it is formally approved to give it legal force domestically.

71 Author's own work.

The ICESCR has been adopted by all the analysed states. Albania, Georgia and the Republic of Moldova acceded to it through accession. Bosnia and Herzegovina, Croatia, Czech Republic, Montenegro, North Macedonia, Serbia, Slovakia, and Slovenia became parties to it through succession. Bulgaria, Hungary, Poland, and Romania adopted it through ratification. The state that committed to the ICESCR the earliest was Bulgaria, while the most recent was Montenegro.

Table 4. ICESCR[72]

Time	Participant	Process
15/10/1970	Bulgaria	Ratification
03/01/1974	Ukraine	Ratification
11/03/1974	Hungary	Ratification
20/01/1975	Romania	Ratification
13/04/1977	Poland	Ratification
27/11/1991	Albania	Accession
28/10/1992	Slovenia	Succession
04/03/1993	Croatia	Succession
05/04/1993	Republic of Moldova	Accession
28/07/1993	Czech Republic	Succession
01/11/1993	Slovakia	Succession
18/01/1994	Bosnia and Herzegovina	Succession
29/06/1994	North Macedonia	Succession
26/07/1994	Georgia	Accession
19/03/2001	Serbia	Succession
31/10/2006	Montenegro	Succession

The ICCPR has been adopted by all the analysed states. Albania, Georgia and the Republic of Moldova acceded to it through accession. Bosnia and Herzegovina, Croatia, Czech Republic, Montenegro, North Macedonia, Serbia, Slovakia and Slovenia became parties to it through succession. Bulgaria, Hungary, Poland, Romania and Ukraine adopted it through ratification. The state that committed to the ICCPR the earliest was Bulgaria, while the most recent was Montenegro.

72 Author's own work.

Table 5. ICCPR[73]

Time	Participant	Process
15/10/1970	Bulgaria	Ratification
12/11/1973	Ukraine	Ratification
11/03/1974	Hungary	Ratification
20/01/1975	Romania	Ratification
13/04/1977	Poland	Ratification
27/11/1991	Albania	Accession
28/10/1992	Slovenia	Succession
04/03/1993	Croatia	Succession
05/04/1993	Republic of Moldova	Accession
28/07/1993	Czech Republic	Succession
01/11/1993	Slovakia	Succession
18/01/1994	Bosnia and Herzegovina	Succession
29/06/1994	North Macedonia	Succession
26/07/1994	Georgia	Accession
26/03/2001	Serbia	Succession
31/10/2006	Montenegro	Succession

The CEDAW has been adopted by all the analysed states. Albania, the Republic of Moldova, and Georgia acceded to it through accession. Slovenia, Croatia, Czech Republic, Slovakia, Bosnia and Herzegovina, North Macedonia, Serbia, and Montenegro became parties to it through succession. Poland, Hungary, Ukraine, Romania, and Bulgaria adopted it through ratification. The state that committed to the CEDAW the earliest was Poland, while the most recent was Montenegro.

Table 6. CEDAW[74]

Time	Participant	Process
05/09/1980	Poland	Ratification
13/01/1981	Hungary	Ratification
27/04/1981	Ukraine	Ratification
04/02/1982	Romania	Ratification
19/02/1982	Bulgaria	Ratification
28/10/1992	Slovenia	Succession

73 Author's own work.
74 Author's own work.

Time	Participant	Process
18/12/1992	Croatia	Succession
06/05/1993	Czech Republic	Succession
01/11/1993	Slovakia	Succession
18/01/1994	Bosnia and Herzegovina	Succession
29/06/1994	North Macedonia	Succession
15/07/1994	Albania	Accession
02/09/1994	Republic of Moldova	Accession
30/03/1995	Georgia	Accession
16/03/2001	Serbia	Succession
02/11/2006	Montenegro	Succession

The CAT has been adopted by all the analysed states. Romania, Slovenia, Albania, Georgia, and the Republic of Moldova acceded to it through accession. Croatia, Czech Republic, Slovakia, Bosnia and Herzegovina, North Macedonia, and Serbia became parties to it through succession. Bulgaria, Ukraine, Hungary, and Poland adopted it through ratification. The state that committed to the CAT the earliest was Bulgaria, while the most recent was Montenegro.

Table 7. CAT[75]

Time	Participant	Process
24/02/1987	Bulgaria	Ratification
16/04/1987	Ukraine	Ratification
19/06/1987	Hungary	Ratification
28/08/1989	Poland	Ratification
28/02/1991	Romania	Accession
22/03/1993	Croatia	Succession
07/07/1993	Czech Republic	Succession
20/09/1993	Slovenia	Accession
01/11/1993	Slovakia	Succession
18/01/1994	Bosnia and Herzegovina	Succession
26/07/1994	Albania	Accession
27/02/1995	Georgia	Accession
27/02/1995	North Macedonia	Succession
26/12/1995	Republic of Moldova	Accession

75 Author's own work.

Time	Participant	Process
04/04/2001	Serbia	Succession
06/11/2006	Montenegro	Succession

The CRC has been adopted by all the analysed states. Georgia and the Republic of Moldova acceded to it through accession. Bosnia and Herzegovina, Croatia, Czech Republic, Montenegro, North Macedonia, Serbia, Slovakia, and Slovenia became parties to it through succession. Romania, Bulgaria, Poland, Ukraine, Hungary, and Albania adopted it through ratification. The state that committed to the CRC the earliest was Romania, while the most recent was Montenegro.

Table 8. CRC[76]

Time	Participant	Process
28/09/1990	Romania	Ratification
29/07/1991	Bulgaria	Ratification
29/07/1991	Poland	Ratification
07/10/1991	Ukraine	Ratification
29/11/1991	Hungary	Ratification
13/05/1992	Albania	Ratification
28/10/1992	Slovenia	Succession
18/02/1993	Croatia	Succession
23/03/1993	Republic of Moldova	Accession
07/07/1993	Czech Republic	Succession
01/11/1993	Slovakia	Succession
18/01/1994	Bosnia and Herzegovina	Succession
15/03/1994	North Macedonia	Succession
05/09/1994	Georgia	Accession
19/03/2001	Serbia	Succession
06/11/2006	Montenegro	Succession

The ICMW has been adopted by only two states among those analysed. Albania and Bosnia and Herzegovina acceded to it through accession. The ICMW remains an example of a UN human rights treaty that the analysed states are reluctant to adopt. This may be due to differing national priorities regarding migration policies.

76 Author's own work.

Table 9. ICMW[77]

Time	Participant	Process
06/02/1997	Bosnia and Herzegovina	Accession
05/06/2007	Albania	Accession

The CRPD has been adopted by all the analysed states, and they all did so through ratification. The state that committed to the CRPD the earliest was Hungary, while the most recent was Georgia.

Table 10. CRPD[78]

Time	Participant	Process
20/07/2007	Hungary	Ratification
15/08/2007	Croatia	Ratification
30/04/2008	Slovenia	Ratification
07/08/2009	Serbia	Ratification
28/09/2009	Czech Republic	Ratification
01/12/2009	Montenegro	Ratification
05/02/2010	Ukraine	Ratification
19/03/2010	Bosnia and Herzegovina	Ratification
02/06/2010	Slovakia	Ratification
27/09/2010	Republic of Moldova	Ratification
02/02/2011	Romania	Ratification
29/12/2011	North Macedonia	Ratification
23/03/2012	Bulgaria	Ratification
26/09/2012	Poland	Ratification
11/02/2013	Albania	Ratification
13/03/2014	Georgia	Ratification

The CSR has been adopted by all the analysed states. Hungary, Romania, Poland, Albania, Bulgaria, Georgia, the Republic of Moldova, and Ukraine acceded to it through accession. Slovenia, Croatia, Slovakia, Czech Republic, Bosnia and Herzegovina, North Macedonia, Serbia, and Montenegro became parties to it through succession. The state that committed to the CSR the earliest was Hungary, while the most recent was Montenegro.

77 Author's own work.
78 Author's own work.

Table 11. CSR[79]

Time	Participant	Process
18/04/1989	Hungary	Accession
15/11/1991	Romania	Accession
29/11/1991	Poland	Accession
28/10/1992	Slovenia	Succession
09/11/1992	Albania	Accession
01/03/1993	Croatia	Succession
25/06/1993	Slovakia	Succession
23/08/1993	Bulgaria	Accession
23/08/1993	Czech Republic	Succession
18/01/1994	Bosnia and Herzegovina	Succession
29/06/1994	North Macedonia	Succession
28/09/1999	Georgia	Accession
04/04/2001	Serbia	Succession
20/02/2002	Republic of Moldova	Accession
12/07/2002	Ukraine	Accession
11/10/2006	Montenegro	Succession

The above analysis demonstrated that all the analysed states have ratified or acceded to most of the core UN human rights treaties, such as the ICERD, ICESCR, ICCPR, CEDAW, CAT, CRC, CRPD, and CSR. An exception is the ICMW, which has been adopted only by Albania and Bosnia and Herzegovina, highlighting a lower willingness among states to commit to treaties focused on the protection of migrant workers' rights. Differences in the processes of ratification, succession, and accession reflect historical circumstances and the political priorities of individual states, particularly in the context of the systemic transformations in Central and Eastern Europe. States that bind themselves to treaties earlier have tended to enjoy relatively stable legal and political situations, while later commitments to international obligations often originated from statehood processes following the dissolution of the former ICTY and the USSR.

79 Author's own work.

6. The Impact of Certain UN Human Rights Treaties on National Law

International human rights law, particularly within the UN system, often requires States Parties to undertake appropriate legislative actions to ensure its effectiveness and practical application. This necessity is closely related to the doctrine of self-executing and non-self-executing treaties.[80] It is important to highlight three relevant observations in this context. The first is that the classification of treaties as self-executing or non-self-executing cannot be mechanical and does not always apply to the entirety of a legal instrument. The appropriate approach is to analyse each provision individually to determine its normative character in the context of human rights protection. In other words, it involves establishing whether a specific provision creates a concrete and directly applicable legal norm. A preferred interpretation should lean toward attributing a self-executing character to treaties or their broader parts in the field of human rights, enabling them to have real and direct effects on individuals within national jurisdictions. The second is that there is no entity that globally and pre-emptively determines whether a treaty or its specific provision is self-executing or non-self-executing. Such determinations may occur in court cases within national jurisdictions, with domestic implications, or in international cases, such as those before UN treaty bodies, where such determinations should be interpreted as global but retrospective. The third is that there is a positive trend wherein States Parties, regardless of whether treaties or their provisions are classified as self-executing or non-self-executing, or not classified at all, often decide to incorporate international human rights standards into their domestic legal systems. This ensures not only the effectiveness and enforceability of such regulations but also their accessibility and prompt implementation for individuals. In such cases, treaty bodies, where they have jurisdiction, operate as secondary watchdogs. In light of these observations, it seems appropriate to examine the impact that the UN human rights treaties ratified by the analysed states have had on their domestic laws. As in the previous section, attention will focus on the CSR, ICCPR, ICESCR, ICERD, CEDAW, CAT, CRC, ICMW, and CRPD. There are at least two reasons for supporting this approach. Firstly, that the arguments previously presented continue to justify the selection of this particular legislative core forming the UN human rights protection system for this comparative analysis. Secondly, that maintaining consistency and uniformity in the comparative analysis necessitates using the same set of UN treaties throughout this study. This uniformity and consistency in more advanced comparative matters requires not only analysing the same set of states but also examining the same international human rights instruments adopted within the UN framework. Therefore, this subsection will conduct a comparative analysis aimed at determining and assessing the impact of the CSR, ICCPR, ICESCR, ICERD, CEDAW, CAT, CRC, ICMW, and CRPD on the domestic

80 Vazquez, 1995, pp. 695–723; Yoo, 1999, pp. 1955–2094; Henry, 1929, pp. 776–785; Enabulele and Okojie, 2016, pp. 1–37.

laws of Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Georgia, Hungary, Moldova, Montenegro, North Macedonia, Poland, Romania, Serbia, Slovakia, Slovenia, and Ukraine. This analysis will be based on the latest data derived from the UPR.

The ratification of key UN treaties such as the ICCPR, ICESCR, ICERD, CEDAW, CAT, CRC, CRPD, CSR, and the partial acceptance of the ICMW has significantly influenced the development of legislation and institutions in Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Georgia, Hungary, Moldova, Montenegro, North Macedonia, Poland, Romania, Serbia, Slovakia, Slovenia, and Ukraine. The ICCPR and ICESCR have provided a robust foundation for constitutional reforms and strengthened mechanisms for human rights protection, including institutional advancements such as the establishment of ombudsman offices and anti-discrimination commissions. The CEDAW and ICERD have contributed towards the improvement of legislation on gender equality and the elimination of ethnic discrimination, particularly notable in regions with significant national minorities, such as the Roma. The CAT has bolstered systems to prevent torture, including the establishment of National Preventive Mechanisms and enhanced standards for monitoring prison conditions. The CRC has driven reforms in the protection of children's rights, including legislation addressing domestic violence and education. Meanwhile, the CRPD has inspired legislative changes to support persons with disabilities, focusing on accessibility in infrastructure and social support systems. Countries such as Albania and Bosnia and Herzegovina are actively taking measures to protect migrants in alignment with the ICMW. Common trends indicate a gradual alignment of national legal systems with international standards. However, the implementation of these standards varies depending on local socio-political challenges and institutional resources. In this context, it is possible to delineate regional specificities, dividing the analysed countries into four groups: The Western Balkans (Albania, Bosnia and Herzegovina, Montenegro, North Macedonia, Serbia), Central Europe (Poland, Czech Republic, Slovakia, Hungary), Southeastern Europe (Bulgaria, Croatia, Slovenia), and Eastern Europe (Ukraine, Georgia, Moldova, Romania).

The countries of the Western Balkans[81] stand out for their implementation of UN treaties in the context of post-war reconstruction, ethnic tensions, and aspirations for EU membership. The ICERD has played a pivotal role in combating ethnic discrimination, which is particularly evident in Bosnia and Herzegovina, where

81 See: National reports of this group of states under the latest Universal Periodic Review: Albania (2024) 'A/HRC/WG.6/43/SRB/1' [Online]. Available at: https://digitallibrary.un.org/record/4061288?v=pdf#files (Accessed: 26 December 2024); North Macedonia (2024) 'A/HRC/WG.6/46/MKD/1' [Online]. Available at: https://digitallibrary.un.org/record/4041616?v=pdf (Accessed: 26 December 2024); Montenegro (2023) 'A/HRC/WG.6/43/MNE/1' [Online]. Available at: https://digitallibrary.un.org/record/4007485?v=pdf (Accessed: 26 December 2024); Bosnia and Herzegovina (2019) 'A/HRC/WG.6/34/BIH/1' [Online]. Available at: https://documents.un.org/doc/undoc/gen/g19/310/04/pdf/g1931004.pdf (Accessed: 26 December 2024); Albania (2024) 'A/HRC/WG.6/47/ALB/1' [Online]. Available at: https://digitallibrary.un.org/record/4061288?v=pdf (Accessed: 26 December 2024).

anti-discrimination policies focus on ensuring equality for all national groups. The CEDAW has inspired legislation addressing violence against women, especially in Albania and North Macedonia, which have taken steps to protect victims of domestic violence. The CRC has influenced reforms aimed at protecting children in crisis situations, developing childcare systems, and mechanisms to combat violence. Montenegro and Serbia have introduced social integration strategies aligned with the CRPD, improving access to education and employment for persons with disabilities. However, the lack of a full implementation of the ICMW remains a challenge across the region, particularly concerning the protection of migrant workers, despite some progress in refugee protection under the CSR. The Western Balkans continue to face institutional and social barriers that delay the full implementation of international human rights standards.

Central Europe[82] is characterised by advanced harmonisation of national laws with UN treaties, largely driven by EU membership and the associated legal obligations. The CEDAW and ICERD have significantly influenced the development of anti-discrimination policies. Poland and the Czech Republic, inspired by the CRC, have reformed child protection systems by establishing institutions such as the Commissioner for Children's Rights, and implementing programs to combat domestic violence. The CAT has strengthened protections for detainees within penitentiary systems across the region, leading to improved prison conditions and the establishment of independent monitoring mechanisms. The CRPD has inspired extensive reforms supporting persons with disabilities, particularly in Slovakia and Hungary, which have implemented strategies for their inclusion in the education and the labour markets. However, challenges remain in effectively implementing CRPD standards, particularly regarding infrastructure accessibility across the region.

The countries of Southeastern Europe[83] are strongly focused on eliminating discrimination and protecting women's rights. The CEDAW and ICERD have contributed to the development of integration policies targeting national minorities, such as the Roma in Bulgaria. Croatia and Slovenia have taken significant steps towards gender equality by enhancing legislation against domestic violence and establishing

82 See: National reports of this group of states under the latest Universal Periodic Review: Slovakia (2024) 'A/HRC/WG.6/46/SVK/1' [Online]. Available at: https://digitallibrary.un.org/record/4052669?v=pdf (Accessed: 26 December 2024); Hungary (2021) 'A/HRC/WG.6/39/HUN/1' [Online]. Available at: https://documents.un.org/doc/undoc/gen/g21/225/62/pdf/g2122562.pdf (Accessed: 26 December 2024); Poland (2022) 'A/HRC/WG.6/41/POL/1' [Online]. Available at: https://documents.un.org/doc/undoc/gen/g22/461/68/pdf/g2246168.pdf (Accessed: 26 December 2024); Czechia (2022) 'A/HRC/WG.6/42/CZE/1' [Online]. Available at: https://documents.un.org/doc/undoc/gen/g22/577/43/pdf/g2257743.pdf (Accessed: 26 December 2024).

83 See: National reports of this group of states under the latest Universal Periodic Review: Bulgaria (2020) 'A/HRC/WG.6/36/BGR/1' [Online]. Available at: https://digitallibrary.un.org/record/3863344?v=pdf (Accessed: 26 December 2024); Croatia (2020) 'A/HRC/WG.6/36/HRV/1' [Online]. Available at: https://digitallibrary.un.org/record/3863348?v=pdf (Accessed: 26 December 2024); Slovenia (2019) 'A/HRC/WG.6/34/SVN/1' [Online]. Available at: https://documents.un.org/doc/undoc/gen/g19/234/44/pdf/g1923444.pdf (Accessed: 26 December 2024).

mechanisms to support its victims. The CRPD has influenced the development of support systems for persons with disabilities, including programs aimed at public infrastructure accessibility and social integration. Croatia, inspired by the CSR, has implemented effective mechanisms for the protection of refugees and migrants, integrating these actions in EU policies. Slovenia has advanced anti-discrimination systems and strategies promoting gender equality. Challenges for the whole region include the uneven implementation of CRPD standards, particularly with regard to the access to education and employment for persons with disabilities, and limited protection for migrants in Bulgaria.

Eastern Europe[84] is characterised by a varied level of implementation of UN standards, shaped by challenges related to political transformation and economic constraints. Ukraine and Georgia have conducted penitentiary reforms in line with the CAT, improving prison conditions and establishing mechanisms to monitor cases of torture. The CRC has inspired the development of educational programs and child protection mechanisms in Moldova and Romania, focusing on combating violence and human trafficking. The implementation of the CRPD in Georgia and Moldova has resulted in policies supporting persons with disabilities, although the accessibility of public infrastructure remains limited. The CSR has influenced refugee protection efforts, particularly in the context of the territorial conflicts in Ukraine and Georgia. The region faces challenges such as a lack of the full harmonisation of anti-discrimination laws in line with the ICERD and CEDAW, as well as uneven implementation of CRPD standards.

UN treaties have had a significant impact on the development of legal systems in the analysed states; however, their implementation depends on local political, social, and economic conditions. In economically more advanced regions, such as Central and Southeastern Europe, the adoption of UN standards is more comprehensive and addresses a wide range of human rights, from combating discrimination to integrating persons with disabilities. Membership in the EU and active participation in the CoE system also play a crucial role in this context. In regions such as the Western Balkans and Eastern Europe, UN treaties serve as tools to support political transformation, although their implementation often encounters barriers related to resource shortages and social tensions. Globally, UN treaties appear to act as catalysts for legislative change, strengthening human rights protection in countries at various levels of development. However, the effectiveness of their implementation depends on

84 See: National reports of this group of states under the latest Universal Periodic Review: Republic of Moldova (2021) 'A/HRC/WG.6/40/MDA/1' [Online]. Available at: https://documents.un.org/doc/undoc/gen/g21/341/43/pdf/g2134143.pdf (Accessed: 26 December 2024); Ukraine (2017) 'A/HRC/WG.6/28/UKR/1' [Online]. Available at: https://www.refworld.org/sites/default/files/attachments/5a2a7ad64.pdf (Accessed: 26 December 2024); Georgia (2020) 'A/HRC/WG.6/37/GEO/1' [Online]. Available at: https://documents.un.org/doc/undoc/gen/g20/342/24/pdf/g2034224.pdf (Accessed: 26 December 2024); Romania (2023) 'A/HRC/WG.6/43/ROU/1' [Online]. Available at: https://documents.un.org/doc/undoc/gen/g23/028/12/pdf/g2302812.pdf (Accessed: 26 December 2024).

international cooperation and local political will. To standardise the level of human rights protection across the region, it is recommended to increase financial and expert support for countries facing the greatest implementation challenges.

7. Cases before UN Treaty Bodies

The protection of human rights, whether at a national or international level, without a control mechanism based on the principle of complaint procedures, can be compared to a *lex imperfecta*.[85] Of course this would not mean that human rights would be violated in every case, but it would imply that in instances where human rights were violated, it would not be legally possible to seek protection or reparative claims. Additionally, there would be no pressure from international entities on states to adequately fulfil their positive and negative obligations, which would not contribute to eliminating systemic errors. This is presented in hypothetical terms because contemporary human rights protection systems for the most part, include control mechanisms often based on individual complaints. These significantly enhance the practical realisation and effectiveness of human rights. Building on the arguments presented earlier regarding the justification for selecting representative UN human rights treaties for analysis and the arguments related to maintaining uniformity and consistency in comparative analysis, this subsection will examine whether Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Georgia, Hungary, Moldova, Montenegro, North Macedonia, Poland, Romania, Serbia, Slovakia, Slovenia, and Ukraine have had cases brought before the UN treaty bodies established under the ICCPR, ICESCR, ICERD, CEDAW, CAT, CRC, ICMW, and CRPD. Specifically, for the ICCPR: Human Rights Committee (hereinafter referred to as the HRC);[86] for ICESCR – Committee on Economic, Social and Cultural Rights (hereinafter referred to as the CESCR);[87] for ICERD – Committee on the Elimination of Racial Discrimination (hereinafter referred to as the CERD);[88] for CEDAW – Committee on the Elimination of Discrimination against Women (hereinafter referred to as the ComEDAW);[89] for CAT – Committee against Torture (hereinafter referred to as the ComAT);[90] for CRC – Committee on the Rights of the Child (hereinafter referred to as the ComRC);[91] for ICMW – Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (hereinafter referred to as the CMW);[92] for CRPD – Committee on the Rights of Persons

85 Wessel, 2016, pp. 439–468; Kania, 2017, pp. 49–63.
86 Buergenthal, 2001, pp. 341–398.
87 Viveros-Uehara, 2022, pp. 904–927.
88 Thornberry, 2005, pp. 239–269.
89 Englehart and Miller, 2014, pp. 22–47.
90 McQuigg, 2011, pp. 813–828.
91 Karp, 2000, pp. 35–44.
92 Chetail, 2020, pp. 601–644.

with Disabilities (hereinafter referred to as the ComRPD).[93] In this context, it should be noted that with regard to the CSR, there is no treaty-specific body established for this human rights treaty that can handle individual complaints against States Parties. For this reason, the CSR cannot be included in the comparative analysis concerning cases before UN treaty bodies. Additionally, it is important to highlight another significant aspect that serves as a limitation to this analysis. Within the scope of this study, primarily due to text volume constraints, no preliminary assessment was made regarding whether the identified UN treaty bodies possess jurisdiction to examine cases related to the analysed states. The relevant and sufficient criterion was whether a specific UN treaty establishes a control mechanism by creating a treaty body dedicated to handling cases under that treaty, without verifying whether the body has the actual ability to act in relation to the analysed states.[94]

This is because the purpose of this subsection is to examine which UN treaties have been invoked and how many cases have been brought against Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Georgia, Hungary, Moldova, Montenegro, North Macedonia, Poland, Romania, Serbia, Slovakia, Slovenia and Ukraine. This analysis should provide the latest information – already derived from the practical application of UN human rights standards – for the final demonstration of similarities and differences in the approaches of the analysed states to the UN human rights protection system, including the fulfilment of their resulting international obligations. Information regarding cases before treaty bodies can act as a barometer of international oversight, reflecting, on the one hand, the popularity of UN monitoring mechanisms in a given region (as indicated by the numbers presented below) and, on the other hand, the effectiveness and efficiency of the analysed states in implementing or respecting their obligations under the universal human rights protection system (as illustrated by the examples of specific cases described below).

To date, 4 finalised complaints have been registered against Albania, all within the framework of the HRC. All these complaints were deemed inadmissible.

A total of 21 finalised complaints have been registered against Bosnia and Herzegovina, of which 15 resulted in substantive decisions. In the case of *S.H. v. Bosnia and Herzegovina*,[95] the ComEDAW found violations of Articles 2(a)–(f), 3, 12, 13(a) and (b), and 15(1) of the CEDAW. In its recommendations, it emphasised the necessity of

93 Guernsey, 2018, pp. 1012–1037.

94 The issue of jurisdiction holds significant importance, as it can be determined in advance that none of the analyzed states could have a case before the CMW. This is because the CMW, as stipulated in the ICMW, currently lacks jurisdiction over any State Party. According to Articles 76(2) and 77(8) of the ICMW, the CMW only acquires jurisdiction when at least 10 State Parties have made the necessary declarations accepting its competence for individual or inter-state complaints. In practice, however, only a small number of states have ratified the protocols granting the committee such jurisdiction, which significantly limits the effectiveness of this mechanism. To date, only six states—Ecuador, El Salvador, Mexico, Turkey, Uruguay, and Guinea-Bissau—have recognized the jurisdiction of the CMW. As a result, this institution is not operational at present. United Nations, n.d.a.

95 United Nations, 2017b.

thoroughly prosecuting violence against women, particularly war crimes, and ensuring the fair punishment of perpetrators. In the case of *A. v. Bosnia and Herzegovina*,[96] the ComAT found a violation of Article 14(1) in connection with Article 1(1) of CAT. It recommended, among other measures, the payment of adequate compensation, the provision of free medical and psychological care, an official apology, and the establishment of an effective reparations system for victims of war crimes, including sexual violence, along with legal frameworks defining victims' rights.

In the case of *Ičić v. Bosnia and Herzegovina*,[97] the HRC found violations of Articles 6, 7, and 9 in connection with Article 2(3) of the ICCPR. It obliged the state to provide families of missing persons with access to investigations and to amend laws requiring the recognition of victims' deaths as a condition for obtaining social benefits and reparations. These cases highlight the challenges related to addressing war crimes and protecting human rights in Bosnia and Herzegovina.

A total of 15 finalised complaints have been registered against Bulgaria, of which nine resulted in substantive decisions. The lack of Bulgaria's ratification of the optional protocols to the ICESCR, CRC, and CRPD has led to the majority of cases before UN treaty bodies focusing on issues related to the HRC and the ComEDAW. An example is the case of *Assenova Naidenova et al. v. Bulgaria,*[98] in which the HRC examined the forced eviction of a Roma community without providing them alternative housing, emphasising Bulgaria's obligation to ensure an effective remedy. Despite interim recommendations, the authorities proceeded to cut off water supplies, prompting the HRC to demand appropriate housing be secured before carrying out the evictions.

In the case of *V.K. v. Bulgaria*,[99] a victim of domestic violence was denied a long-term protection order due to procedural limitations; the ComEDAW recommended reforms to expand access to protection, legal assistance, and shelters.

Another case, of *Isatou Jallow v. Bulgaria*,[100] involved a migrant woman experiencing domestic violence, where the state failed to provide adequate support; the ComEDAW called for compensation, improved services for victims, and specialised training for the relevant authorities.

The case of *S.V.P. v. Bulgaria*[101] concerned the assault of a young girl, exposing shortcomings in Bulgaria's approach to sexual violence, which led to the ComEDAW recommending strengthened legal protections and enhanced support for victims of such crimes.

A total of 6 finalised complaints have been registered against Croatia, of which two resulted in substantive decisions. The first case, *Paraga v. Croatia*,[102] involved the HRC, which found a violation of Article 14, Paragraph 3(c) of the ICCPR and expressed the

96 United Nations, 2017a.
97 United Nations, 2015.
98 United Nations, 2012b.
99 United Nations, 2011.
100 Ibid.
101 United Nations, 2012a.
102 Human Rights Committee, 2001.

expectation that Croatia would take appropriate measures to eliminate and prevent similar violations in the future.

The second case, of *Vojnovic v. Croatia*,[103] also brought before the HRC, found violations of Article 14, Paragraph 1 in conjunction with Article 2, Paragraph 1, and Article 17 in conjunction with Article 2, Paragraph 1 of the ICCPR. In this context, which was similar to the former case, the HRC referred to Croatia's obligation under Article 2 of the ICCPR, to ensure that all individuals within its territory or under its jurisdiction enjoyed the rights recognised in the ICCPR, and to provide an effective and enforceable remedy in cases where a violation had been established.

A total of 61 finalised complaints have been registered against the Czech Republic, of which 31 resulted in substantive decisions. In the case of *B.J. and P.J. v. Czech Republic*,[104] the ComCR found violations of Articles 3(1), 9(1–3), 12, and 37(b) of the CRC in the case of *B.J. and P.J. v. Czech Republic*. In this regard, the ComCR obliged the Czech Republic, among other measures, to ensure that all proceedings aimed at removing children from their parents, including decisions on interim measures, comply with the CRC. This includes the importance of conducting a best-interests assessment, considering and giving due weight to children's views, particularly regarding the type of placement under consideration, medical treatments, access to education, and contact with their parents during placement. Furthermore, procedural safeguards must be established to ensure the protection of children's rights under the CRC. The case of *B.J. and P.J. v. Czech Republic* represents the latest example of a UN treaty body finding a violation of the CRC. Other notable cases include *Preiss v. Czech Republic*[105] *and Fábryová v. Czech Republic*,[106] in which the HRC found a violation of Article 26 of the ICCPR, the principle of equality before the law.

A total of 16 finalised complaints have been registered against Georgia, of which ten have resulted in substantive decisions. Most of the cases involved allegations of violations of the ICCPR and CAT, including instances of torture, arbitrary detention, and discrimination against minorities and persons with disabilities. One such case was *M.L., L.Ko., V.K., L.Ku., Z.J., M.B., G.L., G.Ko. v. Georgia*,[107] in which the ComRC found that Georgia violated the CRC due to physical and psychological violence and discrimination against children with disabilities in a Georgian orphanage.

Another significant case was Domukovsky et al. v. Georgia,[108] which raised issues of arbitrary detention, torture, and unfair trials, pointing to potential systemic deficiencies in Georgia's legal procedures. Cases reviewed by the HRC and other treaty bodies have highlighted Georgia's challenges in adhering to international human rights standards and underscore the role of bodies such as the ComRC and ComAT in monitoring compliance with these norms.

103 United Nations, 2006.
104 Committee on the Rights of the Child, 2021.
105 Human Rights Committee, 2008.
106 Comité de Derechos Humanos, 2001.
107 United Nations, 2024.
108 Human Rights Committee, 1998.

A total of 20 finalised complaints have been registered against Hungary, of which ten have resulted in substantive decisions. One example is the case of *Borisenko v. Hungary*,[109] where the HRC found violations of Articles 9(3) and 14(3)(d) of the ICCPR. Regarding the violation of Article 9(3) ICCPR, two individual opinions were issued by HRC members as separate opinions (*votum separatum*). Following this case, the HRC obligated Hungary to provide the complainant with an effective remedy, including compensation, and to take measures to prevent similar violations in the future.

Another case is *Nyusti and Takács v. Hungary*,[110] in which the ComRPD found a violation of Article 9(2)(b) CRPD. In response, the ComRPD recommended that Hungary take measures to prevent similar violations in the future, which, according to the ComRPD, should include: establishing minimum standards for the accessibility of banking services provided by private financial institutions for persons with visual and other impairments; creating a legislative framework with concrete, enforceable, and time-bound benchmarks for monitoring and assessing the gradual modification and adjustment of previously inaccessible banking services by private financial institutions into accessible ones; ensuring that all newly procured ATMs and other banking services are fully accessible to persons with disabilities; providing regular and appropriate training on the scope of the CRPD to judges and other judicial officials to adjudicate cases in a disability-sensitive manner; ensuring that its legislation and application by domestic courts are consistent with the state party's obligations to prevent legislation from impairing or nullifying the recognition, enjoyment, or exercise of any right for persons with disabilities on an equal basis with others.

A total of ten finalised complaints have been registered against Moldova, of which seven resulted in substantive decisions. In the case of *Natalia Ciobanu v. Republic of Moldova*,[111] the ComEDAW found violations of Article 3 and Article 11(1)(e) and (2)(c) of the CEDAW. Following this, the ComEDAW issued recommendations stating that Moldova should, among other actions, fulfil its obligations to respect, protect, promote, and fulfil the human rights of women, including the right to be free from all forms of gender-based violence, including domestic violence, intimidation, and threats of violence.

Another case, *Belemvire v. Republic of Moldova*,[112] involved the CERD, which found a violation of Article 6 of the ICERD concerning the right to effective protection and remedies, through competent national tribunals and other state institutions, against any acts of racial discrimination that violate human rights and fundamental freedoms as outlined in the ICERD. It also affirmed the right to seek just and adequate reparation or satisfaction from such tribunals for any damage suffered due to such discrimination.

109 United Nations, 2002.
110 United Nations, 2013a.
111 United Nations, 2019.
112 United Nations, 2018.

A total of two finalised complaints have been registered against Montenegro, of which one has resulted in a substantive decision. In the case of *Durmic v. Montenegro, Serbia, The Federal Republic of Yugoslavia (Serbia and Montenegro)*,[113] the CERD found a violation of Article 6 of the ICERD, similar to the case described above against Moldova. In this case, the CERD recommended that Montenegro provide the petitioner with just and adequate compensation commensurate with the moral damage he had suffered. It also recommended that Montenegro take measures to ensure that the police, public prosecutors, and the Court of Serbia and Montenegro properly investigate accusations and complaints related to acts of racial discrimination, which should be punishable by law under Article 4 of the ICERD.

A total of three finalised complaints have been registered against North Macedonia, all of which resulted in substantive decisions. These cases – *S.N., E.R. v. North Macedonia*,[114] *L.A. et al. v. North Macedonia*[115] *and S.B. and M.B. v. North Macedonia*[116] – were all reviewed by the ComEDAW. In the first case, the ComEDAW found violations of Articles 2(d) and (f), 4(1) and (2), 12(1) and (2), and 14(2)(b) and (h) of the CEDAW. In the second, it found violations of Articles 2(d) and (f), 12(1) and (2), and 14(2)(b) and (h) of the CEDAW, and in the third, violations of Articles 1, 2(a), (c) and (e), and 12 of the CEDAW. These cases primarily addressed intersectional discrimination faced by Roma women. The first case concerned the forced eviction of young Roma women, with the ComEDAW considering the complexity of their situation, as some complainants were pregnant or had small children. The second case involved allegations of discrimination based on gender and ethnicity, highlighting violations of Article 2 CEDAW. The third case focused on the denial of access to basic gynaecological care for Roma women due to ethnic discrimination, exposing systemic inequalities in healthcare access. The ComEDAW recommended strengthening protections for marginalised communities, particularly Roma women, emphasising the need for anti-discrimination reforms and improved access to social services.

A total of 12 finalised complaints have been registered against Poland, of which four have resulted in substantive decisions. In the case of *Fijałkowska v. Poland*,[117] the HRC found that the complainant's forced placement in a psychiatric institution violated Articles 9(1) and 9(4) of the ICCPR, highlighting the arbitrariness of the decision and the lack of adequate representation.

The case of *Tatyana v. Poland*[118] concerned a detention at the Polish-Belarusian border. The HRC did not find a violation, emphasising that access to a lawyer and the procedure met the requirements of justice. In *A.B. and B.D. v. Poland*,[119] the HRC found

113 Committee on the Elimination of Racial Discrimination, 2006.
114 United Nations, 2020a.
115 United Nations, 2020.
116 United Nations, 2020c.
117 United Nations, 2005.
118 Human Rights Committee, 2011.
119 Human Rights Committee, 2023.

violations of Articles 7 and 13 of the ICCPR, as the complainants' asylum applications were arbitrarily dismissed, exposing them to the risk of refoulement to Russia.

A total of three finalised complaints have been registered against Romania, of which two have resulted in substantive decisions. In the case of *Blaga and Blaga v. Portugal, Romania*,[120] the complainants alleged violations of Articles 12 and 26 of the ICCPR concerning the expropriation of their apartment due to emigration. The HRC found a violation of Article 26 of the ICCPR, emphasising the obligation to ensure equality before the law. The HRC stated that Romania is under an obligation to provide the complainants with an effective remedy, including prompt restitution of their property or compensation therefor. The case of *Blaga and Blaga v. Portugal, Romania* remains the only case in which Romania was found to have violated binding provisions of UN human rights treaties.

A total of 12 finalised complaints have been registered against Serbia, of which ten have resulted in substantive decisions. In one of the most recent cases, *Cubrilov et al. v. Serbia*,[121] found violations of Articles 2, 12, 13, and 14 of the CAT. In this case, the ComAT called on Serbia to, among other actions: launch a prompt, impartial and independent investigation into the torture and death of Mr. Cubrilov, including, where appropriate, the filing of specific torture charges against perpetrators, and the application of the corresponding penalties under domestic law; take the steps necessary to provide guarantees of non-repetition in connection with the facts in the present complaint; to review its criminal procedures in law and practice to ensure that cases of torture are promptly and adequately investigated ex officio by the authorities, even if victims or their relatives have not requested an investigation.

Another case, *Novakovic v. Serbia*,[122] involved the HRC, which found a violation of Article 2, Paragraph 3, in conjunction with Article 6 of the ICCPR. In this case, the HRC obligated Serbia to: ensure that the criminal proceedings against the persons responsible for the death of Mr. Novaković were speedily concluded and that, if convicted, they would be punished; provide the complainant with appropriate compensation.

A total of 18 finalised complaints have been registered against Slovakia, of which nine have resulted in substantive decisions. In the case of *V.S. v. Slovakia*,[123] the CERD found violations of Articles 2(1)(a) and (c), 5(e)(i), and 6 of the ICERD. In this context, the CERD recommended that Slovakia fully enforce its Anti-discrimination Act by enhancing the available court proceedings for victims of racial discrimination. This includes ensuring, among other measures, that the principle of shifted burden of proof is applied in accordance with Article 11 of the Anti-discrimination Act, and providing clear information about available domestic remedies in cases of racial discrimination.

120 United Nations, 2006b.
121 United Nations, 2022.
122 United Nations, 2010a.
123 United Nations, 2016.

Another case, *Černáková v. Slovakia*,[124] involved the ComAT, which found violations of Article 2(1), read in conjunction with Article 16(1), and Articles 4(1), 11, 12, 14(1), and 16(1) of the CAT. In this case, the ComAT called on Slovakia to: to complete the investigation into the act in question with a view to sanctioning all persons who may have been responsible for the complainant's ill-treatment; to provide the complainant with appropriate redress, including compensation for material and non-material damages, rehabilitation, satisfaction and guarantees of non-repetition; (c) to take measures to prevent the repetition of similar acts in the future, including by strictly regulating, in the context of CAT, the use of physical restraints in psychiatric and related institutions, by restricting the use of physical restraints in all establishments and preventing the use of unlawful or prohibited forms of restraints.

A total of one finalised complaint has been registered against Slovenia, but it was deemed inadmissible by the HRC.

A total of 24 finalised complaints have been registered against Ukraine, of which 13 have resulted in substantive decisions. In the case of *Viktor Taran v. Ukraine*,[125] the HRC found violations of Article 7, read alone and in conjunction with Article 2(3), Article 9, and Article 14(3)(b), (g), and (5) of the ICCPR. The HRC obliged Ukraine to take appropriate steps to: quash the author's conviction and, if necessary, conduct a new trial, in accordance with the principles of fair hearings and other procedural safeguards; conduct a thorough, prompt, and impartial investigation into the author's allegations of torture; provide the author with adequate compensation and other measures of satisfaction for the violations that occurred.

Another case, *O.M. v. Ukraine*,[126] involved the ComEDAW, which found violations of Article 2(a), (d) and (f), Article 3, and Article 5 of the CEDAW. The ComEDAW recommended that Ukraine take appropriate steps, including: ensuring that consular protection, in line with the CEDAW, and as enshrined in the Constitution of Ukraine, is effectively provided to Ukrainian women in vulnerable situations abroad; providing legal support to female nationals abroad in gaining access to justice and all legal guarantees of protection, including against gender-based discrimination and in child custody disputes; ensuring that consular staff are fully trained on matters pertaining to the conventions Ukraine has ratified or acceded to, including CEDAW.

The above analysis shows that there is considerable variation in the number of finalised complaints registered within the HRC, CESCR, CERD, ComEDAW, ComAT, ComRC, CMW, and ComRPD. Among the countries analysed, the above criterion ranges from Slovenia, which has only one such complaint, to The Czech Republic, which has 61 complaints. It does not seem reasonable to draw conclusions about the level of human rights protection solely based on these numbers and assume that the greater the number of complaints, the greater the number of human rights violations in a given country. Such a conclusion is not only unfounded but also illogical. This is

124 Committee against Torture, n.d.
125 Human Rights Committee, 2020.
126 Committee on the Elimination of Discrimination against Women, 2019.

primarily because the number of registered and finalised complaints does not necessarily reflect the number of complaints that have resulted in substantive decisions. Moreover, the number of complaints resulting in substantive decisions does not imply the number of cases in which a violation of UN human rights treaties was found. However, these numbers provide important information. This information concerns the accessibility and/or popularity of UN mechanisms in a given country, especially considering that some of the analysed countries are also EU member states, and all of them are members of the Council of Europe. Nevertheless, based on the data presented, it is possible to categorise all the analysed countries into five groups: 1. Countries with a very high number of complaints: this group includes only Czech Republic; 2. Countries with a high number of complaints: this group includes Bosnia and Herzegovina, Ukraine, Hungary, and Slovakia; 3. Countries with a medium number of complaints: this group includes Bulgaria, Georgia, Poland and Serbia; 4. Countries with a low number of complaints: this group includes Moldova and Croatia; 5. Countries with a very low number of complaints: this group includes Montenegro, North Macedonia, Romania, Albania and Slovenia.

As already noted, the above categorisation reflects only the number of registered and finalised complaints in the UN system. It does not indicate the level of human rights protection in a specific country, as demonstrated by the concrete examples from cases before UN committees provided above.

8. Conclusion

In this chapter, a comparative analysis of Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Georgia, Hungary, Moldova, Montenegro, North Macedonia, Poland, Romania, Serbia, Slovakia, Slovenia, Ukraine was conducted in terms of the protection of human rights provided under the UN system. This analysis is based on six key comparative points: historical development of human rights; relationship to the UN from a human rights perspective; the scope of international obligations from the perspective of UN human rights treaties; the process and time of accession, succession or ratification of certain UN human rights treaties; the impact of certain UN human rights treaties on national law; and cases before UN treaty bodies. The last three points focus on analysing selected UN treaties concerning human rights protection that form the core of the UN system (the CSR, ICCPR, ICESCR, ICERD, CEDAW, CAT, CRC, ICMW, and CRPD). All of this was aimed at achieving the main goal of the study, which was to demonstrate the similarities and differences in the approaches of the analysed countries to the UN human rights protection system, including the implementation of the international obligations arising from it.

In conclusion, the entire analysis above provides information that allows for a collective presentation of all 16 countries in one summary table, finalising the goal of the study. The information presented in the table below provides its full picture only after reviewing the entire content of this chapter.

Table 12. Protection of Human Rights in the UN from a Central European and Certain Eastern European States' Perspective[127]

Country	Historical development of human rights	Relationship to the UN from a human rights perspective	The scope of international obligations from the perspective of UN human rights treaties	The process and time of accession (A), succession (S) or ratification (R) of certain UN human rights treaties	The impact of certain UN human rights treaties on national law	Cases before UN treaty bodies
Albania	Albania (as special case)	States actively cooperating with the UN but facing specific implementational challenges	Failure to accede to AICERD, OPICESCR, ICSPCA, ACAT, ICAS, ACRC, AFDIPLACM, and OPCRPD	ICERD – 1994 (A) ICESCR – 1991 (A) ICCPR – 1991 (A) CEDAW – 1994 (A) CAT – 1994 (A) CRC – 1992 (R) ICMW – 2007 (A) CRPD – 2013 (R) CSR – 1992 (A)	Western Balkans	A very low number of complaints
Bosnia and Herzegovina	Former Yugoslavia	States actively cooperating with the UN but encountering specific implementational challenges	Failure to accede to AICERD, ACAT, ACRC, and AFDIPLACM	ICERD – 1993 (S) ICESCR – 1994 (S) ICCPR – 1994 (S) CEDAW – 1994 (S) CAT – 1994 (S) CRC – 1994 (S) ICMW –1997 (A) CRPD – 2010 (R) CSR – 1994 (S)	Western Balkans	A high number of complaints
Bulgaria	Post-communist countries of Central Europe	States actively cooperating with the UN but encountering specific implementational challenges	Failure to accede to OPICESCR, OPCRCpr, ICMW, AFDIPLACM, OPCRPD, and ICPAPED	ICERD – 1966 (R) ICESCR – 1970 (R) ICCPR – 1970 (R) CEDAW – 1982 (R) CAT – 1987 (R) CRC – 1991 (R) CRPD – 2012 (R) CSR – 1993 (A)	Southeastern Europe	A medium number of complaints
Croatia	Former Yugoslavia	States actively and effectively cooperating with the UN in terms of implementation	Failure to accede to AICERD, OPICESCR, ACAT, ICMW, and AFDIPLACM	ICERD – 1993 (S) ICESCR – 1993 (S) ICCPR – 1993 (S) CEDAW – 1992 (S) CAT – 1993 (S) CRC – 1993 (S) CRPD – 2007 (R) CSR – 1993 (S)	Southeastern Europe	A low number of complaints

127 Author's own work.

Country	Historical development of human rights	Relationship to the UN from a human rights perspective	The scope of international obligations from the perspective of UN human rights treaties	The process and time of accession (A), succession (S) or ratification (R) of certain UN human rights treaties	The impact of certain UN human rights treaties on national law	Cases before UN treaty bodies
Czech Republic	Post-communist countries of Central Europe	States actively and effectively cooperating with the UN in terms of implementation	Failure to accede to OPICESCR, ACAT, ICMW, and AFDIPLACM	ICERD – 1993 (S) ICESCR – 1993 (S) ICCPR – 1993 (S) CEDAW – 1993 (S) CAT – 1993 (S) CRC – 1993 (S) CRPD – 2009 (R) CSR – 1993 (S)	Central Europe	A very high number of complaints
Georgia	Post-Soviet countries	States actively cooperating with the UN but facing serious implementational challenges	Failure to accede to OPICESCR, ACAT, ICAS, ICMW, AFDIPLACM, and ICPAPED	ICERD – 1999 (A) ICESCR – 1994 (A) ICCPR – 1994 (A) CEDAW – 1995 (A) CAT – 1995 (A) CRC – 1994 (A) CRPD – 2014 (R) CSR – 1999 (A)	Eastern Europe	A medium number of complaints
Hungary	Post-communist countries of Central Europe	States with an active but standardised approach to cooperation with the UN	Failure to accede to AICERD, OPICESCR, ACEDAW, ACAT, ICAS, ACRC, OPCRCpr, ICMW, AFDIPLACM, and ICPAPED.	ICERD – 1967 (R) ICESCR – 1974 (R) ICCPR – 1974 (R) CEDAW – 1981 (R) CAT – 1987 (R) CRC – 1991 (R) CRPD – 2007 (R) CSR – 1989 (A)	Central Europe	A very high number of complaints
Moldova	Post-Soviet countries	States actively cooperating with the UN but encountering specific implementational challenges	Failure to accede to AICERD, OPICESCR, ACAT, ICAS, ICMW, AFDIPLACM, and ICPAPED	ICERD – 1993 (A) ICESCR – 1993 (A) ICCPR – 1993 (A) CEDAW – 1994 (A) CAT – 1995 (A) CRC – 1993 (A) CRPD – 2010 (R) CSR – 2002 (A)	Eastern Europe	A low number of complaints
Montenegro	Former Yugoslavia	States actively cooperating with the UN but encountering specific implementational challenges	Failure to accede to AICERD, ACAT, ICMW, and AFDIPLACM	ICERD – 2006 (S) ICESCR – 2006 (S) ICCPR – 2006 (S) CEDAW – 2006 (S) CAT – 2006 (S) CRC – 2006 (S) CRPD – 2009 (R) CSR – 2006 (S)	Western Balkans	A very low number of complaints

Country	Historical development of human rights	Relationship to the UN from a human rights perspective	The scope of international obligations from the perspective of UN human rights treaties	The process and time of accession (A), succession (S) or ratification (R) of certain UN human rights treaties	The impact of certain UN human rights treaties on national law	Cases before UN treaty bodies
North Macedonia	Former Yugoslavia	States actively cooperating with the UN but facing specific implementational challenges	Failure to accede to AICERD, ACEDAW, ACAT, ICAS, OPCRCpr, ICMW, AFDIPLACM, and ICPAPED	ICERD – 1994 (S) ICESCR – 1994 (S) ICCPR – 1994 (S) CEDAW – 1994 (S) CAT – 1995 (S) CRC – 1994 (S) CRPD – 2011 (R) CSR – 1994 (S)	Western Balkans	A very low number of complaints
Poland	Post-communist countries of Central Europe	States with an active but standardised approach to cooperation with the UN	Failure to accede to OPICESCR, OPCRCpr, ICMW, AFDIPLACM, OPCRPD, ICPAPED, CSSP, and CRS	ICERD – 1968 (R) ICESCR – 1977 (R) ICCPR –1977 (R) CEDAW – 1980 (R) CAT – 1989 (R) CRC – 1991 (R) CRPD – 2012 (R) CSR – 1991 (A)	Central Europe	A medium number of complaints
Romania	Post-communist countries of Central Europe	States actively cooperating with the UN but facing specific implementational challenges	Failure to accede to AICERD, OPICESCR, ICSPCA, ACEDAW, ACAT, ICAS, OPCRCpr, ICMW, AFDIPLACM, OPCRPD, and ICPAPED	ICERD – 1971 (A) ICESCR – 1975 (R) ICCPR – 1975 (R) CEDAW – 1982 (R) CAT – 1991 (A) CRC – 1990 (R) CRPD – 2011 (R) CSR – 1991 (A)	Eastern Europe	A very low number of complaints
Serbia	Former Yugoslavia	States actively cooperating with the UN but encountering specific implementational challenges	Failure to accede to AICERD, ACAT, OPCRCpr, ICMW, and AFDIPLACM	ICERD – 2001 (S) ICESCR – 2001 (S) ICCPR – 2001 (S) CEDAW – 2001 (S) CAT – 2001 (S) CRC – 2001 (S) CRPD – 2009 (R) CSR – 2001 (S)	Western Balkans	A medium number of complaints
Slovakia	Post-communist countries of Central Europe	States actively and effectively cooperating with the UN in terms of implementation	Failure to accede to ACEDAW, ACAT, ICAS, ICMW, and AFDIPLACM	ICERD – 1993 (S) ICESCR – 1993 (S) ICCPR – 1993 (S) CEDAW – 1993 (S) CAT – 1993 (S) CRC – 1993 (S) CRPD –2010 (R) CSR – 1993 (S)	Central Europe	A high number of complaints

Country	Historical development of human rights	Relationship to the UN from a human rights perspective	The scope of international obligations from the perspective of UN human rights treaties	The process and time of accession (A), succession (S) or ratification (R) of certain UN human rights treaties	The impact of certain UN human rights treaties on national law	Cases before UN treaty bodies
Slovenia	Former Yugoslavia	States actively and effectively cooperating with the UN in terms of implementation	Failure to accede to AICERD, OPICESCR, ACAT, ICAS, ACRC, ICMW, AFDIPLACM, and CRS	ICERD – 1992 (S) ICESCR – 1992 (S) ICCPR – 1992 (S) CEDAW – 1992 (S) CAT – 1993 (A) CRC – 1992 (S) CRPD – 2008 (R) CSR – 1992 (S)	Southeastern Europe	A very low number of complaints
Ukraine	Post-Soviet countries	States actively cooperating with the UN but facing serious implementational challenges.	Failure to accede to OPICESCR, ACEDAW, ICMW, and AFDIPLACM.	ICERD – 1969 (R) ICESCR – 1974 (R) ICCPR – 1973 (R) CEDAW – 1981 (R) CAT – 1987 (R) CRC – 1991 (R) CRPD – 2010 (R) CSR – 2002 (A)	Eastern Europe	A high number of complaints

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