

HUMR 5140

Human rights in international and national law

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UN TREATY BODIES

UN human rights organization (Smith, 7th ed., p.54)

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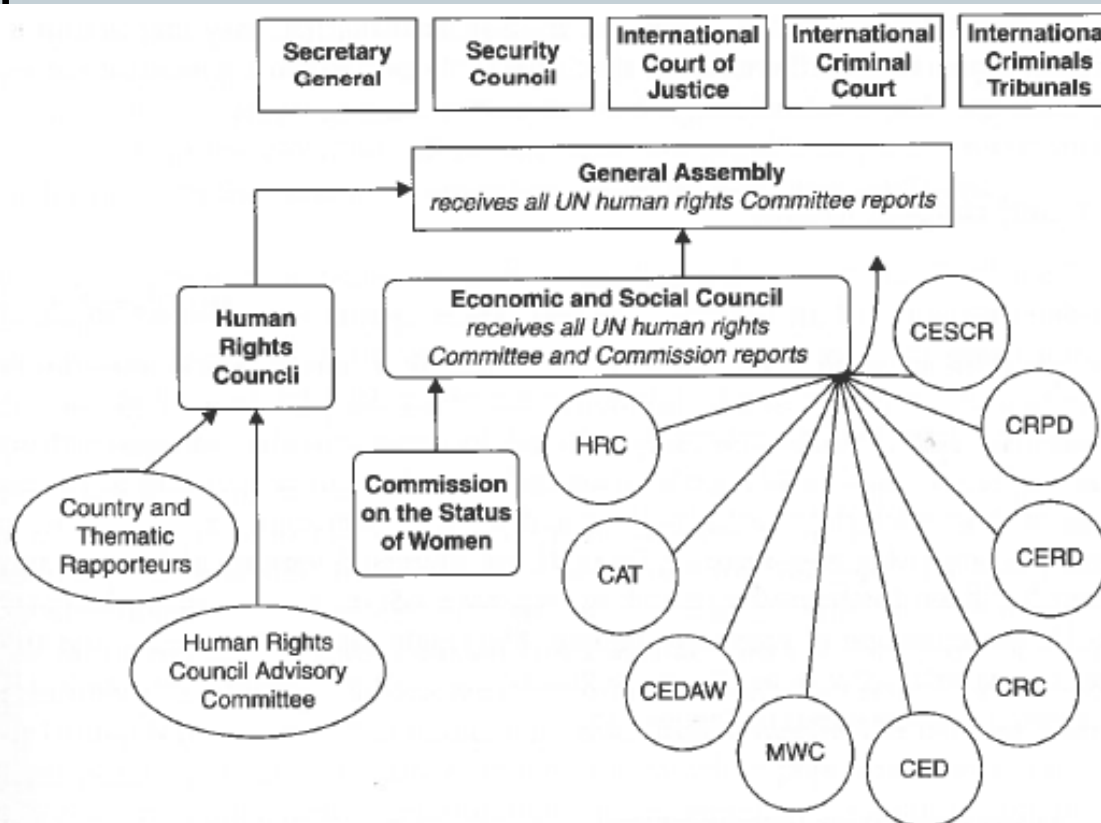


Figure 5.1 United Nations human rights organizational structure.

Major human rights treaties (1)

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- **“Treaty bodies”** monitor the implementation of the **major UN human rights treaties**:
- In addition to **the ICCPR** and the **ICESCR**, the major human rights treaties address either specific groups or categories of persons, **or** specific issues:
- **Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW)**
- **Convention on the Rights of the Child, 1989 (CRC)**
 - **Optional Protocol to the CRC on a Communication Procedures (UN, 2011)**
in force April 2014
- **International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990 (MWC).**

Major human rights treaties (2)

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- **International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (CERD)**
- **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (CAT)**
 - Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2002 (OPCAT)
- **Convention on the Rights of Persons with Disabilities, 2006 (CRPD)**
 - Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2006
- **International Convention for the Protection of All Persons from Enforced Disappearance, 2006 (CIPED)** (in force 23 December 2010)
- **See also:**
 - Second Optional Protocol to the International Covenant on Civil and Political Rights, aimed at the abolition of the death penalty, 1989 (CCPR-OP2)

Ten treaty bodies

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The State parties' compliance with the nine major treaties (their implementation) is monitored by the ten treaty bodies:

1. Committee on Racial Discrimination (CERD)
2. Human Rights Committee (HRC)-
3. Committee on Economic, Social and Cultural Rights (CESCR)-
 1. Strictly speaking a subsidiary body to the ECOSOC-assisting ECOSOC
4. The Committee on the Elimination of Discrimination Against Women (CEDAW)
5. Committee Against Torture (CAT)
6. Committee on the Rights of the Child (CRC)
 1. Optional Protocol to the Convention on the Rights of the Child on a communications procedure, 2011 (entered into force April 2014)
7. Committee on Migrant Workers (CMW)
8. Committee on the Rights of Persons with Disabilities (CRPD)
9. Committee on Enforced Disappearances (CED) (1st meeting on 31 May 2011)
10. Subcommittee on Prevention of Torture (SPT)
 1. - Preventive function

State obligations (1)

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- ICCPR Article 2
- 1. Each State Party to the present Covenant undertakes to **respect and to ensure** to all individuals **within its territory and subject to its jurisdiction** the rights recognized in the present Covenant, 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.
- 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, **to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant**
- 3. Each State Party to the present Covenant undertakes:
 - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an **effective remedy**, notwithstanding that the violation has been committed by persons acting in an official capacity;
 - (b) To ensure that any person claiming such a remedy shall have his right thereto determined **by competent judicial, administrative or legislative authorities**, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
 - (c) To ensure that the competent authorities shall enforce such remedies when granted.

State obligations (2)

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- ICESCR Article 2 :
- 1. 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 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.
- 2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
- 3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

State obligations under the two Covenants

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ICCPR

- **Article 2.1**
- Each State Party to the present Covenant undertakes **to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant**, 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.

ICESCR

- **Article 2.1**
- 1. 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 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.

State obligations - common interpretation

- A common interpretation of State obligations has evolved in the practice of the treaty bodies and literature (General Comment 12: The right to adequate food (Art.11) (U.N. Doc. E/C.12/1999/5, and Civil and Political Rights: The Human Rights Committee Fact Sheet No. 15 (Rev.1))
- **to respect the rights**, which most obviously requires Governments to refrain from violating human rights. This is often also called a “negative” obligation, or an obligation not to engage in a particular act or practice.
- **to protect enjoyment of the rights**, goes further: the State party must not only refrain from violating an individual’s rights itself, but it must also protect an individual from a violation of his or her rights by third parties, be they private individuals, corporations, or other non-State actors.
- a State party must **promote or fulfil** an individual’s rights, that is take the required steps to create a necessary and conducive environment within which the relevant rights can be fully realized.

Reservations

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Vienna Convention on The Law of Treaties, 1969(VCLT) in Art.2.1(d)

- "Reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports *to exclude or to modify the legal effect of certain provisions of the treaty* in their application to that State;
- Thus it is *the content-effect not the form* that is important

Reservations

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- Reservations (VCLT Art. 19: states are not permitted if ***incompatible with object and purpose***)
- The ICCPR:
 - The Committee considers that reservations relating to the required procedures under the first Optional Protocol would not be compatible with its object and purpose. (General Comment 24, para. 14)
- Article 2.1 Second Optional Protocol ICCPR provides:
 - "No reservation is admissible to the present Protocol, **except for a** reservation made at the time of ratification or accession that provides for the application of the death penalty **in time of war** pursuant to a conviction for a most serious crime of a military nature committed during wartime". Paragraphs 2 and 3 provide for certain procedural obligations.
 - Art. 17 CEDAW Optional Protocol: No reservations to the present Protocol shall be permitted.

Criteria for incompatibility with the ICCPR

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- Art. 19.(c) VCLT
- The reservation is incompatible with the object and purpose of the treaty.
- Offending peremptory norms (customary)
 - Ex: torture; thought, conscience and religion; denial of minority rights to culture, language or religion... self-determination
- However, not necessary non-derogable
- No reservation to Art. 2.3 or 40 ICCPR
- Not widely formulated reservations which essentially render ineffective all Covenant rights
- (CCPR General Comment 24, paras. 8-12)

Treaty bodies and reservations

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- When are reservations addressed?
- In reporting procedure (monitoring)
 - A dialogue – time the state may reconsider its reservation - a process
 - Any other procedures where reservations are brought up?
- In the individual complaint-petition procedure (dispute settlement)?
 - Main difference -the reservation **may be decisive** for the case
- A. The reservation directly impacts the obligations under a certain article – can the complaint be heard?
- B. The reservation have an effect that treaty is not

What are the consequences

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- Can a treaty body deal with the reservation and what are the consequences?
- Treat the State as a Party to the convention – i.e. disregard the reservation – state sovereignty?
- The CCPR general comment 24- on reservations
 - Immediately prior to the consideration 1st USA report to the committee
- 1. The HRCmmtee can determine whether a reservation is compatible with the object and purpose of the ICCPR (GC24 para.18)
- 2. One possibility: Strike out the reservation and consider the state as a party to ICCPR without the benefit of the reservation See ECHR in *Belilos v Switzerland*
- The US, the UK and France reacted to this GC- particularly to the fact that a state may remain as a party

How to decide if a reservation is incompatible

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- **3.1.5. Incompatibility of a reservation with the object and purpose of the treaty** ILC Reservations to treaties (final 2011), A/CN.4/L.779
- A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general tenour, in such a way that the reservation impairs the *raison d'être* of the treaty.
- **Determination of the object and purpose of the treaty**
- The object and purpose of the treaty is to be determined in good faith, taking account of the terms of the treaty in their context, in particular the title and the preamble of the treaty. Recourse may also be had to the preparatory work of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice of the parties.
- **Vague or general?** A reservation shall be worded in such a way as to allow its meaning to be understood, in order to assess in particular its compatibility with the object and purpose of the treaty.

The treaty bodies

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- Established by the treaty in question
- See Article 28.1 ICCPR:
 - There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee).
- An exception:
 - The Committee on Economic, Social and Cultural Rights was established by ECOSOC Res. 1985/17 taking over the functions of the ECOSOC (see ch. IV of the ICESCR)

Composition

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- Independent experts, serving in their personal capacity, nominated and elected by the State Parties.
- “The Committee shall be composed of nationals of the State Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal expertise.” (ICCPR Art. 28.2)
- Represent an equitable geographical distribution and different forms of civilizations and principal legal systems (ICCPR Art 31.2, CEDAW Art. 17)

The methods

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- The treaties include a number of methods for the monitoring of the State parties' compliance with the treaty:
- A. State reporting (all)
- B. Interstate communications
 - (CERD - not optional Art. 11; CESCR Optional Protocol and CRC 3rd Optional Protocol -in force April 2014) CEDAW, CRPD-none
- C. Individual communications
 - (CERD, HRC, CAT, CEDAW,CMW, CRPD, CESCR and CRC 3rd Optional Protocol –in force April 2014)
- D. Inquiries/investigations
 - (CAT,CEDAW, CRPD, CED,CESCR and CRC 3rd Optional Protocol -in force April 2014)

State reporting procedures

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- States shall submit reports on measures which give effect to the treaty (Article 40.1 ICCPR)
 - Initial and periodical, and upon request
- Procedure involving both written and oral exchange between the State party and the treaty body – “***a constructive dialogue***”
- Reports shall indicate the factors and difficulties, if any, affecting the implementation of the treaty in question. (Article 40.2 ICCPR)
- Available information from State parties and NGOs etc.

Peru-list of issues 2012 (reporting)

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The rights of indigenous peoples (art. 27)

- 24. Please describe the consultation process implemented under Act No. 29785, passed in August 2011, on the right of indigenous or native peoples to be consulted, as established in International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169). In particular, please describe the mechanisms used for the consultation, the extent of the participation of those consulted and to what degree the findings of the consultation were incorporated into the regulations of the Act. Please also report on the process to inform people and educate public officials regarding the contents of the Act on consultation and its regulations. Please also indicate the steps taken to guarantee that the informed prior consent of indigenous peoples is obtained before licences to exploit or explore indigenous territories are granted.
- List of issues to be taken up in connection with the consideration of the fifth periodic report of Peru (CCPR/C/PER/5), adopted by the Committee at its 105th session (9–27 July 2012), CCPR/C/PER/Q/5

Canada-List of issues (2014)

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- **Right to life, prohibition of torture and cruel, inhuman or degrading treatment, family life and an effective remedy (arts. 2, 6 and 7)**
- Further to the Committee's previous concluding observations (CCPR/C/CAN/CO/5, para. 20) please provide information on the measures taken to ensure that all allegations of ill-treatment and excessive use of force by the police are impartially investigated by an independent body, including those related to the police use of force during the student protests in Quebec in 2012.
- Please provide information on the steps taken to amend the Guidelines for the Use of Conducted Energy Weapons to require that conducted energy devices be used only in situations involving an imminent threat of death or serious injury.
- List of issues in relation to the sixth periodic report of Canada, CCPR/C/CAN/Q/6

State reporting procedure (2)

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- Concluding observations:
- Assessment of the State parties' compliance with the treaty based on information during the consideration of the report
- Transmitted to the State party
- State reports and the concluding observations made by the treaty body are made public
- Failure of the State party to submit a report:
 - The treaty body includes information in its annual report (Article 45 ICCPR)
 - The treaty body may set a date for consideration of the report
 - The treaty body may proceed to consideration of the implementation despite failure to report
 - The treaty body may adopt provisional concluding observations
 - The UPR of the Human Rights Council

Canada- Concluding observations 2015

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C. Principal matters of concern and recommendations

Views under the Optional Protocol

- The State party should reconsider its position in relation to Views and Interim Measures adopted by the Committee under the First Optional Protocol. It should take all necessary measures to establish mechanisms and appropriate procedures to give full effect to the Committee's Views so as to guarantee an effective remedy when there has been a violation of the Covenant. The Committee draws the attention of the State party to its General Comment No. 33 (2009).
- Concluding observations on the sixth periodic report of Canada*
CCPR/C/CAN/CO/6

Canada- Concluding observations 2015

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Indigenous lands and titles

- The State party should consult indigenous people to (a) seek their free, prior and informed consent whenever legislation and actions impact on their lands and rights; and (b) resolve land and resources disputes with indigenous peoples and find ways and means to establish their titles over their lands with respect to their treaty rights.
- Concluding observations on the sixth periodic report of Canada* (2015)

General Comments

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- The Committee shall study the reports submitted by the State Parties to the present Covenant. It shall submit its reports, and such general comments as it may consider appropriate, to the State Parties (Article 40.4 ICCPR).
 - Cf. Article 38.1 ICJ Statutes

Interstate communications

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- State parties *may* complain about the compliance of another State party to the relevant treaty
 - Article 11 ICERD – not an optional procedure
- Treaty body considers communication: CESCR, CAT, CRC, CED, CMW
- Good offices shall be applied aimed at finding a “friendly solution of the matter on the basis of respect for human rights” (Article 41.1(e) ICCPR) see also ICERD, CCPR and CRC)
- Article 42- appoint an ad hoc Conciliation Commission, if not satisfactory to the parties
- The ICJ may be resorted to, if, States cannot reach an agreement under the procedures provided for in ICERD (Art. 22 ICERD)
 - CEDAW, CAT, CMW and CED: negotiation, arbitration

Individual Communications

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- Individuals, or groups of individuals may complain
- Victims or on their behalf:
 - Third party if written consent or impossibility
- Individual complaints about violations of rights with regard the specific treaties, either
 - in the treaty CERD, CAT, CED and Art. 77 CMW- not yet in force
 - or in an additional protocol ICCPR, CEDAW, CRPD, ICESCR and CRC in force April 2014,
- This procedure addresses individual cases and not the general situation in a country.
- **Not legally binding** (Article 5.4 Optional Protocol ICCPR article 9.1 Optional Protocol CESCR)

Admissibility

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- Optional Protocol to the ICCPR:
- Victim of a violation or sufficient link to the victim (Art.1)
 - Sufficiently substantiated claim
 - Individuals or collectives? (Lubicon Lake Band v. Canada)
 - ✦ Cf. Person, NGO or group of individuals (Art. 34 ECHR)
- State is a party to the convention (Art. 1)
 - Continuing nature (Lovelace v. Canada)
 - Outside jurisdiction of the state (Ng v. Canada)
- All available domestic remedies shall be exhausted – if not unreasonably prolonged (Art. 2, 5.2(b))
 - Effective remedies available to the alleged victim
 - Reasonable prospect of success (Lovelace v. Canada)
- Not anonymous (Art. 3)
- Abuse of the “right of submission” or incompatible with the provisions of the ICCPR (Art. 3)
- If the matter is being examined under another procedure of “international investigation or settlement” (Art. 5.2(a))
 - The same claim by the same individuals
 - ✦ Cf. Substantially the same matter and contains no relevant new information (Art. 35.2(b))

Inadmissibility

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Optional Protocol to the CESCR

- **Article 4 Communications not revealing a clear disadvantage**
- The Committee may, if necessary, decline to consider a communication where it does not reveal that the author *has suffered a clear disadvantage*, unless the Committee considers that the communication raises a serious issue of general importance.

Inquiry mechanisms

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- CAT (Article 20) and the Optional protocol to the CEDAW (Article 8 CEDAWOP)
- “reliable information which appears to contain well-founded indications that torture is being systematically practiced in the territory of a State party, the Committee shall invite that State Party to cooperate in the examination of the information” which may include “a visit to its territory” (Article 20.1 and 20.3 CAT, cf. Article 8.1 CEDAW OP)
- Cooperation of the State Party at all stages and confidential (CEDAWOP Art. 8.5)
- State Parties **may opt-out** of this procedure by a declaration at the time of signature or ratification (CEDAW Art. 10.1) Despite the fact that reservations are not permitted (CEDAWOP Art. 17)
 - cf. Art. 28.2 CAT- permitting “reservations” to the competence of the committee

Prevention of violations

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The Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture (SPT) (Optional Protocol CAT)

- Cooperate with the state parties(Art. 2.4)

National preventive mechanism:

- States shall create one or more national preventive body(ies) to visit places of detention (Art.3)
- These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment. (Art.4.1)