



Sierra Leone Bar  
Association

*Fiat Justitia*



# **Practical Guide to International and Regional Human Rights Instruments Applicable in Sierra Leone**

*October 2005*

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## I. INTRODUCTION

Since the end of the ten-year civil war the protection of human rights has become an eminent concern in Sierra Leone. There is a plethora of human rights organizations working in this field in Freetown and increasingly in the provinces.

Lawyers are showing a growing interest in this area of law. The Sierra Leone Bar Association has created a human rights committee, and the number of lawyers graduating with a Master's degree in human rights has dramatically increased, as has the number of lawyers working with human rights non-governmental organizations. Even the University of Sierra Leone is taking a groundbreaking step by seriously considering introducing human rights into the curriculum of the law department.

Consequently, the Sierra Leone Bar Association, in conjunction with the American Bar Association, has undertaken to publish this practical guide. This booklet is intended to assist Sierra Leonean lawyers in understanding international human rights instruments and international humanitarian law conventions, particularly the treaties signed and ratified by Sierra Leone, and pertinent related issues.

The guide examines the International Covenant on Civil and Political Rights, the Optional Protocol to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol, the Convention on the Rights of the Child, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as well as the Rome Statute of the International Criminal Court, its Rules of Procedure and Evidence, and the corresponding Elements of Crimes. The guide also examines three treaties under the African human rights system, namely the African Charter on Human and Peoples' Rights, the African Charter on the Rights and Welfare of the Child, and the Convention Governing the Specific Aspects of Refugee Problems in Africa.

The guide also focuses on several issues, such as general criminal matters relating to detention and fair trial, war crimes and international humanitarian law, alien and refugee status, and the rights of women and children.

In examining the treaties, the guide cites the full title of the treaty, the dates it was adopted and entered into force, and the date Sierra Leone signed or ratified the treaty. The guide also seeks to explain major provisions of each treaty, its implementation mechanisms and the circumstances under which the States parties to each treaty may derogate from certain obligations. This guide is intended to be explanatory in nature, and it is hoped that it will be a starting point for lawyers, law students, and human rights activists when conducting their research.

## II. THE INTERNATIONAL HUMAN RIGHTS SYSTEM

The current international human rights system was established in the wake of the Second World War under the auspices of a then nascent United Nations. Its creation embodied an attestation of the widespread suffering that the world had witnessed and the unified political will of nations to prevent such mistreatment from ever occurring again. The international human rights system also gave voice to struggles for independence in parts of the world that remained under colonial rule. Through international treaties and institutions, states themselves pledged to hold other states accountable for violating the rights and fundamental freedoms of their citizens. Consequently, the international human rights system seeks to make the protection of human rights more effective within national systems. That is, countries that become States parties to international human rights treaties are legally bound to ensure and respect the rights of individuals within national legislation and related domestic implementation efforts.

Presently there are several major institutions that monitor the activities of countries in protecting human rights. There are two types of bodies at the international level: institutions created under the United Nations Charter, such as the Commission on Human Rights and the Sub-Commission on the Promotion and Protection of Human Rights, and institutions created directly under individual human rights treaties.

The United Nations Commission on Human Rights (UN Commission) was established in 1947 and was the body that issued the landmark Universal Declaration of Human Rights (UDHR). The UN Commission is composed of 53 states and meets once a year in Geneva, Switzerland to consider human rights issues and to release numerous resolutions, decisions, and Chairperson statements on the following matters:

- the right to self-determination
- racism
- the right to development
- violations of human rights in the occupied Arab territories, including Palestine
- violations of human rights and fundamental freedoms in any part of the world
- economic, social and cultural rights
- civil and political rights
- the right against torture and unjustified detention
- disappearances and summary executions
- freedom of expression
- the independence of the judiciary
- impunity and religious intolerance
- the rights of women and children
- the rights of migrant workers
- the rights of minorities and displaced persons.

The above is not an exhaustive list since the UN Commission continually assembles working groups in order to identify new challenges to the protection of human rights and to respond by developing new standards. Such working groups can either be standard setting bodies, open-ended entities based on current human rights topics, or groups created to address special procedures. One such working group worth mentioning is the Working Group of Experts on People of African Descent that was established on 25 April 2002 “to study the problems of

racial discrimination faced by people of African descent living in the African Diaspora and [to] make proposals for the elimination of racial discrimination against people of African descent” (Durban Programme of Action). The UN Commission also follows issues related to implementation in countries around the world. The Commission’s work is aided by special rapporteurs who are mandated to work on specific issues (such as torture and other cruel, inhuman or degrading treatment or punishment, violence against women, racism etc.) and who submit thematic reports, undertake country visits, send communications to governments on alleged violations, and issue press releases on specific matters of grave concern. Lastly, the UN Commission provides advisory services for governments and facilitates technical cooperation through the Office of the United Nations High Commissioner for Human Rights.

The Sub-Commission on the Promotion and Protection of Human Rights is the main subsidiary body to the UN Commission. Its functions include undertaking studies, particularly in light of the UDHR, and making recommendations to the UN Commission regarding any violations of human rights and fundamental freedoms as well as the overall protection of racial, national, religious and linguistic minorities. The sub-commission consists of 26 experts that act in their personal capacity and that equally represent all areas of the globe. Currently the sub-commission is composed of seven experts from African states, five experts from Asian states, five experts from American states, three experts from East European states, and six experts from West European states. Members serve for four-year terms and are elected every two years.

In addition to the above institutions established under the United Nations Charter, there are also seven treaty-specific bodies at the international level. These institutions monitor the implementation of the core existing international human rights treaties:

- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention Against Torture)
- Convention on the Rights of the Child (CRC)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

The following are the international bodies listed in corresponding order with the above instruments:

- The Human Rights Committee (HRC)
- The Committee on Economic, Social and Cultural Rights (CESCR)
- The Committee on the Elimination of Racial Discrimination (CERD)
- The Committee on the Elimination of Discrimination Against Women (CEDAW)
- The Committee Against Torture (CAT)
- The Committee on the Rights of the Child (CRC)
- The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW).

In addition to other functions, four of the above committees, HRC, CERD, CAT, and CEDAW, can receive individual petitions from persons claiming that States parties to the respective treaties have infringed upon their rights and fundamental freedoms. A state may choose whether to accept the jurisdiction of a committee to hear individual petitions, either by acceding to or ratifying an optional protocol or by declaring, under the relevant article of the convention, that it recognizes the competence of the committee to review individual petitions.

At the regional level, the Assembly of Heads of State and Government of the Organization of African Unity, now the African Union (AU), established the African Commission on Human and Peoples' Rights (African Commission) in order to monitor the implementation of the African Charter on Human and Peoples' Rights (African Charter). Based in Banjul, the commission is composed of eleven members elected by secret ballot who hold six-year terms and serve in their personal and individual capacity. The main functions of the commission are: to promote and protect human rights on the African continent and to interpret the provisions of the African Charter. This body is also tasked with overseeing inter-state complaints as well as other communications, which include individual petitions from persons who claim that their rights and freedoms, as protected by the African Charter, have been violated by a state. While the African Commission can investigate situations where human rights violations have occurred, its decisions take the form of recommendations. In June 1998, a protocol to the African Charter was drafted in order to create an African Court on Human and Peoples' Rights that would issue legally binding decisions. The protocol received the requisite number of ratifications and came into force on 25 January 2004.

### **Human Rights in Sierra Leone**

In Sierra Leone, although human rights activists make frequent reference to international human rights treaties, little reference is made to these treaties by lawyers and judges in the course of their professional activity. The central reason reported for this incongruity is the uncertainty on the part of Sierra Leonean legal professionals with respect to the applicability of these treaties under national law.

The above-mentioned human rights treaties, like any international treaty, are essentially contracts between states and thus rely upon the consent of the parties involved. While there are a number of methods by which a state can signal its consent to a treaty, consent by ratification is the most prevalent practice in the case of human rights treaties.

The rules governing ratification vary from state to state. Section 40 of the Constitution of Sierra Leone provides as follows:

Provided that any Treaty, Agreement or Convention executed by or under the authority of the President which relates to any matter within the legislative competence of Parliament, or which in any way alters the law of Sierra Leone or imposes any charge on, or authorizes any expenditure out of, the Consolidated Fund or any other fund of Sierra Leone, and any declaration of war made by the President shall be subject to ratification by Parliament—

- i. by an enactment of Parliament; or
- ii. by a resolution supported by the votes of not less than one-half of the Members of Parliament.

In the case of the treaties in this booklet, although Sierra Leone submitted an instrument of ratification to the relevant international bodies, the ratification was not predicated on the requisite action by Parliament. However, despite the fact that Parliament has not yet issued an enactment or resolution, lawyers are not precluded from using these treaties. It is an accepted principle in international law that once a state's representative has signaled agreement with a treaty, the state must refrain from acts which would defeat the object and purpose of the treaty pending ratification. It is therefore incumbent upon Sierra Leone to act consistent with the provisions of the treaty while awaiting Parliamentary action.

In addition, many of notions represented in the treaties included in this booklet are considered to be codifications of already established customary international law. Customary law is a source of international law, equal in authority to treaty law. Customary international law is rooted in the conduct of states. It is characterized by practice that is widespread and uniform among states and is engaged in out of a sense of legal obligation. Some norms of customary international law are considered to be so widely accepted and fundamental that they are binding on all states, regardless of a given state's practice or rejection of the norm. Particular norms embodied in the International Covenant on Civil and Political Rights, Convention on the Rights of the Child, Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, African Charter on Human and Peoples' Rights, and African Charter on the Rights and Welfare of the Child are widely considered to be customary international law.

Finally, regardless of the extent to which these treaties are formally binding on the government of Sierra Leone, they each mark the basic minimum standards observed by the international community. It is therefore incumbent upon Sierra Leone, like all members of the international community, to afford the rights described in these documents to its people. Legal professionals, of any country, including Sierra Leone, are the advocates and arbiters of these norms, the protections they afford, and the state's efforts to provide them. With the full text of, and relevant explanatory information regarding, the treaties available in this reference guide, Sierra Leone's legal professional community gains an additional tool to utilize in its on-going efforts to promote and protect fundamental human rights.

### III. UNITED NATIONS TREATIES - SUMMARIES

#### **International Covenant on Civil and Political Rights and the Optional Protocol to the International Covenant on Civil and Political Rights**

Citation: International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302.

Adopted by the UN General Assembly on 16 December 1966

Entered into force on 23 March 1976 (ICCPR and 1<sup>st</sup> OP)

Acceded to by Sierra Leone on 23 November 1996 (ICCPR), 23 August 1996 (1<sup>st</sup> OP)

Reservations: None

#### Purpose/Definitions

The International Covenant on Civil and Political Rights (ICCPR) is one of the most widely accepted instruments setting forth international human rights standards, and it covers a broad range of rights that affect all the fundamental aspects of society. It is a central part of the efforts of the founding representatives of the United Nations (UN) to provide individual human rights protections grounded in international law. The ICCPR is one of three principle UN international instruments comprising the "International Bill of Human Rights," including the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).

The ICCPR has 27 substantive articles covering a wide range of basic human rights, including the prohibition against torture or other cruel, inhuman or degrading treatment or punishment (Art. 7), the right to life (Art. 6), freedom of speech (Art. 19), and the right to a fair trial (Art. 14). All of the rights inscribed in the ICCPR are to be granted without discrimination on the basis of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status (Art. 2(1)). The ICCPR has two Optional Protocols. The first entered into force concomitantly with the ICCPR in 1976; the second entered into force in 1991. The First Optional Protocol provides an additional monitoring and implementation mechanism, and the Second Optional Protocol addresses the death penalty.

#### Implementation Mechanisms

The Human Rights Committee (HRC) is charged with monitoring compliance with and implementation of the ICCPR. It is not a UN body, but rather a permanent standing committee of 18 individual experts recognized for their achievements in the human rights field. The committee members serve in their own capacity and not as representatives of any state, and so, they are free to voice their opinions in accordance with their own consciences. The HRC

seeks to promote compliance with the ICCPR and its protocols and hold States parties accountable to the international community in the area of human rights. Pursuant to Article 2(2) of the ICCPR, States parties shall “take the necessary steps” to implement its provisions. Utilizing three procedural mechanisms – state reporting, individual complaints, and inter-state complaints – the HRC examines how States parties give effect to the Covenant.

To fulfill its duties under the ICCPR, the HRC routinely engages in two types of analytic review. First, the HRC is specifically tasked with reviewing the reports that State parties are required to submit, which document progress in the implementation and observance of ICCPR provisions (Art. 40). After reviewing these, the HRC prepares “concluding observations,” wherein it analyzes the state of such implementation and suggests improvements. Second, the HRC also considers individual complaints referred to by the HRC as “communications.” According to Article 1 of the First Optional Protocol, individuals who claim to have suffered a violation of any of the Covenant’s provisions and who have exhausted all available domestic remedies may submit a communication to be reviewed and considered by the HRC. Again, after review, the HRC issues decisions that analyze the application of ICCPR provisions and suggest remedial measures where appropriate. The HRC is not a court, but it does have interpretive authority grounded in a legally binding treaty obligation.

In the process of these review functions, the HRC notes trends and patterns, and, at times, has issued guidance that addresses matters of general application. This guidance is issued in the form of “general comments,” which elaborate on various provisions of the ICCPR and their implementation. General Comments are advisory in nature and typically address a specific right or a collection of rights under a particular theme providing authoritative interpretation of treaty provisions. However, certain General Comments have focused on more administrative matters, such as advice on preparing reports. General Comments are useful for assessing the HRC’s position on particular issues, and they compose a valuable body of information on the committee practice and precedent.

### Derogation

Article 4 of the ICCPR allows States parties to derogate from some of their official obligations under the Covenant in times of recognized public emergency. Article 4 can only be invoked if two stringent conditions are met: a) the situation must amount to a public emergency that threatens the life of the nation; and b) the State party in question must have officially proclaimed a state of emergency. Article 4 also places strict limits on the scope and duration of any derogation (Gen. Com. No. 29).

The HRC has mentioned in General Comment no. 29 that not every disturbance or catastrophe constitutes a public emergency within the meaning of Article 4. For example, in times of armed conflict, whether inter-state or internal, international humanitarian law applies in addition to ICCPR obligations, specifically Articles 4 and 5, in order to prevent states from abusing their emergency powers. However, even during armed conflict, the state of public emergency must constitute “a threat to the life of the nation” in order for governments to be able to derogate from their obligations under the ICCPR (Gen. Com. No. 29).

A State party that is seeking to derogate is required to officially declare a public emergency. The HRC explains that this requirement is meant to uphold legality and the rule of law in situations when they are needed most. Thus, when declaring an emergency, a state must act in conformity with its constitution as well as other applicable domestic laws and the HRC is to

monitor whether such laws foster compliance with Article 4 of the ICCPR. In order to better monitor public emergency situations, the HRC encourages states to include a description of their emergency laws and procedures in their reports to the HRC (Gen. Com. No. 29).

States may derogate from their ICCPR obligations only “to the extent strictly required by the exigencies of the situation” (Gen. Com. No. 29). This requirement implies that derogation must be proportionate to the duration, geographical coverage and material scope of the state of emergency. The HRC explains that this condition requires states to carefully justify their decision to proclaim a state of emergency and any measures undertaken thereto (Gen. Com. No. 29).

When a State party undertakes measures derogating from its ICCPR obligations, such measures cannot be inconsistent with that State party’s *other* obligations under international law, particularly international humanitarian law. Additionally, such measures cannot be discriminatory on the basis of race, color, sex, language, religion or social origin (Gen. Com. No. 29).

It should be emphasized that states are not allowed to derogate from *all* ICCPR obligations in times of recognized public emergency. Certain enumerated provisions of the ICCPR are non-derogable. Article 4 prohibits derogation from Article 6 (right to life), Article 7 (prohibition against torture and other cruel, inhuman, or degrading treatment or punishment), Article 8(1) (prohibition against slavery), Article 8(2) (prohibition against servitude), Article 11 (prohibition of imprisonment as a result of inability to fulfill a contractual obligation), Article 15 (principle of legality in criminal law), Article 16 (equal recognition under the law), and Article 18 (freedom of thought, conscience and religion). The HRC indicates that the fact that some provisions are non-derogable does not mean that other articles in the ICCPR may be subjected to derogation at will, even where a legitimate threat to the life of the nation exists (Gen. Com. No. 29).

Lastly, when a State party fulfills the above requirements and exercises its right of derogation, it must inform other States parties to the ICCPR, through the UN Secretary General (Art. 4(3)). The HRC emphasizes that a state should include full information regarding the measures undertaken, delineate the reasons why such measures were undertaken, and provide full documentation regarding all applicable domestic laws. If a State party undertakes further steps under Article 4, it must provide additional notifications. The purpose of this notification requirement is two-fold: a) it allows the HRC to better assess whether the measures taken by a State party were strictly required by the exigent circumstances and b) it allows other States parties to monitor compliance with the provisions of the ICCPR (Gen. Com. No. 29).

## **International Covenant on Economic, Social and Cultural Rights**

Citation: International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3.

Adopted by the UN General Assembly on 16 December 1966

Entered into force on 3 January 1976

Acceded to by Sierra Leone on 23 November 1996

Reservations: None

### Purpose/Definitions

The International Covenant on Economic, Social and Cultural Rights (ICESCR) together with the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) comprise the “International Bill of Human Rights” which was developed by the United Nations (UN) after the Second World War in order to ensure the protection of individual human rights in international law. The ICESCR focuses upon the protection of economic, social and cultural rights while the ICCPR focuses upon the protection of civil and political rights. It should be noted that the division of fundamental human rights into the two aforementioned categories is not always clear or obvious. Scholars frequently emphasize the indivisibility of the two categories of rights. For example, the right to join a trade union, which is delineated in Article 8 of the ICESCR, can also be a right of association protected by Article 22 of the ICCPR.

The ICESCR has 15 substantive articles including such guarantees as the right to work (Art. 6), the right to remuneration and safe working conditions (Art. 7), the right to the highest attainable standard of physical and mental health (Art. 12), and the right to education (Art. 13). Article 2(2) places an obligation on States parties to guarantee that ICESCR rights “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.”

### Implementation Mechanisms

Unlike the ICCPR, the ICESCR did not initially provide for the establishment of a treaty body to monitor the compliance of its State parties. In 1986, the United Nations Economic and Social Council (ECOSOC) issued a resolution that created an official supervisory body for the ICESCR named the Committee on Economic, Social and Cultural Rights (Committee). The Committee is comprised of 18 individual experts that are elected by ECOSOC to serve in their personal capacity and not as representatives of particular States. This enables the Committee members to form independent opinions and to voice them freely.

The primary supervisory role of the Committee is to review reports from States parties regarding their progress in complying with the ICESCR (Art. 16). Upon review of such reports, the Committee issues “concluding observations.” The Committee has also developed a practice of issuing “general comments” which have interpretative value and which are intended

to assist and promote the further implementation of the ICESCR, to draw attention to insufficiencies delineated in States parties' reports, and to suggest improvements in the reporting process. It should be noted that the Committee does not have the ability to review communications filed by individual persons as does the Human Rights Committee under the ICCPR. The notion of an individual complaint mechanism for the ICESCR has been contemplated but it has not yet come to fruition.

According to Article 2(1) of the ICESCR “[e]ach State Party . . . 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.” Article 2(1) contains both obligations of conduct and obligations of result. An obligation of conduct refers to a specific action (or omission) that is required of a State party. An obligation of result requires a State party to take action (or abstain from taking action), in whatever manner the state chooses, in order to achieve a particular result.

Scholars have expressed concern about the language regarding progressive realization of economic, social and cultural rights in Article 2(1), noting that such language is vague and could undermine the States' affirmative obligations under the ICESCR. The Committee issued General Comment No. 3 in 1990 in order to specifically address the nature of States parties' obligations under Article 2(1). The Committee explained that the obligations delineated in Article 2(1) of the ICESCR are different from those mandated by the ICCPR in that the ICESCR takes a progressive approach to the achievement of its rights which does not carry the same degree of immediacy as the ICCPR. The ICESCR recognizes that economic, social, and cultural rights will reach full realization with the passage of time. However, this does not mean that States parties should not give full effect to their obligations under the Covenant. In fact, the Committee indicated that “while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant” (Gen. Com. No. 3). Such steps not only include legislative measures but also judicial remedies as well as administrative, financial, educational, and social measures. Lastly, the Committee noted that the phrase “to the maximum of its available resources” does not only mean a particular State party's resources but also the potential resources available through international cooperation and assistance that a government could use in order to fulfill its obligations under the ICESCR (Gen. Com. No. 3).

### Derogation

States parties to the ICESCR may derogate from their obligations under the Covenant in certain circumstances. Article 4 of the ICESCR restricts derogation, indicating that governments may limit the rights set forth in the Covenant “only insofar as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.” Article 5(2) further proscribes the derogation of *any* human right on the “pretext that the . . . [ICESCR] does not recognize such rights or that it recognizes them to a lesser extent.”

## **Convention on the Elimination of All Forms of Discrimination Against Women and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women**

Citation: Convention on the Elimination of All Forms of Discrimination Against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 (1979), 1249 U.N.T.S. 13.

Optional Protocol to the Convention on the Elimination of Discrimination Against Women, G.A. res. 54/4, annex, 54 U.N. GAOR Supp. (No. 49) at 5, U.N. Doc. A/54/49 (Vol. I) (2000), 2131 U.N.T.S. 83.

Adopted by the U.N. General Assembly on 18 December 1979 (CEDAW), 6 October 1999 (OP)

Entered into force on 3 September 1981 (CEDAW), 22 December 2000 (OP)

Acceded to by Sierra Leone on 11 December 1988 (CEDAW)

Signed by Sierra Leone on 8 September 2000 (OP)

Reservations: None

### Purpose/Definitions

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is the quintessential instrument for articulating, advocating, and monitoring women's human rights. The convention establishes, in legally binding form, internationally accepted principles regarding the rights of all women in all fields. The fundamental purpose of CEDAW is to prohibit all forms of discrimination against women. CEDAW not only demands that women be afforded equal rights with men in the law but also in practice. Thus, States parties are required to enact gender-neutral legislation *and* to undertake measures that enable women to enjoy the rights to which they are equally entitled.

CEDAW has 16 substantive articles that obligate States parties, *inter alia*, to undertake appropriate measures in all fields, including legislation, in order to ensure the equal rights of women (Art. 3), to modify social and cultural patterns that perpetuate gender-role stereotypes (Art. 5), to provide women with equal opportunities in both political and public life (Art. 7), to ensure women's equal access to education (Art. 10), and to guarantee women's equality in employment and their labor rights (Art. 11). According to Article 4, States parties are entitled to adopt temporary special measures in cases where inequality between men and women persists. CEDAW is also accompanied by an Optional Protocol that came into force in 2000. The Protocol establishes an inquiry procedure as well as the right of individuals to file communications alleging violations of CEDAW with the Committee on the Elimination of Discrimination Against Women (Committee).

CEDAW defines discrimination against women as "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.” (Art. 1). The Committee has read gender-based violence into the above definition thus explicitly prohibiting it under CEDAW (Gen. Rec. No. 19).

### Implementation Mechanisms

The monitoring body of CEDAW is the Committee on the Elimination of Discrimination Against Women. The Committee is composed of 23 experts who are elected by States parties. The committee members serve in their personal capacity and not as representatives of their countries of origin. Thus, they are able to form independent opinions and to voice them freely. The central functions of the Committee are to review progress reports submitted by States parties, examine individual communications, and conduct inquiries into grave or systematic abuses of women’s rights within the territories of States parties.

The Committee oversees compliance with CEDAW by examining the reports that States parties are required to file in accordance with Article 18 of the convention. Upon review of such reports, the Committee issues concluding comments concerning the countries’ progress. It should be noted that the Committee never formally pronounces a state to be in violation of CEDAW but rather points out that state’s shortcomings through a series of questions and comments.

The Committee also develops suggestions and general recommendations based upon the examination of reports and information received from States parties (Art. 21). Furthermore, the Committee is encouraged to develop links with specialized agencies such as the World Health Organization, the International Labour Organization, and the United Nations Education, Scientific and Cultural Organization (Art. 22).

With the coming into force of the Optional Protocol in 2000, the Committee can now review individual communications and conduct inquiries into suspected violations of CEDAW by States parties. The communications procedure provides individuals and groups with the opportunity to lodge complaints with the Committee alleging that particular States parties have impeded upon their rights that are inscribed in CEDAW. Before the Committee considers such a communication, it must first determine whether the country in question is a party to both CEDAW *and* the Optional Protocol and, thus, formally recognizes the competence of the Committee to review individual communications (OP Art. 3). In addition to this determination, the Committee must also ascertain whether certain admissibility requirements have been met such as the exhaustion of all available domestic remedies (OP Art. 4).

According to Article 8 of the Optional Protocol, the Committee can also conduct inquiries if it receives reliable information that grave or systematic abuses of women’s rights are occurring within the territory of a State party. After six months, from the date of the inquiry, the government in question may be invited to provide the Committee with details regarding any remedial efforts it has undertaken (Art. 9). It is worthy to note that when countries ratify the Optional Protocol, they have the option to refuse to recognize the competence of the Committee to conduct inquiries (Art. 10).

### Derogation

Neither CEDAW nor its Optional Protocol on individual communications and inquiry procedures explicitly address the issue of States parties derogating from their obligations in cases of recognized public emergency.

## **Convention on the Rights of the Child, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, and Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography**

Citation: Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), 1577 U.N.T.S. 3.

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, G.A. res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49) at 7, U.N. Doc. A/54/49, Vol. III (2000).

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. res. 54/263, Annex II, 54 U.N. GAOR Supp. (No. 49) at 6, U.N. Doc. A/54/49, Vol. III (2000).

Adopted by the U.N. General Assembly on 20 November 1989 (CRC), 25 May 2000 (1<sup>st</sup> OP), 25 May 2000 (2<sup>nd</sup> OP)

Entered into force on 2 September 1990 (CRC), 12 February 2002 (1<sup>st</sup> OP), 18 January 2002 (2<sup>nd</sup> OP)

Ratified by Sierra Leone on 2 September 1990 (CRC), 15 June 2002 (1<sup>st</sup> OP), 18 January 2002 (2<sup>nd</sup> OP)

Reservations: None

Declarations: "With regard to article 3, paragraph 2, of the Optional Protocol to the Convention on the Rights of the Child on the Participation of Children in Armed Conflict, the Government of the Republic of Sierra Leone declares that:

1. The minimum age for voluntary recruitment into the Armed Forces is 18 years;
2. There is no compulsory, forced or coerced recruitment into the National Armed Forces;
3. Recruitment is exclusively on a voluntary basis."

### Purpose/Definitions

The Convention on the Rights of the Child (CRC) is the principle instrument for protecting the human rights of children and, with 192 States parties, is the most widely ratified out of all human rights treaties. The convention establishes norms that are legally binding upon its States parties recognizing that children should develop within a family environment and that they require particular care and protection.

The CRC has 41 substantive articles that require States parties, *inter alia*, to respect and ensure the rights of children without discrimination of any kind (Art. 2), to undertake legislative, judicial and administrative measures while taking into consideration the "best interests of the child" (Art. 3), to respect the child's inherent right to life (Art. 6), to ensure that children are not separated from their parents against their will (Art. 9), to combat the illicit transfer and non-

return of children abroad (Art. 11), to provide appropriate protection and humanitarian assistance to refugee children (Art. 22), to ensure the child's right to health (Art. 24), to uphold the child's right to education (Art. 28), to protect children from economic exploitation (Art. 32), to protect children from sexual exploitation and sexual abuse (Art. 34), to respect rules of international humanitarian law applicable to children during armed conflicts (Art. 38), and to promote the physical and psychological recovery and the social reintegration of children that are victims of exploitation, abuse, torture, any other form of cruel, inhuman or degrading treatment or punishment, or armed conflicts (Art. 39). The CRC is also accompanied by two Optional Protocols that entered into force in 2002. The First Optional Protocol addresses the involvement of children in armed conflicts and the Second Optional Protocol focuses on the sale of children, child prostitution, and child pornography.

It should be noted that the CRC defines the term "child" as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier" (Art. 1).

### Implementation Mechanisms

The Committee on the Rights of the Child (Committee) is the monitoring body of the CRC. The Committee is composed of 18 members that serve in their personal capacity and not as representatives of their countries of origin. Thus, they are able to form independent opinions and to voice them freely. The Committee performs two main functions: to review progress reports submitted by States parties and to interpret the CRC.

According to Article 44 of the CRC, Article 8 of the First Optional Protocol, and Article 12 of the Second Optional Protocol, States parties are obligated to submit reports to the Committee regarding measures they have undertaken in order to give effect to the rights delineated in the above instruments and the progress they have made on the enjoyment of those rights. In addition to the requisite government reports, the Committee receives information on the various human rights situations within the borders of its States parties from other sources such as nongovernmental organizations, UN agencies, other intergovernmental organizations, academic institutions and the press. The Committee examines the state reports as well as all the other information available together with government representatives. Based upon this dialogue, the Committee issues concluding observations voicing its concerns and recommendations to the states in question.

The Committee also interprets the CRC and publishes general comments on thematic issues and its methods of work. Lastly, the Committee holds public discussions, or Days of General Discussion, on particular issues such as "violence against children." Unlike other human rights bodies, the Committee does not review communications filed by individual persons and reports filed by states against other states nor does it conduct investigations within the borders of States parties suspected of abusing children's rights.

### Derogation

Neither the CRC nor the two Optional Protocols address the issue of States parties derogating from their obligations in cases of recognized public emergency.

## **Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

Citation: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), 1465 U.N.T.S. 85.

Adopted by the UN General Assembly on 10 December 1984

Entered into force on 26 June 1987

Ratified by Sierra Leone on 25 May 2001

Reservations: None

### Purpose/Definitions

Eradicating the practice of torture was one of the first challenges undertaken by the United Nations (UN) when it was established after the Second World War. Over the years the UN has coined universally applicable standards through various international declarations and conventions in order to protect all persons from torture and other cruel, inhuman or degrading treatment or punishment. The most significant instrument is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture), which was adopted by the UN General Assembly in 1984.

The Convention Against Torture has 16 substantive articles that establish the States parties' main obligation to prevent, punish, remedy and compensate for acts of torture within their territories. Article by article, the Convention delineates the manner in which this obligation is to be fulfilled. For example, Article 2 of the Convention Against Torture indicates that governments are to undertake effective legislative, administrative, judicial, or other measures in order to combat acts of torture. Article 3 requires that no State party expel, return or extradite an individual to another state if there are substantial grounds for believing that s/he would be in danger of being subjected to torture. Article 4 requires states to criminalize all acts of torture and establish punishments proportionate to the grave nature of the crimes involved. Article 13 obligates States parties to ensure the right of every individual, who alleges that s/he has been subjected to acts of torture, to file complaints and to protect such individuals from ill treatment or intimidation as a consequence of their complaints. Likewise, Article 14 provides victims of torture with the right of redress and the right to fair and adequate compensation. Lastly, Article 16 compels governments to prevent acts of cruel, inhuman or degrading treatment or punishment that do *not* amount to torture and to apply other requirements delineated throughout the Convention Against Torture to such acts.

It should be noted that torture is defined in Article 1 as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Although the definition of "torture" is

generally understood to comprise acts perpetrated by *public* officials, some scholars argue that the Convention Against Torture applies to acts of torture perpetrated by *private* individuals as well and that States parties are to be held responsible for not preventing and punishing such abuses.

### Implementation Mechanisms

The Committee Against Torture (Committee) is the monitoring body of the Convention Against Torture and consists of ten independent experts that are elected by the States parties to serve in their personal capacity (Art. 17). The main functions of the Committee are to review progress reports submitted by States parties, conduct inquiries into suspected patterns of systematic torture within the territory of a State party and examine inter-state as well as individual communications.

Article 19 of the Convention Against Torture obligates each State party to submit a report, within one year from the convention coming into force within its territory and subsequently every four years, on any measures that it has undertaken in order to prevent the practice of torture and other cruel, inhuman or degrading treatment or punishment. The Committee reviews the reports and issues “general comments” regarding each country’s compliance with the Convention Against Torture. Each State party may then respond with any appropriate observations.

By virtue of Article 20 of the Convention Against Torture, the Committee can also conduct inquiries within the territory of a particular state if it receives reliable information that the state has engaged in a systematic pattern of torture. The investigation process is confidential and is carried out with the cooperation of the government in question. However, it should be noted that the competence of the Committee under Article 20 is optional. That is, a State party may declare that it does not recognize the competence of the Committee Against Torture to conduct investigations. In such a case, the Committee would not be able to exercise the powers delineated in Article 20.

The Committee can also examine communications filed by a State party against another State party alleging non-compliance with the Convention Against Torture (Art. 21) as well as communications filed by private individuals alleging that they have been subjected to acts of torture (Art. 22). The inter-state complaint procedure under Article 21 of the Convention Against Torture is a two-step process. First the accusing state presents the accused state with a written communication and, in turn, the accused state must answer within three months by providing the requisite explanations. Second, in the event that the two states are unable to settle the matter, the communication may be filed with the Committee Against Torture by either state. The Committee reviews such communications during sessions that are closed to the public and issues a report that is then communicated to the governments involved through the Secretary General of the United Nations. The inter-state complaint procedure under Article 21 occurs only in instances where both states concerned recognize the competence of the Committee. A key requirement is that all domestic remedies available in the accused state must have been exhausted before the Committee can address the matter, except in cases where the application of domestic remedies is unreasonably prolonged or it is unlikely to bring effective relief to the torture victim (Art. 21(1)(c)).

Article 22 of the Convention Against Torture enables private individuals to file communications alleging that they have been subjected to acts of torture and that certain States parties have, thus, violated the convention. However, in order for an individual victim to be able to lodge such

a complaint with the Committee against a State party, that State party must have expressly recognized the competence of the Committee under Article 22. Upon submission, the Committee ascertains the admissibility of the individual communication, considers the communication on the merits, and formulates concluding “views” as to whether the provisions of the Convention Against Torture asserted in the communication have been violated. The Committee always examines individual complaints in closed meetings. It should be noted that if an alleged victim is not in a position to submit a communication himself/herself, his/her relatives or representatives may act on his/her behalf. Furthermore, the individual must have exhausted all available domestic remedies before filing his/her communication with the Committee except where the application of domestic remedies is unreasonably prolonged or it is unlikely to bring effective relief to him/her (Art. 22(5)(b)).

### Derogation

The right to be free from torture is a non-derogable right. Article 2(2) of the Convention Against Torture clearly states that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” Thus, States parties cannot derogate from their obligations under the Convention Against Torture.

## **Rome Statute of the International Criminal Court, the Rules of Procedure and Evidence, and the Elements of Crimes**

Citation: Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998).

International Criminal Court, Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1 (2000).

International Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000).

Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998 (Rome Statute), the Assembly of States Parties to the ICC on 30 June 2000 (Rules), the Assembly of States Parties to the ICC on 30 June 2000 (Elements)

Entered into force on 1 July 2002 (Rome Statute)

Ratified by Sierra Leone on 15 September 2000 (Rome Statute)

Reservations: No reservations can be made to the Rome Statute (Art. 120). However, many State parties have used forward-leaning declarations and understandings to interpret their obligations under the Rome Statute.

### Purpose/Definitions

The Rome Statute establishes the International Criminal Court (ICC) for the purpose of investigating and prosecuting individuals who have committed “the most serious crimes of international concern” (Art. 1). The treaty identifies these crimes to be genocide (Art. 6), crimes against humanity (Art. 7), war crimes (Art. 8), and the crime of aggression. The crime of aggression has not yet been defined. Treaty negotiators felt it was important to include the crime of aggression in the Rome Statute but they could not agree on a definition. The ICC’s Assembly of States Parties continues to deliberate on the intricacies of this particular term and, assuming an agreement is reached, the definition of aggression will be included in the Rome Statute when the treaty is reviewed. Review is due in 2009, or seven years from the 2002 date of entry into force of the statute (Art. 123).

The Rome Statute has 111 substantive articles and covers the establishment of the ICC (Part 1), the court’s jurisdiction, definition of crimes, admissibility of cases, and applicable law (Part 2), general principles of criminal law (Part 3), the composition and administration of the ICC (Part 4), the manner in which investigations and prosecutions are to be conducted (Part 5), trial procedures (Part 6), penalties (Part 7), appeal and revision processes (Part 8), international cooperation and judicial assistance to the ICC (Part 9), and enforcement of sentences (Part 10). The Rome Statute also establishes an Assembly of States Parties that reaches decisions on all substantive and procedural matters pertaining to the ICC on a consensus basis (Art. 112(7)). If a consensus cannot be reached then a two-thirds majority vote is needed to approve substantive matters and a simple majority vote is needed to approve procedural matters (Art. 112(7)). Lastly, the treaty covers matters of finance (Part 12).

There are two additional basic instruments that are to be read in conjunction with the Rome Statute: the Rules of Procedure and Evidence and the Elements of Crimes. The Rules delineate the application of the Rome Statute and they are subordinate to the treaty. The Elements of Crimes is an explanatory document that assists the ICC in the interpretation and application of Articles 6, 7 and 8 of the Rome Statute. In other words, this document explains the elements of the presently defined crimes within the ICC's subject matter jurisdiction: genocide, crimes against humanity, and war crimes.

### Implementation Mechanism

The entire purpose of the Rome Statute is to establish a permanent international body that can hold persons individually accountable for committing crimes of a grave and heinous nature. Thus, the current subject matter jurisdiction of the ICC solely extends to genocide, crimes against humanity, and war crimes. The ICC's jurisdiction is not retroactive and, therefore, will not be applied to crimes committed before July 1, 2002 (the date of entry into force of the Rome Statute).

A case can be brought before the ICC by a State party to the Rome Statute, the ICC Prosecutor, or the United Nations Security Council acting under Chapter VII of the UN Charter (Art. 13). It should be noted, that the Rome Statute contains strict conditions for when jurisdiction can be exercised. The statute delineates requirements such as territorial or nationality links. That is, the ICC can assert jurisdiction over an individual if the crime was committed on the territory of a State party to the Rome Statute or of a state that has otherwise accepted the jurisdiction of the ICC (Art. 12(2)). Additionally, the ICC can assert jurisdiction over a person if s/he is a national of a State party or of a state that has otherwise accepted the jurisdiction of the ICC (Art. 12(2)). Lastly, the jurisdiction of the ICC is complementary to national courts (Arts. 1, 17-19). This means that the ICC will only act in situations where countries are unwilling or unable to investigate or prosecute a person suspected of committing one or more of the serious crimes listed above. States retain the first opportunity to hold individuals accountable. However, if a state is clearly shielding someone from responsibility, it can be deemed to be "unwilling" to prosecute and investigate, and the ICC can assert jurisdiction. Also, if a state's judicial system has collapsed or cannot conduct a fair trial, it can be deemed to be "unable" to prosecute and investigate, and the ICC can assert jurisdiction.

The seat of the ICC is in The Hague, Netherlands, although the Rome Statute allows for the court to move to another host country if desirable (Art. 3). The court's structure includes the Presidency, the Chambers, the Office of the Prosecutor, and the Registry (Art. 34).

The Presidency is composed of judges who act as the President as well as the First and Second Vice-Presidents. This organ is responsible for the proper administration of the court but not for the Office of the Prosecutor (Art. 38).

The Chambers contain three divisions: the Pre-Trial Chamber, the Trial Chamber, and the Appeals Chamber (Art. 39). There are 18 presiding judges who are permanent members of the court and who are elected by the Assembly of States Parties through secret ballot (Art. 36). Their independence is ensured and required by Article 40 of the Rome Statute.

The Office of the Prosecutor is an independent organ that receives referrals and information pertaining to crimes within the ICC's jurisdiction, conducts investigations, and prosecutes

individuals before the ICC (Art. 42). Article 42 of the Rome Statute indicates that the Chief Prosecutor and Deputy Prosecutors “shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases, [and]...have an excellent knowledge of and be fluent in at least one of the working languages of the Court.” Furthermore, the statute imposes stringent requirements upon the Chief Prosecutor when initiating investigations and prosecuting individuals (Arts. 15, 53-54).

The Registry is responsible for the non-judicial aspects of the administration and servicing of the ICC (Art. 43). It is headed by a principal administrative officer, the Registrar, who exercises his/her functions under the authority of the President of the Court (Art. 43(2)). The Registry is also designed to include a Victims and Witnesses Unit that provides protective measures, security arrangements, counseling and assistance to victims, and other individuals, who choose to appear before the ICC and who are at risk subsequent to their testimony (Art. 43(6)).

The ICC differs from other past and present international ad hoc war crimes tribunals in that it is permanent in nature and it differs from all such tribunals, with the exception of the Special Court for Sierra Leone, in that it has been established by treaty (not by the United Nations Security Council). The ICC is an independent international organization that sustains a relationship with the United Nations based upon an agreement approved by the ICC’s Assembly of States Parties in accordance with Article 2 of the Rome Statute.

#### Derogation

The Rome Statute does not address the issue of States parties derogating from their obligations in cases of recognized public emergency.

#### IV. AFRICAN UNION TREATIES - SUMMARIES

##### **African Charter on Human and Peoples' Rights**

Citation: African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev 5, 21 I.L.M.58 (1982).

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT 1, rev. 2 (1997).

Adopted by the Organization of African Unity (now African Union) on 27 June 1981 (ACHPR), 9 June 1998 (Protocol)

Entered into force on 21 October 1986 (ACHPR), 25 January 2004 (Protocol)

Ratified by Sierra Leone on 21 September 1983 (ACHPR)

Signed by Sierra Leone on 06 September 1998 (Protocol)

Reservations: None

##### Purpose/Definitions

The African Charter on Human and Peoples' Rights (ACHPR) is directly linked to the African Union (formerly the Organization of African Unity) and aims to set forth, in a regional document, an international human rights statement focused on the objectives of the African Union (AU) and its people. Indeed the Charter of the Organization of African Unity provides that "freedom, equality, justice and dignity are essential objectives of the achievement of the legitimate aspiration of the African peoples" (Preamble). The ACHPR is an effort to promote the genuine freedom and development of the African people based on the recent historical past of the African continent with its history of colonial, tribal, and interracial wars. A conscious effort was made to promote the protection of human and peoples rights while taking into consideration the values, traditions, and customs inherent in African societies.

The ACHPR has 29 substantive articles. The substantive articles cover the usual range of fundamental human rights: the right to life (Art. 4), freedom of speech and expression (Art. 9), the right to fair trial (Art. 7), etc. The Charter incorporates an African dimension to the delineated rights. For example, Article 18 sets forth the rights of the *family* as a unit as well as the rights of women and children as recognized by international conventions. Article 20 establishes the right to be free from all forms of colonial and/or foreign domination whether political, economic or cultural. Article 21 stresses the right of people to their wealth and national resources. Article 23 advocates cooperation between the states with a view to minimizing terrorist and subversive activities.

## Implementation Mechanisms

The African Commission on Human and Peoples' Rights (Commission) is responsible for receiving all complaints under the ACHPR and overseeing the interpretation of the ACHPR. It is an AU body consisting of 11 members chosen from African personalities of high reputation, morality, and competence in human and peoples' rights. Consideration is given to individuals with legal experience (Art. 31(1)). The members of the Commission, even though nominated by their individual states, do not represent their countries, but rather serve in their personal capacities (Art. 31(2)). The members of the Commission take a solemn vow to discharge their duties impartially and faithfully (Art. 38). An added advantage is that they enjoy diplomatic privileges and immunities (Art. 43).

The Commission is tasked with the following duties:

- collection of documents and undertaking of studies in the field of African human and peoples rights
- formulation of rules and principles to assist in solving legal problems related to human and peoples rights and their incorporation in African legislation
- cooperation with other African and international institutions concerned with the promotion and protection of human rights
- assurance that human and peoples rights are protected under the conditions of the ACHPR
- interpretation of the provisions of the ACHPR
- performance of any tasks entrusted to it by the Assembly of Heads of State and Government.

(Art. 45).

States parties that have reason to believe that the provisions of the ACHPR have been infringed by another State party have two options. First, pursuant to Article 47, an aggrieved State party may submit a written complaint, or "communication" to the offending State party giving notification of the violations committed by that state. This communication must also be tendered to the Secretary-General of the AU and the Chairman of the Commission. Second, pursuant to Article 49, a State party can directly submit to the Commission a written communication outlining the violations of the offending state. This communication should also be addressed to the Secretary General of the AU and the state government.

The Commission, in furtherance of its objectives, is not limited to any type of investigative methodology and may resort to any procedure that it considers appropriate to the instant case (Art. 46). In reviewing a communication brought by a state against another state, the Commission must first ensure that all local remedies have been exhausted (Art. 50) and may ask the offending state to provide it with all relevant information (Art. 51(1)). The state may be represented while the Commission is considering the communication (Art. 51(2)). After due study and deliberation, the Commission, submits a report with its findings during an ordinary session of the Assembly of Heads of State and Government (Arts. 52, 54).

Article 55(1) of the ACHPR indicates that the Commission can also consider "communications *other* than those of States parties." It is not clear, from the text of this provision, whether these include communications brought forth by aggrieved individuals against a state. However, from the Commission's practice, it is apparent that "anyone" can submit a communication, including individuals and organizations. The complainant does not have to be related to the victim of the

human rights violation, but the victim must be mentioned in the communication. All local remedies must be exhausted before the communication is submitted to the Commission (Art. 56(5)). The Commission alerts the offending state of the communication brought against it (Art. 57) and involves the Assembly of Heads of State and Government (Art. 58). If requested by the Assembly, the Commission conducts an in-depth study and issues a factual report accompanied by its findings and recommendations (Art. 58(2)).

The Commission's reports, in both scenarios above, are meant to be advisory and are not legally binding. They provide guidance as to the position that would be adopted by the Commission if a similar matter would be brought before it. The recommendations given by the Commission provide insight into the way that States parties should be guided in their local legislations to give effect to the objectives of the ACHPR.

This severe limitation and lack of judicial function necessitated the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, which came into force on 25 January 2004. Pursuant to Article 2 of the Protocol, the Court's main role is to "complement the protective mandate" of the Commission and its jurisdiction extends "to all cases and disputes submitted to it concerning the interpretation and application of the Charter, [the] Protocol and any other relevant Human Rights instrument ratified by the States concerned" (Art. 3(1)). The Court is an organ of the AU, and funding is to be borne by the AU. The parties entitled to submit cases to the Court are delineated in Article 5(1) of the Protocol and they are as follows:

- the Commission
- the State party which has lodged a complaint to the Commission
- the State party against which the complaint has been lodged at the Commission
- the State party whose citizen is a victim of a human rights violation
- African Intergovernmental Organizations
- Non-governmental organizations
- Individual persons.

(Art. 5(1)).

It is important to note, though, that the Court can only consider complaints brought forth by individual persons if the State against which the complaint has been lodged has recognized the competence of the Court (Art. 34(6)). As of the date of this writing, only Burkina Faso has formally recognized the Court by depositing the requisite declaration (Arts. 34(6)-(7)). For further details on admissibility issues and court hearings, the reader should refer to Articles 6 and 10 of the Protocol.

A mechanism that is outside the treaty realm of human rights within the AU but that could prove to be useful in the future is the African Peer Review Mechanism (APRM), which is part of the New Partnership for Africa's Development (NEPAD). NEPAD is a program that seeks to address poverty issues in Africa and to accelerate economic development on the continent. The APRM's primary purpose is to foster the adoption of laws, policies, standards and practices that, in turn, will lead to political stability, high economic growth, sustainable development and economic integration. The APRM works through an elaborate system of report writing, self-assessment by the country in question, and panel and forum reviews. Scholars are of the opinion that this peer review mechanism, which was primarily developed to address economic issues, will necessarily place pressure on states to address human rights issues as well. They suggest that, peer pressure based on objective evaluation, rather than punitive measures, will

induce states to address human rights violations. As of August 2004, Sierra Leone has acceded to NEPAD.

### Derogation

Neither the African Charter on Human and Peoples' Rights nor the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights specifically addresses the issue of States parties derogating from their obligations in cases of recognized public emergency.

## **African Charter on the Rights and Welfare of the Child**

Citation: African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990).

Adopted by the Organization of African Unity (now African Union) on 11 July 1990 by the 26<sup>th</sup> Ordinary Decision of the Assembly of Heads of State and Government

Entered into force on 29 November 1999

Acceded to by Sierra Leone on 13 May 2002

Reservations: None

### Purpose / Definitions

The African Charter on the Rights and Welfare of the Child (ACRWC) is one of the most important documents among members states of the African Union (AU) (formerly the Organization of African Unity, OAU) recognizing the human rights, freedoms, welfare, and responsibilities of the African child within the cultural context, historical background, and values of African civilization. It is to a great extent modelled after the principles delineated in the United Nations Convention on the Rights of the Child (CRC) and the AU Heads of State and Government Declaration on the Rights and Welfare of the African Child.

The ACRWC has 31 substantive articles dealing with a wide variety of rights and freedoms of the African child. These include the right to survival and development, which principally provides that every child has an inherent right to life (Art. 5(1)). Article 5 further provides that the death penalty shall not be pronounced for crimes committed by children (Art. 5(3)). Article 7 recognizes the right to freedom of expression. Article 11 sets forth the right to education. Article 13 addresses the right to special measures of protection for children who are mentally or physically disabled. Article 17 relates to the administration of juvenile justice. Articles 22 and 23 relate to children in armed conflicts and refugee children, respectively.

### Implementation Mechanisms

The African Committee of Experts on the Rights and Welfare of the Child (Committee) has responsibility for monitoring the implementation and ensuring the protection of the rights of the African child as enshrined in the ACRWC (Art. 42). The Committee also collects and documents information in the field of the rights and welfare of the African child, organizes meetings, encourages national and local institutions concerned with the rights and welfare of the African child and, where necessary, gives its views and recommendations to African governments (Art. 42(a)(i)). The Committee is responsible for interpreting the provisions of the ACRWC (Art. 42(c)). The Committee also performs such other tasks as may be entrusted to it by the Assembly of African Heads of State and Government, the Secretary-General of the AU, and other organs of the AU or the United Nations (Art. 42(d)).

The Committee is comprised of 11 members who should be of high moral standing, integrity, impartiality and competence in matters of the rights and welfare of the child (Art. 33(1)). The members of the Committee serve in their personal capacity and not as representatives of any

African state, thus enjoying a high degree of independence (Art. 33(2)). The members of the Committee are elected by secret ballot by the Assembly of African Heads of State and Government from a host of persons nominated by the States parties to the ACRWC (Art. 34). The members of the Committee hold office for a term of five years (Art. 37(1)). In the discharging of its functions the Committee establishes its own rules of procedure, elects its officers and enjoys the privileges and immunities as delineated in the General Convention on the Privileges and Immunities of the Organization of African Unity (currently African Union) (Arts. 38, 41).

Under Article 1(1) of the ACRWC, member states of the African Union have an obligation to recognize the rights, freedoms, and duties as enshrined in the ACRWC and “shall undertake the necessary steps, in accordance with their Constitutional processes and with the provisions of the . . . Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of [the] Charter.”

Article 43(1) of the ACRWC provides that every three years each State party must submit to the Committee reports on the measures they have adopted to give effect to the provisions of the ACRWC and on the progress made in the enjoyment of the rights and freedoms enshrined in it. These reports should contain sufficient information on the implementation of the ACRWC to enable the Committee to fully understand the state’s progress and must indicate the obstacles, if any, affecting the implementation and fulfilment of the state’s obligations under the ACRWC (Art. 43(2)).

The Committee also receives complaints from any person, group or non-governmental organization recognized by the AU, by a member state, or the United Nations (Art. 44). The Committee is empowered to receive complaints, or “communications,” relating to any provision in the ACRWC (Art. 44). In investigating communications, the Committee may request from State parties any information relevant to the implementation of the ACRWC and may also resort to any appropriate method of investigating the measures that State parties have adopted to implement the ACRWC (Art. 45(1)). The Committee “where necessary [can] give its views and make recommendations to Governments” (Art. 42(a)(i)).

### Derogation

The ACRWC does not address the issue of States parties derogating from their obligations in cases of recognized public emergency.

## **Convention Governing the Specific Aspects of Refugee Problems in Africa**

Citation: Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 U.N.T.S. 45.

Adopted by the Organization of African Unity (now African Union) on 10 September 1969

Entered into force on 20 June 1974

Ratified by Sierra Leone on 28 December 1987

Reservations: None

### Purpose/Definitions

The Convention Governing the Specific Aspects of Refugee Problems in Africa (African Refugee Convention) is a regional instrument promulgated by the Organization of African Unity (OAU), presently known as the African Union (AU). The convention was drafted in 1969 in the spirit of various pertinent United Nations instruments as well as the OAU Charter in order to address problems specifically related to the protection of refugees on the African continent. Article 8(2) indicates that the instrument is “the effective regional complement in Africa of the 1951 United Nations Convention on the Status of Refugees.”

The African Refugee Convention has eight substantive articles that require States parties to determine whether persons, who are not their nationals or do not habitually reside within their borders, qualify as refugees according to the convention’s definition (Art. 1), to “use their best endeavours consistent with their respective legislations” to grant asylum to refugees (Art. 2(1)), to prevent refugees found on their territories from attacking any AU member state (Art. 3(2)), to provide protection to refugees in a non-discriminatory manner (Art. 4), to facilitate voluntary repatriation where pertinent (Art. 5), to issue requisite travel documents where pertinent (Art. 6), to provide information regarding the condition of refugees within their borders, the implementation of the convention as well as the domestic laws and regulations that are applicable to refugees (Art. 7), and to cooperate with the Office of the United Nations High Commissioner for Refugees (Art. 8).

The African Refugee Convention defines the term “refugee” as “every 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, 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” (Art. 1(1)). The African Refugee Convention defines the term “refugee” more broadly than the international standard contained in the UN Convention. In addition to fear of persecution based on five enumerated grounds, the African Convention recognizes other factors that can potentially compel individuals to flee and become refugees. Such factors include “external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of [a] country of origin or nationality” (Art. 1(2)).

There are certain individuals who are not permitted to assert the status of refugee. According to Article 1 of the African Refugee Convention the following persons are excluded:

- persons who voluntarily re-avail themselves of the protection of their country of nationality
- persons who, having lost their nationality, voluntarily reacquire it
- persons who have acquired a new nationality and enjoy the protection of the country of their new nationality
- persons who have voluntarily re-established themselves in the country which they left out of fear of persecution
- persons who can no longer continue to refuse to avail themselves of the protection of their country of nationality because the circumstances which led to their refugee status have ceased to exist
- persons who have committed serious non-political crimes outside their country of refuge prior to/after being admitted
- persons who have seriously infringed upon the purposes and objectives of the African Refugee Convention
- persons who have committed crimes against peace, war crimes, or crimes against humanity
- persons who are guilty of acts contrary to the purposes and principles of the AU and the United Nations.

(Arts. 1(4)-(5)).

### Implementation Mechanisms

The provisions of the African Refugee Convention do not establish a specific body that would be tasked with overseeing the enforcement of the instrument's obligations. Article 7(b), however, requires States parties to cooperate with the Administrative Secretary General of the AU and provide information and data regarding "the implementation of [the] Convention" within their borders such that the Secretary General can properly report to the competent organs of the AU. Furthermore, states are required to cooperate with the Office of the United Nations High Commissioner for Refugees since the African Refugee Convention complements the 1951 United Nations Convention on the Status of Refugees (Art. 8).

Lastly, the jurisdiction of the African Court on Human and Peoples' Rights, that complements the mandate of the African Commission on Human and Peoples' Rights, extends "to all cases and disputes submitted to it concerning the interpretation and application of:"

- the African Charter on Human and Peoples' Rights
- the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Protocol)
- *any other relevant human rights instrument.*

(Protocol Arts. 2, 3).

Thus, technically, the court can address a case brought against a state that invokes provisions of the African Refugee Convention, if, in fact, that state has ratified the African Refugee Convention (Art. 3(1)) and has accepted the competence of the court by depositing a declaration (Art. 34(6)). Sierra Leone ratified the African Refugee Convention on 28 December 1987 and signed the Protocol establishing the African Court on Human and Peoples' Rights on 06 September 1998. Although it has signed the Protocol, it has not yet ratified it and therefore has not yet accepted the competence of the court to hear such claims.

## Derogation

The African Refugee Convention does not explicitly address the issue of States parties derogating from their obligations in cases of recognized public emergency.

## **V. ISSUE SPECIFIC DISCUSSION OF TREATIES**

### **A. GENERAL CRIMINAL MATTERS**

#### **Introduction**

There are a variety of articles in the many treaties applicable to Sierra Leone addressing various matters of criminal law and procedure. In this summary, the attempt is made to collect related provisions from these treaties and briefly connect them substantively. This summary covers broadly matters related to criminal proceedings, but does not represent the entirety of implications international instruments may have on domestic criminal law and procedure. This summary is arranged in the basic chronological order in which a person might come in contact with the criminal justice system – from general state obligations to detention to trial to punishment.

#### **General State Obligations**

A State party's obligations under the ICCPR are both broad and specific. Broadly, ICCPR Article 2 requires States parties to refrain from restrictions of enumerated civil and political rights and to "respect" and "ensure" such rights. This provision also requires States parties to guarantee that both substantive and procedural protections are available to persons within its jurisdiction. This duty also imposes an obligation to address "horizontal effects" that might result in private interference with the enjoyment of rights, e.g., the right to personal security in Article 9(1). Finally, Article 2 also guarantees that violations of ICCPR tenets be subject to an available and effective remedy (Art. 2(3)).

#### Derogation

Recognizing that States parties might attempt to circumvent their international obligations in certain circumstances, the drafters of the ICCPR included Article 4, which indicates that:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin. (Art. 4(1))

This provision specifically allows a state to detract from its official obligations under the ICCPR in limited situations, namely in times of recognized public emergency. It is only to be invoked when two stringent conditions are met. First, there must be a situation prevailing throughout the country that constitutes a state of emergency, which threatens the existence of the nation (Art. 4(1)). Second, the state must officially proclaim the existence of a state of emergency (Art. 4(3)). The HRC has made clear that all restrictions should not exceed those "strictly required by the exigencies of the situation" (Gen. Com. No. 29).

The Human Rights Committee (HRC), concerned with the possibility of abuse of emergency powers, has noted that in cases of public emergency relating to armed conflict, the rules of international humanitarian law apply and supplement the requirements of Articles 4 and 5 of the ICCPR to forestall the possibility of such abuse. The HRC has made it a practice to require explanations and submissions regarding the effect of any measures taken pursuant to Article 4 on the enjoyment of the other rights secured by Articles 1-27 of the ICCPR (Gen. Com. No. 29).

Moreover, Article 4(2) of the ICCPR expressly prevents derogation from certain “core” rights. Of the eight rights enumerated as non-derogable by Article 4(2), four are protected from derogation by similar provisions in other human rights treaties. The HRC has indicated that the protection of these particular rights is all the more necessary during times of national emergency. However, the HRC has also strongly indicated that these are not the only rights protected from derogation by Article 4. Setting forth a relatively expansive understanding of the reach of Article 4, the HRC noted that the particular provisions contained in Article 4(2) recognize those protections as peremptory norms of international law, but that the universe of peremptory norms is broader than those in Article 4(2). The HRC, in referencing international humanitarian law, recognized it as within the ambit of Article 4(2). The HRC also listed several rights which it considers incapable of being lawfully derogated from pursuant to Article 4, including Article 10’s protection of humane treatment while in detention, hostage taking or unacknowledged detention (which would violate Article 9), the rights of persons belonging to minorities, with respect to which the HRC specifically referenced genocide (Arts. 4(1), 18), deportation or forcible transfer without grounds that would constitute a crime against humanity (Art. 12), and advocacy of national, racial, or religious hatred in violation of Article 20. The HRC also indicated that judicial due process, fair trial, and available fair remedy provisions of the ICCPR cannot be subject to derogation if so doing would circumvent the Covenant as a whole, the non-derogable rights listed, or other international obligations (Gen. Com. No. 29).

### Recognition Before the Law

All persons have the right to be recognized before the law. Guaranteed by ICCPR Article 16, such recognition is a prerequisite to the ability to secure, if necessary, the enjoyment of all the other rights and freedoms. This essentially means that a person has a right to exist officially and to be an individual who bears legal rights and responsibilities. Article 16 guarantees to “everyone” the right to recognition before the law “everywhere,” while other international instruments have secured the right for “every person” or “every individual.” This language would indicate that all persons within a State party’s jurisdiction are entitled to the right to enjoy the protection of the law as well as the obligations such protection entails, including the ability to conclude a contract.

Other international and regional instruments have addressed issues related to the right to legal personality, including:

- Universal Declaration of Human Rights (UDHR), Article 6
- American Convention on Human Rights (ACHR), Article 3
- African Charter on Human and Peoples’ Rights (ACHPR), Article 3.

## Detention

The right to liberty of person is one of the oldest basic rights of an individual against the state. A number of international and regional instruments have addressed issues related to the right to liberty and security of the person, including:

- UDHR, Article 9
- European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 5
- ACHR, Article 7
- ACHPR, Article 6.

ICCPR Article 9 protects individuals against arbitrary and unlawful deprivation of liberty and guarantees security of the person, obligating States parties to prohibit arbitrary deprivations. Article 9 contains both substantive and procedural protections. Article 9(1) establishes specific substantive rights of general application, and Articles 9(2) through 9(5) provide procedural protections that are important for realizing these substantive guarantees. Most of these protections are of general application, but certain rights, such as those provided in Article 9(3), are targeted at criminal cases.

Article 9 does not prohibit all such restrictions on liberty of person, but rather requires States parties to define precisely in which instances deprivation of liberty may be permissible, as well as the necessary procedures to effect such a deprivation legally. Article 9 requires States parties to ensure that a person deprived of his or her liberty possesses sufficient information and opportunity to seek meaningful judicial review of the detention. In accordance with Article 4 of the ICCPR, Article 9 is a derogable right subject to restrictions during a period of public emergency. If preventive detention is used on public security grounds, it is subject to the same Article 9 protections that apply to “normal” detention.

If criminal charges are brought in cases of preventive detention for reasons of public security, the HRC has noted that “the full protection of Article 9(2) and (3), as well as Article 14, must also be granted” (Gen. Com. No. 8). Thus, special provisions addressing security threats, such as terrorism, are not exempt from the protections of Article 9.

### Conditions of Detention

Those deprived of their liberty, whether or not in accordance with Article 9, are nevertheless to be treated well while in detention. ICCPR Article 10(1) guarantees that all persons deprived of their liberty should be treated with humanity and with respect for their dignity. Most national bills of rights do not detail a similar separate right, but merely provide for the general prohibition of torture and other cruel, inhuman or degrading treatment or punishment. The HRC stressed in General Comment 21 that the following UN standards should be taken into account in interpreting and applying Article 10:

- Standard Minimum Rules for the Treatment of Prisoners (1957)
- Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (1988)
- Code of Conduct for Law Enforcement Officials (1978)

- Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982)
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1987).  
(Gen. Com. No. 21).

In addition, other international standards are relevant to the analysis of Article 10 protections, such as:

- Basic Principles for the Treatment of Prisoners (1990)
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990).

While these international principles may not constitute binding international law, the HRC's endorsement, as well as that of a substantial number of UN member states, provide support for their use in a detailed analysis of state compliance with the protections of Article 10.

Article 10 of the ICCPR guarantees persons deprived of their liberty the right to humane treatment. Distinguishing this level of protection from the prohibition against torture and other cruel, inhuman or degrading treatment or punishment provided in Article 7 has proven difficult. Leading scholars have concluded that "the line between the two provisions is often blurred in HRC jurisprudence." These same scholars have summarized the distinction simply, by stating that "Article 10 seems to prohibit a less serious form of treatment than that prohibited in article 7."

Also, Article 10 imposes certain positive duties upon the state, such as rehabilitation (Art. 10(3)) and segregation of prisoners (Art. 10(2)). These duties imply certain costs, and it is clear that states of varying economic strength may approach these differently. However, persons who are deprived of their liberty are guaranteed treatment that respects their humanity and dignity, and this basic standard does not depend on the material resources available to the State party. Thus, at a minimum, a state should be able to provide food, basic sanitation and health care, clothing, light, space to move about, and access to means of communication. In its General Comment 21, the HRC has clearly stated that these standards "must be applied 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." Certain exceptions to this rule apply for juveniles and other detainees to the extent that their treatment should reflect their age and legal status, but Article 2(1)'s prohibition of discriminatory treatment still applies to these two classes.

### Torture

Freedom from torture and other cruel, inhuman or degrading treatment or punishment is a basic and fundamental human right. In addition to the ICCPR and the Convention Against Torture, several other major international and regional human rights instruments prohibit the use of torture or other cruel, inhuman or degrading treatment or punishment, including the:

- UDHR, Article 5
- ECHR, Article 3
- ACHR, Article 5(2)
- ACHPR, Article 5

- Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and its two Protocols
- Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

According to Article 4(2) of the ICCPR, the right to be free from torture and other cruel, inhuman, or degrading treatment or punishment is non-derogable, regardless of circumstance, including times of public emergency. The absolute prohibition on torture is a peremptory norm of customary international law, binding on all states.

The prohibition against torture has a special status under international law. As noted above, it is the subject of several international and regional instruments. In each of these, the freedom from torture is assured without restriction. Article 7 was prepared using Article 5 of the UDHR as a basis. The drafting history emphasizes the substantive nature of the prohibition and that the concept of torture should be interpreted to cover a wide variety of treatment.

Relying in part on its own expert views and in part on the wording of the article itself, the HRC has interpreted Article 7 broadly. It has declared in its General Comment 20 that the “aim of the provisions of Article 7 . . . is to protect both the dignity and the physical and mental integrity of the individual.” Article 7 “clearly” applies to detainees, but also to “pupils and patients in teaching and medical institutions” (Gen. Com. No. 20). A state’s observance of Article 7 should be considered together with a state’s compliance with the positive rights to liberty and security of persons (Art. 9) and the obligation of states to treat those they detain with dignity and respect (Art. 10).

What constitutes torture, cruel, inhuman, or degrading treatment or punishment in violation of Article 7 has not been specifically defined and is a fact-based finding determined by the HRC on a case-by-case basis (Gen. Com. No. 20). In some of its cases, the Committee has indicated that assessing what constitutes torture is a subjective endeavor that depends upon all of the circumstances of the case, including duration and manner of treatment, its physical and mental effects, and the status of the victim (e.g., sex, age, health). The Committee has stated that the terms of Article 7 indicate that the scope of its protection required from States parties “goes far beyond torture as normally understood” (Gen. Com. No. 7). Drawing distinctions and creating definitions “depend on the kind, purpose, and severity of the particular treatment,” because Article 7 completely and unequivocally prohibits any violation of its provisions (Gen. Com. No. 7).

The Convention Against Torture indicates that torture is the intentional infliction of “severe pain or suffering, whether physical or mental . . . for such purposes as obtaining from [the person] or a third person information or a confession” (Art. 1(1)). Its definition is not binding on the interpretation of ICCPR Article 7 but serves as a valuable interpretational aid. In addition, the Convention Against Torture provision differs from the ICCPR provision inasmuch as the Convention Against Torture limits its definition to acts “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” (Art. 1(1)). ICCPR Article 7 does not contain any similar limitation regarding the party who inflicts the act, instead stating plainly that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Based on decisions of the HRC and the

Committee Against Torture, torture may include the use of electric shock; forcing of detainees' heads under water; forcing of detainees to remain standing for several days and nights; use of physical beatings or treatment resulting in permanent physical damage; and use of psychological torture, including threats of torture or violence to friends or relatives and mock executions.

The Committee has considered the question of whether omissions (such as the withholding of food or water) can be classified as torture. The HRC has considered at least one case relating to this issue. It has observed that depriving prisoners of food as punishment in prison should not be tolerated. It also concluded that the failure to address a detainee's mental deterioration constituted degrading treatment. Lastly, the HRC has noted that severe prison conditions can invoke Article 7 concerns (Gen. Com. No. 20).

### **Fair Trial Protections**

ICCPR Article 14 is a foundation Covenant article necessary for the proper implementation of all basic substantive rights. Article 14's modern application of the fair trial concept draws heavily upon the US experience. Article 14 is imbued with the principles of separation of powers and an independent judiciary, and these positive state obligations have often proved challenging to implement. Nevertheless, the framework established in Article 14 provides one of the most sophisticated and widely accepted outlines of what is now commonly understood as the "rule of law."

In accordance with Article 4 of the ICCPR, Article 14 is a derogable right subject to restrictions during a period of public emergency. However, the HRC has been explicit in cautioning against unnecessary restrictions during times of emergency. According to the HRC, all restrictions should not exceed those "strictly required by the exigencies of the situation" (Gen. Com. No. 29).

Article 14 can be divided into two parts: Article 14(1), which establishes fundamental rule of law principles that apply to both criminal and civil trial proceedings, and Articles 14(2) through 14(7), which define specific guarantees that should be present in all criminal proceedings. Regarding the latter, the HRC has made clear in its General Comment 13 that Articles 14(1) and 14(3) provide judges with the general authority to hear allegations that Article 14 has been violated "during any stage of the prosecution." Moreover, Article 14(1) is understood to apply to all proceedings at all levels (Gen. Com. No. 13). Thus, it may even serve as a residual guarantee of certain rights that are more specifically ensured in later paragraphs.

Given the wide variety in the national legal systems, the HRC has taken a cautious, practical approach to developing Article 14 jurisprudence. The HRC has consistently avoided becoming a court of fourth instance. The HRC has indicated that it is for the courts of the States parties to the Covenant, and not for the HRC, to evaluate the facts and evidence of a particular case, unless it is apparent that the courts' decisions are manifestly arbitrary or amount to a denial of justice. Therefore, the HRC will refrain from reviewing the factual determinations of national courts unless these determinations are so clearly erroneous as to undermine the legal, procedural protections embodied in Article 14.

Provisions similar to Article 14 may be found in a number of international and regional human rights instruments, including the:

- UDHR, Articles 10 and 11
- ACHPR, Article 7
- ECHR, Article 6
- ACHR, Article 8.

A particularly rich source of analogous jurisprudence can be found under Article 6 of the ECHR.

## **Post Trial Detention and Punishment**

### Retroactive Punishments

ICCPR Article 15(1) enshrines a basic principle of due process of law, stating that no person should be held criminally liable for any action that was not a crime at the time of its commission. In addition, where penalties are specified at the time a crime was committed, this provision of the Covenant forbids states from imposing heavier penalties for criminal activities than those that existed at the time the crime was committed (Art. 15(1)). In distinct contrast, when laws are amended to reduce penalties, they are required to have retroactive effect (Art. 15(1)).

With regard to the application of these rules, the lack of national legislation enumerating crimes “according to the general principles of law recognized by the community of nations” shall not be a bar to prosecution. Thus, Article 15(2) affirms universal jurisdiction and accountability for war crimes and similar international crimes, securing the ongoing growth and application of this dynamic area of law regardless of national legislation. In accordance with Article 4(2) of the ICCPR, Article 15 is a non-derogable right. Therefore, it may not be subject to restrictions even during a period of public emergency.

Other international and regional instruments have addressed the issues related to the prohibition of retroactive criminal law, including:

- UDHR, Article 11(2)
- ECHR, Article 7
- ACHR, Article 9
- ACHPR, Article 7(2).

### The Death Penalty

The right to life is the most basic and fundamental of all human rights, without which all other rights are irrelevant. While Article 6(2) explicitly permits the use of the death penalty, it also prescribes that it be applied in accordance with the procedural guarantees provided elsewhere in the ICCPR. Furthermore, the HRC has noted in its General Comment 6 that while “States parties are not obliged to abolish the death penalty totally they are obliged to limit its use and, in particular, to abolish it for other than the ‘most serious crimes.’”

Other international and regional human rights provisions that ensure the right to life include:

- UDHR, Article 3
- ECHR, Article 2
- ACHR, Article 4
- ACHPR, Article 4.

## **B. WAR CRIMES, INTERNATIONAL HUMANITARIAN LAW**

### **Introduction**

Holding individuals accountable for committing offenses during times of war is an important component of the rule of law. Initiating indictments and proceeding with such trials is a complex process involving international as well as domestic norms. This summary addresses some of the major issues that arise when prosecuting alleged perpetrators beginning with a brief outline of the body of law that applies, stressing the importance of establishing the scope of the conflict in war crimes trials, identifying the possible protected persons and objectives, explaining the notion of individual criminal responsibility, and describing the various categories of crimes that are punishable.

### **Applicable Law**

In order to understand the intricacies of war crimes prosecutions, one must identify the areas of law that can govern over an interstate or internal conflict. At least three areas of law are applicable: international humanitarian law, international criminal law, and international human rights law. International humanitarian law applies for the duration of the conflict. International criminal law pertains to prosecuting alleged perpetrators during or after the conflict in question. International human rights law can apply during the conflict as well as during international criminal proceedings. Although some scholars argue that a state's obligation to uphold the rights of its citizens, delineated throughout various international human rights treaties, is suspended during times of emergency, certain rights are non-derogable and must be protected regardless of whether a conflict is taking place or not.

#### International Humanitarian Law

International humanitarian law imposes individual accountability for gross violations during interstate and internal conflicts. This body of law indicates what rules are applicable to the conflict at hand, restraining the operation of military entities while protecting the rights of civilians and other identified parties to the conflict. The relevant governing instruments are the:

- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
- Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
- Geneva Convention Relative to the Treatment of Prisoners of War
- Geneva Convention Relative to the Protection of Civilian Persons in Time of War
- Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)
- Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

The above documents are commonly known as the four Geneva Conventions and two additional Protocols. The instruments apply interchangeably depending on the conflict. For example, all four Geneva Conventions and Protocol I apply to inter-state conflict. The third Geneva Convention, addressing the rights of prisoners of war, is *not* applicable in situations of internal conflict. Thus, the remaining Geneva Conventions and Protocol II govern internal conflict.

## International Criminal Law

International criminal law is used to hold individuals responsible for atrocities committed during both internal and inter-state conflicts. The trials can be held while the conflict is still waging or post-conflict. This particular discipline has evolved from both international and national legal norms. The substantive elements of crimes and the notion of individual criminal liability arise from international principles while the procedural aspects of war crimes trials are influenced by a mixture of both international and national penal traditions. The goals of international criminal law include prevention and suppression of international criminality, enhancement of individual accountability, reduction of impunity, and the establishment of an overall system of international criminal justice.

International criminal norms have been inscribed over the years in the statutes and rules of procedure and evidence of various ad hoc tribunals, hybrid courts, as well as the newly established permanent court, including the:

- International Military Tribunal at Nuremberg
- International Military Tribunal for the Far East at Tokyo
- International Criminal Tribunal for the Former Yugoslavia (ICTY)
- International Criminal Tribunal for Rwanda (ICTR)
- Hybrid panels established by UNMIK in Kosovo
- Special Panel for Serious Crimes in East Timor
- Special Court for Sierra Leone
- International Criminal Court (ICC).

The Nuremberg and Tokyo military tribunals were created in order to prosecute alleged perpetrators for gross violations committed during the Second World War. The statutes specifically state that the tribunals could assert jurisdiction regardless of the geographical location of the offenses, although the trials did focus on atrocities committed in Europe and the Far East.

Ad hoc tribunals, like the ICTY and ICTR, were established by Security Council resolutions pursuant to Chapter VII of the United Nations Charter, in order to prosecute individuals for crimes committed during conflicts that occurred within a particular territory and during an established period of time. Thus, the ICTY has jurisdiction over offenses committed within the territory of the former Yugoslavia since 1991. Similarly, the ICTR has jurisdiction over offenses committed within the territory of Rwanda and offenses committed by Rwandan citizens in neighboring states between January 1, 1994 and December 31, 1994.

The hybrid panels in Kosovo and East Timor are components of the domestic justice system within each entity. The panels consist of both international and domestic judges who preside over war crimes cases that occurred in Kosovo, during the break-up of the former Yugoslavia, and East Timor, during the 1999 campaign of violence. Here, it is also worthy to note the Extraordinary Chambers in the Courts of Cambodia, which, as of June 2005, had not yet begun to function, but which are also part of a domestic legal structure. These Chambers are subject to an international agreement between the United Nations and Cambodia that ensures the participation of international judges, prosecutors, investigators, and administrative staff in the work of the Chambers and invokes the application of a number of international standards of due process. The Extraordinary Chambers will investigate and prosecute cases involving genocide,

crimes against humanity, and war crimes committed during the rule of the Khmer Rouge in the late 1970's.

The Special Court for Sierra Leone was established via a bilateral agreement between the United Nations and the Government of Sierra Leone and is mandated to prosecute individuals who committed serious violations of international humanitarian law and Sierra Leonean law within the territory of Sierra Leone starting on November 30, 1996. The Court is neither a UN body nor a component of the judicial system of Sierra Leone, but has a status that sets it somewhat apart from both. It is a hybrid court before which both international and domestic lawyers appear.

Lastly, the ICC is the permanent embodiment of international criminal law. The court was created through the Rome Statute of the International Criminal Court (Rome Statute), a multi-lateral agreement that came into force on July 1, 2002. The ICC exercises jurisdiction over individuals for "the most serious crimes of international concern" such as genocide, crimes against humanity, war crimes and, when it becomes a defined and actionable crime, aggression (Arts. 1, 5). The court can only address crimes that were committed *after* the entry into force of its founding statute and asserts its jurisdiction in cases where countries are unwilling or unable to investigate or prosecute domestically persons who are suspected of committing one or more of the crimes listed above.

### International Human Rights Law

International human rights law can apply simultaneously with international humanitarian law during both inter-state and internal conflicts. A distinction should be made between the two disciplines: international human rights law imposes responsibility upon *states* to protect the fundamental rights of their citizens while international humanitarian law holds *individuals* accountable for gross violations committed during wartime.

Some scholars argue that most human rights are derogable, meaning that the obligation of states to uphold the rights of their citizens is suspended in times of a recognized public emergency such as a war. However, certain rights are non-derogable, thus, they must be upheld regardless of whether a state of emergency has been declared or not. One example is the right to be free from torture and other cruel, inhuman, or degrading treatment or punishment, which is confirmed throughout various international and regional human rights instruments:

- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture)
- Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees Against and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Universal Declaration of Human Rights (UDHR), Article 5
- International Covenant on Civil and Political Rights (ICCPR), Article 7
- American Convention on Human Rights (ACHR), Article 5(2)
- European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 3

- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and its two Protocols
- African Charter on Human and Peoples' Rights (ACHPR), Article 5.

International and regional human rights norms are also applicable during international criminal proceedings. Such norms provide a framework for the procedural rights of defendants and other parties involved in a war crimes case. International human rights law also ensures that penalties are proportionate to the crime and that detainees are treated properly in criminal proceedings. For further details on the influence of human rights treaties on criminal trials, see Section V (A) on "General Criminal Matters."

### **Establishing the Scope of the Conflict**

Before proceeding with a war crimes trial, any ad hoc tribunal, hybrid panel, or permanent court, is required to establish the conflict during which the alleged crimes were perpetrated. This task is done in accordance with the aforementioned four Geneva Conventions and two additional Protocols together with the statute and rules governing the adjudicating body.

#### Inter-state Conflict

A conflict between two or more states (inter-state conflict) is defined in accordance with Article 2 common to the four Geneva Conventions as well as Protocol I. Common Article 2, which appears in all four conventions, indicates that the rights and obligations delineated in the four Geneva Conventions are applicable to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." Protocol I is applicable to situations referred to in Article 2 common to the four Geneva Conventions and further details the protections that states are obligated to offer civilians and other recognized parties to the inter-state conflict in question.

#### Internal Conflict

A conflict that occurs within the boundaries of one state (internal conflict) is defined in accordance with Article 3 common to the four Geneva Conventions as well as Protocol II. Common Article 3 extends to "case[s] of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties" to the conventions. Protocol II is applicable "to all armed conflicts which are not covered by Article 1 of . . . Protocol I, and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement . . . [Protocol II]" (Art. 1(1)). Protocol II also specifically states that its application will *not* extend to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts" (Art. 1(2)). The Tadic decision before the ICTY is a good example of the manner in which a panel of ICTY judges established the internal conflict in the former Yugoslavia.

### **Protected Persons and Objectives**

In general, international humanitarian law seeks to protect members of the civilian population who are not participating in the conflict at hand as well as non-military objectives. That is, the

four Geneva Conventions and two additional Protocols prohibit military entities, composed of uniformed, armed combatants, from intentionally attacking unarmed civilians who are not participating in the hostilities. However, civilians who pick up weapons and take part in the conflict assume the risk and become legitimate targets along with other uniformed, armed combatants. It should be noted that such civilians do not forfeit their status. That is, as soon as they cease from actively participating in combat, they are fully protected once again.

While uniformed and armed combatants are legitimate targets, international humanitarian law does restrict units from initiating indiscriminate attacks. Indiscriminate attacks are those which are not directed at a specific military objective, employ a method or means of combat that cannot be directed at a specific military objective, or employ a method or means of combat the effects of which cannot be limited as required by the four Geneva Conventions and two additional Protocols. Furthermore, commanders are required to avoid and minimize what may be expected to be collateral damage when launching an attack. Collateral damage entails damage to civilians and civilian objects that is incidental to an attack against a lawful military objective. A target is a legitimate military objective if it makes an effective contribution to military action, and if its total or partial destruction, capture or neutralization, at a moment in time, offers a definite military advantage.

Conversely, international humanitarian law prohibits military entities from attacking non-military objectives, such as civilian homes. Other protected objectives include fixed or mobile medical units and establishments of the International Committee of the Red Cross as well as cultural, historical and religious sites.

Lastly, uniformed and armed combatants who are captured by enemy forces attain the status of “privileged combatant” or “Prisoner of War” status (POW) under the third Geneva Convention. This means that, once captured, such individuals are immune from being prosecuted by the adversary for acts that they committed during combat and that are within the bounds of international humanitarian law. This protection does *not* excuse the combatant from having committed war crimes and other violations of international humanitarian law. POW status is only applicable in inter-state conflicts.

### **Individual Criminal Responsibility**

International humanitarian law together with international criminal law hold individuals accountable for having committed gross violations and atrocities during interstate and internal conflicts. The notion of individual responsibility traces back to the Nuremberg and Tokyo trials where it was generally recognized that crimes against international law are committed by men, and not by abstract entities such as states thus, international justice can only be achieved by punishing such individuals for their crimes. The concept of individual accountability has been reiterated throughout the statutes of the following ad hoc tribunals, hybrid courts as well as the ICC:

- Nuremberg Charter, Article 6
- Tokyo Charter, Article 5
- ICTY Statute, Articles 7(1), 23(1)
- ICTR Statute, Articles 6(1), 22(1)
- Statute of the Special Court for Sierra Leone, Article 6
- Rome Statute, Article 25.

## Categories of Crimes

This section attempts to briefly summarize the major categories of crimes that exist as part of various international treaties, statutes, and other applicable instruments. It should be noted, that the crimes inscribed in the statutes of ad hoc tribunals and hybrid courts are tailored according to the conflict for which each body was established. Thus, while some statutes include the crime of genocide, for example, other statutes might not since the targeting of a national, ethnic, racial or religious group with a particular intent to destroy, in whole or in part, members of such a group was not prevalent within the scope of the conflict at hand. One such example, is the statute of the Special Court for Sierra Leone that lists the following categories of crimes:

- crimes against humanity (Art. 2)
- violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Art. 3)
- other serious violations of international humanitarian law (Art. 4)
- crimes under Sierra Leonean law (Art. 5).

In this section, the Rome Statute is used as a general model representing the major categories of crimes: genocide, crimes against humanity, war crimes, and the crime of aggression. Where pertinent, statutes of ad hoc tribunals and hybrid courts are cited along with other relevant international treaties.

### Genocide

Genocide was coined as an international crime in 1948 with the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). Its definition has remained fairly unchanged since then and has been reproduced in international and regional instruments as well as domestic laws criminalizing the act of genocide. Today, genocide is deemed a *jus cogens* offense, which means that it has become such a fundamental norm that states cannot agree to contravene it.

The Rome Statute indicates that genocide:

[M]eans any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

(Art. 6).

The crime of genocide has also been included in the following ad hoc tribunal statutes:

- ICTY Statute, Article 4
- ICTR Statute, Article 2.

## Crimes Against Humanity

There is no specific convention addressing crimes against humanity, however, this category of crimes incorporates eleven prohibited acts that are individually covered by other instruments such as torture, unlawful human experimentation, slavery and slave-related practices, and *apartheid*. While the definition of crimes against humanity has varied over the years, the Rome Statute has changed it in such a way that it is both more specific and less restrictive (see below). Crimes against humanity, although subject to continuing study regarding their precise content, definition, and reach, are deemed to be *jus cogens*, which means that they have become such fundamental norms that states cannot agree to contravene them.

The Rome Statute states that crimes against humanity mean:

[A]ny of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

(Art. 7(1)).

The category of crimes against humanity has also been introduced in the following ad hoc tribunal and hybrid court statutes:

- ICTY Statute, Article 5
- ICTR Statute, Article 3
- Statute of the Special Court for Sierra Leone, Article 2.

It should be noted that the definitions included in these statutes differ from each other and the ICC definition above, given that the conflicts in the former Yugoslavia, Rwanda, and Sierra Leone each displayed slightly different facets of this category of crimes.

## War Crimes

War crimes is the most comprehensive category of offenses that includes prohibited acts covered by 71 other relevant instruments including the four Geneva Conventions and two

additional Protocols. War crimes are deemed to be *jus cogens*, which means that they have become such fundamental norms that states cannot agree to contravene them.

Given the length of the ICC article that addresses war crimes (Art. 8), it will not be reproduced here, however, this category includes offenses, such as:

- willful killing
- torture or inhuman treatment, including biological experiments
- taking hostages
- intentionally directing attacks against members of the civilian population and civilian objects
- pillaging a town or place, even when taken by assault
- committing outrages upon personal dignity, in particular humiliating and degrading treatment
- committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization
- conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

The offenses listed under the war crimes category in Article 8 of the Rome Statute are separated in two sub-categories: crimes committed during inter-state conflict and crimes committed during internal conflict.

War crimes are also included in the following instruments:

- ICTY Statute, Articles 2, 3
- ICTR Statute, Article 4
- Statute of the Special Court for Sierra Leone, Article 3.

Again, the definitions included in these statutes differ from each other and the ICC definition of war crimes in Article 8, given that the conflicts in the former Yugoslavia, Rwanda, and Sierra Leone each displayed slightly different facets of this category of offenses.

### Crime of Aggression

Thus far, there is no specialized convention that specifically declares aggression to be a crime under international law. While the United Nations coined a definition of the term “aggression” in a non-binding resolution issued by the General Assembly, the crime remains undefined. The Rome Statute includes the “crime of aggression” within the jurisdiction of the ICC (Art. 5(1)(d)), however, this particular offense was left undefined and thus is not actionable because the treaty negotiators could not agree on its definition, elements, or what procedure would trigger its enforcement. The ICC’s Assembly of States Parties continues to deliberate on the intricacies of this offense and, in the event an agreement is reached, the definition of aggression would be included in the Rome Statute when the treaty is reviewed in 2009, or seven years from the 2002 date of entry into force of the statute (Art. 123).

Likewise, the crime of aggression has not be included within the statutes of any other ad hoc tribunal or hybrid court.

## C. ALIEN AND REFUGEE STATUS

### Introduction

The issue of refugee and alien status has been addressed by various treaties and protocols. Generally speaking, one becomes a refugee when s/he is forced to leave home for specific reasons and is outside the country of his/her origin or habitual residence and does not have its protection. An alien is an individual who, according to the laws of a certain state, is not considered its citizen or its national. However, these two classifications have become more complex over the years and international as well as regional instruments have extended protections to persons who do not fall neatly within these categories. Below is a summary of the rights and duties of individuals who can be designated various legal statuses as they cross the borders of Sierra Leone or migrate within its borders: refugees, asylum seekers, stateless persons, internally displaced persons (IDPs), and aliens.

### General State Obligations

Since most, if not all, instruments that offer protections to refugees and aliens are human rights documents, the responsibility to uphold such rights falls upon states. That is, countries that sign and ratify such treaties undertake the obligation to protect the fundamental rights of their citizens and other persons as delineated in such instruments.

The 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention), the quintessential document addressing refugee matters, requires its States parties to protect refugees without discrimination as to race, religion or country of origin (Art. 3). The International Covenant on Civil and Political Rights (ICCPR) obligates its States parties “to respect and to ensure to *all individuals* within its territory and subject to its jurisdiction the rights recognized” throughout the instrument “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” (Art. 2(1)). The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) indicates that its “High Contracting Parties shall secure to *everyone* within their jurisdiction the rights and freedoms” delineated in the Convention (Art. 1). The Convention Governing the Specific Aspects of Refugee Problems in Africa (African Refugee Convention) requires States parties to “use their best endeavours” to receive refugees and allow for the settlement of those individuals who have well-founded reasons for being unable or unwilling to return to their country of origin (Art. 2(1)). Lastly, the African Charter on Human and Peoples’ Rights (ACHPR) obligates its States parties to protect *all* persons who, in turn, are “entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the . . . Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status” (Art. 2).

### Derogation

Some international human rights instruments allow their States parties to derogate from their official obligations in times of recognized public emergency. The ICCPR, for example, provides for this in Article 4 in cases where a) the situation amounts to a public emergency that threatens the life of the nation and b) the State party in question has officially proclaimed a state of emergency. The Human Rights Committee (HRC) has indicated that states can derogate from

their ICCPR obligations “to the extent strictly required by the exigencies of the situation” (Gen. Com. No. 29).

However, not all rights are derogable. That is, states must still protect certain fundamental rights even during recognized public emergencies: the right to life, prohibition against torture, prohibition against slavery, prohibition against servitude, prohibition of imprisonment as a result of inability to fulfill a contractual obligation, principle of legality in criminal law, equal recognition under the law, and freedom of thought, conscience and religion (Art. 4(2)). As outlined below, such non-derogable rights can apply to refugees, asylum seekers, and others in certain situations.

## Refugees

The term “refugee” is defined in the 1951 Refugee Convention as any person who:

As a result of events occurring before 1 January 1951 and 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; 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 (Art. 1(A)(2)).

The Convention explains that the phrase “as a result of events occurring before 1 January 1951” means either events occurring in Europe during that time period or events occurring in Europe or elsewhere during that time period (Art. 1(B)(1)). Following criticisms that the Convention’s definition was Eurocentric and solely focusing upon one major event (*i.e.* the Second World War), these temporal and geographic limitations were removed in 1967 by the Protocol Relating to the Status of Refugees (1967 Protocol) which indicates that the term “refugee” means “any person within the definition of article 1 of the Convention [above] as if the words ‘As a result of events occurring before 1 January 1951 and . . .’ and the words ‘. . . as a result of such events’, were omitted” (Art. 1(2)).

The definition of “refugee” that was coined in the 1951 Refugee Convention contains five essential elements that must be established before such a status is granted to an individual. First, the definition is based upon the notion of alienage. That is, the Convention only covers persons who have left their country of nationality or citizenship, or, in the case of stateless persons, their country of former habitual residence, and have crossed international borders.

Second, the Convention requires that the person who is claiming refugee status be genuinely at risk. It is not sufficient that the claimant truly believes that s/he is in danger. There must be objective facts that concretely evidence the reasons why the person is seeking protection in another state.

Third, the claimant’s flight must be motivated by persecution. The term “persecution” entails risk of serious harm against which the state of origin is unwilling or unable to protect the person in question. Reasons for fleeing other than persecution seem to be excluded. That is, the 1951 Refugee Convention’s definition could be interpreted to solely protect those fleeing from persecution and not those leaving their country of origin or habitual residence as a result of other causes such as natural disasters, wars, or political and economic turmoil. Thus, regional

instruments have adopted much broader and more inclusive definitions. The African Refugee Convention, for example, incorporates the term “persecution” but mentions that a refugee can also be:

[E]very person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality (Art. 1(2)).

The 1984 Cartagena Declaration on Refugees, covering the Inter-American system, recognizes persecution as a reason for persons to flee their country of origin or habitual residence, but indicates that refugees can also be those “who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order” (Art. 3). The Model Legislation on the Status and Treatment of Refugees, drafted mainly for Asian states, mimics a similarly broadened definition of the term “refugee.”

Fourth, the risk faced by the claimant must be related to his/her race, religion, nationality, membership in a particular social group, or political opinion. The pertinent test is to ask whether “but for” the claimant’s civil or political status, it could reasonably be said that s/he would be at risk of serious harm.

Fifth, the person claiming refugee status must have a genuine need for protection. Furthermore, his/her claim must be legitimate.

#### Persons Who Do Not Qualify as Refugees

The 1951 Refugee Convention as well as regional instruments such as the African Refugee Convention, do not allow certain individuals to assert the status of refugee. The following persons are excluded:

- persons who voluntarily re-avail themselves of the protection of their country of nationality
- persons who, having lost their nationality, voluntarily reacquire it
- persons who have acquired a new nationality and enjoy the protection of the country of their new nationality
- persons who have re-established themselves in the country which they left out of fear of persecution
- persons who can no longer continue to refuse to avail themselves of the protection of their country of nationality because the circumstances which have led to their refugee status have ceased to exist
- stateless persons who are able to return to their country of former habitual residence because the circumstances which have led to their refugee status have ceased to exist
- persons who receive protection or assistance from UN organs or agencies other than the United Nations High Commissioner for Refugees (UNHCR)
- persons who have been recognized by the country in which they have taken residence as having rights and obligations of nationals
- persons who have committed crimes against peace, war crimes, or crimes against humanity

- persons who have committed serious non-political crimes outside their country of refuge prior to/after being admitted
- persons who are guilty of acts contrary to the purposes and principles of the 1951 Refugee Convention or the African Refugee Convention
- persons who are guilty of acts contrary to the purposes and principles of the African Union (formerly Organization of African Unity) or the United Nations.

(1951 Refugee Convention, Arts. 1(C)-1(F); African Refugee Convention, Arts. 1(4) –1(5)).

## **Children**

Neither the 1951 Refugee Convention and its Protocol, nor the African Refugee Convention and the Cartagena Declaration on Refugees, specifically address the status of refugee children. However, such international and regional instruments do define persons as refugees regardless of age. A child is generally defined in the Convention on the Rights of the Child (CRC) as “every human being below the age of eighteen years, unless the law applicable to the child, majority is attained earlier” (Art. 1). Thus, a child, as defined by the CRC, could acquire the status of “refugee” under the Refugee Convention and its 1967 Protocol, if s/he has a “well-founded fear of being persecuted” (Art. 1(A)(2)). A child can also be deemed a refugee under the African Refugee Convention and the Cartagena Declaration on Refugees provided that s/he fits the definitions delineated in each document. If a child’s refugee claim is denied, s/he can be granted an immigration status for other humanitarian reasons and remain within the borders of a particular state. Otherwise, a child can receive a rejection order or a deportation order.

There are three procedures that government authorities can use to determine the legal status of a child seeking protection: group determination, determination based on an adult’s claim, and the child’s individual claim.

Group determination occurs when a state is faced with a large refugee movement and it is not possible to determine each individual’s claim. In such cases, the immigration officials might grant refugee status to the entire group. Thus, each child in the group will automatically receive refugee status.

Determination based on an adult’s claim takes place when the head of a household applies for refugee status. If the laws of the state in question deem the adult to be a refugee, then it is customary for his/her dependents to receive the same status. This is not a requirement imposed by any of the international and regional treaties, but states apply such measures in order to promote family unity. Such measures can also be applicable to situations where children have been adopted or are in the care of a non-relative where the quality of the relationship is equivalent to that of a family. However, if a child is with his/her uncle, cousin or any other relative that the state does not consider to be part of the family nucleus, then immigration officials might require the child to file an individual claim. If the child’s claim is denied and s/he is separated from the adult that s/he was with, then the child becomes an unaccompanied minor (see below).

Determination based on a child’s individual claim for refugee status can occur either when the child is accompanied by a parent or guardian or when the child is alone. When the child is with a parent or guardian, the adult can assist authorities by giving pertinent factual information regarding the child, speaking on behalf of the child, explaining procedures to the child, etc. Conversely, an unaccompanied child will have none of this support when seeking protection as a refugee.

## Unaccompanied Minors

Although many countries have developed procedures for refugees, such measures, for the most part, do not take into account the special situation of unaccompanied minors. Thus, in 1997, the UNHCR issued specific Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (UNHCR Guidelines).

The UNHCR defines an unaccompanied minor as “a person who is under the age of eighteen years, unless, under the law applicable to the child, majority is attained earlier and who is ‘separated from both parents and is not being cared for by an adult who by law or custom has responsibility to do so’” (UNHCR Guidelines, p. 2).

Emphasizing the “best interests of the child” principle and the increased vulnerability of unaccompanied minors, the UNHCR advises states not to refuse unaccompanied minors access to the state’s territory and asylum procedures. The UNHCR encourages government officials to implement the following measures and guidelines:

- promptly identify unaccompanied children at border checkpoints
- register them through interviews and provide them with effective documentation
- appoint a guardian or adviser with the necessary expertise in the field of child-caring
- collect biodata and social history information from the children in an age-appropriate manner
- ensure that interviewers (and interpreters to a certain extent) are professionally qualified and trained in refugee and children’s issues
- at all times, take into consideration the views and wishes of the children
- provide special care and protection for the children throughout the asylum process ensuring that they are not kept in detention facilities and that they attend school
- given their vulnerability, give priority to the children’s refugee status applications
- ensure that a durable solution, such as local integration, resettlement in a third country or repatriation, be identified and implemented without undue delay.

(UNHCR Guidelines, pp. 2-14).

## **Asylum Seekers**

The notion of asylum has been conceptualized from the perspective of the state. An individual seeks asylum from a state other than his/her state of origin, and that state, within its sovereign discretion, can grant or deny the individual asylum. Asylum seekers can include refugees, within the meaning of the 1951 Convention and other regional refugee instruments, as well as other persons, who can avail themselves of the protection of their state of origin or habitual residence, but who, nevertheless, seek asylum in another state.

The general right of individuals to seek asylum was coined in Article 14 of the Universal Declaration of Human Rights (UDHR). It should be noted that persons have a right to *seek* asylum but not an automatic right *to* asylum. Thus, states’ sovereignty to decide whether to grant asylum to individual claimants is preserved.

The right of refugees to seek asylum is delineated in instruments that specifically address refugee issues. For example, the African Refugee Convention requires its States parties to “use their best endeavours” to grant asylum to persons who “for well-founded reasons, are unable or unwilling to return to their country of origin or nationality” (Art. 2(1)). The Cartagena

Declaration on Refugees emphasizes that the grant of asylum to refugees is “peaceful, non-political and exclusively humanitarian in nature” (Art. 4).

### Non-refoulement

The principle of *non-refoulement* is an obligation imposed on states not to expel or return individuals to any country where they are likely to face persecution or torture. Thus, when a person, whether s/he is deemed a refugee or not, seeks asylum in a state, that state is prohibited from expelling or returning him/her if the individual is in danger of being persecuted or tortured. The notion of *non-refoulement* is explicitly embodied in various instruments:

- 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention), Article 33
- Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention Against Torture), Article 3
- Convention Governing the Specific Aspects of Refugee Problems in Africa (African Refugee Convention), Article 2(3)
- Cartagena Declaration on Refugees, Article 5.

Several such instruments specifically recognize that *non-refoulement* includes the prohibition of rejecting individuals at the border:

- African Refugee Convention, Article 2(3)
- Cartagena Declaration on Refugees, Article 5.

Consequently, some states have created forms of temporary protection for asylum seekers who face a grave risk to life or liberty if they are expelled, returned or rejected at the border of a particular state, but who cannot necessarily establish a well-founded fear of persecution based on one of the five required grounds. It should be noted, though, that the principle of *non-refoulement* is not absolute in the context of persecution under the 1951 Refugee Convention. Article 33(2) of the 1951 Refugee Convention indicates that a person who is reasonably regarded as a threat to the country in which s/he is present or who has been convicted of a serious crime and, thus, poses a danger to his/her community, will not be able to benefit from the protections of *non-refoulement* and can be expelled or returned. Critically, however, the prohibition on *refoulement* to torture is absolute and permits no exceptions whatsoever.

### **Stateless Persons**

Stateless persons are in a category by themselves. While the 1951 Refugee Convention protects refugees, the 1954 Convention Relating to the Status of Stateless Persons (1954 Stateless Persons Convention) protects individuals who are not considered nationals by *any* state under the operation of its laws (Art. 1(1)). Given their lack of nationality, stateless persons have countries of “habitual residence.” They can apply for refugee status and seek asylum in other states.

The above definition of statelessness was later presumed for the purposes of the 1961 Convention on the Reduction of Statelessness, which designated the UNHCR as the facilitating body for the protection of stateless persons. According to Article 11, the UNHCR is the institution “to which a person claiming the benefit of [the 1961 Convention on the Reduction of

Statelessness] may apply for the examination of his claim and for assistance in presenting it to the appropriate authority.”

#### Persons Who Do Not Qualify as Stateless

The 1954 Stateless Persons Convention does not extend the status of “stateless” to the following individuals:

- persons who receive protection or assistance from UN organs or agencies other than the UNHCR
- persons who have been recognized by the country in which they have taken residence as having rights and obligations of nationals
- persons who have committed crimes against peace, war crimes, or crimes against humanity
- persons who have committed serious non-political crimes outside their country of residence prior to being admitted
- persons who are guilty of acts contrary to the purposes and principles of the United Nations.

(Art. 1(2)).

#### **Internally Displaced Persons (IDPs)**

Generally speaking, internally displaced persons (IDPs) are individuals who are forced to flee their homes in search of safety but who remain within the boundaries of their state. They are unlike refugees who cross international borders and flee their country of origin, nationality, or habitual residence. Thus, IDPs cannot directly benefit from the protections of the 1951 Refugee Convention and its 1967 Protocol.

The UNHCR’s role in protecting IDPs has increased over the years. However, formally, IDPs remain under the protection of their own state, despite the fact that government authorities within that state may have deliberately caused their displacement. Notably though, where states mistreat IDPs and, thus, violate human rights treaties, they are subject to international scrutiny and cannot invoke sovereignty as a defense. Thus, IDPs can assert the rights enumerated below along with refugees and others, if their state is a party to the relevant instruments.

As a side note, the reader should be mindful that the definition of IDPs is not yet established and the question remains whether IDPs should be protected under a special regime separate from other victims of human rights violations who are covered at the international level. While the international community continues its debate over these issues, the Secretary General’s Representative to the UN Commission on Human Rights, has released helpful “Guiding Principles on Internal Displacement” (IDP Principles). These principles are not binding but they address the specific needs of IDPs through an international human rights and humanitarian law lens, thus, providing guidance to state officials, representatives of intergovernmental and non-governmental organizations, and others on how to better protect the rights of such individuals.

The IDP Principles establish that every person has a right to be protected against arbitrary displacement whether it is caused by:

- policies of “apartheid,” ethnic cleansing, or similar practices aimed at changing the ethnic, religious or racial demographics within a particular state
- armed conflicts
- large-scale development projects that are not justified by compelling and overriding public interests
- disasters
- campaigns intended to impose collective punishment.

(IDP Principle 6).

The IDP Principles then continue to delineate the fundamental rights and guarantees of IDPs that states are obligated to respect and ensure, such as the right to life, dignity, liberty, and security, as well as the right to be protected against genocide, murder, summary or arbitrary executions, and forced disappearances (IDP Principles 5, 8, 10) -- a list which closely resembles the rights outlined below.

### Safe Havens

In the past, states have established internal safety zones, or safe havens, in order to protect IDPs. A safe haven is an area within a particular country where IDPs, as well as prospective refugees, can retreat such that they can receive the proper assistance and protection. There are three types of safe havens:

- safety zones established outside the country where individuals are at risk that are under the protection of an external authority or the United Nations
- safety zones established within the territory of the country where individuals are at risk that are self-administered, economically viable and internationally protected
- safety zones established within the territory of the country where individuals are at risk that are internationally protected and that depend upon external support in providing IDPs with basic necessities.

### **Aliens**

The definition of the term “alien” is by nature exclusionary as it covers individuals that states do not consider as their nationals. *Any* person who is not a national of a certain country is considered and treated as an alien by that country. Persons who hold two or more nationalities will also be considered and treated as aliens when they are outside the countries of those nationalities.

Aliens can assert the rights ensured by international and regional instruments that are delineated below along with refugees, asylum seekers, stateless persons, and IDPs. In 1985, the United Nations issued the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live and reaffirmed those rights.

### **Rights**

The fundamental rights of refugees, asylum seekers, stateless persons, IDPs, and aliens are protected by international and regional instruments. As mentioned above, some of these rights and guarantees, such as the right to life, prohibition against torture and other cruel, inhuman or degrading treatment or punishment, prohibition against slavery, prohibition against servitude, prohibition of imprisonment as a result of inability to fulfill a contractual obligation, principle of

legality in criminal law, equal recognition under the law, and freedom of thought, conscience and religion, are non-derogable. This means that states cannot suspend their obligation to uphold such rights even in times of a recognized public emergency, such as an armed conflict.

### Right to Life and Physical Integrity and Prohibition Against Torture

When persons are fleeing their country of origin or habitual residence, or remain within those borders but are forced to leave their homes, they are often in grave danger. Their lives are at risk during the course of their flight and they could also face peril if there is a possibility that they might be returned. Consequently, states are obligated to protect the right to life and the physical integrity of such persons as well as refrain from subjecting them to torture or other cruel, inhuman or degrading treatment or punishment.

The right to life and physical integrity is non-derogable and is guaranteed by the following international and regional instruments:

- Universal Declaration of Human Rights (UDHR), Article 3
- International Covenant on Civil and Political Rights (ICCPR), Article 6
- European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 2
- American Convention on Human Rights (ACHR), Articles 4, 5(1)
- African Charter on Human and Peoples' Rights (ACHPR), Article 4.

State officials are also proscribed from subjecting refugees, asylum seekers, stateless persons, IDPs, and aliens to torture and other cruel, inhuman, or degrading treatment or punishment or from returning such individuals to environments where they are in danger of being subjected to such prohibited conduct by the following:

- Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention Against Torture)
- UDHR, Article 5
- ICCPR, Article 7
- ECHR, Article 3
- ACHR, Article 5(2)
- ACHPR, Article 5.

It should be noted that, according to instruments such as the ICCPR, the right not to be subjected to torture or other cruel, inhuman, or degrading treatment or punishment is a non-derogable right (Art. 4(2)).

### Right to Non-discrimination and Equality

The displacement of refugees, asylum seekers, stateless persons, IDPs, and aliens can expose them to situations where they will be discriminated against, especially if their host country does not tolerate their identity, religion, race, etc. Several international and regional human rights instruments prohibit such discrimination. It should be noted though, that the right to equality, as opposed to non-discrimination, is not absolute as states can draw reasonable distinctions that are proportionate to legitimate state objectives. Thus, especially in the arena of political rights (*i.e.* right to vote), non-citizens can experience disparate treatment in comparison to citizens.

However, if such disparate treatment becomes arbitrary or disproportionate, non-citizens can assert their right to equality.

The right to be protected from discrimination, a derogable right, is delineated in the following instruments:

- UDHR, Article 2
- ICCPR, Article 2(1)
- ECHR, Article 14
- ACHR, Article 1(1)
- ACHPR, Article 2
- 1951 Refugee Convention, Article 3
- African Refugee Convention, Article 4
- 1954 Stateless Persons Convention, Article 3
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Article 2
- Convention on the Rights of the Child (CRC), Article 2.

The right to equality is two-tiered in that individuals have the right to be equal to one another, regardless of their legal status, gender, and other distinctions, and they also have a right to be equally recognized under the law. The former is derogable while the latter is non-derogable. These rights are inscribed in the:

- UDHR, Articles 1, 6, 7
- ICCPR, Articles 3, 16
- ACHR, Article 24
- ACHPR, Articles 3, 19
- CEDAW, Article 3.

### Personal Liberty

The issue of personal liberty is key for persons crossing borders or being forcefully displaced within the borders of a country. Refugees are particularly vulnerable to detainment in closed camps and a host of other human rights violations. Thus international and regional instruments offer protection:

- UDHR, Articles 3, 9
- ICCPR, Articles 9, 10
- ECHR, Article 5
- ACHR, Article 7
- ACHPR, Article 6.

### Freedom of Movement

Freedom of movement entails the right to choose one's own residence and the right to determine where and when one travels. This right has several implications, especially for IDPs, who have been forced out of their homes within their own country, as well as for asylum seekers, who are entitled to cross borders and seek protection in a state other than their own.

Freedom of movement is a derogable right that is protected in the following instruments:

- UDHR, Articles 13, 14
- ICCPR, Article 12
- ACHR, Article 22
- ACHPR, Article 12
- 1951 Refugee Convention, Article 26
- 1954 Stateless Persons Convention, Article 26.

### Right to Family Life

The right to family life can be interpreted within the context of family unity as well as within the context of interference with private life and the home. That is, during mass movements of people across or within borders, family members can become separated from one another either because the situation is chaotic or one endangered individual must flee and leave his/her family behind. Thus, one's right to be reunited with his/her family is essential. Likewise, particularly during periods of ethnic cleansing, security forces frequently invade homes thus violating one's right to privacy.

The rights to family life and privacy within the home, both derogable rights, as well as the fundamental protection of the family unit are delineated in the following instruments:

- UDHR, Articles 12, 16(3)
- ICCPR, Articles 17, 23(1)
- International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 10(1)
- ECHR, Articles 8, 12
- ACHR, Articles 11, 17
- ACHPR, Article 18.

### Social and Economic Rights

Refugees, asylum seekers, stateless persons, IDPs, and aliens face a great deal of deprivation during their flight into another country or within the borders of a country. They will more than likely lack access to adequate food supplies, clothing, shelter, health care, education, employment, and other social support. The most pertinent human rights instrument that can offer refugees and others comprehensive protections in this regard is the ICESCR. The ICESCR has been interpreted to impose core obligations upon its States parties concerning the aforementioned needs. It should be noted, though, that to date no enforcement mechanism exists to hear individual complaints and to impose the ICESCR's obligations.

### Right to Proper Documentation

When crossing borders or even moving within the territory of a particular country, it is important for persons to carry the proper travel and identification documents. If government authorities or others seize such documents, the rights of the holders have been infringed. Not only has their right to carry proper documentation been violated, a derogable right, but also their right to be fully recognized under the law, a non-derogable right (discussed above). Furthermore, a loss of travel documents can impair a person's freedom of movement (also discussed above).

The right to carry proper travel and identity documents is clearly stated in the following instruments specifically focusing on refugees and stateless persons:

- 1951 Refugee Convention, Articles 27, 28
- African Refugee Convention, Article 6
- 1954 Stateless Persons Convention, Articles 27, 28.

### Property Rights

When leaving their homes, refugees and other similarly situated persons leave their movable and immovable property behind. International and regional human rights law ensures that they can claim such property upon return or receive just compensation if such property has been destroyed. The legal regime dealing with refugees and stateless persons also guarantees the right of persons to own movable and immovable property within their host country. The following instruments are applicable:

- UDHR, Article 17
- ACHR, Article 21
- ACHPR, Article 14
- 1951 Refugee Convention, Article 13
- 1954 Stateless Persons Convention, Article 13.

### **Duties**

Lastly, the reader should note that while the rights of refugees, asylum seekers, stateless persons, IDPs, and aliens are guaranteed by various instruments, they also owe certain duties to the states that host them either temporarily or permanently. For example, Article 2 of the 1951 Refugee Convention indicates that “[e]very refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.” The 1954 Stateless Persons Convention mimics the exact language in its Article 2. More broadly, the ACHPR mentions that “[e]very individual shall have duties towards his family and society, the State and other legally recognized communities and the international community” (Art. 27(1)).

## **D. WOMEN**

### **Introduction**

Women's rights and protections are the subject of various international and regional declarations, treaties and protocols. While the summary below does not incorporate the complete gamut of rights and protections available to women worldwide, it does touch upon the most prevalent issues presently affecting women in Africa. Such issues include violence against women (domestic violence included), cultural and religious barriers to achieving gender equality, reproductive rights, HIV/AIDS, slavery and trafficking in persons, access to education, economic disparities, and women's participation in the political process.

There are other issues that specifically pertain to women during times of war, whether they qualify as protected civilians or active participants in militaries, but such issues are not addressed in this section. For more information concerning civilian and military protections during conflict, the reader should refer to Section V(B) on "Protected Persons and Objectives" under the rubric of "War Crimes, International Humanitarian Law" of this booklet.

Furthermore, African women have been forced out of their homes and have become refugees on a large scale either as a result of fear of persecution or war, environmental disasters or other events disturbing public order. Their rights and protections as refugees are described in detail in Section V(C) of this booklet on "Alien and Refugee Status."

### **General State Obligations**

As confirmed by the United Nations World Human Rights Conference in 1993, women's rights are human rights, thus international and regional instruments pertaining to women fall into the category of human rights documents. Consequently, states that have signed and/or ratified such instruments undertake the affirmative obligation to protect the fundamental rights of their female citizens. For example, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) requires its States parties to "take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men" (Art. 3).

In Africa, the African Union (AU) has adopted a protocol to the African Charter on Human and Peoples' Rights that addresses women's issues exclusively and obligates its States parties to "combat all forms of discrimination against women through appropriate legislative, institutional and other measures" (Art. 2(1)). As of the date of this writing, the protocol is not in force since it has not acquired the requisite amount of ratifications. Thus, African states cannot presently be held accountable in accordance with its provisions.

## Derogation

Some international human rights instruments allow their States parties to derogate from their official obligations in times of recognized public emergency. The International Covenant on Civil and Political Rights (ICCPR), for example, provides for this in Article 4 in cases where a) the situation amounts to a public emergency that threatens the life of the nation and b) the State party in question has officially proclaimed a state of emergency. The Human Rights Committee (HRC) has indicated that states can derogate from their ICCPR obligations “to the extent strictly required by the exigencies of the situation” (Gen. Com. No. 29).

However, not all rights are derogable. That is, states must still protect certain fundamental rights even during recognized public emergencies: the right to life, prohibition against torture and other cruel, inhuman or degrading treatment or punishment, prohibition against slavery, prohibition against servitude, prohibition of imprisonment as a result of inability to fulfill a contractual obligation, principle of legality in criminal law, equal recognition under the law, and freedom of thought, conscience and religion (ICCPR Art. 4(2)). As outlined below, such non-derogable rights can apply to women in certain situations.

It should be noted, though, that CEDAW, the quintessential women’s rights document, does not explicitly address the issue of States parties derogating from their obligations in cases of recognized public emergency.

## **Violence Against Women**

A major obstacle in achieving women’s equality is violence against women. The United Nations defined the term “violence against women” in its 1993 Declaration on the Elimination of Violence Against Women as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life” (Art. 1).

The declaration further indicates that violence against women can occur within the family or within the general community and that it may be condoned or perpetrated by government officials (Art. 2). Violence in the family, or domestic violence, may include battery, sexual abuse of female children in the household, dowry-related violence, female genital mutilation and other traditional practices harmful to women, marital rape, violence perpetrated by a non-spouse as well as violence perpetrated for the purposes of exploitation (Art. 2(a)). Violence in the general community may include rape, sexual abuse, sexual harassment and intimidation at work, sexual harassment and intimidation in educational institutions and elsewhere, trafficking in women, and forced prostitution (Art. 2(b)).

Rape and sexual violence can violate rights guaranteed by several international instruments, including the ICCPR, the Convention Against Torture, and CEDAW. CEDAW does not explicitly prohibit violence against women. However, the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) has incorporated gender-based violence within CEDAW’s general ban on gender-based discrimination. In General Recommendation No. 19, the CEDAW Committee explains that the convention’s definition of discrimination against women in Article 1, “includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately.” The CEDAW Committee further indicates that “[g]ender-based violence may breach specific

provisions of the Convention, regardless of whether those provisions expressly mention violence” (Gen. Rec. No. 19).

Other regional instruments that prohibit violence against women (including domestic violence) are:

- The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, (Women’s Rights Protocol to the African Charter), Articles 3(4), 4(2) (not in force)
- The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, (Inter-American Convention on Violence Against Women).

### **Cultural and Religious Barriers**

Given the supra-imposition of western legal systems (usually French or English) during the colonialist period, certain African states have ended up with a parallel structure incorporating customary law as well as statutory law. Customary law is usually unwritten and upholds traditionally held views with regard to women and their role in the family realm, their inheritance rights, their ability to own property, as well as their overall status in society. Some of these traditional principles have impeded upon women’s efforts to achieve equality. For example, according to customary law principles in many African societies, women are not authorized to own property. This is a constraint on women’s economic participation since they are not able to provide their own collateral for a business loan or any other endeavor that would, in turn, increase their incomes and their economic independence. The CEDAW Committee explains that:

When a woman cannot enter into a contract at all, or have access to financial credit, or can do so only with her husband’s or a male relative’s concurrence or guarantee, she is denied legal autonomy. Any such restriction prevents her from holding property as the sole owner and precludes her from the legal management of her own business or from entering into any other form of contract. Such restrictions seriously limit the woman’s ability to provide for herself and her dependants (Gen. Rec. No. 21).

Religious practice is closely intertwined with customary law in Africa and, whether animist, Christian, Muslim or Jewish, such practice tends to be patriarchal. For example, Sharia law, present in several African countries, reinforces certain gender stereotypes that often result in discriminatory practices against women. A Muslim woman inherits a half share in comparison to a man at the same generational level and she is required to have a male guardian. Inheritance practices of other communities also tend to discriminate against women. The CEDAW Committee indicates that this type of practice breaches the obligations delineated in CEDAW (Gen. Rec. No. 21). Furthermore, in some countries, Muslim men can have up to four wives while women are only allowed to marry once. The Committee has expressed that “[p]olygamous marriage contravenes a woman’s right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged and prohibited” (Gen. Rec. No. 21).

Article 2(f) of CEDAW requires States parties “[t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, *customs and practices* which constitute discrimination against women.” Furthermore, CEDAW indicates that States parties are to take all appropriate measures “[t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving *the elimination of prejudices and customary and all*

*other practices* which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women” (Art. 5(a)).

The Women’s Rights Protocol to the African Charter, which is not yet in force, also restricts cultural attitudes and customary practices that have a discriminatory or harmful effect upon women (Arts. 2(2), 5, 17). The Protocol also establishes a woman’s right to inherit property (Art. 21).

## **Reproductive Rights**

Traditional practices such as polygamy, bride price, widow inheritance, child marriages, and female genital mutilation have a substantial influence upon women’s reproductive rights. All too often, African women today lack the autonomy to make certain decisions and choices regarding reproduction as a result of the various traditions and customs mentioned above. Moreover, in certain instances, husbands may prevent their wives from seeking advice related to family planning or basic health care.

CEDAW requires its States parties to undertake all appropriate measures to eradicate discrimination against women in matters related to marriage and family relations. According to Article 16(1)(c), women are to hold the same rights and responsibilities as men during marriage. The CEDAW Committee explains in General Recommendation No. 21 that traditional practices and religious and customary law have led to the husband often being accorded the status of head of household and the primary decision-maker, thus, directly contravening Article 16(1)(c). Article 16(1)(d) also allots women “[t]he same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children.” (Art. 16(1)(d)). Lastly, and, perhaps most importantly, Article 16(1)(e) grants women “[t]he same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.” The CEDAW Committee points out that:

The responsibilities that women have to bear and raise children affect their right of access to education, employment and other activities related to their personal development. They also impose inequitable burdens of work on women. The number and spacing of their children have a similar impact on women’s lives and also affect their physical and mental health, as well as that of their children. For these reasons, women are entitled to decide on the number and spacing of their children (Gen. Rec. No. 21).

Related to reproductive rights is the right to access proper health care and, in particular services related to family planning. Article 12(1) of CEDAW ensures that women are not discriminated against in this respect. The CEDAW Committee articulates in General Recommendation No. 24 that:

Measures to eliminate discrimination against women are considered to be inappropriate if a healthcare system lacks services to prevent, detect and treat illnesses specific to women. It is discriminatory for a State party to refuse to provide legally for the performance of certain reproductive health services for women. For instance, if health service providers refuse to perform such services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers (Gen. Rec. No. 24).

Furthermore, Article 12(2) of CEDAW indicates that “States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.” In their reports to the CEDAW Committee, States parties are to indicate “how they supply free services where necessary to ensure safe pregnancies, childbirth and post-partum periods for women” as well as provide “[i]nformation on the rates at which these measures have reduced maternal mortality and morbidity in their countries, in general, and in vulnerable groups, regions and communities, in particular” (Gen. Rec. 24).

The Women’s Rights Protocol to the African Charter, which is not yet in force, also addresses health and reproductive rights. Such rights include the:

- right to control fertility
- right to decide whether to have children, the number of children, and their spacing
- right to choose any contraceptive method
- right to be protected against sexually transmitted diseases including HIV/AIDS
- right to information about one’s health status and that of her partner
- right to family planning education.

(Art. 14(1)).

When the protocol comes into force, States parties will have the following obligations with respect to women’s reproductive rights in Africa:

- to provide women with “adequate, affordable and accessible health services” especially in rural areas
- to establish or strengthen existing pre-natal, delivery and post-natal health and nutrition services
- to authorize “medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus.”

(Art. 14(2)).

## **HIV/AIDS**

The HIV/AIDS pandemic in Africa affects women at various levels. First and foremost, women are in serious physical danger in situations where they are subjected to illicit conduct, such as rape committed either during peacetime or wartime, or harmful practices, such as female genital surgery. Women are also at high risk when they are forced into polygamous relationships where their partners engage in sexual intercourse knowing that they are infected with HIV/AIDS.

Second, the economic dependency of women leaves them with very little or no ability to refuse the sexual advances of infected husbands and partners. Furthermore, African women often find themselves unable to ask their husbands or partners, who are carrying the AIDS virus, to use condoms.

Third, the social implications of the HIV/AIDS pandemic run deep. Women, who are not infected, become caregivers for family members who have contracted the disease and they tend to them without any basic necessities (clean water etc.). Women who are widowed by AIDS are left to care for children without viable income or any other economic alternatives.

Lastly, HIV/AIDS carries a strong stigma and women who are infected often perish in isolation while women who care for AIDS victims are often shunned by society.

While CEDAW ensures women's equal access to health care and services (Art. 12(1)) and the CEDAW Committee has expressed its position on the pandemic in General Recommendations No. 24 and No. 15, the Women's Rights Protocol to the African Charter addresses the issue of HIV/AIDS in a more direct manner. Article 14(1)(d) of the protocol delineates "the right to self protection and to be protected against sexually transmitted infections, including HIV/AIDS." The protocol further indicates that African women are entitled to "the right to be informed of [their] health status and on the health status of [their] partner[s], particularly if affected with sexually transmitted infections, including HIV/AIDS" (Art. 14(1)(e)). Once the protocol will come into force, its States parties will be legally bound to not only provide AIDS infected women with proper medical care but to also ensure that women are fully informed and protected from partners who are infected.

### **Slavery and Trafficking in Persons**

The practice of slavery, even though banned by international instruments as well as national laws and constitutions, is still present in certain parts of Africa. Women are forced into slavery, or slavery-like conditions, as a result of various factors. In war torn countries, like Sierra Leone, women and girl children have been forced into sex slavery as well as slave portorage. Slave portorage entails the unlawful seizure of individuals during wartime for the purposes of carrying military or other supplies.

Slavery and slavery-like practices are prohibited by general and women-specific international and regional documents:

- 1926 Slavery Servitude, Forced Labour and Similar Institutions and Practices Convention
- Universal Declaration of Human Rights (UDHR), Article 4
- International Covenant on Civil and Political Rights (ICCPR), Article 8
- African Charter on Human and Peoples' Rights (African Charter), Article 5
- Women's Rights Protocol to the African Charter, Article 4(1) (not in force)
- European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 4
- American Convention on Human Rights, Article 6.

Related to the practice of slavery is trafficking in persons, a phenomenon that has affected African women and children on a large scale. Trafficking in persons is different from slavery and it is defined separately in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime (UN Trafficking Protocol). Article 3 of the UN Trafficking Protocol defines trafficking in persons as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, *at a minimum*, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs" (Art. 3(a)).

A few elements are noteworthy. Trafficking in persons is a crime that involves several human rights violations such as impeding upon individuals' right to be free from slavery, etc. Trafficking in persons can be trans-national or internal in nature depending upon whether traffickers forcefully move their victims across national borders from a source country, through a transit country, to a destination country, or whether they forcefully move their victims within the border of one particular country. The UN Trafficking Protocol indicates that the consent of trafficked victims is irrelevant when their traffickers have used coercive means such as the ones listed in the definition above (*i.e.* threat or use of force, abduction, fraud, deception, etc.) (Art. 3(b)). Furthermore, when the crime is committed against a child, none of the above coercive means need to be proven (Art. 3(c)). Lastly, trafficking in persons encompasses several exploitative purposes, not just slavery and slave-like practices. Trafficked victims are typically forced into prostitution, other forms of sexual exploitation, forced labor or services, servitude, and the removal of their organs.

In addition to the UN Trafficking Protocol, the first document to set forth a comprehensive definition of the crime of trafficking in persons and to call for its prosecution, for the protection of trafficked victims, and for prevention of the overall phenomenon, other women-specific instruments address the issue:

- CEDAW, Article 6
- Women's Rights Protocol to the African Charter, Article 4(2)(g) (not in force).

### **Access to Education**

Another obstacle to achieving full equality for women is their lack of access to education. In many instances, girls and women are prevented from pursuing an education as a result of societal attitudes that women should stay at home and tend to the family. If they do enroll in school, girls and women are faced with discriminatory practices and can become the target of sexual harassment. This has resulted in an overall lower literacy rate among women in comparison to men in Africa as well as a steep curtailment of women's rights.

CEDAW requires its States parties to ensure that women have equal access to education with men. According to Article 10, governments are to offer women, on an equal basis with men:

- the same conditions for career and vocational guidance as well as access to studies at the primary, secondary and tertiary level
- access to the same curricula, examinations, and same quality of teaching staff, school premises, and equipment
- the elimination of gender stereotypes from school materials, programs and teaching methods
- the same scholarship and study grant opportunities
- the same access to programs of continuing education including adult literacy programs and programs aiming at reducing the gap in education existing between men and women
- programs for women and girls who have left school prematurely
- the same opportunities in sports and physical education
- access to health education including information and advice about family planning.

Once it will come into force, the Women's Rights Protocol to the African Charter will require its States parties to ensure the same gender equality within their national education systems by specifically:

- eliminating all forms of discrimination against women and guaranteeing their equal access to education and training
- eliminating all gender stereotypes from school materials and the media
- protecting women, especially girl children, from all forms of abuse and sexual harassment in school and punishing the perpetrators
- providing counseling and rehabilitation services to women who suffer abuses and sexual harassment
- integrating gender sensitization and human rights training at all levels of education (including teacher training)
- promoting literacy among women
- promoting education and training for women at all levels in all disciplines, particularly in the field of science and technology
- organizing programs for girls and women that have left school prematurely

(Art. 12).

### **Economic Disparities**

Although women are a substantial component of the African workforce, they are subjected to disparate treatment in comparison to men. Particularly in the agricultural sector, women, who comprise the majority of workers toiling the land, do not have equal access to the same benefits as men. They work longer hours than men and are not remunerated at the same rate as men. Men are the primary beneficiaries of agricultural extension programs and modern equipment. Furthermore, as mentioned above, as a result of the application of customary law in certain African countries, women are not allowed to inherit or own property. Thus, women do not benefit directly from the land and cannot advance in the economic sector since they cannot use the land as collateral for business loans or other endeavors. Lastly, women face general and systematic discrimination in the African labor force, and they are typically relegated to domestic roles.

CEDAW seeks to eliminate the disparate treatment of women in the economic sector in several ways. Article 11 requires States parties to CEDAW to ensure that women are treated equally with men in the field of employment and that they have the same opportunities and the same level of freedom to choose their professions as men. Furthermore, women have the right to equal remuneration (including benefits) and the right to work in a healthy and safe environment on the basis of equality with men (Art. 11(1)). Women are not to be discriminated against based on their marital status or their ability to bear children and when they are pregnant, they should be offered benefits such as maternity leave, other pertinent social services, and special protections during the pregnancy (Art. 11(2)). The CEDAW Committee has suggested that countries develop job evaluation systems based on gender-neutral criteria in order to further the goals of Article 11 (Gen. Rec. No. 13).

CEDAW also ensures that women have access to family benefits, bank loans, mortgages, other forms of financial credit as well as equal participation in recreational activities, sports and all aspects of cultural life (Art. 13). Lastly, CEDAW requires States parties to "take into account the particular problems faced by rural women and the significant roles which rural women play

in the economic survival of their families, including their work in the non-monetized sectors of the economy” and to take appropriate measures to aid such women (Art. 14(1)).

The Women’s Rights Protocol to the African Charter, which is not yet in force, also delineates certain obligations that its States parties will have with respect to women’s participation in the labor force. Such obligations include:

- promoting equal access to employment
- promoting equal remuneration for jobs of equal value
- ensuring transparency in recruitment, promotion and dismissal of women
- combating sexual harassment in the workplace
- guaranteeing women the freedom to choose their professions
- protecting women from exploitation by their employers
- supporting the occupations and economic activities of women in the informal sector
- establishing a system of social insurance in the informal sector
- introducing a minimum work age and preventing the exploitation of children
- recognizing the economic value of the work performed by women in the home
- providing adequate pre- and post-natal maternity leave in both the private and public sector
- applying taxations laws in an equal manner to men and women
- enforcing spousal and dependent benefits for both working men and women
- recognizing that both parents bear the primary responsibility of raising children and that this is a social function for which the state and the private sector have a secondary responsibility
- preventing the exploitation and abuse of women in advertising and pornography.

(Art. 13).

## **Political Participation**

African women are vastly underrepresented in the political arena. In recent years, several women’s movements have mobilized governments to ensure that women are properly represented at the national and local level. In some African countries now, affirmative action programs have been established and a certain percentage of parliamentary seats are reserved for women. While these are signs of improvement, a great deal more needs to occur in order for African countries to fully uphold their obligations inscribed in CEDAW and other applicable women’s rights instruments.

CEDAW guarantees women’s equal access to the political arena and their participation in the political process at both the national and international level specifically focusing on their role as key decision-makers. Article 7 requires States parties to ensure women’s right to:

- vote in all elections and public referenda
- be eligible for election to all publicly elected bodies
- participate in the formulation of government policy and its implementation
- hold public office
- perform all public functions at all levels of government
- participate in non-governmental organizations and associations concerned with public and political life.

The CEDAW Committee explains that:

The obligation[s] specified in article 7 extends to all areas of public and political life and is not limited to those areas specified in . . . [the article]. The political and public life of a country is a broad concept. It refers to the exercise of political power, in particular the exercise of legislative, judicial, executive and administrative powers. The term covers all aspects of public administration and the formulation and implementation of policy at the international, national, regional and local levels. The concept also includes many aspects of civil society, including public boards and local councils and the activities of organizations such as political parties, trade unions, professional or industry associations, women's organizations, community-based organizations and other organizations concerned with public and political life (Gen. Rec. No. 23).

Article 8 of CEDAW obligates States parties "to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations." The CEDAW Committee interprets this provision to require that women "be included in economic and military matters, in both multilateral and bilateral diplomacy, and in official delegations to international and regional conferences" (Gen. Rec. No. 23). The Committee also emphasizes the role of women in addressing armed or other conflicts either before or after they erupt (Gen. Rec. No. 23). Recently, the United Nations has coined the notion of "gender justice" in order to ensure the protection of women's rights in post-conflict situations and the involvement of women in reconstruction efforts. In a report presented to the Secretary General of the United Nations on October 25, 2004, participants at a conference agreed that "gender justice:"

[E]ncompasses equitable treatment and participation for women in the negotiation of peace agreements, the planning and implementation of UN peace operations, the creation and administration of new governments (including agencies and institutions focused on the needs of women and girls), the provision of the full range of educational opportunities, the revival and growth of the economy, and the fostering of a culture that enhances the talents, capabilities, and well-being of women and girls (Report of the Conference on Gender Justice in Post-Conflict Situations "Peace Needs Women and Women Need Justice," Oct. 25, 2004).

It should be noted that, in addition to CEDAW, there are other international and regional instruments that delineate women's political rights and that seek to affirm their equal and meaningful participation in the government decision-making process:

- United Nations Convention on the Political Rights of Women
- Women's Rights Protocol to the African Charter, Article 9 (not in force)
- Inter-American Convention on the Granting of Civil Rights to Women
- Inter-American Convention on the Granting of Political Rights to Women.

## **E. CHILDREN**

### **Introduction**

Protecting the rights of children has been the subject of several international and regional instruments. This explanatory summary solely focuses on those rights and protections that are of particular importance to children on the African continent. The discussion is divided according to some of the major issues that affect African children today and does not represent an exhaustive list of existing problems. The child soldier phenomenon, juvenile justice issues, HIV/AIDS and other health risks, access to education, and child labor are a few of the challenges African children face and will be analyzed below.

Additionally, children are also frequently the subject of domestic violence, slavery, and trafficking in persons. Their rights and protections in these particular situations are covered in the section pertaining to women's issues of this booklet (Section V(D)). It is worthy to note, though, that the Convention on the Rights of the Child (CRC), the main international instrument pertaining to children, addresses domestic violence and requires its States parties to protect minors specifically from "all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child" (Art. 19(1)). Furthermore, the CRC specifically prohibits the trafficking of children "for any purpose or in any form" (Art. 35).

Together with women and overall vulnerable civilian populations, children are subjected to large-scale violence and displacement during wartime. For more information on applicable legal standards during inter-state and internal conflict, the reader should consult Section V(B) of this booklet entitled "War Crimes, International Humanitarian Law." The rights and protections of children as refugees and as unaccompanied minors are delineated in more detail in Section V(C) of this booklet on "Alien and Refugee Status" as well as in Article 22 of the CRC.

### **General State Obligations**

Similar to women's rights instruments, declarations, treaties and protocols designed to protect children belong to the human rights realm. Thus, the obligation falls upon the states that have signed and ratified such instruments to ensure that the rights of minors are not violated. For example, the CRC imposes the affirmative obligation upon its 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" (Art. 2(1)).

The former Organization of African Unity (OAU), currently the African Union (AU), drafted the African Charter on the Rights and Welfare of the Child (ACRWC) instrument that entered into force on 29 November 1999. The ACRWC also imposes an affirmative obligation and requires its States parties to "undertake . . . the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to [the rights and freedoms delineated in] this Charter" (Art. 1(1)).

## Derogation

Some international human rights instruments allow their States parties to derogate from their official obligations in times of recognized public emergency. The International Covenant on Civil and Political Rights (ICCPR), for example, provides for this in Article 4 in cases where a) the situation amounts to a public emergency that threatens the life of the nation and b) the State party in question has officially proclaimed a state of emergency. The Human Rights Committee (HRC) has indicated that states can derogate from their ICCPR obligations “to the extent strictly required by the exigencies of the situation” (Gen. Com. No. 29).

However, not all rights are derogable. That is, states must still protect certain fundamental rights even during recognized public emergencies: the right to life, prohibition against torture and other cruel, inhuman or degrading treatment or punishment, prohibition against slavery, prohibition against servitude, prohibition of imprisonment as a result of inability to fulfill a contractual obligation, principle of legality in criminal law, equal recognition under the law, and freedom of thought, conscience and religion (Art. 4(2)). Some of these non-derogable rights apply to children in certain situations.

It should be noted, though, that the CRC, the quintessential children’s rights document, does not explicitly address the issue of State parties derogating from their obligations in cases of recognized public emergency.

## **Child Soldiers**

The child soldier phenomenon is particularly prevalent in war torn countries like Sierra Leone. Children, as young as seven years old, have been forced to serve as front-line combatants, porters, messengers, spies, and sex slaves (for other soldiers or rebel fighters). They have either been abducted or subjected to outright conscription. The most at-risk children are those who come from poverty stricken areas as well as those that have been orphaned and displaced. The psychological and social consequences of the child soldier phenomenon are enormous and reintegrating the former young combatants into society is a major issue.

Consequently, the Statute of the Special Court for Sierra Leone imposes individual criminal liability for the crime of “[c]onscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities” which is a serious violation of international humanitarian law (Art. 4(c)). The Statute of the International Criminal Court (Rome Statute) also criminalizes the “[c]onscripting or enlisting [of] children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities” and categorizes such an offense, first as a war crime, then as a serious violation of the laws and customs applicable in international armed conflict (Art. 8(2)(b)(xxvi)). Scholars have posed the question of whether the applicable age of the child victims should be raised from 15 to 18. For further information regarding the prosecution of individuals for war crimes, the reader should consult Section V(B) of this booklet entitled “War Crimes, International Humanitarian Law.”

Other international and regional instruments address the issue of child soldiers but do not allot individual criminal liability for committing such a violation. Rather they impose state responsibility for protecting children during conflict and reintegrating them into society post conflict. Such instruments include:

- CRC, Articles 38, 39

- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts (CRC Protocol on Children in Conflict), and
- ACRWC, Article 22.

It is important to note that the CRC Protocol on Children in Conflict raises the minimum age of conscription or recruitment into the armed forces from 15 to 18 years of age (Art. 1).

## Juvenile Justice

Issues concerning juvenile justice include an increasing number of children awaiting trial in prison, long prison sentences (*i.e.* life sentences) for children, the lack of adequate and separate detention facilities for minors, lack of proper training for security staff to deal with children, and lack of alternatives to jail time for children (*i.e.* guardians etc.). Scholars suggest that all of these issues can be addressed by establishing a separate child justice system.

Article 40 of the CRC establishes detailed obligations for States parties regarding juvenile justice. First the provision recognizes that every child that has allegedly violated a nation's penal law has a right "to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society" (Art. 40(1)). Furthermore, States parties are to ensure that:

- children are not indicted in accordance with laws that came into force after the commission of the alleged illicit act(s) (*i.e.* *ex post facto* laws)
- every child is innocent until proven guilty
- accused children are promptly and directly informed of the charges against them
- every child has legal or other appropriate assistance in preparing and presenting a defense
- matters are determined without delay by a competent, independent, and impartial authority or judicial body taking into account the accused child's age or situation, his/her parents or legal guardians
- children are not compelled to give testimony or confess guilt
- every accused child has the right to examine witnesses brought against him/her and that such cross-examination occurs under conditions of equality
- every child has the opportunity to appeal decisions made by a lower court
- children have the free assistance of an interpreter if they cannot understand the language in which the proceedings are being conducted
- every child has his/her privacy protected at all stages of the proceedings.

(Art. 40(2)).

States parties are also required to promote:

- a minimum age requirement below which children are presumed to not have the capacity to commit crimes
- alternatives for adjudication when formal judicial proceedings are not appropriate or desirable
- availability of alternatives to sentencing (*i.e.* jail time) that could include care, guidance and supervision orders, counseling, probation, foster care, as well as education and vocational training programs.

(Arts. 40(3)-(4)).

Article 37(a) of the CRC prohibits cruel, inhuman or degrading treatment or punishment, including capital punishment and life sentences for children under 18 years of age.

Within the African context, the ACRWC also establishes certain state responsibilities with respect to the administration of juvenile justice. In particular, States parties are to:

- guarantee that detained or imprisoned children are not subjected to torture, inhuman or degrading treatment or punishment
- ensure that children are separated from adults in detention centers or jails
- ensure that every child is innocent until proven guilty
- make certain that children are informed of the charges brought against them in a language that they can understand providing for an interpreter when necessary
- provide children with appropriate assistance in the preparation and presentation of their defense
- ensure that every child is afforded a speedy trial before an impartial tribunal
- make certain that, if found guilty, accused children have the right to appeal
- prohibit the press and the public from the trial of a minor
- adjudicate children with the mind frame of reforming, rehabilitating, and reintegrating them into society
- establish a minimum age below which a child is presumed incapable of committing crimes.

(Art. 17).

### **HIV/AIDS and Other Health Risks**

The HIV/AIDS pandemic in Africa has had a disproportionate impact on children. Not only are children physically affected, they are also impaired at the social and economic level. A large number of African children contract the disease from their mothers during pregnancy, delivery or breast-feeding, or by engaging in sexual activity during their teenage years, often in exploitative relationships with older men. Furthermore, many have been orphaned by the disease and have no means of economic support.

Africa is plagued by high prenatal, infant and child mortality rates resulting from other illnesses as well as inadequate health services. Health risks threatening children's lives include malnutrition, infectious diseases, diarrheal diseases, dehydration, malaria, acute respiratory infections like pneumonia, measles, neonatal tetanus, whooping cough, polio, and diphtheria. Medical experts indicate that the administration of vaccines can prevent many of these aforementioned diseases. However, lack of proper medication and health care in Africa perpetuate such risks.

Article 6 of the CRC establishes a child's basic right to life (Art. 6(1)). States parties are to "ensure to the maximum extent possible the survival and development of the child" (Art. 6(2)). Article 24(1) further recognizes the right of children to "the *highest attainable standard of health* and . . . facilities for the treatment of illness and rehabilitation of health." Children are not to be deprived of access to such health care services (Art. 24(1)). States parties are to also undertake measures to:

- diminish infant and child mortality
- provide necessary medical assistance and health care to all children (especially primary health care)

- combat disease and malnutrition through, *inter alia*, readily available technology, adequate nutritious foods, clean drinking water, and measures that address environmental pollution
- ensure appropriate pre-natal and post-natal health care for mothers
- provide information and opportunities for education on child health, nutrition, the advantages of breastfeeding, hygiene, environmental sanitation and the prevention of accidents, as well as family planning and services
- abolish traditional practices prejudicial to children's health
- engage in international cooperation to progressively achieve the above goals.

(Art. 24).

Lastly, CRC ratifiers must “recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement” (Art. 25).

For further, more in-depth interpretation of the CRC articles addressing children's health issues and a comprehensive approach to combating HIV/AIDS, the reader should consult General Comment No. 3, entitled “HIV/AIDS and the Rights of the Child,” and General Comment No. 4, entitled “Adolescent Health and Development in the Context of the Convention on the Rights of the Child” of the Committee on the Rights of the Child.

Separately and more pertinent to the African context, the ACRWC indicates that “[e]very child shall have the right to enjoy the *best attainable* state of physical, mental and spiritual health” (Art. 14(1)) and that its States parties have the obligation to fully implement this right by taking similar measures as delineated in the CRC above (Art. 14(2)).

### **Access to Education**

Difficult circumstances in various African countries have prevented children from receiving a primary education as well as pursuing their goals for a secondary or higher education. War, poverty, and other factors have worked to the detriment of children's educational goals. Meager or almost non-existent infrastructure as well as lack of proper textbooks and materials have provided for a less than adequate scholastic environment. Furthermore, there is a disparity between the attendance rate of girls and that of boys. Girls attend school in smaller numbers.

Article 28 of the CRC ensures a child's basic right to an education and imposes an obligation upon States parties to “progressively” achieve this right. That is, governments are to incrementally devote resources to ensuring the educational goals of children rather than to immediately give full effect to their obligations under Article 28. However, the Committee on the Rights of the Child warns that “[s]tates need to be able to demonstrate that they have implemented [measures] ‘to the maximum extent of their available resources’ and, where necessary, have sought international cooperation” (Gen. Com. No. 5). States cannot use the progressive realization language of Article 28, or any other CRC provision, in order to excuse themselves from their obligations.

Article 28 also requires states to pursue education measures “on the basis of equal opportunity” thus eliminating discrimination against the girl child and allotting her equal access to the school system.

The measures that CRC States parties are to undertake in accordance with Article 28 are to:

- make primary education compulsory and available to all without charge
- encourage the development of secondary education including general and vocational education and make it available and accessible to all children
- make higher education available to all on the basis of capacity
- undertake measures to encourage regular school attendance
- ensure that school disciplinary methods are consistent with the child's human dignity and the CRC
- promote and encourage international cooperation to eliminate illiteracy and facilitate access to scientific and technical knowledge as well as modern teaching methods paying particular attention to the needs of developing countries.

(Art. 28).

Article 29(1) of the CRC indicates that the *type* of education that is to be made available to children is to be geared towards:

- the development of the child's personality, talents, mental, and physical abilities
- the development of respect for human rights and fundamental freedoms
- the development of respect for the child's parents, his/her cultural identity, language and values as well as for the national values of the country in which the child is living, the country from which s/he may originate, and for civilizations different from the child's own
- the preparation of the child 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 development of respect for the natural environment.

(Art. 29(1)).

The Committee on the Rights of the Child emphasizes the importance of *both* Article 28 and 29 of the CRC indicating that:

The child's right to education is not only a matter of access (art. 28) but also of content. An education with its contents firmly rooted in the values of article 29(1) is for every child an indispensable tool for her or his efforts to achieve in the course of her or his life a balanced, human rights-friendly response to the challenges that accompany a period of fundamental change driven by globalization, new technologies and related phenomena. Such challenges include the tensions between, inter-alia, the global and the local; the individual and the collective; tradition and modernity; long-and short-term considerations; competition and equality of opportunity; the expansion of knowledge and the capacity to assimilate it; and the spiritual and the material (Gen. Com. No. 1).

Within the African context, the ACRWC delineates a child's basic right to education and lists similar measures to the ones in the CRC mentioned above (Art. 11). It is worthy to note that the charter provides more detail with respect to the equality of girls and underprivileged children by requiring States parties to "take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community" (Art. 11(3)(e)). Furthermore, the ACRWC pays heed to the parents', or legal guardians', right to choose the appropriate education for their children, whether it is public or private (Art. 11(4)). Lastly, the charter indicates that "State Parties . . . shall have appropriate measures to ensure

that children who become pregnant before completing their education shall have an opportunity to continue with their education on the basis of their individual ability” (Art. 11(6)).

## **Child Labor**

Children throughout the world have been exploited for their labor starting at a very young age. Whether such exploitation rises to the level of slavery or qualifies as the offense of trafficking in persons can be determined by referring to the sections of this booklet that detail the requirements of these two terms (see Section V(D) on women’s issues). Nevertheless, forcing children to work interferes with their educational opportunities and recreation and, in some cases, even places them in physical danger.

Article 32 of the CRC outlines “the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development.” In this vein, States parties are to provide for:

- a minimum age or ages for admission to employment
- appropriate regulation of the hours and conditions of employment
- appropriate penalties or other sanctions if violation of the child’s right to be protected from economic exploitation occurs.

(Art. 32(2)).

Furthermore, it should be noted that the CRC places primary responsibility upon parents (or others responsible for the child) “to secure, within their abilities and financial capacities, the conditions of living necessary for the child’s development.” (Art. 27). Thus, a child is not expected to provide for his own financial well-being and adequate standard of living.

The ACRWC also protects children from economic exploitation (Art. 15(1)) and requires its State parties to:

- provide for minimum ages for admission to every employment<sup>1</sup>
- provide appropriate regulation of hours and conditions of employment
- provide for appropriate penalties or other sanctions if violations of the child’s right to be protected from economic exploitation occurs
- promote the distribution of information regarding the hazards of child labor to all sectors of the community.

(Art. 15(2)).

Other international instruments, particularly those drafted by the International Labour Organization (ILO), address the issue of child labor and the establishment of a minimum working age:

- Minimum Age (Industry) Convention, 1919 (ILO No. 5)
- Minimum Age (Industry) Convention (Revised), 1937 (ILO No. 59)
- Minimum Age (Non-Industrial Employment) Convention, 1932 (ILO No. 33)
- Minimum Age (Non-Industrial Employment) Convention (Revised), 1937 (ILO No. 60)

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<sup>1</sup> Note the English translation of the ACRWC uses the phrase “minimum wage” rather than the phrase “minimum age” as used in the French translation.

- Minimum Age Convention, 1973 (ILO No. 138)
- Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO No. 182).

There is a progression, over the years, in the above ILO conventions, from a minimum working age of 14 to a minimum working age of 18 depending upon the type of work involved.

As a side note, the ACRWC refers to the ILO and its instruments with regard to children's employment (Art. 15(2)).

## APPENDIX

### REFERENCED TREATIES AND OTHER DOCUMENTS - BY SECTION

#### ***The International Human Rights System***

Office of the United Nations High Commissioner for Human Rights, Explanation of Human Rights Bodies, at <http://www.ohchr.org/english/bodies/index.htm>.

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Office of the United Nations High Commissioner for Human Rights, The Committee Against Torture, Fact. Sheet No. 17, at <http://www.unhchr.ch/html/menu6/2/fs17.htm>.

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