

**Human
right
protection
system:
individual
complaint**

Author:
Adisalem
Desta (LLB)¹



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Introduction

Human rights are moral principles or norms that describe certain standards of human behaviour, and are regularly protected as legal rights in national and international law. They are commonly understood as inalienable fundamental rights "to which a person is inherently entitled simply because she or he is a human being," and which are "inherent in all human beings" regardless of

¹ The author received his LLB in Business Laws from Addis Ababa University School of Law, worked in Ethiopian Metals and Engineering Corporation as Attorney and Legal Advisor, now he is a Trainee Diplomat in the Ministry of Foreign Affairs.

their nation, location, language, religion, ethnic origin or any other status. They are applicable everywhere and at every time in the sense of being universal, and they are egalitarian in the sense of being the same for everyone. They require empathy and the rule of law and impose an obligation on persons to respect the human rights of others. They should not be taken away except as a result of due process based on specific circumstances, and require freedom from unlawful imprisonment, torture, and execution. The doctrine of human rights has been highly influential within international law, global and regional institutions. Actions by states and non-governmental organizations form a basis of public policy worldwide.

The idea of human rights suggests that "if the public discourse of peacetime global society can be said to have a common moral language, it is that of human rights." The strong claims made by the doctrine of human rights continue to provoke considerable skepticism and debates about the content, nature and justifications of human rights to this day. The precise meaning of the term *right* is controversial and is the subject of continued philosophical debate; while there is consensus that human rights encompasses a wide variety of rights such as the right to a fair trial, protection against enslavement, prohibition of genocide, free speech, or a right to education, there is disagreement about which of these particular rights should be included within the general framework of human rights; some thinkers suggest that human rights should be a minimum requirement to avoid the worst-case abuses, while others see it as a higher standard.²

Many of the basic ideas that animated the human rights movement developed in the aftermath of the Second World War and the atrocities of The Holocaust, culminating in the adoption of the *Universal Declaration of Human Rights* in Paris by the United Nations General Assembly in 1948. Ancient peoples did not have the same modern-day conception of universal human rights. The true forerunner of human rights discourse was the concept of natural rights which appeared as part of the medieval natural law tradition that became prominent during the Enlightenment with such philosophers as John Locke, Francis Hutcheson, and Jean-Jacques Burlamaqui, and which featured prominently in the political discourse of the American Revolution and the French Revolution. From this foundation, the modern human rights arguments emerged over the latter half of the twentieth century, possibly as a reaction to slavery, torture, genocide, and war crimes, as a realization of inherent human vulnerability and as being a

² <http://en.wikipedia.org> accessed on November 10,2014

precondition for the possibility of a just society. This notion is incorporated in the Universal Declaration of Human Rights; which reads as: ... *Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...*³

The purpose of this paper is to **inform** readers interested in how the human right protection system functions within a state and internationally and **familiarize** with the concept of individual complaint and the procedures associated with it.

Human right protection systems

Before 1945 individuals were considered as objects of international law. States used to have absolute sovereignty in their internal affairs; they can treat their nationals in way that pleases them. But after the massive destruction resulted from the Second World War, on June 26, 1945 the UN Charter was adopted which established an international organization the UN as a global institution to protect human right. The term “human right” was first included in the UN charter. There are two levels of human right protection systems. These are:

1. National human right protection system and
2. International system of human right protection

National human right protection system systems will be discussed briefly and the main area of emphasis, international system of human right protection will be examined.

National human right protection system (NHRPS)

National human right protection system is the main system of human right protection and it is the most effective by the fact that domestic legal system has effectively operating organs of government. The domestic system has the legislative, executive and the judiciary which can make, enforce and interpret laws unlike the international system which is not effective like the national human right protection system. **The principle of subsidiarity** also applies here because international system of human right protection comes when domestic or national human right protection system fails to protect human right.

³ 1st sentence of the Preamble to the Universal Declaration of Human Rights

The United Nations has identified the key features of what it defines as national human rights protection systems. These are:

- Democracy: democratic institutions and processes that enable participation;
- The rule of law: including the incorporation of international human rights standards in the national Constitution and laws;
- An independent and corruption-free judiciary that applies international human rights standards and jurisprudence;
- Good governance: effective structures of government at central, regional and local levels that recognize, respect and apply human rights standards;
- Specialized human rights institutions and accountability mechanisms;
- Human rights information and education;
- An active civil society: citizens who engage, organise and participate;
- A focus on the most vulnerable parts of the population.

International system of human right protection

The organisational structure of the UN is indicated in Article 7(1) of the Charter, which lists the principal organs of the United Nations. Those are:

1. General Assembly
2. Security Council
3. Economic and Social Council
4. Trusteeship Council
5. International Court of Justice and
6. Secretariat. Under article 7(2) it states that, other subsidiary organs as may be found necessary may be established in accordance with the present Charter.

In 1946, under the umbrella of ECOSOC pursuant to article 68 of the UN charter, UNCHR was established. In 2006 its name was renamed as UNHRC. But the UN did not go from promotion to protection until 1967 in which the ECOSOC was given the mandate to investigate serious and systematic human right violations by Resolution number 1235. Under international human right protection system there are two types of protection systems. They are:

1. Charter based protection system and
2. Treaty based protection system

Charter based protection system

This system of protection works even if a state has not ratified or signed a given treaty.

Under the mandate of the UN charter, the multilateral UN human rights treaties, the United Nations as an intergovernmental body seeks to apply international jurisdiction for universal human-rights legislation. Within the UN machinery, human-rights issues are primarily the concern of the United Nations Security Council and the United Nations Human Rights Council, and there are numerous committees within the UN with responsibilities for safeguarding different human-rights treaties. The most senior body of the UN in the sphere of human rights is the Office of the High Commissioner for Human Rights. The United Nations has an international mandate to: achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, gender, language, or religion.⁴

1. General Assembly

The United Nations General Assembly, under Article 13 of the UN Charter, which is quasi legislative body, has the power to initiate studies and make recommendations on human rights issues and mandate to coordinate and assist the realization of human rights. Under this provision, the general assembly passed the Universal Declaration of Human Rights in 1948, and since then a wide variety of other human rights instruments. It is a kind of standard setting institution which is composed of member states. The assembly has several subsidiary organs that deal with specific human rights issues, such as the Special Committee on Decolonization and the Special Commission against Apartheid (no longer operational). In addition the general assembly has set up a number of subsidiary organs that consider human rights issues in a number of high-profile contexts: such as the UN Council on Namibia, the Special Committee to Investigate Israeli Practices in the Occupied territories and the Committee on the Exercise of the Inalienable rights of the Palestine People. It also oversees treaty based and thematic country mandates like UN

⁴ Article 1–3 of the United Nations Charter

Millennium declaration that includes MDGs. It is not occupied by peace and security issues and minimal attention for human right issues.

2. Security Council

The United Nations Security Council has no clear and explicit mandate on human right. But its primary responsibility being maintenance of international peace and security, when there is gross human right violation that can disturb international peace and security the Security Council can use force through regional arrangements.⁵ It is the only body of the UN that can authorize the use of force. It has been criticized for failing to take action to prevent human rights abuses, including the Darfur crisis, the Srebrenica massacre and the Rwandan Genocide. For example, critics blamed the presence of non-democracies on the Security Council for its failure regarding.

On April 28, 2006 the Security Council adopted resolution 1674 that reaffirmed the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity" and committed the Security Council to action to protect civilians in armed conflict.

3. Economic and social council

The ECOSOC is given clear mandate to establish institutions based on which in 1946 UNCHR was established⁶ until it was replaced by Human Rights Council created at the 2005 World Summit, has a mandate to investigate violations of human rights. The Human Rights Council is a subsidiary body of the General Assembly and reports directly to it. It ranks below the Security Council, which is the final authority for the interpretation of the United Nations Charter. Forty-seven of the one hundred ninety-one member states sit on the council, elected by simple majority in a secret ballot of the United Nations General Assembly. Members serve a maximum of six years and may have their membership suspended for gross human rights abuses. The Council is based in Geneva, and meets three times a year; with additional meetings to respond to urgent situations. Independent experts (*rappoteurs*) are retained by the Council to investigate alleged human rights abuses and to provide the Council with reports. In 1967 based on the ECOSOC resolution number 1235 UNCHR was given the mandate to investigate systemic and gross human right violation. Before this it did not had the power to investigate and send persons to

⁵ Ibid articles 41, 42 and 53(1)

⁶ Ibid article 68

other countries. The proceeding is open and shaming states was one method used because there will be media, NGOs and governments of other states.

On May 20, 1970 the ECOSOC gave mandate to UNCHR by resolution number 1503 to accept individual communication. The reason to pass this resolution was the emergence of dictators. This procedure help not to hear the case of individuals but to take notice the existence of systemic and gross violation of human rights. Its confidentiality and the requirement of exhaustion of local remedies were its weaknesses. More than 90 countries were investigated by this procedure.

The Human Rights Council may request that the Security Council take action when human rights violations occur. This action may be direct actions, may involve sanctions, and the Security Council may also refer cases to the International Criminal Court (ICC) even if the issue being referred is outside the normal jurisdiction of the ICC.

4. International Court of Justice

ICJ is not international human right court: its contribution is marginal in respect of human right protection. Have two competencies, which are:

1. Contentious jurisdiction and
2. Advisory opinion- the ICJ gave different advisory opinions like:
 - The south west Africa case
 - Barcelona Traction case of 1970
 - East-Timor case and
 - In 2004, the legal consequence of construction of wall on Palestine occupied territory in which ICJ said construction of the wall affected or violated obligation erga omnes i.e. right of self-determination.

5. Trusteeship Council

This is de facto non existing institution that ceased to exist since 1994 when Palau got its independence. Its contributions are:

- ✓ Self- determination of colonized states
- ✓ Contributed in the adoption of the 1960 UNGA declaration on the granting of independence for colonized states.

6. **The Secretariat** –simply stating the secretariat is international moral figure.

Special charter protection-under this there are:

- 1) Country mandate-10 country mandate are established by UN. For example there is country mandate on Palestine occupied territories.
- 2) Thematic mandates- work on outstanding human right issues. UN appoints independent experts, working groups and special rapporters. On thematic mandate there are 30 rapporters:
 - On disappearance
 - The right to food
 - Right to housing
 - Right to development and the like.

The tasks they undertake are: investigate the matter, prepare a report, prepare discussion and give recommendation. The process done by special rapporters is called “fact finding missions”.

In 2006 Universal Periodic Review was established, the 192 countries subjected to prepare and submit report every four years on any human right issues. Based on the report Human Right Council open discussion which is called constructive dialogue which is loose soft discussion with diplomatic language and recommendation is given. Some of the recommendation might be rejected. Ethiopia has received recommendations recently.

Treaty based protection system

In addition to the charter based human right protection system by the permanent bodies and specialized agencies whose mandate flows from the UN charter, the UN has set up a number of *treaty-based* bodies, comprising committees of independent experts who monitor compliance with human rights standards and norms flowing from the core international human rights treaties. They are supported by and are created by the treaty that they monitor, With the exception of the CESCR, which was established under a resolution of the Economic and Social Council to carry out the monitoring functions originally assigned to that body under the Covenant, they are technically autonomous bodies, established by the treaties that they monitor and accountable to the state parties of those treaties - rather than subsidiary to the United Nations. Though in practice they are closely intertwined with the United Nations system and are supported by

the UN High Commissioner for Human Rights (UNHCHR) and the UN Center for Human Rights.

- The *Human Rights Committee* promotes participation with the standards of the ICCPR. The eighteen members of the committee express opinions on member countries and make judgments on individual complaints against countries which have ratified an Optional Protocol to the treaty. The judgments, termed "views", are not legally binding.
- The *Committee on Economic, Social and Cultural Rights* monitors the ICESCR and makes general comments on ratifying countries performance. It will have the power to receive complaints against the countries that opted into the Optional Protocol once it has come into force. It is important to note that unlike the other treaty bodies, the economic committee is not an autonomous body responsible to the treaty parties, but directly responsible to the Economic and Social Council and ultimately to the General Assembly. This means that the Economic Committee faces particular difficulties at its disposal only relatively "weak" means of implementation in comparison to other treaty bodies.^[61] Particular difficulties noted by commentators include: perceived vagueness of the principles of the treaty, relative lack of legal texts and decisions, ambivalence of many states in addressing economic, social and cultural rights, comparatively few non-governmental organizations focused on the area and problems with obtaining relevant and precise information.
- The *Committee on the Elimination of Racial Discrimination* monitors the CERD and conducts regular reviews of countries' performance. It can make judgments on complaints against member states allowing it, but these are not legally binding. It issues warnings to attempt to prevent serious contraventions of the convention.
- The *Committee on the Elimination of Discrimination against Women* monitors the CEDAW. It receives states' reports on their performance and comments on them, and can make judgments on complaints against countries which have opted into the 1999 Optional Protocol.
- The *Committee against Torture* monitors the CAT and receives states' reports on their performance every four years and comments on them. Its subcommittee may visit and inspect countries which have opted into the Optional Protocol.

- The *Committee on the Rights of the Child* monitors the CRC and makes comments on reports submitted by states every five years. It does not have the power to receive complaints.
- The *Committee on Migrant Workers* was established in 2004 and monitors the ICRMW and makes comments on reports submitted by states every five years. It will have the power to receive complaints of specific violations only once ten member states allow it.
- The *Committee on the Rights of Persons with Disabilities* was established in 2008 to monitor the Convention on the Rights of Persons with Disabilities. It has the power to receive complaints against the countries which have opted into the Optional Protocol to the Convention on the Rights of Persons with Disabilities.⁷

Each treaty body receives secretariat support from the Human Rights Council and Treaties Division of Office of the High Commissioner on Human Rights (OHCHR) in Geneva except CEDAW, which is supported by the Division for the Advancement of Women (DAW). CEDAW formerly held all its sessions at United Nations headquarters in New York but now frequently meets at the United Nations Office in Geneva; the other treaty bodies meet in Geneva. The Human Rights Committee usually holds its March session in New York City.

Each convention has committees that follow up and monitor their implementation in their personal capacity, not in the interest of the state for which he/she is representing. There are four monitoring mechanisms. These are:

1. Interstate complaint

This is monitoring mechanism used by states. For example, let us assume that x and y are signatories to ICCPR mandated to accept interstate complaint, if y is violating human rights of its citizens, x can lodge interstate complaint. This is not because x country citizens human right is violated but the fact that human right of citizens of y is violated.

It is conciliatory meaning is more of mediatory:

- X has duty of notification to y within 3 months
- Within 6 months bring the case to Human Right Council
- There is no compensatory action but good office

⁷ <http://en.wikipedia.org> accessed on November 15,2014

Article 21 of Convention Against Torture, Convention on the Elimination of Racial Discrimination article 11(mandatory), Convention on Migratory Workers article 76 and ICCPR article 41 have interstate complaint mechanism. It is confidential- entertained in closed session. More than 13 interstate complaints have been lodged. For example, in 1970 Denmark, Norway, Sweden and Netherlands filed against Greece human right violations.

States are not using this mechanism and interstate complaint is ineffective. Reasons for its ineffectiveness are:

- ✓ Fear of jeopardizing diplomatic relations
- ✓ Fear of retaliation or conspiracy of silence- the alleged may also counter file

2. Individual complaint

This is the most direct way of supervision. Is provided as optional procedure meaning states can opt for their citizens to file individual complaint. This can be done in the form of either optional protocol or separate procedure (declaration allowing individual complaint). If the state hasn't ratified the optional protocol, citizens of that state cannot lodge individual complaint.

Article 77 of Convention on Migratory Workers, article 14 of Convention on the Elimination of Racial Discrimination and article 21 of Convention against Torture allow individual complaint. ICCPR⁸ and Convention on the Elimination of any Discrimination against Women also have optional protocol allowing individual complaint. This will be illustrated deeply on the coming separate topic.

3. State reporting system

This is the most common and mandatory procedure; if a state is party to a given convention, it is mandatory to the state to submit report. Example, Ethiopia on the ICCPR is obliged to report every 5 years. Since 2006 the mechanism of Universal Periodic Review was introduced which is more comprehensive report on all human right issues.

State report is prepared by Ministry of Foreign Affairs and it should be participatory and include civil societies, opposition parties, and NGOs should have a say. It is open and public in nature- NGOs, media and other organizations participate. There is recent development in the form of shadow or alternative report which NGOs prepare its own version of report to cross check state

⁸ Its 1st optional protocol, its 2nd optional protocol in on the elimination of capital punishment

report. The committee prepares concluding observation after it has heard and analyzed the report. The observation has three parts:

- 1) Positive observation (developments)
- 2) Areas of concern- constructive dialogue not contentious.
- 3) Recommendations to the state

All committees have obligation to report annually to the General Assembly. But there is adequate follow up system i.e. there is no concrete enforcement system. But the notion of consent is emphasised “states do... by their free consent to...”

4. **Inquiry procedure**

Only few conventions adopted this procedure. Convention on the Elimination of any Discrimination against Women on its optional protocol, article 20 of Convention against Torture and article 10 of ICESCR. Is confidential and seems to address systemic human right violations. More than 27 countries which adopted Convention against Torture have undergone this procedure. As to this procedure, if in a given country it is alleged existing systemic violation of human right, a group of experts are sent to investigate and prepare a report. The limitation of this procedure is, it requires consent of the state to be investigated. In addition, treaty based system of human right protection are assigned for ordinary human right violations. Gross violations like genocide and war crimes are accommodated by charter based protection system.

Regional human rights regimes




International human rights regimes are in several cases "nested" within more comprehensive and overlapping regional agreements. These regional regimes can be seen as relatively independently coherent human rights sub-regimes. Three principal regional human rights instruments can be identified; the African Charter on Human and Peoples' Rights, the American Convention on Human Rights (the Americas) and the European Convention on Human Rights. The European Convention on Human Rights has since 1950 defined and guaranteed human rights and fundamental freedoms in Europe. All 47 member states of the Council of Europe have signed the Convention and are therefore under the jurisdiction of the European Court of Human Rights in Strasbourg.

Individual complaint⁹

Before the adoption of the UN Charter individuals were considered as objects of the law and states were given absolute jurisdiction in their internal affairs and absolute immunity in treating their nationals. But after the shocking results of human treatment, UN Charter recognized individuals as subjects of international law and states absolute immunity in their internal affairs was redefined. Human Right Council an organ with the mandate of ensuring the respect, protection, promotion and fulfillment of human right have four major competences so as to achieve its objectives. These are:

- 1) Accepts state report as per article 40 of the ICCPR
- 2) Accept interstate complaint article 41 of the ICCPR
- 3) Adopting general comment and
- 4) Entertaining individual complaint-through optional protocol (have about 10 articles) of the ICCPR and other conventions.¹⁰

The committee is composed of 18 independent experts from state parties and meet three times a year lasting for a week (2 in Geneva and 1 in New York). Article 28 which narrates about membership and composition states that state parties can nominate and they are experts meaning they serve in their personal capacity did not reflect the interest of their country. The criteria are:

-  High moral character and recognized competence in human right
-  Consideration should be given to geographical representation
-  It is better if they are with legal background

To approach the Human Right Council to file individual complaint there are procedure which should be observed. The procedures will be discussed one by one in their logical sequence.

1) Admissibility procedure¹¹

- A. The communication submitted should not dealt by another investigation or settlement. Meaning the communication should pass the tests of res-judicata and

⁹⁹ This tool of human right protection is both used in charter based and treaty based human right protection systems

¹⁰ Article 77 of Convention on Migratory Workers, article 14 of Convention on the Elimination of Racial Discrimination and article 21 of Convention against Torture

¹¹ Article 5 of the 1st optional protocol to the ICCPR

pendency. This seems if filed to regional, an individual can file to the Human Right Council and the later may accept the communication.

B. The principle of exhaustion of local (domestic) remedies. The presumption is there is higher protection. An individual is expected to exhaust only judicial remedies. But there are exceptions meaning exhaustion is not needed if there is:

- ✓ delay of justice (undue prolonged case)¹²
- ✓ Impossibility of seeking domestic remedy. There is the case of Angel Bahomandi Vs Equatorial Guinea in which the individual was charged of political offence imprisoned and escaped and he asked asylum.
- ✓ When prospect of getting remedy is weak-when there is some sort of precedence

C. Named application- anonymous application is not admissible. But when Human Right Council reports it may be made anonymous. Article 3 of the optional protocol also states the application should not abuse the right of others and incompatible or ill conceived communication. By incompatible it means complaint made against non state party to the 1st optional protocol or groundless or false accusation. If the communication pass the above tests, the next step is:

2) Merit of the case- its main features are:

- Only written communication is admissible
- There is no oral hearing
- Amicus curie¹³ is not applicable
- The proceeding is closed session- third parties are not allowed to participate because it is sensitive issue. But the decision is publicized and every one can access it.
- The complaint is not appeal from the domestic system; fresh proceeding is conducted.
- This is to address ordinary human right violation

The committee expresses its views (some say the views are recommendatory and others say it is binding decision but it is recommendation).

¹² The paradox in that HRC decides a case after 4 to 5 years

¹³ Amicus curie sometimes known as friend of the court is an organization or entity that helps the court in reaching the right decision

3. Relief – awards different reliefs depending from case to case¹⁴. Some of these being:

- ✓ Compensation-the most common
- ✓ Adoption of laws
- ✓ Abolishment of bad act
- ✓ Injunction – if someone is illegally detained

The problem is that there is no concrete follow up system. Among the loose monitoring the implementation of the recommendation of the committee are:

- i. Annual report to the General Assembly
- ii. State reporting procedure- asking at that stage what have you done with Mr. X case on the issue of compensation.
- iii. Notification within 90 days measures taken by the state to implement the views of the committee.

Human Right Council work is acceptable and most respected it is facing challenges and practical problems like, the committee members are part time workers, incentive factor because the remuneration is very low and there is case load by the fact that thousands of cases are flooding to the committee.

Conclusion

Though national human right protection system is the main system of human right protection and it is the most effective by the fact that domestic legal system has effectively operating organs of government, international system of human right protection also has invaluable contribution by filling the gaps of national human right protection system, intervening when domestic or national human right protection system fails to protect human right and by prescribing threshold human right treatment, as a result of which uniformity of human protection is ensured universally.

¹⁴ article 2(3) states “effective remedy”