

2 Legal protection of vulnerable groups as an integral component of the scope of international human rights law

Introduction

The scope of International Human Rights Law (IHRL) is traditionally associated with regulation of the treatment State authorities afford to individuals under their jurisdiction. The emphasis is on the State's performance of specific negative and positive duties towards those persons for the purposes of giving effect to international human rights domestically.¹ Some studies have further explored the ambit of the application of IHRL and have highlighted its relevance to the special situation of groups including Indigenous Peoples women and children.²

This chapter further reviews the overall scope of IHRL to show that it incorporates, as an integral component, protection of certain groups of persons whose predicament, from a human rights point of view, is or may become highly problematic and, hence, more challenging than the situation of other members of society. Protection is available to the group in general and to its members individually. This chapter refers to a group of these persons as “vulnerable group” without seeking to elaborate a legal definition of the concept. [Chapter 8](#) builds on the analysis developed in this chapter and [Chapters 3, 4, 5 and 6](#) to propose a legal definition of the term “vulnerable groups of persons.”

To demonstrate the thesis that the protection of vulnerable groups and their individual members is an essential dimension of IHRL, this chapter systematically scrutinizes the normative content of relevant IHRL instruments. The starting point of this investigation is the 1948 Universal Declaration of Human Rights, the source of IHRL as developed by the UN and other regional organizations such as the Council of Europe, the Organization of American States and the African Union. Section 1 briefly recalls major historical events that eventually led to the adoption of the Universal Declaration by the UN in 1948. Its purpose is to introduce Section 2 highlighting how the Declaration rights were elaborated against the background of the egregious violations of human rights the Nazi regime committed before and during World War II against certain groups of persons, particularly on the ground of their ethnicity and political opinion.

The rest of this chapter explores the texts of UN and regional IHRL conventions and emphasizes their applicability to the situation of vulnerable groups and their members. The conventions under investigation are treaties with a wide-ranging personal scope and treaties that apply specifically to certain groups of persons.

1. Historical context of the 1948 Universal Declaration of Human Rights

On 10 December 1948 the UN General Assembly adopted the Universal Declaration of Human Rights (UDHR) thereby marking the birth of IHRL.³ Proclaimed as a “common standard of achievement for all peoples and all nations,”⁴ the Declaration is the most authoritative interpretation of those UN Charter provisions referring to human rights, and the main source from which UN and regional human rights treaties flow.⁵

The drafting of the UDHR did not occur in a vacuum. It was determined by dramatic historical events that date back to the first half of the 20th century, briefly recalled below for the purpose of contextualizing the relevance of the Declaration for the protection of vulnerable groups and their members.

At the beginning of the 20th century nationalism was rampant in Europe and led in 1914 to the breakout of World War I. World War I was the first global armed conflict ever witnessed in which over eight million combatants and as many as 13,000,000 civilians died.⁶ Its end was legally sanctioned by the Treaty of Versailles of 28 June 1919. Under the terms of the Treaty, Germany, the State the Allied Powers primarily condemned for starting World War I, was to give up 65,000 km² of territory, pay reparations, renounce control over its colonies and agree on military restrictions.⁷

Another notable feature of the Treaty of Versailles is that it created an early international system for the conduct of relations among States and the development of human rights standards. The system involved two main fora: the International Labor Office, known today as the International Labor Organization (ILO), and the League of Nations, established respectively under parts XIII and I of the Treaty.⁸ The ILO started to make important contributions to the drafting of international standards immediately following its creation. During its first International Labor Conference convened in Washington D.C. in October 1919, the ILO adopted six conventions concerned with working hours in industry, unemployment, maternity protection, night work for women, minimum age and night work for young persons in industry. The Organization adopted 16 additional labor conventions between 1920 and 1922.⁹

The League of Nations was the first international organization required to maintain international peace and security and can be considered the predecessor of the UN. The League was also competent in dealing with breaches of bilateral treaties setting out rights applying to members of national minorities living in Eastern and Central European States.¹⁰ Equally relevant, the Covenant establishing the League of Nations provided for certain protection standards relevant, in particular, to native inhabitants of Germany's former colonies, the so-called mandated territories. These standards were, essentially, obligations that those member States of the League in charge of the administration of the territories had to fulfill. These duties were relevant to the implementation of freedom of conscience and religion, freedom from discrimination on the ground of race, religion and language, fair treatment and labor conditions.¹¹

The ILO Conventions, the above minority treaties and standards regarding inhabitants of mandated territories, together with customary international law norms on injured aliens, can be regarded as the foremost components of the international legal protection available to individuals between the years 1920–1948. This protection was piecemeal and for the most part

binding on certain States only. In addition, this international protection was underlined by a fundamental principle whereby the treatment a State afforded to its inhabitants was a matter falling exclusively within its domestic jurisdiction.¹²

Nationalism was again predominant in Europe in the two decades following World War I. Hitler's aggressive nationalistic drive pushed the continent into another global conflict more devastating than World War I, which also fatally undermined the legitimacy and effectiveness of the early international system created by the Treaty of Versailles. At home Hitler exploited the German people's own discontent with the economic recession, their country's defeat during World War I and the concessions imposed by the Allied Powers in the Treaty of Versailles. He merged nationalism with racism to advance an ideology based on the assumption that the purity of the German race had to be protected through extermination of "inferior races" and by annexing to Germany foreign territories where ethnic Germans lived. The Nazi regime invaded the Sudetenland and Poland in 1939. The occupation of Poland started World War II and definitively revealed the League of Nations' inability to prevent armed conflicts. The League's inertia in the very aftermath of the invasion of Poland was astonishing: the organization limited itself to postponing meetings of its Assembly and Council.¹³

The most glaring manifestations of the racist nature of the Nazi regime were in its repellent discriminatory policies, practices and laws against groups of persons who, in Hitler's view, spoiled Germans' racial purity. These groups included primarily the Jews but also the Roma. Millions of Jews were exterminated as part of the Nazis' "Final Solution," a fate that many members of the other group suffered as well.¹⁴ Other persons who faced persecution in Nazi Germany included members of the political opposition. Hitler's treatment of the above groups before and during World War II brutally showed the inadequacy of the existing international protection available to individuals. This protection was too deferential to the principle of State sovereignty and left millions of persons at the mercy of a racist and murderous government.

What happened at international level in the aftermath of World War II is well-known: the then international community, led by the Allied Powers, decided to replace the League of Nations with the UN¹⁵ which endeavored, *inter alia*, to create a new and improved international system of human rights protection to pursue those human rights provisions enshrined in its constitutive Charter, notably paragraph 3 of Article 1, and Articles 55 and 56. The bedrock of the system is the UDHR, the drafting of which, as we see next, was largely and profoundly influenced by the egregious violations of rights the Nazis perpetrated against the Jews, the Roma and members of the political opposition.

2. The 1948 Universal Declaration of Human Rights and its relevance to vulnerable groups

The UDHR bears unique relevance to the protection of vulnerable groups. As borne out by UN documents detailing its preparation, the Declaration's purpose was to prevent the reoccurrence of gross violations of human rights such as those the Nazi authorities committed against certain groups of individuals, particularly the Jews, the Roma and members of the political opposition.¹⁶ The moral abhorrence of the situation of these groups during the era of the

Holocaust was the propulsive force that led UN member States to draft and accept the rights set out in the UDHR.¹⁷

As shown in the legislative history of the Declaration and scholarly writing, Article 1, by affirming that “[a]ll human beings are born [...] equal in dignity and rights,” constitutes the drafters’ forceful rejection of Hitler’s discriminatory racial policies, laws and practices.¹⁸ The necessity to emphasize the fact that dignity and human rights are characteristics that *everyone* enjoys from birth was prompted by the infamous racial ideology that Hitler conceived and implemented.

The Article 3 affirmation of the right to life, liberty and security can be considered as the drafters’ response to the Nazi regime’s extermination of 6,000,000 Jews and up to 200,000 Roma as well as an attempt to obliterate these groups forever.¹⁹ Similarly, the inclusion of Article 5 prohibiting torture or inhuman or degrading treatment constitutes the drafter’s unequivocal reaction to the abhorrent medical experimentation the Nazis performed on Jews and persons of Romani ethnicity based on the fact that their racial characteristics tainted the purity of their ethnicity as Germans.²⁰

The right of everyone to recognition everywhere as a person before the law and the principle of individuals’ equality before the law, enshrined in Articles 6 and 7, feature in the Declaration as a result of the Nazi experience. To paraphrase René Cassin speaking during one of the first meetings of the drafters: Article 6 and Article 7 were viewed as antidotes to States’ authoritarian acts such as those committed in Nazi Germany, which invalidated the Jews’ legal capacity and rendered them slaves at the cruel mercy of Nazi authorities.²¹

Likewise, what prompted the adoption of Article 9 on the right to be free from arbitrary detention and Article 15 on the right to a nationality was the flagrant denial of those rights in Nazi Germany. Article 9 was meant to avoid situations such as those experienced by the Jews and members of the political opposition under Nazi rule whereby these persons, because of their race and political opinion, could be detained following capricious interpretations and enforcement of the law. The right to a nationality was included as a result of the tragic effects that ensued from the revocation of German citizenship to the Jews. As implied by Eichman during his interrogation before his trial in Israel, the Jews were rendered stateless so that: other countries could not challenge what was happening to them; any form of legal protection against unlawful and discriminatory State action would vanish; and the Nazis could deport and exterminate them with impunity.²²

Paragraph 1 of Article 23 containing the right to work found its place in the UDHR *qua* reaction to the fact that the right to be free from forced labor was systematically denied in the concentration camps managed by Nazi Germans.²³ Article 26 on the right to education, on the other hand, was shaped in opposition to the educational policies of the Third Reich which, as Hitler predicted in *Mein Kampf*, were to indoctrinate children and instill in their mind “blood purity” ideas.²⁴ It then comes as no surprise that Article 26 lists the strengthening of respect for human rights, and the promotion of understanding, tolerance and friendship among all racial or religious groups as aims of education.

Article 2 on the fundamental prohibition of discrimination is another example of how the UDHR was shaped by the situation of the Jews, the Roma and members of the political opposition in Nazi Germany. Article 2 has to be read together with each Declaration right. It

states that “[e]veryone is entitled to all the rights and freedoms set forth in the [Universal Declaration], without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” As Morsink suggests, race and color were included as prohibited discrimination grounds because the drafters wanted to make very plain that they rejected Hitler’s racial policies and ensure that in the future States would not differentiate arbitrarily among individuals on the basis of their ethnic traits as Hitler had done.²⁵ The driving force behind the inclusion of political opinion as a prohibited ground of discrimination was what happened in Nazi Germany, where individuals were sent to concentration camps for their political ideas.²⁶

For the purposes of this chapter it is relevant to point out that the inclusion of Article 2 in the UDHR also derives from the drafter’s concern for the legal protection of groups of persons other than those who could be subjected to racial discrimination or persecuted because of their political beliefs. The prohibition of ground sex was incorporated to address widespread discrimination affecting women and affirm the principle of equality between men and women. This principle was re-articulated in other provisions of the Declaration such as paragraph 1 of Article 16 setting out the equal right of men and women to marry, Article 21, and paragraph 2 of Article 23. As Morsink has shown, the wording “everyone has the right to take part in the government of his country” in paragraph 1 of Article 21 and the adjective “equal” preceding the term “suffrage” in paragraph 3 of that provision should be read as asserting the absolute equality between men and women in terms of their political rights.²⁷ The wording “everyone without any discrimination, has the right to equal pay for equal work” in paragraph 2 of Article 23 was included to show that the UDHR sets out the right to equal pay for equal work for both men and women.²⁸

The ground language was incorporated in Article 2 to afford protection against unequal enjoyment of Declaration rights by members of groups such as linguistic groups.²⁹ The grounds of social origin, property and birth were specifically included to protect persons who could not enjoy human rights on an equal basis with others due to their disadvantaged economic and social conditions.³⁰

Finally, it is worth noting that Article 25 (right to an adequate standard of living) is further evidence of the drafters’ concerns about the situation of certain categories of individuals lacking or in need of enhanced legal protection. Specifically, paragraph 2 of Article 25 dealing with special care and assistance for children and mothers is indicative of:

- a) the drafters’ intention to unequivocally affirm that all children are entitled to special protection, including those born out of wedlock; and
- b) the drafters’ intention to reinforce the prohibition of discrimination against women and the principle of equality between sexes already affirmed in Article 2, paragraph 1 of Article 16, paragraphs 1 and 3 of Article 21 and paragraph 2 of Article 23.³¹

2.1. *Conclusive remarks*

The legislative history of the UDHR supports the thesis that IHRL incorporates the legal protection of vulnerable groups in its essence.

The Declaration represents the reaction of the newly established UN to the serious human rights situation of the Jews, Roma and members of the political opposition in Nazi Germany before and during World War II. Its very purpose was to universalize human rights thereby preventing certain persons from being singled out by the State for different treatment amounting to egregious violation of rights because of factors such as race and political opinion. This is why the Declaration is a concise and comprehensive catalogue of rights that everyone possesses *qua* human being and is entitled to without discrimination on racist or political grounds. Further evidence of the Declaration's relevance to vulnerable groups emerges from the wording of some provisions which features in it because of concern by the drafters for certain persons who they saw as encountering particular problems in the exercise of human rights and needing enhanced legal protection. These vulnerable groups include: women, mothers, members of linguistic minorities, children in general and children born out of wedlock and the poor.

3. UN Human Rights Conventions and their relevance to the legal protection of vulnerable groups and their members

Following the adoption of the UDHR the UN drafted several human rights treaties, all recalling the Declaration at the beginning of their Preambles thereby establishing it as their principal legal source. These Conventions have evolved human rights protection under the auspices of the UN by setting out legally binding rights and detailing State obligations instrumental to their being made a reality.

Now I turn to highlighting the Conventions' relevance to the protection of vulnerable groups and their members. I look at the reasons leading to the adoption of these treaties and contents pertinent to the situation of vulnerable groups and their members. Reliance is also placed on the legislative history of the treaties, the practice of the bodies that monitor State parties' compliance with them and/or the writings of scholars when necessary to further substantiate the thesis that the treaties are relevant to the protection of vulnerable groups and their members. The treaties are examined in chronological order.

3.1 The 1965 International Convention on the Elimination of All Forms of Racial Discrimination

The 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) supports the thesis that concern for the legal protection of vulnerable groups and their individual members is central to IHRL. Adopted during a period of time characterized by antisemitism, racial discrimination and racial hatred,³² the Convention aims to secure the enjoyment of rights free from discrimination on the ground of race for racial or ethnic groups and their members. Its drafting was strongly championed by African and Asian countries emerging from the decolonization process. As noticed, these States on becoming members of the UN, used the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities as well as the UN Commission on Human Rights and the UN Economic and Social

Council to develop international legal standards for the eradication of discrimination against black and non-white persons.³³ The crowning result of such standard-setting endeavors was the ICERD: the above UN Sub-Commission began drafting it in January 1964 and the UN General Assembly adopted it “with record speed”³⁴ in December 1965.³⁵

The Convention is made up of a Preamble and three parts. For the purposes of this analysis provisions contained in Part I will be reviewed in so far as they are illustrative of the general contour of the legal protection available to racial or ethnic groups and their members.

Paragraph 1 of Article 1 defines racial discrimination for the purposes of IHRL as “any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.” Article 1 is especially noteworthy also because it indicates that, depending on the specific circumstances of a given case or situation, the ICERD places on its State parties the positive obligation to ensure that ethnic and racial groups or their individual members enjoy equal access to rights through the adoption of affirmative action measures. Paragraph 4 defines these measures as “[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms.” These measures are not unlawful provided they do not lead to different systems of legal protection for different racial groups and that they are temporary.³⁶ That the ICERD may require adoption of affirmative action measures is confirmed in paragraph 2 of Article 2 stipulating that “when the circumstances so warrant” State parties should put in place those measures.

Article 2 articulates in paragraph 1 and its various headings additional State duties for the purpose of eliminating all forms of racial discrimination including: *de jure* and *de facto* racial discrimination and insidious indirect discrimination based on race. The provision also requires eradication of racial discrimination perpetrated by Non-State Actors (NSAs) in the private sphere.³⁷

While Article 3 enshrines condemnation of apartheid, Article 4 (a) protects racial and ethnic groups from, inter alia, racially motivated violence by obligating State parties to the ICERD to make acts amounting to racial violence or incitement to such acts offenses punishable by domestic law. Article 4 (b) prohibits formation of organizations and other propaganda activities which promote and incite racial discrimination.³⁸ That Article was inspired by the Nazi propaganda against the Jews and the pernicious consequences it had on the situation of those persons.³⁹

Article 5 is concerned with the substantive rights that racial or ethnic groups, and their members, enjoy under the Convention without discrimination based on race as defined in paragraph 1 of Article 1. Article 5 includes both civil and political rights and economic, social and cultural rights. Examples of those rights are: the right to equal treatment before tribunals and all other organs administering justice; the right to nationality; the right to freedom of thought, conscience and religion; the right to vote; the right to security of person and protection by the State against violence and bodily harm; and rights to housing, health, education and

work. Article 6 reinforces the legal protection available to racial or ethnic groups and their members by requiring that State parties to the ICERD assure that those who have been subjected to racial discrimination violating the Convention rights have access to remedies and are able to seek reparation.⁴⁰

3.2 The 1966 International Covenant on Civil and Political Rights and The 1966 International Covenant on Economic, Social and Cultural Rights

The civil, political, economic, social and cultural rights affirmed in the UDHR were restated, in some cases reformulated, and given teeth in the two UN human rights treaties characterized by the widest-ranging *ratione personae* and *materiae*: the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 International Covenant on Economic, Social and Cultural Rights (Covenant on ESCR).⁴¹

It is well-known that initially the UN Commission on Human Rights was required to draft the text of a single human rights treaty enshrining both civil and political rights and ESCR. Eventually though, the treaty did not materialize due to the views of UN member States, especially Western States, held on the legal nature of ESCR. Western States opposed the incorporation of ESCR in the treaty at stake on the ground that the rights were mere aspirational goals rather than true legal and enforceable rights.⁴² Thus, once it became clear that Western States were not prepared to adopt a human rights treaty containing both sets of rights, the UN General Assembly directed the Commission on Human Rights to draft two distinct treaties: one on civil and political rights and one setting out ESCR.⁴³ The Commission completed its work in 1954 and the General Assembly adopted the two Covenants in 1966.

It bears emphasizing that UN member States' determination to enshrine the rights contained in the UDHR in international treaties spelling out corresponding State obligations has to be attributed to the gross violations of human rights committed during the era of the Holocaust.⁴⁴ The atrocities the Nazi regime committed against the Jews, the Roma and members of the political opposition shaped and mustered the political consensus necessary not only to adopt the UDHR but also to prepare the texts of the two Covenants. This point finds confirmation, to provide an example, in the drafting history of the ICCPR showing that Article 7 on the prohibition of torture or cruel, inhuman or degrading treatment has been enshrined in the Covenant "against the background of criminal events which took place in Nazi Germany."⁴⁵ The urge to avoid groups of persons being severely and arbitrarily deprived of their human rights in future, on account of certain characteristics they possess or things they believe in, by an oppressive and racist government similar to the Nazi regime, prompted the UN to start structuring its system of human rights protection. The UDHR constitutes the bedrock of such a system and the two Covenants are its main pillars.

The two Covenants are particularly germane to the investigation of this chapter not only because they arose out of concern for prospective violations of rights that could disproportionately affect certain vulnerable groups of persons. The Covenants contain provisions concerned with the situation of specific groups of individuals and therefore warrant attentive examination.

3.2.1. The 1966 ICCPR's relevance to the protection of vulnerable groups and their members

The ICCPR is made up of a Preamble and six parts. The cluster of Covenant rights is contained in Part III.⁴⁶ Examples of these rights, contained in Articles 6–27, include: the right to life; the right to be free from torture or cruel, inhuman or degrading treatment; the right to be free from slavery, servitude and forced labor; the right to liberty and security; the right to liberty of movement and freedom to choose a place of residence; everyone's right to recognition everywhere as a person before the law; the right to freedom of thought, conscience and religion; rights to freedom of opinion and expression; and the rights of every citizen to take part in the conduct of public affairs, to vote and to be elected and to have access, on general terms of equality, to public service in his or her country.⁴⁷

As required by paragraph 1 of Article 2, State parties to the ICCPR must respect and ensure Covenant rights to all individuals within their territory and under their jurisdiction. The use of wording such as “every human being,” “everyone,” “anyone,” “all persons” and “no one” in the articulation of most of the Covenant rights further substantiate this point, and is a strong indication that one of the main objectives of the Covenant is to universalize the enjoyment of the rights it sets out.

The ICCPR also serves an additional and equally important purpose that reinforces its universal reach: it contains provisions detailing specific legal protection for certain groups of persons whose situation of human rights was considered to be particularly problematic or likely to become particularly problematic by its drafters. These groups include primarily women, who in accordance with Article 3 have the right to enjoy all the Covenant rights on an equal basis with men. What is stated in Article 3 is far reaching since it requires State parties to the ICCPR to pay particular attention to the situation of women and to protect them against *de jure* and *de facto* sex-based discrimination that hampers the exercise of their civil and political rights.⁴⁸ The drafters of the Covenant decided to include Article 3 in the text of the treaty because, in their view, an express reference to the principle of equality between men and women was warranted by the widespread and systematic nature of violations of women's rights worldwide.⁴⁹ Article 3 enshrines a fundamental principle of IHRL that must inform the overall implementation of the ICCPR and reinforces the prohibition of sex-based discrimination contained in paragraph 1 of Article 2. This is why Article 3 features in Part II of the Covenant setting out the general scope of State parties' obligations and the extent to which the Covenant rights can be limited or suspended.

Two other Covenant provisions specifically concerned with the situation of women are Articles 6 and 23. Article 6 prohibits, in paragraph 5, the carrying out of the death penalty on pregnant women. Paragraph 2 of Article 23 recognizes the right of women of marriageable age to marry; paragraph 3 states that no marriage “shall be entered into without the free and full consent of the intending spouses;” and paragraph 4 provides equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. As Nowak has noted, Article 23 was incorporated in the ICCPR to follow up on the request of the UN Commission on the Status of Women that Article 16 of the UDHR on marriage equality between women and men should be included in the treaty.⁵⁰ He further explains that paragraph 3 was intended to protect girls from being married by their parents,⁵¹ and that paragraph 4 became part of the content of Article 23 because women were to be afforded legal protection

against discrimination occurring primarily in the family and marital spheres.⁵²

Article 9 on rights to liberty and security is particularly relevant to the situation of those who may be at risk of being deprived of their liberty arbitrarily. Paragraph 1 sets out the general requirement that no one shall be deprived of their liberty “except on such grounds and in accordance with such procedure as are established by law.” Thereafter, paragraphs 2–4 detail the protection that State parties to the ICCPR must afford to any arrested or detained persons so they are not deprived of liberty unlawfully and enjoy *habeas corpus* guarantees. Paragraph 5 entitles anyone who has been the victim of unlawful arrest or detention to an enforceable right to compensation. Further protection for persons deprived of liberty is spelled out in Article 10 requiring their treatment to involve humanity and respect. Paragraph 2 (a) of Article 10 specifies that accused persons shall be segregated from convicted persons and afforded “separate treatment appropriate to their status as un-convicted persons.”⁵³

Articles 13 and 14 are relevant, respectively, to the situation of aliens lawfully present in the territory of contracting States of the ICCPR, and to the predicament of persons charged with a criminal offense or convicted of a crime. Article 13 articulates requirements aimed to avoid arbitrary expulsion of any alien legally in the territory of State parties to the ICCPR. Article 14 provides, in paragraph 1, for a universal right to equality before courts and tribunals. Paragraphs 2, 3, 5, 6 and 7 spell out specific fair trial guarantees that apply to the situation of persons charged with a criminal offense or to those convicted of a crime, to prevent wrongful conviction and miscarriage of justice or to rectify their occurrence. Paragraph 3 (d) ensures the right to a fair trial for any destitute person charged with a criminal offense. It affirms that legal assistance will be available to a person charged with a criminal offense, “in any case where the interests of justice so require, and without payment by [him/her] in any such case if [he/she] does not have sufficient means to pay for it.”

Article 15, on the other hand, makes clear that “[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.”

Children are another group of persons expressly mentioned in the ICCPR. The leading provision is Article 24 included in the Covenant because of the drafters’ belief that children need enhanced protection.⁵⁴ Paragraph 1 entitles every child to protective measures as required by her status as minor and without discrimination on the grounds of race, color, sex, language, religion, national or social origin, property or birth. Paragraphs 2 and 3 entitle every child to, respectively, registration after birth and a name, and acquiring a nationality.

Article 24 seeks to ensure general and specific protection for children as warranted by their status as minors. Article 24 obligates State parties to the ICCPR to put in place special protective measures conducive to the enjoyment of human rights *vis-à-vis* all children under their jurisdiction so that each and every one of these children benefit from adequate legal protection. Furthermore, the requirement in paragraph 1 to afford protection to every child without discrimination of any kind entails that contracting States of the ICCPR have to implement additional safeguards applying to children who suffer deprivation of human rights to a greater extent than other children and adults on account of the prohibited grounds listed in

paragraph 1. These children may include (depending on the specific circumstances of their situation) girls, children belonging to ethnic minorities, children who are born out of wedlock and those who are stateless.⁵⁵

The ICCPR sets out further legal protection for children in Articles 6, 10 and 14. Paragraph 5 of Article 6 prohibits the sentencing to death of persons under the age of 18. Paragraphs 2 (b) and 3 of Article 10 require State parties to the Covenant to:

- a) separate accused juveniles from adults and ensure that these juveniles are promptly brought before a competent judicial authority; and
- b) ensure that juvenile offenders are separated from adults and treated in a manner that is appropriate to their age and legal status.

Paragraph 4 of Article 14 deals with juveniles charged with a criminal offense and mandates that in these cases “the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.”⁵⁶

Another noteworthy provision is Article 27 which confers on members of ethnic, linguistic and religious minorities “the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” Although Article 27 sets out an individual cultural right that each member of the said minority groups must enjoy, it can also bring about protection of these groups as a whole. This is because the exercise of the right set out in Article 27 is contingent on the minority groups’ ability to develop and preserve their culture, religion and language. Therefore, as maintained by the Human Rights Committee (the body that monitors State compliance with the ICCPR), Article 27 may require State parties to the ICCPR to adopt measures ensuring that ethnic, linguistic and religious groups can exercise their cultural rights so as to enable their members to enjoy cultural rights on an individual basis.⁵⁷ The drafters of the ICCPR meant the term “minorities” to refer to “separate or distinct groups, well-defined and long established on the territory of a State;” as noted by Nowak, Article 27 was included in the Covenant to enable minorities to achieve real equality.⁵⁸

The most significant provisions of the ICCPR for the purposes of the legal protection of vulnerable groups and their individual members are paragraph 1 of Article 2 and Article 26.

Paragraph 1 of Article 2 enshrines the prohibition of discrimination in the enjoyment of Covenant rights on grounds that are the same as those enumerated in Article 2 of the UDHR. Paragraph 1 of Article 2 requires State parties to the ICCPR to respect and ensure to all individuals within their territory and subject to their jurisdiction the Covenant rights “without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” During the drafting of the ICCPR, representatives of States sitting in the Third Committee of the UN General Assembly agreed with the Indian representative when he held that measures aimed at advancing socially and educationally backward groups of society were not at variance with paragraph 1 of Article 2.⁵⁹ While, in the view of this author, the Indian representative could have used less stigmatizing language to refer to groups affected by discrimination, his point of view and the backing it received support the conclusion that paragraph 1 of Article 2 is especially relevant to the

protection of vulnerable groups of persons and their members. The provision squarely covers the situation of any groups or individuals in cases where these persons do not enjoy civil and political rights on an equal basis with others on account of: any of the discrimination grounds expressly enumerated in it; any ground implicit in the open-ended ground “other status;” or combinations of two or more of said grounds. Paragraph 1 of Article 2 is endowed with wide protective and personal scope because the prohibited discrimination grounds it enshrines correspond with numerous factors and circumstances that place persons affected by them at a disadvantage when seeking to enjoy human rights. Moreover, the ground “other status,” by virtue of its open-endedness, can be interpreted to cover new factors and situations that, besides those expressly listed in paragraph 1 of Article 2, create disadvantage in the enjoyment of rights for certain persons.⁶⁰ The groups falling within the personal scope of paragraph 1 of Article 2 also include, obviously, those expressly protected under the Covenant such as women and members of ethnic minorities, who tend to experience severe discrimination in the enjoyment of civil and political rights owing to, respectively, their sex and race. When sex and gender-based discrimination affecting civil and political rights is at stake, paragraph 1 of Article 2 will have to be read together with Article 3 on the principle of equality between men and women. Article 3 complements paragraph 1 of Article 2 and was included in the Covenant to reinforce the legal protection afforded to women under it.

Article 26 is even more wide-ranging than paragraph 1 of Article 2. It states that all persons are equal before the law and entitled to equal protection of the law without discrimination; and that the law shall ensure to all persons effective protection against discrimination based on the prohibited grounds of paragraph 1 of Article 2. Article 26 is an autonomous anti-discrimination provision which protects everyone who is within the jurisdictional control of State parties to the ICCPR from unlawful differential treatment, based on the prohibited grounds, impeding effective exercise of the Covenant rights as well as enjoyment of rights other than those set out in the Covenant.⁶¹ Therefore, Article 26 can be instrumental in bringing about legal protection for any vulnerable groups of persons or their individual members in cases where they experience discrimination owing to factors corresponding to the prohibited grounds listed in paragraph 1 of Article 2, or a combination of these grounds, in the enjoyment of civil rights, political rights and ESCR.

The ICCPR enshrines several provisions concerned with groups of persons whose human rights situation is or may become particularly worrisome and, consequently, more alarming than the human rights situation of other members of society. These groups are:

- a) those expressly covered by the Covenant, i.e., women, persons deprived of their liberty, legal aliens, persons charged with a criminal offense and those convicted of a crime, children, children affected by different forms of discrimination and members of ethnic and linguistic minorities; and
- b) any other groups of persons, or their individual members, suffering discrimination in the enjoyment of Covenant rights and human rights in general based on the internationally prohibited grounds enumerated in paragraph 1 of Article 2.

These points corroborate the thesis that IHRL incorporates as an essential element the

protection of vulnerable groups and their members.

3.2.2. The 1966 Covenant on ESCR and its relevance to the protection of vulnerable groups and their members

The Covenant on ESCR contains a Preamble and five parts.⁶²

The Covenant rights are enunciated in Part III. Articles 6–15 comprise the right to work; the right to the enjoyment of just and favorable conditions of work; the right to form and join trade unions; the right of trade unions to function freely; the right to social security; the right to an adequate standard of living, which has been interpreted as to include the rights to housing, food and water;⁶³ the right to health; the right to education; and cultural rights. The cluster of cultural rights includes: the right to take part in cultural life; the right to enjoy the benefits of scientific progress and its applications; and the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author.

All the above rights have a general and wide-ranging personal scope: they apply to everyone who is within the jurisdiction of State parties to the Covenant on ESCR.⁶⁴ The encompassing personal scope of application nature of the Covenant is reinforced by provisions which detail specific legal protections for two groups of persons, namely, women and children.⁶⁵ These provisions are evidence that strengthens the thesis that the protection of vulnerable groups is a constituent component of IHRL.

The first Covenant provision relating to the situation of women is Article 3 setting out the equal right of men and women to the enjoyment of ESCR. Article 3 was incorporated in the Covenant on ESCR on the request of the UN General Assembly in an effort to enhance the prohibition of sex-based discrimination set out in paragraph 2 of Article 2 in the face of the extent of unlawful differential treatment afforded to women worldwide on account of their gender.⁶⁶ Article 3 was to constitute the legal basis requiring State parties to the Covenant to create equal opportunities for women so they could effectively exercise ESCR on an equal basis with men.⁶⁷ Article 3 features in Part II of the Covenant delineating the general scope of State parties' obligations and possible limitations to Covenant rights. Together with the sex-based discrimination prohibition set out in paragraph 2 of Article 2, Article 3 constitutes a pivotal principle around which the overall implementation of the ESCR enshrined in the Covenant is built.

Article 7 on everyone's right to enjoy just and favorable working conditions is another provision applicable to women.

Heading (a) (i) entitles women to conditions of work not inferior to those enjoyed by men, and to equal salaries for equal work. When heading (a) (i) was drafted, most States supported it because they were convinced that it would counter discrimination against women specifically happening in the workplace, and because it would have helped improve the legal protection of women in general and enforcement of their rights.⁶⁸

Another relevant provision is Article 10 which reveals the drafters of the Covenant on ESCR's intention to afford to afford extensive socio-economic protection to women elsewhere (in addition to in the workplace).⁶⁹ Accordingly, paragraph 1 provides that marriage must be

entered into with the free consent of the intending spouses. Its drafting history shows that States wished to include this in response to child marriage, arranged marriages or situations where women were treated as objects or “married off like slaves.”⁷⁰ In paragraph 2 of Article 10 State parties to the Covenant recognize that special protection should extend to mothers during a reasonable period before and after childbirth, and that during such period, working mothers should be accorded paid leave or leave with adequate social security benefits. The legislative history of paragraph 2 indicates that protection of working mothers was included to further spell out labor and social security guarantees in their application to women.⁷¹ Thus, when it comes to the protection of working mothers, paragraph 2 of Article 10 complements and should be read together with Articles 6, 7 and 9 on rights to work, just and favorable conditions of work and social security.

Some commentators feel that Article 10 reduces women to wives and mothers,⁷² but it should not be forgotten that as seen above in relation to the drafting of Article 7 (a) (i), the Covenant contains fundamental labor guarantees specifically applicable to working women. Article 10 should therefore not be read in isolation but in the light of other Covenant rights. Further, the drafters of the Covenant were quite aware of the necessity to strike a balance between motherhood and women’s ability to carry on with their career. Commentators have emphasized that during the drafting of paragraph 2 of Article 10(2) it was insisted that the protection of mothers had to have a specified duration because long-term protection would have been paternalistic and would have relegated women in the domestic sphere in total disregard of the development of their professional lives.⁷³

It is also worth adding that the significance of Article 10 *vis-à-vis* the legal protection of women should be neither dismissed nor underestimated since it covers real and important dimensions of women’s lives that necessitate enhanced and specific legal protection. As confirmed by the UN, the practice of marrying girls before they reach 18 is currently still widespread.⁷⁴ And concern for motherhood was not misplaced, given the complexities associated with it: such complexities have been recognized by domestic courts which have not hesitated to delineate specific State obligations, such as the obligation to provide mothers with access to certain essential medicines to protect the health of their newborn children.⁷⁵

Children and young persons are expressly protected under the Covenant on ESCR too. This is evidenced in paragraph 3 of Article 10 providing that States should take special protective measures on behalf of children and young persons without any discrimination for reasons of parentage and other conditions. Rather importantly, paragraph 3 is also specifically concerned with the economic and social exploitation of children and young persons in prohibiting their employment in work which is harmful to their morals, health, lives and normal development. Paragraph 3 applies to children and adolescents by virtue of their dependency on their families and was meant to address the persistence of child labor.⁷⁶

Another Covenant provision relevant to the situation of children is Article 12 on the right to health. Paragraph 2 (a) requires the adoption of measures for the reduction of the still-birth and infant mortality rate, and promotes the healthy development of children.

While the Covenant on ESCR has been criticized for recognizing only women and children as groups of persons in need of special legal protection,⁷⁷ the provision that has the greatest potential to protect vulnerable groups of persons and their individual members is the non-

discrimination clause set out in paragraph 2 of Article 2. Paragraph 2 of Article 2 requires State parties to the Covenant to ensure that Covenant rights will be exercised without discrimination of any kind in terms of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Paragraph 2 of Article 2 may be relied on to address unlawful differential treatment, hampering the enjoyment of ESCR by any group of persons or individuals, which is based on any of the discrimination grounds expressly enumerated in it, any ground implied in the open-ended ground “other status,” or combinations of two or more of said grounds. The exceptionally encompassing personal and material scope of paragraph 2 of Article 2 can be explained by the nature of the prohibited discrimination grounds listed in it, which are the same as those enumerated in Article 2 of the UDHR and in paragraph 1 of Article 2 of the ICCPR. These grounds amount to several factors and situations that detrimentally and disproportionately affect certain persons, thereby giving rise to severe denial of rights and discrimination in their enjoyment. The ground “other status” is even more far reaching since it can be construed to comprise new elements, other than those expressly enumerated in paragraph 2 of Article 2, that disproportionately affect certain persons and prevent them from exercising their ESCR on an equal basis with others.⁷⁸

Women and children, groups expressly protected by the Covenant, are obviously covered by paragraph 2 of Article 2 since more often than not they are affected by discrimination in the enjoyment of ESCR on account of, respectively, sex, and young age, a discrimination ground that would fall within the meaning of the expressly prohibited ground “other status.”⁷⁹ When it comes to instances of sex and gender-based discrimination in the exercise of ESCR, paragraph 2 of Article 2 should be read together with Article 3 on the principle of equality between men and women since Article 3 complements paragraph 2 of Article 2 and was included in the Covenant to bring about more robust equality for women.

That paragraph 2 of Article 2 can be used to further specific legal protection of certain groups of persons and their members was confirmed in the discussion held by the Third Committee of the UN General Assembly during the drafting of paragraph 2 of Article 2. Relevant UN documentation shows that governments made the very same points in discussion about the anti-discrimination clause set out in the ICCPR. It was acknowledged that measures aimed at advancing socially and educationally disadvantaged groups of society were not a breach of paragraph 2 of Article 2 of the Covenant on ESCR.⁸⁰

Thus, the *ratione personae* and *materiae* of the Covenant on ESCR confirms that IHRL incorporates as an essential dimension the protection of vulnerable groups and their members. The Covenant contains provisions germane to persons whose human rights situation is particularly problematic, including persons expressly protected under the Covenant, i.e. women and children, and any other group of individuals, or their members, when they experience different types of discrimination in the enjoyment of ESCR due to factors falling within the scope of the prohibited grounds of paragraph 2 of Article 2.

3.3 The 1979 UN Convention on the Elimination of All Forms of Discrimination against Women

The 1979 International UN Convention on the Elimination of All Forms of Discrimination against Women (ICEDAW) boosts the claim that concern for particularly problematic human rights situations of certain groups of person is an integral component of IHRL.

The adoption of the Convention stemmed from the realization that the incorporation of provisions prohibiting sex-based discrimination and affirming the principle of equality between men and women in the enjoyment of all human rights in Articles 2 and 3 of the two 1966 Covenants was not enough to effectively deal with the severity of unlawful differential treatment affecting women worldwide.⁸¹ At the end of the 70s, discrimination against women was still very serious and widespread, including in those States that saw decolonization and were expected to take innovative approaches to improve the situation of women living within their territories.⁸² The narrow scope of international conventions on the political rights of women, the nationality of married women and criteria that must underpin marriage, adopted between 1953 and 1962 further highlight that at the end of the 70s the international legal framework of norms addressing discrimination targeting women because of their sex and gender was incomplete.⁸³

The ICEDAW is made up of a Preamble and six parts.

The Preamble expresses concern for discrimination against women and the obstacles it creates when it comes to ensuring that these persons exercise human rights on an equal footing with men. The Preamble also mentions the particularly worrisome situation of poor women, acknowledges the importance of women's participation in all fields of society and advocates the need to change "the traditional role of men as well as the role of women in society and in the family."⁸⁴ The Preamble specifies that the ICEDAW is meant to implement principles set out in the 1967 Declaration on the Elimination of Discrimination against Women.

The Preamble is followed by Part I which contains provisions spelling out obligations that contracting States must implement to fulfill the main aim of the ICEDAW: the elimination of discrimination against women defined in Article 1 as any distinction, exclusion or restriction specifically targeting women *qua* women and preventing them from enjoying all human rights on an equal basis with men. Thus, Article 2 requires State parties to the ICEDAW to eliminate discrimination against women by to provide some examples:

- ensuring their constitutions and domestic legislation enshrine the principle of equality between men and women;
- adopting legislation prohibiting discrimination against women;
- refraining from discriminating against women;
- addressing discrimination against women perpetrated by NSAs; and
- modifying or repealing laws and cultural practices that discriminate against women.

Article 4 deals with the adoption of temporary special measures to accelerate achievement of *de facto* equality between men and women: it clarifies that these measures do not amount to discrimination within the meaning of Article 1 and sets out requirements State parties to the ICEDAW should meet when adopting them. Article 5 requires in heading (a) modification of social and cultural patterns based on and perpetuating the idea of inferiority or superiority of either of the sexes or stereotypical roles for men and women. Under Article 6 contracting

States are required to suppress phenomena rooted in the subordinated and stereotypical role of women in society: all forms of trafficking in women and exploitation of prostitution of women.⁸⁵

Chinkin has pointed out that the reach of the ICEDAW is ambitious in so far as eradication of formal and substantive discrimination against women is not its only purpose. She explains that, in fact, the Convention additionally mandates “transformative equality,” i.e., equality that does not merely require affirmation and implementation of the same rights for men and women but which also aims to profoundly and dramatically change the role of women in society. The obligation to foster such a complex form of equality is contained in Article 3 requiring contracting States to take measures in all fields of society to guarantee the full development and advancement of women.⁸⁶ How this ultimate form of equality for women must be achieved is detailed in Parts II–IV of the Convention. Articles 7–16 elaborate on specific positive obligations State parties must fulfill to implement women’s human rights equally with men. These rights include:

- political rights;
- the right to equality before the law;
- the right to nationality; and
- rights relevant to the fields of education, employment, healthcare, social and economic life and rural development.

In the latter case it is noteworthy that the ICEDAW includes Article 14 which is specifically concerned with the situation of rural women, mandating the implementation of adequate measures to eradicate discrimination against them and fostering their participation in rural development. The Convention applies to adult women and girls under the age of 18.⁸⁷

3.4 The 1989 Convention on the Rights of the Child

The 1989 UN Convention on the Rights of the Child (UNCRC) is another UN treaty supporting the thesis that IHRL incorporates as an integral component the protection of vulnerable groups and their members.

The UNCRC was adopted in the 1980s, a time when large numbers of children worldwide were not receiving basic human rights. According to Mower, during the 80s 155 million children under the age of five lived in absolute poverty and 38,000 children were dying every day because they lacked food. What is more, the situation of children living without their families in the streets became a worldwide phenomenon; sexual abuse and economic exploitation of children were pervasive; and children under the age of 18 were being forcibly recruited to fight wars in Southern parts of the world.⁸⁸ Children who had been deprived of their liberty often could not afford legal representation, and were subjected to torture and sexual abuse.⁸⁹

The legislative history of the Convention powerfully proves that it was adopted because the drafters tended to consider children as an especially vulnerable group exposed to exploitation, with special health needs and facing violations of their rights to a greater extent than adults.

The Committee on the Rights of the Child, the body charged with monitoring State compliance with the UNCRC, has confirmed this. Kirsten Sandberg, the Rapporteur of the Committee, has maintained that the Convention is a critical tool to deal with children's vulnerability resulting from their young age and factors such as being affected by a disability, living in remote areas, living in poverty and ethnicity.⁹⁰

The Child Convention recognizes in its Preamble (in line with the UDHR, the 1959 Declaration of the Rights of the Child and the 1966 Covenants), that children are entitled to special care, assistance and legal protection. The Convention defines a child as a person below the age of 18 unless under relevant domestic law majority is reached earlier.⁹¹ This definition appears to include the unborn child, referred to in paragraph 9 of the Preamble and in paragraph 2 (d) of Article 24. The former recalls that the child needs special care and appropriate legal protection before and after birth, and the latter is concerned with prenatal care for mothers.⁹²

The UNCRC is a breakthrough international instrument that enshrines extraordinary legal protection for children in at least three respects.

First, the Convention changes the international community's perception of the child. The child to whom the Convention applies is no longer a passive recipient of "patronizing generosity"⁹³ by parents, legal guardians and governments.⁹⁴ The Convention emancipates the child and makes her a right holder capable of asserting her rights. Article 12 most powerfully expresses this sense of empowerment. It states that a child capable of forming his or her own views has the right to express those views freely in all matters, including during any judicial and administrative proceedings.

The second innovative feature of the UNCRC is that it restates and reformulates the civil, political and ESCR set out in the two 1966 Covenants to better meet the protection needs of children. Paragraph 1 of Article 7 is a pertinent example: it is restatement and a reformulation of paragraphs 2 and 3 of Article 24 of the ICCPR on child's registration after birth and the child's right to a nationality. Paragraph 1 of Article 7 affirms that "[t]he child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents."

The third novel aspect of the UNCRC, as Mower has suggested, lies in its incorporation of "new rights" that are specifically tailored to the situation of children, and significantly advance their legal protection. These rights include: the child's right to live and develop (Article 6); the child's right to know and be cared for by his or her parents (paragraph 1, Article 7); and rights in Article 30 for children within ethnic minorities.⁹⁵

Interestingly, Mower has further maintained that the Convention incorporates a cluster of provisions that taken together may be deemed to set out the child's right to protection from:

- physical and mental violence, including abuse, neglect and sexual abuse;
- economic exploitation;
- sexual exploitation; and
- trafficking in human beings.

The provisions in question are Articles 19, 32, 34 and 35. Mower takes the view that said provisions have to be read together with Articles 20, 21, 33 and 37 entitling to special protection: children who are deprived of their family environment; children who are placed for adoption; those who may be exposed to the illicit use of drugs, and those in conflict with the law.⁹⁶

The solid legal protection the UNCRC guarantees all children is also reinforced by the requirement set out in Article 2 that every child must be able to exercise all Convention rights without discrimination of any kind or discrimination based on their parents'/legal guardian's/family members' qualities. The Article 2 protection is buttressed by paragraph 1 of Article 3 mandating that in all actions regarding children their best interests shall be a primary element to be taken into account.⁹⁷

The UNCRC has been the most rapidly and widely adhered to human rights treaty in history, a fact which signals universal recognition of children's international rights and the need of improve children's living conditions.⁹⁸ The Convention was adopted on 20 November 1989 and entered into force within ten months (on 2 September 1990). The Convention now has the largest number of State parties having been ratified or acceded to by 196 Countries.⁹⁹

3.5 The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (“the Migrant Workers Convention”) was adopted on 18 December 1990 by the UN General Assembly.

The Preamble of the Convention is particularly relevant to this chapter. In the view of this author, it highlights how migrant workers and their family members are rendered vulnerable for a number of reasons and that such vulnerability is a major factor necessitating implementation of relevant international legal protection. Paragraph 9 of the Preamble points specifically and explicitly to the “situation of vulnerability” in which migrant workers find themselves as a result of their “absence from their State of origin and the difficulties they may encounter arising from their presence in the State of employment.” Paragraphs 11, 12 and 13 of the Preamble appear to elaborate on what vulnerability entails since through them the drafters express convictions that:

- a) migration often causes serious problems for migrant workers and their family members, especially because it leads to fragmentation of the family;
- b) clandestine movements and trafficking in migrant workers should be prevented and suppressed; and
- c) undocumented migrants are frequently employed under less favorable conditions of work than other workers.

Paragraphs 10 and 15 complement paragraphs 9, 11, 12 and 13 by setting out the drafters' convictions that the rights of migrant workers and members of their families have not been sufficiently recognized everywhere; and that there is a need to bring about international legal

protection of all migrant workers and their families by adopting a comprehensive and universal human rights Convention.

The personal scope of the Migrant Workers Convention is shown in paragraph 1 of Article 2 which defines a migrant worker as a “person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.” This definition encompasses both documented and undocumented migrant workers, and all migrant workers employed in State parties to the Migrant Workers Convention regardless of whether their country of origin has ratified it.¹⁰⁰ Other categories of migrant workers covered by the Convention are listed in paragraph 2 of Article 2 and include, among others, sessional workers, frontier workers, self-employed workers, itinerant workers and specified-employment workers.

Part I of the Migrant Workers Convention affirms, in paragraph 1 of Article 1, that the Convention rights apply to all migrant workers and their respective families without discrimination based on grounds such as those listed in the non-discrimination clauses of the two 1966 Covenants, and on new grounds such as ethnic origin, nationality, age, economic position and marital status. Paragraph 2 of Article 1 details the temporal scope of the Convention. It clarifies that this treaty applies “during the entire migration process of migrant workers and members of their families, which comprises preparation for migration, departure, transit and the entire period of stay and remunerated activity in the State of employment as well as return to the State of origin or the State of habitual residence.” Article 7 contains State parties’ undertaking to respect and to ensure to all migrant workers and members of their families subject to their jurisdiction the rights provided for in the Convention without any distinction on the grounds listed in paragraph 1 of Article 1. Article 7 is the sole provision that features in Part II of the Convention.

The rights that specifically apply to all migrant workers and members of their families, including undocumented migrant workers and their family members, are set out in Part III. Articles 8–35 restate classical international civil and political rights and ESCR. Examples include:

- the right to life,
- the right to be free from torture or from cruel, inhuman or degrading treatment or punishment;
- the right to be free from slavery and forced labor;
- the right to a fair trial;
- the right to join freely trade unions;
- the right to social security;
- the right to health; and
- the rights of a child of a migrant worker to a name, registration of birth, nationality and education.¹⁰¹

Article 25 is particularly emblematic of the drafters’ intention to fill gaps in the legal protection of migrant workers. The provision details how migrant workers should enjoy treatment not less favorable than that which applies to nationals of the State of employment in

respect of remuneration and other conditions and terms of employment.

Part IV is concerned with rights that documented migrant workers and members of their families enjoy in addition to the rights set out in Part III. Part IV essentially articulates how some of the rights already listed in Part III apply specifically to documented migrant workers and their families, thereby affording these persons protection better tailored to their specific situations. Additionally, Part IV provides for rights that are not contained in Part III such as migrant workers' freedom of movement and their freedom to choose a residence in the State of employment; migrant workers' rights to transfer earnings and savings from the State of employment to their State of origin; and migrant workers' right to vote and be elected at elections in the home State.¹⁰²

The progressiveness of the Migrant Workers Convention, as evidenced in particular by the provisions applying to undocumented migrants and their families, is balanced out against State sovereignty in Article 79. The provision affirms that "[n]othing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families." What is stated in Article 79, however, has not provided an incentive for those States that play prominent roles in the world economy to adhere to the Convention. There are 48 State parties to the Convention at the time of writing. Major destination countries for global migrants such as the U.S.A., the Russian Federation, Western European States, Saudi Arabia, Japan and South Africa are not among them.¹⁰³

The Migrant Workers Convention confirms that IHRL is specifically concerned with vulnerable groups of persons. The remarkability of the Convention lies in the fact that it is the sole UN human rights treaty reviewed here to expressly mention and formally acknowledge the situation of vulnerability of a specific group of persons and consider it as a main factor that warrants extending international legal protection to them. Paragraphs 9, 10 and 15 of the Preamble convey the idea that migrant workers and their families are vulnerable because their situation, from a human rights standpoint, is more problematic than the situation of workers who are nationals of the State. Challenges characterizing the situation of vulnerability of the migrant workers and their families derive from their absence from their States of origin and difficulties they may encounter arising from their presence in the State of employment. The situation of vulnerability of migrant workers and their families has required the adoption of the Migrant Workers Convention by the international community.¹⁰⁴

3.6 The 2006 UN Convention on the Rights of Persons with Disabilities

The 2006 UN Convention on the Rights of Persons with Disabilities (UNCRPWD) is the latest human rights treaty drafted under the auspices of the UN. The Convention was adopted to afford enhanced and more specific protection to a group of persons, namely, those with disabilities, that has been historically subjected to social exclusion and discrimination, and whose members have been, in many instances, considered as not having the legal capacity to exercise their human rights.¹⁰⁵ The Convention, hence, highlights that the protection of vulnerable groups of persons and their members is an integral dimension of IHRL.

The UNCRPWD is a revolutionary legal text that changes the societal and cultural perception of persons with disabilities. Drawing upon the social model, a paradigm developed

to inform disability policies, the Convention does not embrace a definition of disability as a defect or something that needs to be fixed.¹⁰⁶ Rather, Article 1 defines persons with disabilities as persons “who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”¹⁰⁷ This definition is predicated upon the powerful idea that there is nothing wrong with persons with disabilities, and that it is the configuration of society as a whole that needs restructuring to allow these persons to effectively take part in society, have equal access to rights and manage their impairments.

The Convention seeks to neutralize the detriment that societal barriers create for persons with disability by enshrining freedom from discrimination based on disability as a pivotal principle that permeates its entire text. The principle is in fact restated, often in reference to the formula “on an equal basis with others” in virtually all of the provisions detailing the rights of persons with disabilities.¹⁰⁸ The affirmation that persons with disabilities enjoy human rights free from discrimination based on their impairments was necessary because for centuries and despite the adoption of human rights treaties of general application personal scope, these persons have been neglected, considered subhuman beings and denied rights because of their disabilities.¹⁰⁹

The rights contained in the UNCRPWD include civil and political rights and ESCR such as those set out in the two 1966 Covenants. The added value of the Convention lies in the fact that, while the Covenants contain rights which by virtue of their broad scope may be implemented, even by the most well-meaning State, without taking into due account the needs of persons with disabilities, the Convention reformulates the above rights to avoid these persons being overlooked or forgotten by competent authorities when they give effect to international human rights. The result is a legal text that illuminates novel dimensions of civil and political rights and ESCR: dimensions tailored to the situation of persons with disabilities so as to provide State parties to the UNCRPWD with invaluable guidance on how to adequately ensure their legal protection.¹¹⁰ Relevant examples are: Article 16 on persons with disabilities’ freedom from exploitation, violence and abuse, which may be considered a derivative of freedom from forced labor and freedom from torture or inhuman or degrading treatment; and Article 19 on the rights of all persons with disabilities to live independently in the community, which may be deemed to be a ramification of the freedom to choose a place of residence and the right to participate in cultural life).

It is also noteworthy that the UNCRPWD enshrines provisions such as Articles 6 and 7 dealing, respectively, with women and children with disabilities. The reasons for their incorporation is found in paragraphs *q* and *r* of the Preamble recognizing that women with disabilities “are often at greater risk, both within and outside the home of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation,” and that “[children with disabilities] should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children.” Other provisions of the Convention concerned with the two groups at stake include, to provide salient examples: paragraphs *g* and *h* of Article 3 on general principles; paragraph 5 of Article 16; paragraph 2 of Article 18 on liberty of movement and nationality; paragraphs 1 (c), 3, 4 and 5 of Article 23 on respect for home and family; paragraphs 2 (a) and 3 (c) of Article 24 on education; paragraph 2 (b) of Article 28 on

an adequate standard of living; and paragraph 5 (d) of Article 30 on participation in cultural life, recreation, leisure and sport. Paragraph 2 (b) of Article 28 also addresses the special social needs of older persons with disabilities.

The UNCRPWD empowers persons with disabilities. It acknowledges that these persons are right holders and translates their unique needs in the language of human rights and corresponding State obligations for the purposes of enabling them to truly participate in society. What is more, the Convention mandates that persons with disabilities must have a say in the way in which their international rights are realized. Paragraph 3 of Article 4 and paragraph 3 of Article 33 state that persons with disabilities, including children with disabilities, and their representative organizations shall be involved and participate fully in the implementation of Convention rights domestically and in relevant monitoring processes.

~~4. Regional human rights instruments relevant to the protection of vulnerable groups and their individual members~~

~~We now turn to the normative content of regional human rights treaties and their relevance to the protection of vulnerable groups and their individual members. The contents of these treaties are presented, described and analyzed mainly in light of their textual setting. Reliance is placed on the legislative history of the treaties, the practice of the bodies that monitor State parties compliance with them, and/or the writings of scholars when necessary to further corroborate the argument that said treaties are relevant to the protection of vulnerable groups and their members. These treaties involve those adopted under the auspices of the Council of Europe and the Organization of the American States, and in Africa.~~

~~4.1 Human rights instruments adopted by the Council of Europe~~

~~In Europe two instruments are especially relevant to the subject of this chapter: the 1961 European Social Charter (revised in 1996), and the 1950 European Convention on Human Rights and Fundamental Freedoms (ECHR) and its Protocols.~~

~~The European Social Charter (ESC) was drafted in 1961. It was meant to be the “sister” of the ECHR and to guarantee protection of ESCR in member States of the Council of Europe. Between 1990 and 1996 the Charter underwent changes aimed at giving more teeth to the protection of the human rights incorporated in it. The most important change worth highlighting here is the adoption of the Revised ESC in 1996.¹¹¹ The Revised Charter restates the 19 rights contained in the 1961 Charter, amends some of them and introduces new ones. The Revised Charter also incorporates rights set out in the 1988 Additional Protocol to the 1961 Charter.~~

~~The Revised ESC contains an impressive number of provisions that apply to specific groups of persons. These provisions include:~~

- ~~• paragraph 3 of Article 4 on the right of men and women to equal pay for work of equal value;~~
- ~~• Article 7 concerned with the socio-economic protection of children and adolescents in the~~

~~occupational field;~~

- ~~• Article 8 on the right of employed women to protection of maternity;~~
- ~~• Article 15 on the right of persons with disabilities to independence, social integration and participation in the life of the community;~~
- ~~• Article 17 on the right of children and young persons to social, legal and economic protection;~~
- ~~• Article 19 on the right of migrant workers and their families to protection and assistance;~~
- ~~• Article 23 on the right of elderly persons to social protection; and~~
- ~~• Article 27 on the right to equality of opportunity and treatment of men and women workers with family responsibilities.¹¹²~~

~~The Revised ESC pays special attention to these groups based on the recognition that their members are in need of legal protection to a greater extent than others because: they may suffer discrimination affecting their socio-economic protection; they are detrimentally affected by morally and physically hazardous occupations to a greater extent than others; they have special needs; they do not have equal access to employment and may be at a higher risk of impoverishment.¹¹³~~

~~The 1950 ECHR was adopted by the Council of Europe five years after the end of World War II and was meant to serve two purposes:~~

- ~~a) to establish a system of human rights protection to prevent atrocities such as those committed during the era of the Holocaust; and~~
- ~~b) to affirm and implement the rule of law, which members of the Council of Europe saw as a remedy against the rise of totalitarian States and the condition *sine qua non* for the establishment of a durable peace in Europe.¹¹⁴~~

~~The ECHR Preamble evokes the UDHR and considers that this pivotal UN instrument “aims at securing the universal and effective recognition and observance of the Rights therein declared.”~~

~~The ECHR has a general and wide-ranging personal scope as delineated in Article 1 mandating contracting parties to secure the Convention rights and freedoms for everyone within their jurisdictions.¹¹⁵ As with the UN Covenants of 1966, the European Convention also enshrines provisions that specifically refer to or may apply to certain persons whose human rights situation is or may become especially problematic. The first pertinent example is Article 5 on the right to liberty and security which, in paragraph 1 (d) permits “the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority.” Paragraph 1 (d) was incorporated in the European Convention to ensure that persons under the age of 18 could be placed under educational supervision, or to cover persons under the age of 18 who should be removed from dangerous places and situations before being brought before courts of law. Paragraph 1 (e) of Article 5 deals with the lawful detention of persons of unsound mind, persons who misuse alcohol or drugs or homeless people. It was included in the Convention so that these persons would undergo medical treatment and supervision.¹¹⁶ On the other hand,~~

paragraphs 2-4 of Article 5 detail procedural and substantive requirements applying to any detained or arrested persons to shield them from arbitrary detention. Paragraph 5 of Article 5 entitles everyone who has been the victim of an unlawful arrest or detention to an enforceable right to compensation.¹¹⁷ Paragraphs 1, 2 and 3 of Article 6 and paragraph 1 of Article 7 are especially relevant to the situation of persons charged with or found guilty of a criminal offense and aim to prevent miscarriages of justice.¹¹⁸ Paragraphs 1, 2 and 3 of Article 6 ensure that persons charged with a criminal offense have a fair trial while paragraph 1 of Article 7 requires that no one shall be held guilty of any criminal offense on account of any act which was not criminalized under national or international law at the time when it was committed. Paragraph 3 (c) of Article 6 states that everyone charged with a criminal offense has the right, if he or she has insufficient means to pay for legal assistance, “to be given it free when the interests of justice so require.” The drafting history of the Convention indicates that this provision was included to protect those who due to their economic situation could not afford to pay for their defense.¹¹⁹

Article 14 of the ECHR may afford the most far-reaching protection to vulnerable groups and their members. This provision sets out the prohibition of discrimination in the enjoyment of the Convention rights, and rights contained in Protocols to the ECHR, on grounds that include sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. By virtue of its normative content, Article 14 can apply to any group or persons subjected to unlawful differential treatment in the enjoyment of Convention or Protocol rights based on: one of the above expressly prohibited grounds, a ground implied in the ground “other status,” or a combination of one or more of these grounds. Article 14 is especially relevant to the situation of vulnerable groups, because, as with the non-discrimination clauses of the two 1966 Covenants, it sets out prohibited discrimination grounds that coincide with factors and circumstances that make persons affected by them less likely to access rights than other individuals in similar situations. Moreover, the ground “other status” can be interpreted as encompassing new and additional factors and situations, not foreseen by the Convention’s drafters, creating disadvantages in the enjoyment of rights for certain persons.¹²⁰

The Protocols to the Convention also contain provisions that have a particular *ratione personae*. For instance Article 4 of Protocol No. 4 of 1963 prohibits the collective expulsion of aliens and is complemented by Article 1 of Protocol No. 7 of 1984 on procedural safeguards that must inform expulsion of any alien legally present on the territory of a contracting State. Articles 2 and 3 of Protocol No. 7 are concerned with the situation of convicted persons. Article 2 entitles everyone convicted of a criminal offense to the right of appeal in criminal matters whereas Article 3 details instances in which these persons shall be compensated for wrongful conviction. Article 4 of Protocol No. 7 sets out the right not to be tried or punished twice, and it is relevant to the situation of convicted persons and those who have been finally acquitted. Article 5 of Protocol No. 7 may be deemed to be especially relevant to the situation of women in the matrimonial sphere in that it enshrines the principle of equality between spouses in getting married, during marriage and in the event of its dissolution.¹²¹ Protocol No. 13 of 2002 reinforces protection of persons who have been found guilty of a criminal offense by abolishing the death penalty and affirming in Article 1 that “no

~~one shall be condemned to such penalty and executed.”¹²²~~

~~Article 1 of Protocol No. 12 adopted in 2000 contains the prohibition of discrimination in the enjoyment of any right set by law on the same ground as those listed in Article 14. As such, Article 1 can be instrumental in bringing about the legal protection of any groups or their members who suffer denial of any human rights set by law, including those not expressly set out in the European Convention and its Protocols, as a result of factors and situations falling within the scope of the prohibited grounds of discrimination enumerated in Article 14 or a combination of them. As specified in paragraph 2 the discriminatory treatment should flow, in particular, from the conduct of any public authority.~~

~~Conclusively, the provisions of the Revised ESCR and the normative content of the ECHR and its Protocols as highlighted above confirm that the legal protection of vulnerable groups and their members is a prominent component of the scope of IHRL.~~

~~4.2 Human rights treaties adopted by the Organization of American States~~

~~At the Inter American level there is a rich constellation of human rights treaties relevant to the international protection of vulnerable groups and their individual members.~~

~~The leading instrument is the 1969 American Convention on Human Rights. Rooted in the concept that the “essential rights of men”¹²³ derive from “attributes of the human personality”¹²⁴ and the standards set out in the UDHR,¹²⁵ the Convention spells out civil and political rights, and two rights that, depending on how one categorizes human rights, can be characterized as economic rights: freedom from slavery and forced labor, and the right to property. Moreover, the Convention contains Article 26, a general provision requiring State parties to progressively realize rights implicit in the economic, social, educational, scientific and cultural standards set out in the Charter of the Organization of American States (OAS). The vagueness of Article 26 and difficulties in deriving ESCR related State obligations from the OAS Charter led in 1988 to the adoption of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador”), which is discussed below.¹²⁶~~

~~The American Convention applies to all persons who are within the jurisdiction of its State parties. This point is solemnly affirmed in paragraph 1 of Article 1 which also enshrines contracting States’ undertakings to respect and ensure Convention rights to those persons without discrimination based on race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth or any other social condition. Paragraph 1 of Article 1 elucidates the broad personal scope of application of the American Convention while contemplating, at the same time, specific legal protection for persons who are not able to enjoy the Convention rights on an equal footing with others because of certain physical characteristics they have, the language they speak, the political or religious beliefs they hold, their national or social origins, their socio-economic condition, any other type of social condition or combinations of these factors. As the non-discrimination clauses set out in the 1966 UN Covenants, paragraph 1 of Article 1 is strongly relevant to the legal protection of vulnerable groups and their individual members.¹²⁷~~

~~Further similarities between the American Convention and the two Covenants are evident in~~

~~those provisions of the Convention that refer to particular groups of persons. The legislative history of the Convention suggests that these references were incorporated as a result of the recognition that the groups and their members required special protection to rectify their deplorable situation, or because these persons had to be shielded from violations of rights originating from certain factors such as age, race and sex/gender. Hence, these provisions support the thesis that protection of vulnerable groups of persons is an integral component of IHRL. A pertinent example is Article 4 on the right to life which in paragraph 5 prohibits the imposition of the death penalty upon persons over the age of 70. Monroy Cabra has shown that, when paragraph 5 was drafted, the Inter American Commission on Human Rights made sure that older persons would fall within its personal scope because these individuals' rights to life requires enhanced protection due to their age.~~¹²⁸

~~Article 5 on the right to humane treatment deals with accused persons in paragraph 4 and requires their separation from convicted persons. Paragraph 5 additionally requires that minors "while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors." These paragraphs were incorporated in the text of Article 5 in an effort to:~~

- ~~a) improve the situation of detention centers in prospective State parties to the American Convention where accused persons were detained together with convicts; and~~
- ~~b) promote reforms of criminal justice systems in those countries to foster rehabilitation of minors.~~¹²⁹

~~Additionally, paragraph 2 of Article 5 mandates that all persons deprived of liberty shall be treated with respect for the inherent dignity of the human person. Another relevant provision is Article 7 which sets out extensive and important safeguards to prevent unlawful detention of any person deprived of liberty in paragraphs 4-6. As borne out by its drafting history, Article 7 features in the American Convention to counter disappearances, arbitrary detentions of persons in general and situations where detainees are not promptly tried.~~¹³⁰

~~Article 8 on the right to a fair trial, Article 9 on freedom from *ex post facto* laws and Article 11 on the right to compensation enshrine fundamental procedural and substantive guarantees that are specifically germane to the situation of every person accused or found guilty of a criminal offense. Their aim is to prevent wrongful conviction and miscarriage of justice.~~

~~Paragraph 5 of Article 13 on freedom of thought is relevant to the protection of ethnic, religious and national groups and their individual members in so far as it requires State parties to the American Convention to criminalize "any advocacy of national, racial, or religious hatred that constitute[s] incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin."~~

~~Other groups of persons who fall within the scope of specific provisions of the American Convention are women, children born out of wedlock, children in general, aliens lawfully present within the territory of a State party to the Convention and asylum seekers.~~

~~Paragraphs 2, 3 and 4 of Article 17 are concerned with the right to marry and bear special relevance to the situation of women. Their aim is to foster enjoyment of the right to marry between men and women on grounds of equality, avoid forced marriages and ensure that women enjoy family rights on an equal footing with men; paragraph 5 of Article 17 deals with children born out of wedlock and endeavors to eradicate discrimination against them by stating that domestic law should recognize equal rights for them and for those born in wedlock.¹³¹~~

~~Article 19 on the right of every child to the measures of protection required by his condition as a minor is particularly noteworthy. The Inter American Commission on Human Rights and the Inter American Court of Human Rights have made clear that the provision features in the American Convention for the specific purpose of countering children's vulnerability arising from their young age.¹³² This acknowledgment is particularly significant: it signals that the drafters of the Convention regarded children as a vulnerable group of persons deserving special protection under the terms of a specific Article of the Convention.~~

~~Finally paragraphs 6, 8 and 9 of Article 22 on freedom of movement specify requirements that must inform the expulsion of any alien lawfully present in the territory of a State party to the American Convention, or instances where deportations of aliens cannot be carried out. In this last regard, it should be noted that paragraph 8 is germane to specific categories of aliens in so far as it solemnly affirms that "[i]n no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions." Paragraph 7 of the same Article provides for the right to seek and be granted asylum in accordance with international and domestic legislation when one person is being pursued for political offenses or related common crimes.¹³³~~

4.2.1. The 1988 Protocol of San Salvador

~~The Protocol of San Salvador enshrines a wealth of provisions concerned with the ESCR of certain groups of persons. The first relevant example that illustrates this point is Article 7 on just, equitable and satisfactory conditions of work. This provision prohibits in paragraph (f) night work and all types of work which jeopardize the health, safety or morals of persons under 18 years of age. Paragraph (f) also requires that the work schedule of persons under 16 years of age shall be subordinated to the Protocol provisions regarding compulsory education.~~

~~Paragraph 1 of Article 9 on the right to social security specifically protects old persons and those with disabilities for the specific purpose of ensuring them a dignified existence; paragraph 2 requires that the right to social security of women covers paid maternity leave before and after childbirth. Article 10 on the right to health affirms in paragraph 2 (f) that State parties to the Protocol agree to satisfy the health needs of "those whose poverty makes them the most vulnerable." It is submitted that Article 10 labels the poor as the most vulnerable because, as a result of their low income status, they encounter difficulties in accessing adequate healthcare that render them highly susceptible to ill health. Thus, the poor's vulnerability appears to be understood as severe exposure to illness.~~

~~Article 13 on the right to education expressly mentions persons with disabilities in paragraph 3 (e) and mandates the establishment of special education for them. Article 15 on~~

right to the formation and the protection of families spells out in paragraph 3 (a), (b) and (c) State obligations to provide special care to mothers during a reasonable period before and after childbirth; to guarantee adequate nutrition for children at the nursing stage and during school attendance years; and to provide special protection to adolescents in order to ensure the full development of their physical, intellectual and moral capacities.

Finally, Articles 16, 17 and 18 detail the scope of the right to special protection for children, the elderly and persons with disabilities.¹³⁴ These articles suggest that children and the elderly are entitled to special protection due to the unique needs arising because of their age; whereas persons with disabilities must enjoy protection enabling them to attain the greatest possible development of their personality. Article 16 also states that every child has the right to free and compulsory primary education. The implementation of this right shall be harmonized with paragraph (f) of Article 7 applying to working persons under 16 years of age and requiring that their education takes precedence over any employment activities.

The San Salvador Protocol's particular concern for the situation of children, the elderly, persons with disabilities, mothers and the poor provides further evidence of how the protection of vulnerable groups and their members is a pivotal component of the scope of IHRL. The wording of the Protocol's provisions suggests that the groups at stake are entitled to enhanced socio-economic protection, because as a result of specific circumstances of their predicaments, they may not adequately enjoy ESCR or may be deprived of equal and effective access to them. These circumstances include essentially special needs originating from youth or old age, disability or motherhood. The Protocol expressly characterizes the poor as most vulnerable to ill health as a result of the great difficulties they encounter in accessing healthcare due to their socio-economic situation.

4.2.2. Group specific treaties

Like the UN, the OAS has adopted various treaties specifically applying to certain groups of persons. Particularly notable are those on the rights of women and persons with disabilities.

The 1994 Inter American Convention on the Prevention, Punishment and Eradication of Violence against Women, "Convention of Belém do Pará," aims to protect the rights of women and eliminate violence against them.¹³⁵ Violence against women is defined in Articles 1 and 2 as a form of gender based discrimination causing death or physical, sexual or psychological harm to women and occurring in both the public or private spheres. Articles 4, 5 and 6 (a) of the Convention entitle all women to the full exercise of civil, political and ESCR, and the right to be free from all forms of discrimination. The Convention also enshrines in Articles 3 and 6 (b) rights that could be regarded as "new rights": the right of every woman to be free from violence in both the public and private spheres, and women's right to be valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination.¹³⁶

Corresponding State obligations require adoption of wide-ranging measures to root out violence against women (as described in Chapter III of the Convention). Article 9 is especially noteworthy. It requires that when adopting these measures State parties "take special account of the vulnerability of women to violence by reason of, among others, their race or ethnic

background or their status as migrants, refugees or displaced persons.” Article 9 additionally requires that “[s]imilar consideration shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socioeconomically disadvantaged, affected by armed conflict or deprived of their freedom.” Article 9 singles out groups of women who are or may be disproportionately affected by gender based violence. The word *vulnerability* appears to mean that these women are more exposed to gender based violence, or more likely to experience it, than women in general due to certain factors such as ethnicity, age, migrant/refugee status or displacement.

Finally, a brief description of the 1999 Inter American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities is in order.

As stated in the third and fifth paragraph of the Preamble, the Convention is predicated upon a concern about discrimination to which people are subject because of their disability and the need to eliminate this in all its forms and manifestations. Keeping up with these premises, the Convention defines disability based discrimination in paragraph 2 of Article I and spells out relevant State obligations in Articles III, IV and V. Paragraph 2 of Article I states that disability based discrimination is “any distinction, exclusion, or restriction based on a disability, record of disability, condition resulting from a previous disability, or perception of disability, whether present or past, which has the effect or objective of impairing or nullifying the recognition, enjoyment, or exercise by a person with a disability of his or her human rights and fundamental freedoms.”

The Convention enshrines State parties’ undertakings to apply a holistic approach when responding to discrimination against persons with disabilities through the adoption of measures that include legislative measures, measures in the political field as well as in the fields of transportation, communication and healthcare.¹³⁷ In an effort to boost the advancement of persons with disabilities, paragraph 1 of Article V obligates States, to the extent that it is consistent with their respective national laws, to promote participation by representatives of organizations of persons with disabilities, non-governmental organizations working with these persons and persons with disabilities themselves, in developing, executing and evaluating measures and policies adopted to implement the 1999 Convention. The UNCRPWD contains paragraph 3 of Article 4 and paragraph 3 of Article 33 which, like Article V (1), aim to promote the active participation of persons with disabilities in the process that leads to the realization of their international human rights. All provisions are welcome because they are predicated on the assumption that persons with disabilities are makers of their own destiny and must have a say in all matters that affect their interests.

4.2.3. Latest Inter American human rights conventions

In 2013 the OAS adopted three additional human rights conventions especially relevant here: the Inter American Convention against Racism, Racial Discrimination and Related Forms of Intolerance; the Inter American Convention against All Forms of Discrimination and Intolerance; and the Inter American Convention on Protecting the Human Rights of Older Persons.

The Inter American Convention against Racism, Racial Discrimination and Related Forms

~~of Intolerance, adopted on 5 June 2013, applies to persons and/or groups who experience different forms of discrimination and related intolerance, hampering effective enjoyment of international rights based on race, color, lineage or national or ethnic origin. Paragraph 1 of Article 1 characterizes racial discrimination as “any distinction, exclusion, restriction, or preference, in any area of public or private life, the purpose or effect of which is to nullify or curtail the equal recognition, enjoyment, or exercise of one or more human rights and fundamental freedoms enshrined in the international instruments applicable to the States Parties.” Paragraph 1 ends by clarifying that racial discrimination “may be based on race, color, lineage, or national or ethnic origin.”¹³⁸ The Convention is also concerned with individuals and groups subjected to more complex forms of racial discrimination such as multiple or extreme forms of racism, discrimination and intolerance “driven by a combination of factors such as race, color, lineage, national or ethnic origin, or others recognized in international instruments.”¹³⁹ Clarification of the groups that fall within the scope of the Convention is offered in paragraph 6 of the Preamble stating that victims of racism, racial discrimination and other related forms of intolerance in the Americas include people of African descent, Indigenous Peoples, other racial and ethnic groups or minorities or groups which because of their lineage or national or ethnic origin are affected by such manifestations.~~

~~The Convention sets forth in Article 2 that every human being has the right to equal protection against all types of racial discrimination and intolerance in the public or private spheres. Article 3 also recognizes that every human being has the right to the equal exercise and protection, on both individual and collective levels, of all human rights and fundamental freedoms enshrined in domestic laws and international treaties binding on the State parties. How prospective State parties will actualize these rights is articulated in Chapter III enshrining, *inter alia*, an undertaking to prevent, eliminate, prohibit and punish all instances of racial discrimination.¹⁴⁰~~

~~Interestingly, paragraph 6 of Article 1 defines racial intolerance as marginalization and socio-political exclusion of vulnerable groups, or violence against them. Further mention of vulnerable groups can be found in Article 4 (viii). The provision deals with the State undertaking to prevent, eliminate and punish racially discriminatory restrictions on the enjoyment of human rights recognized at the international and regional level and in the jurisprudence of international and regional human rights courts, particularly those applicable to “minorities or groups that are in vulnerable situations and subject to racial discrimination.” In light of the overall textual setting of paragraph 6 of Article 1 and Article 4 (viii) it is concluded that the provisions at stake use the wording “vulnerable groups” and “groups that are in vulnerable situations” to refer to:~~

- ~~a) racial, ethnic and national groups, or groups of a certain descent, that are affected by severe forms of racial intolerance culminating in racial violence against them and exclusion; and~~
- ~~b) ethnic/racial groups labeled as vulnerable by the Inter American Court of Human Rights and the European Court of Human Rights.~~

~~Based on the analysis that is carried in Chapters 5 and 6 these groups include: migrant~~

~~children belonging to racial and ethnic groups; undocumented/stateless/unaccompanied migrant children belonging to racial and ethnic groups; migrants belonging to a certain ethnic group; stateless persons of a certain descent; Indigenous Peoples and persons of Romani origin.~~

~~The Inter American Convention against All Forms of Discrimination and Intolerance complements the above Convention against Racism, Racial Discrimination and Related Forms of Intolerance by affording protection to persons and groups that suffer discrimination in the enjoyment of human rights other than discrimination based on race, color, lineage or national or ethnic origin. As specified in paragraphs 1 and 3 of Article 1, the discriminatory treatment covered by the Inter American Convention against All Forms of Discrimination and Intolerance may be based on any of the following grounds or a combination of two or more of them: nationality; age; sex; sexual orientation; gender identity and expression; language; religion; cultural identity; political opinions or opinions of any kind; social origin; socioeconomic status; educational level; migrant, refugee, repatriate, stateless or internally displaced status; disability; genetic trait; mental or physical health condition including an infectious contagious condition or debilitating psychological condition; or any other condition. The rights the Convention sets out in Articles 2 and 3 of Chapter II entitle everyone to:~~

- ~~a) equal protection against any form of discrimination and intolerance in any sphere of life, public or private; and~~
- ~~b) equal exercise and protection, at individual and collective levels, of all human rights and fundamental freedoms enshrined in domestic laws and international treaties binding on State parties.~~

~~Like the Convention against Racism, Racial Discrimination and Related Forms of Intolerance, the Inter American Convention against All Forms of Discrimination and Intolerance requires undertakings to prevent, eliminate, prohibit and punish all forms of discrimination and intolerance (in Chapter III). The Convention refers to “groups in conditions of vulnerability” and “groups that are in vulnerable situations” in paragraph 5 of Article 1 defining intolerance, and Article 4 (viii) prohibiting discriminatory restriction of international human rights. These provisions appear to draw upon paragraph 6 of Article 1 and Article 4 (viii) of the Convention against Racism, Racial Discrimination and Related Forms of Intolerance, and reproduce their normative content almost *verbatim*. Based on the overall textual setting of paragraph 5 of Article 1 and Article 4 (viii), this author concludes that the wording “groups in conditions of vulnerability” and “groups that are in vulnerable situations” refers to:~~

- ~~a) groups that are affected by severe forms of intolerance such as violence against them and exclusion owing to one or more than one of the prohibited grounds listed in paragraph 1 of Article 3; and~~
- ~~b) groups affected by discrimination and labeled as vulnerable by the Inter American Court of Human Rights and the European Court of Human Rights.~~

~~As seen in Chapters 5 and 6, these groups of persons include, among others: children, migrant~~

~~children, undocumented/stateless/unaccompanied migrant children; migrants; women, persons with disabilities, homosexuals and persons living with HIV/AIDS.~~

~~Finally, the Inter American Convention on Protecting the Human Rights of Older Persons, adopted on 15 June 2013, constitutes the latest example of standard setting at regional level, designed to rectify discrimination affecting specifically a certain group of persons. Its main aims are to protect older persons from age based discrimination and enhance their full participation in society.¹⁴¹ The Convention expressly defines age based discrimination in old age as a form of distinction, exclusion or restriction based on age preventing full enjoyment of rights, and recognizes the notion of multiple discrimination against older persons as any restriction or distinction towards an older person based on two or more discrimination factors.¹⁴² The Convention characterizes an older person as a person aged 60 or older, except where legislation has determined a minimum age that is younger or older, provided that it is not over 65.¹⁴³ In a break through move the Convention makes a distinction between “ageing” and “old age”. The former is “a gradual process that develops over the course of life and entails biological, physiological, psychosocial, and functional changes with varying consequences,”¹⁴⁴ the latter is the social construct of the last stage of life.¹⁴⁵ The Convention explicitly requires adoption of affirmative action measures¹⁴⁶ and reformulates existing rights to clarify what they mean and entail for older people. Article 6 spells out the right to life as an entitlement to live with dignity in old age and on an equal basis with others; Article 12 on the right to receive long term care appears to be derivative of the rights to health and to an adequate standard of living in that it entitles older persons to a system of care that promotes their health, and provides food, water, clothing and housing. Article 24 (a) on the right to housing is specifically concerned with the situation of older persons with disabilities and restricted mobility: it sets out that housing should be built and progressively adapted for it to be architecturally accessible and tailored to the needs of the older people in question. Article 31 on the right of access to justice provides, inter alia, that older persons have access to justice without discrimination of any kind and that judicial action must be particularly expedited in instances where the health or life of an older person may be at risk.~~

~~That the Convention aims to change the way in which society sees older people is confirmed in heading (c) of Article 32 in which States agree to adopt programs that make the public aware of the aging process and to involve older persons and their organizations in the design and creation of such programs. Heading (e) includes an undertaking by State parties to recognize the experience, wisdom, productivity and contribution to development that older people offer to society as a whole. Another powerful example is Article 7: it conveys the idea that older people should be regarded as autonomous and independent individuals. Accordingly, Article 7 entitles older people to make decisions, to determine their life plans and “to lead an autonomous and independent life in keeping with their traditions and beliefs on an equal basis, and to be afforded access to mechanisms enabling them to exercise their rights.”~~

~~The Convention also mentions older persons who are vulnerable or in situations of vulnerability in Article 5 on equality and non discrimination on the ground of age, Article 20 (a) and (e) on the right to education, Article 23 on the right to property and Article 24 on the right to housing. The answer to the question of who these persons are is provided in Article 5. Article 5 contains a long and non exhaustive list of vulnerable older people which includes:~~

women, persons with disabilities, persons of different sexual orientations and gender identities, migrants, persons living in poverty or social exclusion, people of African descent, persons pertaining to Indigenous Peoples, the homeless, people deprived of their liberty, persons belonging to traditional peoples and persons who belong to ethnic, racial, national, linguistic, religious and rural groups. State obligations to be performed towards the above vulnerable older persons include the development of specific approaches for them, when enacting policies and laws in order to:

- enhance their access to education and training;
- eradicate illiteracy among them;
- eliminate discrimination against them in the exercise of the right to property; and
- promote their rights to housing and land as a matter of priority.¹⁴⁷

The OAS treaties specifically applying to women, persons with disabilities, groups and individuals affected by various forms of discrimination and older persons eloquently confirm that protection of vulnerable groups and their members is an integral component of IHRL.

4.3 African human rights instruments

Human rights instruments adopted at the African level highlight specific concerns for certain groups and their individual members. These instruments corroborate the thesis that protection of vulnerable groups of persons is an essential component of the general scope of IHRL.

The 1985 African Charter on Human and Peoples' Rights is the first relevant example. Article 6 is germane to the situation of people who have been arbitrarily arrested or detained. Paragraph 1 (b), (c) and (d) and paragraph 2 of Article 7 enshrine fundamental fair trial guarantees that must be enjoyed by persons accused of a criminal offense to shield them from wrongful convictions and miscarriage of justice.

Also, the African Charter contains paragraph 3 of Article 12 which is germane to the situation of asylum seekers: that provision sets out the right of every individual who is persecuted to seek and obtain asylum in other countries in accordance with domestic and international law. Paragraphs 4 and 5 complement protection of non-nationals by regulating the expulsion of any non-national legally admitted in the territory of a State party to the Charter, and through an explicit prohibition of mass expulsion of non-nationals belonging to national, racial, ethnic or religious groups.

Paragraphs 3 and 4 of Article 18 deal specifically with the situation of four groups of persons: women, children, the elderly and persons with disabilities. Paragraph 3 requires State parties to the Charter to eliminate discrimination against women and to protect internationally recognized women and children's rights. Paragraph 4 sets out the right of the aged and disabled to special measures of protection to satisfy their physical or moral needs.

Articles 19-24 are particularly germane to the situation of racial groups and Indigenous Peoples.¹⁴⁸ Article 19 entitles these groups to equality in the enjoyment of rights whereas Article 20 enshrines all peoples' right to existence and to political and socio-economic self-determination. Article 21 contains peoples' right to freely dispose of their wealth and natural

~~resources and details how this right should be duly exercised and implemented. Article 22 enshrines peoples' right to their economic, social and cultural development, whereas Articles 23 and 24 deal, respectively, with peoples' right to peace and security and the right to a general satisfactory environment favorable to their development.~~¹⁴⁹

~~Importantly, the African Charter sets out in Article 2 an anti discrimination clause entitling everyone to the enjoyment of Charter rights without any distinction based on race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status. This provision can be of relevance to the situation of any vulnerable group of persons, or their members, in cases where they experience unlawfully different treatment in the exercise of Charter rights based on any of the above grounds, a ground implied in the ground "any status" and a combination of two or more of these grounds. The encompassing scope of Article 2 has to be attributed, as for the non-discrimination clauses of the 1966 Covenant, to the prohibited discrimination grounds it lists. They constitute factors and circumstances that detrimentally impact the situation of certain persons and culminate in severe and undue denial of rights. The ground "any status" is even more far reaching since it can be construed to comprise elements other than those expressly listed in Article 2 that may generate serious and undue deprivation of rights. Groups of persons that can be protected under Article 2 may include those expressly mentioned in the Charter too, such as, for instance, women and ethnic groups in all those instances in which they are exposed to discrimination based on sex and ethnicity and other forms of discrimination falling within the scope of Article 2.~~

~~The legal protection of women is reinforced by the 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, which was developed to tackle obstacles to the realization of women's rights in Africa and to further women's emancipation.~~¹⁵⁰

~~The Protocol provides for women's civil and political rights and ESCR. It also reformulates some of these rights to better address the situation of women. A good example is Article 14 which sets out women's right to health and details their reproductive rights such as the rights to control their fertility and to decide whether to have children in paragraph 1 (a) and (b).~~

~~Article 2 of the Protocol spells out modalities through which States should realize women's equality. Paragraph 2 contains State parties' commitment to change cultural practices and attitudes which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotypical roles for women and men.~~

~~The Protocol affords special legal protection to certain categories of women in various provisions such as Articles 4, 5, 10, 11, 13, 14, 18, 19 and 20. These groups of women include:~~

- ~~• women victims of violence;~~
- ~~• trafficked women;~~
- ~~• women most at risk of being trafficked;~~
- ~~• pregnant women;~~
- ~~• women who have been subjected to harmful practices and women at risk of such exposure;~~
- ~~• asylum seeking and refugee women;~~

- ~~women affected by armed conflict;~~
- ~~women working in the informal sector;~~
- ~~women working at home;~~
- ~~rural women;~~
- ~~Indigenous women;~~
- ~~women living in poverty; and~~
- ~~widows.~~

~~The Protocol also deals with the situation of the girl child. To provide an example, paragraph 1 (b) of Article 12 on the right to education requires State parties to protect the girl child “from all forms of abuse, including sexual harassment in schools and other educational institutions.” Paragraph 2 (c) requires States to take positive action to promote and retain enrollment of girls in schools and training institutions.~~

~~Articles 22, 23 and 24 oblige States to adopt and implement special measures to ensure protection of elderly women, women with disabilities and women in distress. Women in distress, as provided for in Article 24, include poor women, women heads of families, women from marginalized population groups, pregnant or nursing women and women in detention.¹⁵¹~~

~~The 1990 African Charter on the Rights and Welfare of the Child addresses the problematic situation of African children due to factors such as armed conflicts and natural disasters, exploitation, hunger and socio-economic, cultural, traditional and developmental circumstances.¹⁵² An additional rationale for the adoption of the Charter is laid down in its fifth preambular paragraph which acknowledges that children, as a result of the needs of their physical and mental development may require particular care as well as legal protection in conditions of freedom, dignity and security.~~

~~The Charter applies to every person below the age of 18 years (Article 2), and makes clear, in paragraph 1 of Article 4, that the best interests of the child must be the primary consideration that must inform the legal protection State parties afford to children under their jurisdiction. Paragraph 1 of Article 4 is therefore more progressive than paragraph 1 of Article 3 of UNCRC since this provision states that the best interests of the child must be a primary consideration informing actions regarding children.¹⁵³~~

~~Paragraph 2 of Article 4 is especially noteworthy because of its empowering reach. It sets out the right of children capable of communicating their views to be heard in all judicial or administrative proceedings affecting them. Paragraph 2 clarifies that the child can be heard directly or through an impartial representative as a party to the proceedings. Relevant authorities have an obligation to take the child’s views into consideration in accordance with the applicable domestic legislation.~~

~~The Charter provides for other rights which include: the child’s right to life set out in Article 5 and requiring States to ensure the survival and development of the child; the child’s right to a name and nationality (Article 6); the child’s right to education (Article 11); and the child’s right to leisure and cultural life (Article 12). Articles 15, 16, 27, 28 and 29 obligate State parties to protect the child from forced labor, abuse and torture, sexual exploitation, use of narcotics and trafficking in human beings and abduction. Some Charter provisions deal with the predicament of certain groups of children and spell out relevant State obligations.~~

~~Examples include: Articles 13 on children with disabilities; paragraph 2 (a) of Article 17 on protection of children deprived of their liberty against torture and other ill treatment; paragraph 1 (b) of Articles 21 on children affected by harmful traditional practices due to their sex; and Articles 23 and 30 on refugee children and children of imprisoned mothers.~~

~~The legal protection the Charter affords to children within the jurisdiction of its State parties is reinforced by Article 3 which requires that every child enjoys the Charter rights without discrimination based on grounds that are the same as those detailed in Article 2 of the African Charter on Human and Peoples' Rights. Article 3 is highly relevant to the protection of vulnerable groups of persons. Article 3 is in fact applicable to a myriad of situations involving groups of children, or individual children, who are deprived of rights due to factors that fall within the scope of the prohibited grounds of discrimination it lists or a combination of them.¹⁵⁴~~

~~Finally, in 2009 the African Union adopted the Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention). As the Preamble states, the Convention seeks to tackle the gravity of the situation of internally displaced persons (IDPs) in Africa and the specific vulnerability of these persons.¹⁵⁵ While such vulnerability is not elucidated, internally displaced persons (IDPs) are defined in Article 1 (k) as "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human made disasters, and who have not crossed an internationally recognized State border." Internal displacement is defined, in heading (i), as "involuntary or forced movement, evacuation or relocation of persons or groups of persons within internationally recognized state borders."~~

~~The Convention details State obligations to prevent arbitrary internal displacement and to provide protection against it to affected persons and communities in Article 4. Articles 5, 6 and 9 set out protective duties that are incumbent on State parties, international organizations and humanitarian agencies. These duties are especially relevant during internal displacement and include provision of humanitarian relief. Article 7 regulates the activity of armed groups by prohibiting members of these groups from engaging in conduct that leads to arbitrary internal displacement, harms IDPs and jeopardizes their protection and assistance. Article 7 makes clear that it does not purport to legitimize or accord legal status to armed groups. Article 8 details the role of the African Union in situations of internal displacement.~~

~~Articles 10, 11 and 12 are concerned, respectively, with:~~

- ~~a) State parties' obligation to prevent displacement induced by development projects carried out by private and public actors;~~
- ~~b) obligations relating to sustainable return, local reintegration and relocation; and~~
- ~~c) the obligation to provide remedies to IDPs.~~

~~Paragraphs 1, 2 and 3 of Article 13 on registration and personal documentation are further evidence of how the Convention is specifically tailored to the situation of IDPs. Under the terms of these paragraphs States have to create and maintain an updated register of IDPs within their jurisdiction or effective control; and to issue personal documentation necessary for the enjoyment of rights to IDPs, in cases where those documents were lost or destroyed during~~

~~displacement, without imposing unreasonable conditions. Remarkably, the Convention is concerned with the predicament of specific groups of IDPs. For example, Article 9, on the obligations of State parties relating to protection and assistance during internal displacement, deals in paragraph 2 (c) and (d) with the specific protection needs of the following IDPs: unaccompanied or separated children, female heads of households, expectant mothers, mothers with children, persons with disabilities, the elderly, the sick and women in general.~~

~~Finally, it is noteworthy that paragraph 5 of Article 5 requires State parties to the Kampala Convention to assess the specific vulnerabilities of IDPs in cooperation with international organizations and agencies. As the language of the Preamble, paragraph 5 of Article 5 does not make it easy to understand those vulnerabilities. This author concludes, reading that paragraph together with the overall text of the Kampala Convention and its purpose and object, that the vulnerabilities arise from the traumatic experiences IDPs go through during their internal displacement and that they amount to violations of human rights. Addressing such vulnerabilities requires that all stakeholders under the Kampala Convention, as a minimum, respect IDPs' rights; that contracting States protect these rights by implementing the Convention in good faith, including through a holistic protective strategy ensuring, *inter alia*, safety to IDPs without discrimination of any kind; and that these persons have access to shelter, food, water, education, healthcare and social services.¹⁵⁶~~

5. Conclusions

The legal protection of vulnerable groups and their individual members is an essential component of the *ratione personae* and *materiae* of IHRL.

The drafting of the UDHR, the moment that marked the birth of IHRL, indicates that the *raison d'être* of this pivotal document should be assigned to the highly deplorable human rights situation of certain vulnerable groups. Prepared against the background of the atrocities the Nazis committed against the Jews, the Roma and members of the political opposition before and during World War II, the Declaration constitutes the dramatic effort of the newly established UN to universalize human rights to avoid certain groups of persons being singled out in future by the State for differential treatment, amounting to egregious violation of rights, owing to factors such as ethnicity and race. The UDHR therefore embodies a comprehensive list of human rights that everyone possesses *qua* human being and is entitled to without discrimination based on race or political opinion. And the Declaration contains provisions specifically germane to the situation of certain persons that in the view of its drafters encountered particular difficulties in the exercise of human rights. These groups include: women, mothers, members of linguistic minorities, children in general and children born out of wedlock and persons holding disadvantaged socio-economic status in society.

UN human rights treaties adopted after the proclamation of the UDHR by the UN General Assembly, and which translate the Declaration rights “into legal form as treaties,”¹⁵⁷ are germane to the situation of vulnerable groups of persons too.

The first glaring example is the ICERD which is concerned with instances where certain groups and their individual members experience or are at risk of experiencing discrimination in the enjoyment of human rights because of their race or ethnicity. The Convention enumerates

civil, political and ESCR that ethnic or racial groups and their members must be able to enjoy without racial discrimination. The Convention may require, in certain instances, adoption of affirmative action measures to speed up the achievement of the equal enjoyment of rights by the above persons. The Convention provides that racial or ethnic groups and their members must have access to justice if they have suffered violations of the Convention rights based on their race or ethnicity. The Convention protects racial and ethnic groups from racially motivated violence by requiring State parties to criminalize racist propaganda and acts amounting to racial violence domestically.

The 1966 Covenants are further evidence that IHRL incorporates as one of its main components protection of vulnerable groups and their individual members. Both treaties contain provisions concerned with specific groups of persons. This is because their drafters regarded the human rights situation of these persons to be particularly problematic or potentially highly worrisome warranting enhanced legal protection.

The ICCPR enshrines Articles 3, 23 and 27 which are germane to the situation of women, whereas Article 27 applies to ethnic and linguistic minorities and their individual members. These provisions feature in the Covenant in so far as its drafters considered women and ethnic and linguistic minorities in need of special protection against discrimination affecting enjoyment of their civil and political rights on account of, respectively, sex and ethnicity/language. Article 24 of the Covenant specifically applies to children because its drafters believed that any child requires special protection owing to her young age. Other groups of individuals afforded specific protection under the ICCPR are, in accordance with Articles 9, 10, 13 and 14:

- persons at risk of being deprived of their liberty unlawfully;
- persons deprived of their liberty;
- migrants;
- persons charged with a criminal offense; and
- convicts.

The Covenant on ESCR contains Articles which aim to protect women from discrimination based on their sex in the enjoyment of all Covenant rights, in the workplace and within the family. The leading provisions are Articles 3, 7 (a) (i), and paragraph 1 of Article 10. Paragraph 2 of Article 10 affords special social protection to mothers and working mothers. Children and adolescents are protected under Article 10, too, as a result of the specific needs arising because of their young age and their exposure to child labor. Paragraph 3 of Article 10 requires State parties to the Covenant on ESCR to adopt relevant special measures of protection and shield them from exploitation. Both the ICCPR and the Covenant on ESCR enshrine anti-discrimination clauses, respectively, paragraph 1 of Article 2 and paragraph 2 of Article 2, that are especially significant when it comes to the protection of vulnerable groups and their members. These provisions not only universalize the enjoyment of the rights the Covenants set out by mandating that everyone exercises them without discrimination of any kind. The provisions particularize human rights protection by applying to any groups or persons who experience discrimination, based on any of the prohibited discrimination grounds

they enumerate or a combination of them, in the enjoyment of the Covenant rights.

The ICEDAW, the UNCRC, the UNCRPWD and the Migrant Workers Convention are notable UN human rights treaties which have been adopted to improve the situations of certain groups of persons facing, more often than not, enormous challenges and difficulties in the exercise of their human rights. The UNCRC and the Migrant Workers Convention are especially noteworthy because they are predicated upon the unique vulnerability of children and migrants, thereby highlighting that notions of vulnerability are determinative of and taken into account during international standard-setting exercises by governments. As borne out by its legislative history, the UNCRC was drafted because UN member States expressly recognized that children are a vulnerable group exposed to exploitation and violations of rights to a greater extent than adults. The Migrant Workers Convention explicitly refers to the vulnerability of migrant workers and members of their families, and considers it a main factor that has warranted extending international legal protection to them. The Preamble of the Convention conveys the idea that migrant workers and their families are vulnerable because their situations, from a human rights point of view, are more difficult than those of other persons, i.e. workers who are nationals of the, workers who are nationals of the State of employment. The vulnerability of the migrant workers and their families is ascribed, essentially, to their absence from their State of origin and the difficulties they may encounter arising from their presence in the State of employment. The Migrant Workers Convention represents the UN response to such vulnerability. The ICEDAW, the UNCRC, the UNCRPWD and the Migrant Workers Convention help assert the argument that protection of vulnerable groups and their members is a prominent component of the scope of IHRL.

The ICEDAW, the UNCRC and the UNCRPWD are revolutionary legal texts in many respects. The ICEDAW spells out complex State obligations to be fulfilled for the purposes of ensuring that women exercise rights on an equal footing with men in all parts of society. The Convention requires State parties to eradicate any form of discrimination affecting women and hampering their advancement, including particularly insidious and pervasive instances of *de facto* discrimination. The UNCRC and the UNCRPWD restate and reformulate human rights such as those contained in the two UN Covenants of 1966 to better meet the unique protection needs of children and people with disabilities. In this regard the UNCRC goes even further: it appears to have created new rights that apply to children, such as the right to protection from phenomena that disproportionately affect them with long lasting and adverse consequences affecting their physical and psychological development, i.e. all types of violence and exploitation. The UNCRPWD reformulates the rights set out in the two UN Covenants to spell out how they apply to persons with disability without discrimination based on disability and on an equal basis with others. Equally important, the three Conventions at hand aim to modify the way in which society conceives and deals with women, children and persons with disabilities. The ICEDAW purports to change women's role in society at large in order to secure their true advancement. The UNCRC goes against perceptions of children that see them as passive subjects in need of protection by adults and the State. The UNCRC emancipates children and makes them right holders who must be able to enjoy all the Convention rights and to have a say, where they are able to form their own views, in all matters that affect them. The UNCRPWD recognizes that society should be remodeled to enable persons with disabilities to effectively

and fully exercise their rights. Under the Convention, persons with disabilities are rights holders who should meaningfully participate in the implementation of their internationally recognized rights by competent authorities. The three Conventions also incorporate provisions dealing with the rights and special protection needs of particular groups of women, children and persons with disabilities. The ICEDAW spells out specific State obligations to be performed towards rural women in Article 14 thereby indicating that these individuals are disproportionately affected by gender and sex-based discrimination, and that they are in need of greater legal protection than other women. The UNCRC sets out provisions covering groups of children who encounter or may encounter greater difficulties in enjoying their rights than other children in comparable situations. Relevant examples include:

- Article 20 on children deprived of their family environment;
- Article 30 on children belonging to minority groups; and
- Article 37 on children deprived of their liberty.

The UNCRPWD contains provisions such as Articles 6, 7 and paragraph 2 (b) of Article 28 dealing with the unique protection needs of women, children and older people with disabilities.

The analysis of the human rights treaties adopted at the regional level offers further elements to show that IHRL incorporates as an integral component the protection of vulnerable groups of persons and their members. At the European level the 1996 Revised ESC contains multiple provisions detailing enhanced socio-economic protection relevant to specific groups such as persons with disabilities, children and young persons, mothers, employed women, the elderly and migrant workers and their families.

The ECHR and its Protocols, the American Convention on Human Rights, the Protocol of San Salvador and the African Charter on Human and Peoples' Rights enshrine a myriad of provisions that apply to groups whose human rights situation requires special attention and for the purpose of shielding them from violation of their rights. Examples of these persons include: persons deprived of liberty, women, individuals charged with a criminal offense, the elderly, children and persons with disabilities. Among the provisions at hand, Article 19 of the American Convention on Human Rights, on the right of every child to measures of protection, is especially noteworthy. It features in the American Convention as a result of the acknowledgment of the specific vulnerability of children arising from their young age. On the other hand, Article 13 of the Protocol of San Salvador explicitly labels the poor as a vulnerable group, because they are particularly exposed to ill health as a result of their socio-economic situation. Article 19 of the American Convention and Article 13 of the Protocol of San Salvador further confirm the point that notions of vulnerability influence international standard-setting and are taken into account by States when engaging in it. Also, it should not be forgotten that the ECHR, the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights (ACHPR) can provide far-reaching protection to any vulnerable groups and their individual members in instances where these persons suffer discrimination in the enjoyment of rights falling within the scope of their anti-discrimination clauses.

The Convention of Belém do Pará, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, the African Charter on the Rights and Welfare of the Child and the Kampala Convention are an additional token of the specific concern of IHRL for vulnerable groups. The Conventions reflect a particular preoccupation with the severe discrimination suffered by women and persons with disabilities, the special protection needs of children flowing from their young age and the unique needs of IDPs resulting from what they experience during displacement. These Conventions also provide enhanced protection to sub-groups of women, children and IDPs thereby highlighting the fact that the situation of vulnerable groups is not homogeneous and that there are members of these groups that are affected by violations of human rights to a greater extent than other group members. The provisions of the ICEDAW, UNCRC and UNCRPWD that deal with certain groups of women, certain children and certain persons with disabilities further substantiate this inference. Article 9 of the Convention of Belém do Pará deserves special mention since it requires State parties to take into account the vulnerability of certain women to disproportionate exposure, both actual or potential, to gender-based violence due to factors such as ethnicity, migrant/refugee status or displacement. Article 9 can, therefore, be clustered together with the UNCRC, the Migrant Workers Convention, Article 19 of the ACHR and Article 13 of the Protocol of San Salvador. It validates the idea that notions of vulnerability are taken into account by States when engaging in international standard-setting.

The scope of the three Inter-American Conventions adopted in 2013 confirms that IHRL is concerned with the protection of vulnerable groups and their individual members. These human rights treaties apply to racial, ethnic and national groups, as well as their members, in so far as they experience discrimination based on race, descent, national origin and ethnicity, persons and groups which suffer various forms of discrimination other than discrimination based on race, national origin and ethnicity and older persons *qua* persons affected by age-based discrimination. Remarkably, the Conventions explicitly refer to “vulnerable groups” thereby indicating that these terms are increasingly becoming part of the international human rights lexicon. The 2013 Inter-American Convention on Racism, Racial Discrimination and Related Forms of Intolerance refers to vulnerable ethnic, racial and national groups as groups that experience severe forms of racial intolerance in the form of socio-political exclusion based on race/ethnicity/national origin and racially motivated violence. Similarly, the Inter-American Convention Against All Forms of Discrimination and Intolerance refers to groups in conditions of vulnerability such as those subjected to severe forms of intolerance (e.g. violence and socio-political exclusion). Both Conventions recognize that groups that are in vulnerable situations also include groups labeled as vulnerable by the Inter-American Court of Human Rights and the European Court of Human Rights. To provide some examples: migrant children belonging to racial and ethnic groups, the Roma, women, persons living with HIV/AIDS and Indigenous People.

The 2013 Inter-American Convention on Protecting the Human Rights of Older Persons provides a long list of vulnerable older persons in Article 5 on equality and non-discrimination. It suggests that the vulnerability of these persons is associated with serious and complex forms of unlawful differential treatment affecting their enjoyment of rights. State

obligations to be performed towards these vulnerable older persons entail the development of specific approaches for them when enacting policies and laws. Vulnerable older persons encompass (albeit in a list that is non-exhaustive): women, persons with disabilities, persons of different sexual orientations and gender identities, migrants and persons living in conditions of poverty or social exclusion.

Before concluding, an important caveat should be made. To maintain that a given UN or regional human rights treaty contains a provision that is relevant to the situation of a vulnerable group and its members is intended to mean two main things. First, all the rights and protective guarantees that the provision spells out should be enjoyed by every individual member of the vulnerable group. This is because IHRL provides for rights that are essentially individual rights. Second, the provision is instrumental to the general protection of the vulnerable group because it requires implementation of legislative and other measures intended to benefit all the persons making up the group by virtue of the fact that these individuals encounter or may encounter the same difficulties in their enjoyment of human rights. Thus, to maintain that a certain UN or regional treaty contains provisions that are especially relevant to the situation of vulnerable groups and their members is not the same as suggesting that the rights enshrined in these legal instruments are collective rights. The only exceptions are those provisions that specifically apply to Indigenous Peoples and racial groups such as those contained in the African Charter on Human and Peoples' Rights, or Article 27 of ICCPR which requires that ethnic and cultural minorities as a whole exercise the cultural rights set out in it for their members to fully enjoy them.

Notes

- 1 See generally: Rodley N., "International Human Rights Law," in *International Law*, Evans M. (ed.), fourth edition, 2014, pp. 783–790; Sheeran S., "The Relationship of International Human Rights Law and General International Law: Hermeneutic Constraint, or Pushing the Boundaries?," in *Routledge Handbook of International Human Rights Law*, Rodley N. and Sheeran S. (eds.), 2014, pp. 79–108; Joseph S. and Kyriakakis J., "The United Nations and Human Rights," in *Research Handbook on International Human Rights Law*, Joseph S. and McBeth A. (eds.), 2010, pp. 1–35; Malanczuk P., *Akehurst's Modern Introduction to International Law*, 1997, Chapter 14.
- 2 See for instance: Pulitano E., *Indigenous Rights in the Age of the UN Declaration*, 2014; Otiocha E. E., *International Human Rights: The Protection of the Rights of Women and Female Child in Africa: Theory and Practice*, 2011.
- 3 *The Foundation of International Human Rights Law*, available at <http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html>, (visited on 23 January 2016).
- 4 Paragraph 8 of the Preamble of the Universal Declaration of Human Rights, available at <http://www.un.org/en/universal-declaration-human-rights/index.html>, (visited on 23 January 2016).
- 5 On the legal significance of the UDHR see René Cassin's point of view as quoted by Morsink J., *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*, 1999, p. 295; Henkin L., *The International Bill of Rights: The Covenant on Civil and Political Rights*, 1999, pp. 8–9; Schabas W., *The Universal Declaration of Human Rights, The Travaux Préparatoires, Volume I*, 2013, pp. cxiii–cxxxiii; Hannum H., "The Status of the Universal Declaration of Human Rights in National and International Law," *Georgia Journal of International and Comparative Law*, vol. 25, no. 1, 1996, pp. 287–397.
- 6 Shuster R. J., *German Disarmament After World War I*, 2006, p. 1; *World War I*, available at <https://www.ushmm.org/wlc/en/article.php?ModuleId=10007427>, (visited on 15 October 2016).
- 7 Cohrs P. O., *The Unfinished Peace After World War I*, 2006, p. 63; Shuster R., *supra* note 6, pp. 11–23; and *Treaty of Versailles, 1919*, available at <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005425> (visited on 15 October 2016).
- 8 Malanczuk P., *supra* note 1, p. 209.
- 9 More information is available at <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm>, (visited on 15 February 2016).

- 2016). See also, *ILO Histories: Essays on the International Labour Organization and Its Impact on the World During the Twentieth Century*, Van Daele J. et al., (eds.), 2010; Swepston L., “The International Labour Organization and International Human Rights System,” in *Routledge Handbook of International Human Rights Law*, *supra* note 1, Chapter 21.
- 10 Khan B. U. and Rahman M.M., *Protection of Minorities: Regimes, Norms and Issues in South Asia*, 2012, pp. 20–24.
 - 11 Parlett K., *The Individual in the International Legal System: Continuity and Change in International Law*, 2011, pp. 287–289. On the League of Nations see generally: Housden M., *The League of Nations and the Organisation of Peace*, 2012.
 - 12 Dunoff J. L., Ratner S. R., and Wippman D., *International Law, Norms, Actors and Process: A Problem-Oriented Approach*, 2006, p. 442; McCorquodale R., “The Individual in the International Legal System,” in *International Law*, Evans M. (ed.), second edition, 2006, p. 317.
 - 13 Malanczuk, *supra* note 1, p. 26.
 - 14 Götz A., “*Final Solution: Nazi Population Policy and the Murder of the European Jews*,” 1999; and Hilberg R., *The Destruction of the European Jews*, 2003.
 - 15 The Assembly of the League of Nations convened for the last time in April 1946. It adopted a resolution which formally sanctioned the end of the League and transferred its assets to the UN. See: *History of the League of Nations*, UNOG Library, Registry, Records and Archives Unit, available at [http://www.unog.ch/80256EDD006B8954/\(httpA-ssets\)/36BC4F83BD9E4443C1257AF3004FC0AE/\\$file/Historical_overview_of_the_League_of_Nations.pdf](http://www.unog.ch/80256EDD006B8954/(httpA-ssets)/36BC4F83BD9E4443C1257AF3004FC0AE/$file/Historical_overview_of_the_League_of_Nations.pdf) (visited on 22 July 2016).
 - 16 During the final debate in the UN General Assembly on 9 and 10 December 1948, Charles Malik, the representative of Lebanon, made clear that the UDHR was “inspired by opposition to the barbarous doctrines of Nazism and fascism,” Morsink, *supra* note 5, p. 36. Also, during the first session of the UN Commission on Human Rights’ Drafting Committee, Geoffrey Wilson, a United Kingdom delegate, pointed out that the historical moment in which the Committee met was one where “Germany and other enemy countries during the war had completely ignored what mankind regarded as fundamental human rights and freedoms.” He added that “[t]he Committee met as a first step toward providing the maximum possible safeguard against that sort of thing in the future,” E/CN.4/AC.1/SR.7, 19 June 1947, p. 5. See also René Cassin’s comments during the Second Session of the Commission of Human Rights’ Drafting Committee, E/CN.4/SR.38, 15 December 1947, p. 11.
 - 17 Morsink, *supra* note 5, p. 37, and more generally Chapter 2; Rodley, “International Human Rights Law,” *supra* note 1, p. 786; Osiatynski W., “The Historical Development of Human Rights,” in *Routledge Handbook of International Human Rights Law*, *supra* note 1, pp. 9–10; Grear A., *Redirecting Human Rights*, 2010, pp. 142–149 and 155; Ghai Y. and Cottrell J., *The Millennium Declaration, Rights and Constitutions*, 2011, p. 11; Schabas, *supra* note 5, pp. ixii and cxxv. For further analysis of the Universal Declaration of Human Rights see: Samnoy A., “The Origins of the Universal Declaration of Human Rights,” in *The Universal Declaration of Human Rights*, Alfredsson G. and Eide A. (eds.), 1999, pp. 3–22.
 - 18 See René Cassin’s explanation of the rationale behind Article 1, as contained in E/CN.4/AC.1/SR.8, 20 June 1947, p. 2; and Morsink, *supra* note 5, pp. 38–39.
 - 19 See the statements by the representatives of Cuba, Uruguay, Belgium and the United Kingdom as reproduced by Morsink, *supra* note 5, pp. 40–41. On the number of Roma who died under Nazi rule see: *Genocide of the European Roma, (1939–1945)*, available at <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005219>, (visited on 3 July 2016).
 - 20 Morsink, *supra* note 5, pp. 42–43; and E/CN.4/AC.1/SR.3, 13 June 1947, especially p. 13.
 - 21 E/CN.4/AC.1/SR 37, 28 May 1948, p. 3.
 - 22 See Morsink, *supra* note 5, p. 80; and *Eichman Interrogated: Transcripts from the Archives of the Israeli Police*, von Lang J. and Sibyll C. (eds.), 1984, pp. 115 and 130–131. On the legislative history of Article 9 see Morsink, *supra* note 5, pp. 49–50.
 - 23 Morsink, *supra* note 5, p. 89.
 - 24 The World Jewish Congress gave a fundamental contribution to the drafting of Article 26. See Morsink, *supra* note 5, p. 90.
 - 25 Morsink, *supra* note 5, p. 102.
 - 26 E/CN.4/AC.1/3/Add.1, 11 June 1947, p. 379.
 - 27 Morsink, *supra* note 5, p. 127.
 - 28 Morsink, *supra* note 5, pp. 127–128.
 - 29 *Ibid.*, pp. 105–109.
 - 30 *Ibid.*, pp. 113–116.
 - 31 *Ibid.*, pp. 257–258.
 - 32 Meron T., “The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination,” *American Journal of International Law*, vol. 79, no. 2, 1985, p. 283; Egan S., *The United Nations*

Human Rights Treaty System: Law and Procedure, 2011, p. 85.

- 33 Meron, *supra* note 32, p. 284.
- 34 Ibid.
- 35 It should also be noted that the Convention's specific concern with racial discrimination is indicative of an effort to give effect to Articles 1, 13 and 55 of UN Charter, all of which prohibit racial discrimination.
- 36 Paragraph 4 of Article 1 of the ICERD. On the special measures see: Meron, *supra* note 32, pp. 288–289; Committee on the Elimination of Racial Discrimination General Recommendation No. 32 on the Meaning of Special Measures in the International Convention on the Elimination of All Forms of Racial Discrimination, CERD/C/GC/32, 24 September 2009; and De la Vega C., “The Special Measures Mandate of the International Convention on the Elimination of All Forms of Race Discrimination: Lessons Learned from the United States and South Africa,” *University of San Francisco Law Research Paper No. 2009–08*, 31 January 2009.
- 37 General Recommendation No. 32, *supra* note 36, paras. 28–35. As regards the State obligation to regulate the activity of NSAs see: paras. 9 and 23 of General Recommendation No. 32, *supra* note 36; Committee on the Elimination of Racial Discrimination General Recommendation XXVII on Discrimination against the Roma, 16 August 2000, para. 12; and General Recommendation XXX on Discrimination against Non-Citizens, 2005, paras. 12, 32 and 38.
- 38 Article 4 (a) also requires State parties to the ICERD to declare an “offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination [...] and also the provision of any assistance to racist activities, including the financing thereof.”
- 39 Meron, *supra* note 32, p. 296.
- 40 For further analysis of the ICERD see: Egan., *supra* note 32, pp. 85–89; Buys C.G., “Case Concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination,” *American Journal of International Law*, vol. 103, no. 2, 2009, pp. 294–299.
- 41 The Text of the ICCPR is available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, (visited on 5 March 2016). The text of the Covenant on ESCR is available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>, (visited on 5 March 2016).
- 42 Document A/2929, Annotations on the Text of the Draft International Covenants on Human Rights, 1 July 1955, pp. 7–10; Tomuschat C., *International Covenant on Civil and Political Rights*, United Nations Audiovisual Library of International Law, 2008, pp. 1–2, available at <http://legal.un.org/avl/ha/iccpr/iccpr.html>, (visited on 5 March 2016); Sepúlveda, M., *The Nature of Obligations under The International Covenant on Economic, Social and Cultural Rights*, 2003, pp. 116–133.
- 43 UN General Assembly Resolution 543(VI), 4 February 1952.
- 44 Tomuschat, *supra* note 42; and Pechota V., “The Development of the Covenant on Civil and Political Rights,” in *The International Bill of Rights: The Covenant on Civil and Political Rights*, *supra* note 5, pp. 32–71.
- 45 E/CN.4/AC.1/SR. 23, 10 May 1948, p. 3.
- 46 See the text of the ICCPR, *supra* note 41.
- 47 Ibid.
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