

Felipe Gómez Isa and Koen de Feyter (eds.)

# International Human Rights Law in a Global Context



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International  
Human Rights Law  
in a Global Context



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**Felipe Gómez Isa**  
**Koen de Feyter**  
(eds.)

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*To Claudia and Irene*





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## Preface

The international human rights system remains as dynamic as ever. If at the end of the last century there was a sense that the normative and institutional development of the system had been completed and that the emphasis should shift to issues of implementation, nothing of the sort occurred. Even over the last few years significant changes happened, as this book amply demonstrates.

On 15 March 2006, the UN General Assembly decided to replace the United Nations' central political human rights body, the UN Commission on Human Rights by the UN Human Rights Council. The Commission had been discredited, even by the UN Secretary General, as a body suffering from a credibility deficit – an analysis that was perhaps not completely unfair, at least when one focuses on the final decade of the Commission's work. In June 2007 the Council adopted an institution-building package that included a number of innovations, most notably the organisation of the universal periodic review process, and the setting up of an Advisory Committee to replace the former Sub-Commission. At the time of writing, the Council has held nine sessions. The jury is still out on whether the reform was a success, a failure or much ado about nothing. All depends on the criterion used for the assessment. If that criterion is whether there is now more effective human rights protection on the ground, the change may not be as profound as both proponents and detractors of the reform process had predicted.

Navanethem Pillay took up the post of UN High Commissioner for Human Rights on 1 September 2008. She succeeded Louise Arbour who held the job in the 2004-2008 period. Ms. Pillay comes with excellent credentials. She served as a judge on some of the most influential human rights judicial bodies: the South African Constitutional Court, the International Criminal Tribunal for Rwanda and the International Criminal Court.

At the International Criminal Court, four persons are currently detained and awaiting trial. All cases are related to the situation in the Eastern Part of the Democratic Republic of the Congo. The cases will allow clarifying provisions in the Statute dealing with the enlisting and conscription of children under the age of fifteen, and with sexual atrocities. The Court's involvement with the situation in Darfur has not yet led to arrests, mainly because the Government of Sudan refuses to cooperate with the Court.

The African Human and Peoples' Rights Court started its operations in Addis Ababa, Ethiopia in November 2006, but moved to its permanent seat to Arusha in August 2007. So far only 24 member States out of the 53 African Union (AU) States have ratified the Protocol establishing the Court. Among the 24 States, only two (Burkina Faso and Mali) have issued a declaration accepting the Court's competence to entertain cases from individuals and NGOs. In July 2008 the African Union approved a plan to merge the African Human and Peoples' Rights Court with that of the African Court of Justice. The Court, unlike other organs of AU, is empowered to give binding judgements which are enforceable against parties.

The new ASEAN Charter will enter into force by the end of 2008. Article 14 of the updated Charter calls for the establishment of an ASEAN human rights body that should operate in accordance with terms of reference "to be determined by the ASEAN Foreign Ministers Meeting". There may be a long and winding road ahead, but the entry into force of the ASEAN Charter opens up a real prospect for the establishment of a first Asian regional human rights body.

At the normative level, two new *core* international conventions were adopted recently: the Convention on the Rights of Persons with Disabilities (on 13 December 2006 – with an Optional Protocol), and the International Convention for the Protection of All Persons from Enforced Disappearances (on 20 December 2006). The Disability Convention is typical of post Vienna World Conference human rights treaties in that it deals equally with civil, cultural, economic, political and social rights. The Convention also contains a number of innovations, e.g. with respect to individual autonomy, including the right to live independently. Both the Convention and the Protocol entered into force quickly, on 3 May 2008. The Disappearances Convention continues another trend, namely the definition of certain human rights violations as crimes, both under domestic and international law, with corollary obligations to hold individual perpetrators responsible.

On 18 June 2008, after years of negotiation, the Human Rights Council approved by consensus the Optional Protocol to the Interna-

tional Covenant on Economic, Social and Cultural Rights. The Human Rights Council recommended that the text be adopted by the UN General Assembly<sup>1</sup>. A State that becomes a Party to the Protocol recognizes the competence of the UN Committee on ESC Rights to receive and consider communications submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party.

Another milestone was the adoption by the UN General Assembly of the Declaration on the Rights of Indigenous Peoples on 13 September 2007 (this time by a vote of 143-4-11, with negative votes cast by Canada, Australia, New Zealand and the United States). According to the Declaration, indigenous peoples enjoy the right to self-determination, but in exercising the right, they do not have a right to independence, but to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Mainstreaming human rights in the whole of international relations became a major theme in the last fifteen years. Many human rights challenges require a response from actors outside of the UN Geneva human rights system. Discussions flared up on the relationship between human rights and peace and security, and between human rights and economic globalisation.

Disagreement continued on the legitimacy and appropriateness of the use of force to stop gross and systematic violations of human rights, particularly when such 'humanitarian interventions' would occur without the clear permission of the UN Security Council. In February 2008, Edward C. Luck was appointed Special Advisor to the UN Secretary-General working on the responsibility to protect. The UN General Assembly endorsed R2P – as it is fashionably abbreviated – in the Outcome document of the High-Level Plenary Meeting in September 2005. According to the document, the international community has a subsidiary responsibility to intervene *through the Security Council* to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity when the primarily responsible national authorities are manifestly failing to offer protection.

The International Court of Justice continued to struggle with the issue of the permissible use of force in the exercise of the right of self-defence. In *Congo vs. Uganda* (19 December 2005), the ICJ de-

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<sup>1</sup> On 10 December 2008 the General Assembly adopted the Optional Protocol.

clined the opportunity to pronounce itself on the conditions under which contemporary international law provides a right of self-defence against large-scale attacks by irregular forces. More generally, the enforcement of human rights vis-à-vis non-States armed groups remains problematic.

Equally heated debates continue on the human rights compatibility of measures taken both by the Security Council and by States unilaterally to combat terrorism in the wake of the 11 September attacks. Advances that had seemingly been made in the areas of prohibition of torture or freedom of expression in the previous decade, proved tenuous. In human rights circles, US President Obama's announcement of closure of the Guantanamo Bay detention facilities was met with a sigh of relief.

The impact of economic globalisation on human rights has challenged the State-oriented nature of international human rights law. New developments occurred in the definition of State obligations to provide protection against abuses by third parties (particularly in the context of privatisation). At the same time some progress was made in the articulation of the human rights obligations of non-State actors such as economic and financial intergovernmental organisations, corporations and non-governmental organisations. Even discussions on the right to development moved, when the Human Rights Council in March 2007 required from the High Level Task Force on the right to development to execute a work plan, the final phase of which might include "consideration of an international legal standard of a binding nature". The issue of climate change has come to the fore in human rights discussions. The Human Rights Council has recently commissioned a study on the subject from the Office of the High Commissioner, while the non-governmental Geneva-based International Council on Human Rights Policy already produced an excellent "rough guide" on a rights approach to climate change in 2008.

At the time of writing celebrations for the 60<sup>th</sup> anniversary of the Universal Declaration of Human Rights are in full swing. Strikingly, some provisions in the UDHR that had long been forgotten enjoy a revival today: the idea that human rights are a responsibility of each organ of society; the notion that human rights aim at achieving human dignity, and should therefore be interpreted in such a way that they effectively contribute to the realisation of that aim; the lack of hierarchy between rights, and finally the acknowledgement that impediments to human rights realisation also derive from defects in the international legal order. The UDHR thus truly remains a visionary document; it took us decades to discover its real depth.



The present book is the result of a joint project under the auspices of HumanitarianNet, a Thematic Network on Humanitarian Development Studies led by the University of Deusto (Bilbao, the Basque Country, Spain), and the research group "Social and Cultural Challenges in a Changing World". This latter group has been officially recognised by the Department of Education and Universities of the Basque Government in 2007. In this respect, we would like to express our sincere gratitude to Marisa Setién, Professor of Sociology at the University of Deusto and Chair of the research group, for her wise support and courage to assume new projects. The European Inter-University Center for Human Rights and Democratisation (EIUC, Venice, Italy) has served as a laboratory to discuss and test with colleagues and students the main ideas of this book in the framework of the *European Master in Human Rights and Democratisation*, EMA. Our aim is that this book continues to be a source of inspiration for both academics and students.

We would like to take the opportunity to thank all people that participated in the process of edition of this book. First of all, we would like to thank Julia González, Vice-Rector of International Relations at the University of Deusto, and Marisa Setién, Chair of the above mentioned research group. Kevin Villanueva, project officer of HumanitarianNet, showed great interest in this book from the beginning and offered unrelenting support. We also want to express our gratitude to Horst Fischer and George Ulrich, President and Secretary-General of EIUC, respectively. Finally, we would like to mention Eoin McGirr and his professional job in the process of translating and editing some of the contributions.

We hope that this Manual makes a contribution to the development of International Human Rights Law in a context marked by a deep global financial crisis. We want to put on the table the need of mainstreaming human rights in any solution that is foreseen to try to mitigate the impact of the crisis. Our concern is that, once again, vulnerable groups will suffer the most severe impacts of the crisis. Human rights of all should be the inspiring principle for those responsible of taking decisions.

Felipe Gómez Isa and Koen de Feyter  
Deusto-Bilbao, Antwerp  
December 2008



Part I

# General Introduction



# International Protection of Human Rights

Felipe Gómez Isa

**Summary:** 1. Precedents for the international protection of human rights: 1.1 The work of the League of Nations. 1.2 Human rights in the inter-war period. 1.3 Human rights during the Second World War. 2. The United Nations and human rights: 2.1 The San Francisco Conference. 2.2. Human rights in the United Nations Charter. 2.3. Post-1945 legal developments. 2.4. Indivisibility and interdependence of all human rights. 2.5. The emergence of third-generation human rights. 2.6. The Vienna World Conference on Human Rights. 3. Conclusions.

The concept of human rights based on the notions of the human dignity and the limitation on the power of the State is a phenomenon which has been present, albeit in many different manifestations, practically throughout modern history. The struggle to recognise people's dignity has been continuous throughout recent history from the tentative recognition of the rights of Native Americans during the time of the Spanish conquest of America to the modern expression of the rights of man and the citizen following the French Revolution. We are currently in a phase of internationalisation of human rights, in other words now that most domestic legal systems have started to recognise fundamental rights and freedoms, a new phase has begun in which human rights have been proclaimed in both universal and regional international organisations. In this progressive and ongoing internationalisation process the promotion and protection of all human rights has gone from being an issue which fell within the exclusive competence of the States to becoming "a legitimate concern of the international community" as stated in the Vienna Declaration from the World Conference on Human Rights<sup>1</sup>. As we will see below, this internationalisation process has not however been simple and has in fact been, and indeed continues being, riddled by obstacles and problems making a real and universal culture of human rights still more of a desire than the reality.

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<sup>1</sup> *Vienna Declaration and Programme of Action*, World Conference on Human Rights, Vienna, from 14 to 25 June 1993, A/CONF.157/23, 12 July 1993, Part I, para. 4.

## 1. Precedents for the international protection of human rights

The key date on which we begin to witness the internationalisation of human rights is 1945, after the Second World War and on the creation of the United Nations Organisation. However during the inter-war period, and mainly through the League of Nations, there was an upsurge of a broad movement in favour of the international recognition of human rights which, as we shall see, united both academics and public opinion and eventually come to the attention of politicians once the fight against fascism had begun in 1939<sup>2</sup>.

Classic International Law (i.e. pre-1945) was conceived as the legal system which exclusively regulated relations between States; only States were subjects of International Law and, as such, only States were capable of holding rights and obligations within the international sphere. Following the First World War and the creation of the first general international organisation, the League of Nations, the definition of the subjects of International Law began to undergo a tentative expansion with the recognition of a certain amount of legal personality for the international organisations. Individuals however had no rights; they were not subjects of International Law, but its objects<sup>3</sup>. This meant that the way in which States treated their nationals was a question which fell exclusively within each State's domestic jurisdiction. This principle denied other States the right to intercede or intervene so as to help nationals of the State in which they were being mistreated<sup>4</sup>. The only exception was the institution of *humanitarian intervention*: the theory of humanitarian intervention is based on the assumption that States are internationally obliged to guarantee certain basic rights for their nationals. These rights are so fundamental, and of such intrinsic value to the human being, that their violation by one State cannot be ignored by the other States. In the event of very serious, large-scale or brutal violations of those basic human rights, the

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<sup>2</sup> An in-depth analysis of the significance of the inter-war period for the process of internationalisation of human rights can be found in BURGERS, J.H.: "The Road to San Francisco: the Revival of the Human Rights Idea in the Twentieth Century", *Human Rights Quarterly*, Vol. 14, 1992, pp. 447-477.

<sup>3</sup> An interesting analysis of the position of the individual within Classic International Law and its later "historical rescue" can be found in CAÑADO TRINIDADE, A.A.: *El acceso directo del individuo a los Tribunales Internacionales de derechos humanos*, Universidad de Deusto, Bilbao, 2001, particularly pp. 19 ff.

<sup>4</sup> On the relationship between State sovereignty and human rights see CARRILLO SALCEDO, J.A.: *Soberanía de los Estados y Derechos Humanos en Derecho Internacional Contemporáneo*, Tecnos, Madrid, 2001.

use of force by one or more States was permitted so as to put an end to said violations<sup>5</sup>. Hence limitations began to be imposed on the absolute sovereignty of States.

Even before the internationalisation of human rights, Classic International Law did have some institutions which protected certain groups of people and which can therefore be cited as close precedents for such international protection of human rights. On this issue, apart from the aforementioned institution of humanitarian intervention, we could mention the following:

- The area of the international responsibility of States for the treatment of aliens: a State would incur liability if its treatment of a national of another State fell below a minimum standard of civilisation and justice;
- Certain 19<sup>th</sup> century international treaties were aimed at protecting Christian minorities in the Ottoman Empire, while other Conventions were aimed at prohibiting of slavery and the slave trade. The most significant of these were the Brussels General Agreement (1890), the Saint-Germain-en-Laye Convention (1919) and the International Convention for the Abolition of Slavery and the Slave Trade (1926)<sup>6</sup>;
- International Humanitarian Law, which arose chiefly out of the Conventions of Geneva of 1864 and The Hague of 1899 and 1907, and which seeks to protect the victims of armed conflicts, has also been considered as one of the most significant precedents for the current international protection of human rights<sup>7</sup>. International Humanitarian Law ultimately seeks to safeguard the most basic human rights of individuals in situations of conflict.

Notwithstanding this, the most important event which paved the way for a progressive internationalisation of human rights was the foundation of the League of Nations, which as we shall see below was an international organisation which performed crucial work in order to generalise the protection of human rights.

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<sup>5</sup> ROUGIER, A.: "La Théorie de l'Intervention d'Humanité", *Revue Générale de Droit International Public*, 1910, pp. 468-526.

<sup>6</sup> On the process of the abolition of slavery and the slave trade see GANJI, M.: *International Protection of Human Rights*, Librairie E. Droz, Geneve-Librairie Minard, Paris, pp. 88-110.

<sup>7</sup> DOSWALD-BECK, L. and VITE, S.: "International Humanitarian Rights and Human Rights Law", *International Red Cross Review*, Vol. 18, March-April 1993, pp. 99-126.

### 1.1. *The Work of the League of Nations*

Despite the fact that the Covenant of the League of Nations does not once expressly mention “human rights”, there are many provisions which one way or another served as a basis for the Organisation’s human rights-related work<sup>8</sup>. Firstly, Article 22, which establishes the system of *tutelages* “for those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them”, stipulates the prohibition in these territories of “abuses such as the slave trade” and establishes conditions which “will guarantee freedom of conscience and religion”. Furthermore, Article 23 of the Covenant states that members of the League of Nations:

- a) will endeavour to secure and maintain fair and humane conditions of labour for men, women, and children..., and, for that purpose will establish and maintain the necessary international organisations;
- b) undertake to secure just treatment of the native inhabitants of territories under their control;
- c) will entrust the League with the general supervision over the execution of agreements with regard to the traffic in women and children...;
- f) will endeavour to take steps in matters of international concern for the prevention and control of disease.

A direct consequence of this Article was the creation, within the framework of the League of Nations, of the International Labour Organisation (ILO) which performed and continues to perform unprecedented work in the area of employment rights, ensuring equality between men and women at work, preventing the exploitation of child labour and ensuring the protection of indigenous peoples, etc.<sup>9</sup>.

The Peace Treaties which brought an end to the first great military conflict of the last century established a system for protecting national minorities which would remain under the protection of the League of

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<sup>8</sup> BRUNET, R.: *La Garantie Internationale des Droits de l’Homme d’après la Charte de San Francisco*, Ch. Grasset, Geneva, 1947, pp. 35 ff.

<sup>9</sup> The ILO’s work protecting human rights can be consulted in VALTICOS, N.: «La Organización Internacional del Trabajo (OIT)», in VASAK, K. (Editor General): *Las dimensiones internacionales de los derechos humanos*, Serbal-UNESCO, Barcelona, 1984, pp. 504-551; SAMSON, K.: “The Standard-Setting and Supervisory System of the International Labour Organization”, in HANSKI, R. and SUKSI, M. (Eds.): *An Introduction to the International Protection of Human Rights. A Textbook*, Abo Akademi University-Institute for Human Rights, Turku, 1998, pp. 149-180.



Nations. This legal framework for the protection of minorities, based on the principles of equal treatment and non-discrimination, granted minorities broad rights as regards the conservation of their language, their religion, their schooling system and even envisaged certain political rights<sup>10</sup>. As Professor Carrillo Salcedo stated regarding this legal framework for the protection of the rights of minorities, "despite its deficiencies and limits (...) it nevertheless constituted a mechanism for safeguarding and protecting human rights"<sup>11</sup>. It is very significant that neither in the United Nations Charter (1945) nor in the Universal Declaration of Human Rights (1948) were the rights of minorities given as much recognition as they were in the period of the League of Nations.

To sum up, we could state that Classic International Law developed various doctrines and institutions with the aim of protecting various groups of people: slaves; religious, ethnic and cultural minorities; indigenous peoples; aliens; victims of massive human rights violations; combatants in wars etc. These institutions and doctrines have influenced the creation of International Human Rights Law given that, at their most basic levels, they recognised that individuals had rights as human beings and that those rights should be protected by International Law. However, what they did not establish was a general and systematic protection of human rights; they only protected the rights of certain categories of people and not those of human beings per se. This global protection of human rights was to come after the Second World War on the passing of the United Nations Charter and the Universal Declaration of Human Rights.

All these contributions from the League of Nations towards the internationalisation of human rights were to create an ideal environment for the growth of a strong movement in favour of the international recognition of human rights in the inter-war period.

## 1.2. *Human Rights in the Inter-War Period*

Motivated by the advances which were being brought about by the League of Nations many different organisations began to launch initiatives inspired by the need to internationally guarantee human rights and

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<sup>10</sup> An interesting contribution concerning the system for the protection of minorities established by the peace treaties can be found in MANDELSTAM, A.: *La protection internationale des minorités*, Sirey, Paris, 1931.

<sup>11</sup> CARRILLO SALCEDO, J.A.: *El Derecho internacional en perspectiva histórica*, Tecnos, Madrid, 1991, p. 57.

freedoms. Proposals of this type came about at the International Diplomatic Academy, the International Legal Union, the International Law Association, the Grotius Society, the Inter-American Conference of Jurists, the American Institute of International Law etc<sup>12</sup>. As Jan Herman Burgers, one of the people who has studied the evolution of human rights following the First World War, states, "while in the period between the First and the Second World Wars most governments were unwilling to accept obligations under International Law regarding the treatment of their own citizens, a far more positive attitude developed among the scholars of International Law"<sup>13</sup>.

One of the most serious initiatives was launched by the International Law Institute when in 1921 it created a Commission chaired by André Mandelstam to study the protection of minorities and human rights in general. The result of the Commission's work was a project on the Declaration of Human Rights which was presented at the session held by the Institute in New York in 1929. Eventually, following various debates, the *Declaration of the International Rights of Man*<sup>14</sup> was passed on 12 October 1929 with 45 votes in favour, 11 abstentions and only one vote against. In this very important Declaration the International Law Institute considered that "the juridical conscience of the civilised world demands the recognition for the individual of rights preserved from all infringement on the part of the State", and that "it is necessary to extend international recognition of human rights across the whole world"<sup>15</sup>. Likewise, in the regulatory part of the Declaration, which is not incidentally very long, rights are established to life, freedom, property, and the principle of non-discrimination (Article 1); freedom of religion (Article 2); the right to a nationality (Article 6) etc. In the words of its most signifi-

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<sup>12</sup> These and other views have been collected in CASSIN, R.: "La Déclaration Universelle et la mise en oeuvre des droits de l'homme", *Recueil des Cours de l'Académie de Droit International de La Haye*, 1951 – II, p. 272.

<sup>13</sup> BURGERS, J.H.: "The Road to San Francisco: the Revival of the Human Rights Idea...", *op. cit.*, p. 450.

<sup>14</sup> *Annuaire de l'Institut de Droit International*, New York session, October 1929, vol. I, pp 730-732.

<sup>15</sup> This idea had been put forward one year previously, in 1928, by the International Diplomatic Academy, presided over by an ardent defender of the internationalisation of human rights, A.F. Frangulis. In a resolution approved on 8 November 1928, the Academy stated that international protection of human rights "responds to the legal feelings of the contemporary world" and that, as such, "a generalisation of the protection of the rights of man and of the citizen is highly desirable". The text of this resolution can be found in MANDELSTAM, A.: "La protection internationale des droits de l'homme", *Recueil des Cours de l'Académie de Droit International de La Haye*, 1931-IV, p. 218.

cant mentor, the aforementioned Mandelstam, this Declaration of the International Rights of Man meant “the starting point of a new era..., a solemn challenge to the idea of the absolute sovereignty of States and, at the same time, the enshrinement of the legal equality of all members of the international community”<sup>16</sup>. The most relevant feature of this Declaration was not its content, which was not revolutionary, but the fact that it opened the door to an irreversible process of internationalisation of human rights. As of this moment, and based on this New York Declaration, many different initiatives arose with a single objective: to remove all the issues related to human rights and freedoms from the sovereignty of States<sup>17</sup>.

### 1.3. *Human Rights during the Second World War*

From the start of the Nazi regime in Germany in the 1930s, the international community began to be aware of the fact that this was not a regime which respected even the most basic human rights<sup>18</sup>. These suspicions were resoundingly confirmed with the start of the war in 1939. The result was that human rights became one of the objectives of the Allies in their battle against fascism, and also became one of the centres of the attention for both intellectuals and public opinion. According to the very appropriate words of René Brunet:

“a strong movement of public opinion, born in Great Britain and the United States at the beginning of hostilities, grew incessantly in both strength and influence as the war progressed. Hundreds of political, academic, and religious organisations, through publications, requests, protests and interventions, spread the idea that the protection of human rights should be one of the objectives of the Allies”<sup>19</sup>.

This was the background against which Franklin Delano Roosevelt made his famous State of the Union speech<sup>20</sup> to the US Congress on 6

<sup>16</sup> MANDELSTAM, A.: “La protection internationale...”, *op. cit.*, p. 206.

<sup>17</sup> Some of these initiatives can be found in BURGERS, J.H.: “The Road to San Francisco”, *op.cit.*, pp. 453 ff.

<sup>18</sup> MORSINK, J.: “World War Two and the Universal Declaration”, *Human Rights Quarterly*, Vol. 15, 1993, p. 360. A very interesting analysis of the collusion of German society with the excesses of Nazism can be found in GELLATELY, R.: *No sólo Hitler. La Alemania nazi entre la coacción y el consenso*, Crítica, Barcelona, 2002.

<sup>19</sup> BRUNET, R.: *La Garantie Internationale des Droits de l’Homme...*, *op. cit.*, pp. 93-94.

<sup>20</sup> A very comprehensive review of Franklin D. Roosevelt’s and Eleanor Roosevelt’s contributions to discussions on human rights can be found in JOHNSON, M.G.: “The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection for Human Rights”, *Human Rights Quarterly*, Vol. 9, 1987, pp. 19-48.

January 1941. In his speech<sup>21</sup> the President of the United States identified the fundamental freedoms which should be guaranteed for every human being. There are four such freedoms: freedom of speech and thought; freedom of worship; freedom from want, and freedom from fear. And the fact is that "Roosevelt was personally convinced that the internationalisation of the care for human rights was the proper idea for uniting the American people against the forces of totalitarianism"<sup>22</sup>. It is undeniable that this speech by Roosevelt constituted "the driving force which was to set in motion the proclamation of human rights on a world-wide level and, afterwards, the development of the Universal Declaration of Human Rights"<sup>23</sup>.

A few months later, on 14 August 1941, the *Atlantic Charter* expressed the desire to reach a peace which "will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all lands may live out their lives in freedom from fear and want". Similarly incorporating human rights as objectives of the war, on 1 January 1942 the Allied countries, in the *United Nations Declaration*, stated that "complete victory over their enemies is essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands"<sup>24</sup>. What is crystal clear in this statement is that human rights burst onto the political scene at a fairly early stage of the war as there was the clear conviction that peace necessarily came from the establishment of political regimes which protected human rights.

In September and October of 1944 when the so-called 'Big Four' (China, United States, Great Britain and the Soviet Union) met at Dumbarton Oaks to plan the structure of international society once the war had finished, and decided on the creation of the United Nations Organisation, human rights were one of the main issues being discussed. The debate was fierce with passionate disputes between the Big Four. The strongest opposition against human rights featuring in the Dumbarton Oaks Proposal on the creation of the United Nations came from the British delegate, Sir Alexander Cadogan. He was of the opinion that it could "open up the

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<sup>21</sup> This speech has been reproduced in Good, M.H.: "Freedom from Want: the Failure of United States Courts to protect Subsistence Rights", *Human Rights Quarterly*, Vol. 6, 1984, pp. 384 and 385.

<sup>22</sup> BURGERS, J.H.: "The Road to San Francisco...", *op. cit.*, p. 469.

<sup>23</sup> CASSESE, A.: *Los derechos humanos en el mundo contemporáneo*, Ariel, Barcelona, 1991, p. 37.

<sup>24</sup> Extracts from these important international statements, together with a brief analysis of them, appear in RABOSI, E.: *La Carta Internacional de Derechos Humanos*, EUDEBA, Buenos Aires, 1987, pp. 10 ff.

possibility that the Organisation could criticise the internal organisation of Member States”, clearly referring the colonial issue which was particularly sensitive for the British. As can be seen, the issue of sovereignty is always present when it comes to human rights commitments. Nor was the Soviet Union very much in favour of human rights occupying a privileged position among the principles of the new organisation although it did not put up insurmountable hurdles<sup>25</sup>. Faced with these problems the United States had to lower its expectations and as a result the Dumbarton Oaks Proposal eventually only included “a vague reference to human rights”<sup>26</sup>. In the section dealing with international economic and social cooperation, one of the objectives of the United Nations was to “facilitate solutions to international economic, social and other humanitarian problems and to promote respect for human rights and fundamental freedoms”. Despite the fact that human rights were only a superficial element in the Dumbarton Oaks Proposal, they were nevertheless to play a far more important role at the San Francisco Conference. It was at this Conference that those involved adopted the United Nations Charter, the constituent document of the international organisation created following the Second World War, the United Nations Organisation.

## 2. The United Nations and Human Rights

The phenomenon of the internationalisation of human rights following World War Two can be attributed to the monstrous abuses which took place during Hitler’s time in power, and to the belief that many of those abuses could have been avoided had there been an effective international system for the protection of human rights while the League of Nations was in existence. However the horrors of the Second World War are not the only factor, albeit perhaps the most important, behind this process to internationally enshrine human rights<sup>27</sup>. As was seen in the

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<sup>25</sup> It is interesting to note the fact that, at this time, the attitude of the Soviet Union towards human rights was fairly moderate. This attitude is in contrast to that expressed at the United Nations from 1945, when the Cold War was intensifying. As of this time, human rights became an ideological weapon in the conflict between the United States and the Soviet Union.

<sup>26</sup> SAMNOY, A.: *Human Rights as International Consensus. The Making of the Universal Declaration of Human Rights, 1945–1948*, CHR. Michelsen Institute, Bergen–Norway, 1993, p. 12.

<sup>27</sup> BURGERS, J.H.: “The Road to San Francisco...”, *op. cit.*, p. 448. On the other hand, for Manfred Nowak, the recognition which is made of human rights in the Universal Declaration of Human Rights “can only be completely understood as a reaction to the

previous chapter, a far-reaching movement in favour of human rights was developing. The human rights tragedy experienced during World War Two served as a catalyst for all these forces which were calling for human rights to be recognised in the international sphere. This resulted in human rights being very high on the agenda of those present at the San Francisco Conference.

### 2.1. *The San Francisco Conference*

The San Francisco Conference was to play a fundamental role in including human rights in the United Nations Charter. As an expert on the Charter preparation process at San Francisco said:

“there was great interest, particularly among the lesser powers and the host of private organizations which had consultant status with the US delegation, in broadening and strengthening the proposed organization’s role in economic and social matters, including the area of human rights”<sup>28</sup>.

In this matter various Latin American delegations played incredibly significant roles at the San Francisco Conference, which has become known as the “Latin American activism”<sup>29</sup>. Some of these delegations wanted a *Bill of Rights* in the Charter, in other words a Declaration of Human Rights as an appendix. Countries such as Mexico, Chile, Cuba, Panama and Uruguay, encouraged by the Chapultepec Conference<sup>30</sup>, made very advanced proposals on this issue. While Mexico and Panama were proposing a Declaration within the text of the United Nations Charter, Uruguay and Cuba were satisfied with the General Assembly passing

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atrocities committed by the Nazi government and its absolute attack on human rights and human dignity”, NOWAK, M.: “The Significance of the Universal Declaration 40 years after its adoption”, in *The Universal Declaration of Human Rights: Its Significance in 1988*, Report of the Maastricht/Utrecht Workshop held from 8 to 10 December 1988 on the occasion of the 40<sup>th</sup> anniversary of the Universal Declaration, p. 67.

<sup>28</sup> JHABVALA, F.: “The Drafting of the Human Rights Provisions in the UN Charter”, *Netherlands International Law Review*, Vol. XLIV, 1997, p. 4.

<sup>29</sup> SAMNOY, A.: *Human Rights as International Consensus...*, *op. cit.*, p. 15.

<sup>30</sup> At the *Inter-American Conference on Problems of War and Peace*, Chapultepec Conference (Mexico, March 1945), the Latin American States declared that the future United Nations Organisation should take on responsibility for the international protection of human rights through a catalogue of rights and duties in a declaration which would take the form of a convention. See GARCIA BOWER, C.: *Los Derechos Humanos. Preocupación Universal*, Editorial Universitaria, Guatemala, 1960, especially pp. 25 ff., where there is analysis of the development of human rights in Latin America.

a Declaration of Human Rights as soon as possible after the creation of the UN. Panama's proposal was, without doubt, the most audacious as it introduced a proposal to embody a "Declaration of Essential Rights of Man"<sup>31</sup> as an amendment. This included both civil and political rights, and also economic, social and cultural rights, and was to form an integral part of the United Nations Charter.

These proposals were however completely rejected by the Superpowers present in San Francisco. There were various reasons for this rejection. Firstly, an aspect which worried all the big powers was that human rights should not interfere with their internal matters particularly due to the fact that at that time they all had serious problems with some of the inhabitants of their territories. The United States was facing the issue of racial discrimination against the people we now know as African Americans; the Soviet Union, for its part, continued to have its *Gulags*, where human rights were starkly conspicuous in their absence; finally, both the United Kingdom and France continued enjoying their colonial empires, where it could hardly be said that human rights were scrupulously respected. Secondly, it would have been very difficult to produce a Declaration of Human Rights at an international conference that lasted several weeks like the one in San Francisco which also had many other problems to solve such as delicate issues related to international peace and security. Finally, another issue which present throughout the entire San Francisco Conference was "the spectre of the U.S. Senate's refusal to give its 'advice and consent' to the ratification of the League Covenant"<sup>32</sup> which, among other factors, contributed to the relative failure of the organisation created after the First World War. Forcing the United States to accept a United Nations Charter including a Declaration of Human Rights would perhaps have again led to its "international isolation" which was to be avoided at all costs.

Despite the fact that in the end it was not possible to include a Declaration of Rights in the United Nations Charter, important references to human rights were included in provisions which were much stronger than those included in the Dumbarton Oaks Proposals<sup>33</sup>. The relative force of the human rights related provisions in the United Nations Charter is basically down to the lobbying of certain smaller countries, such as those in Latin America, and of the NGOs which were a

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<sup>31</sup> This Declaration had been produced by jurists from 24 Latin American countries between 1942 and 1944, under the auspices of the American Law Institute.

<sup>32</sup> JHABVALA, F.: "The Drafting of the Human Rights Provisions...", *op. cit.*, p. 11.

<sup>33</sup> BURGERS, J.H.: "The Road to San Francisco...", *op. cit.*, p. 475.

part of the U.S. delegation at the San Francisco Conference<sup>34</sup>. As John P. Humphrey, Director of the Human Rights Division of the United Nations at the time of the writing of the Universal Declaration, has said on this matter:

“the relatively strong human rights provisions of the Charter were largely, and appropriately, the result of determined lobbying by non-governmental organizations and individuals at the San Francisco Conference. The United States Government had invited some forty-two private organizations representing various aspects of American life – the churches, trade unions, ethnic groups, peace movements, etc. – to send their representatives to San Francisco, where they acted as consultants to its delegation. These people, aided by delegations of some of the smaller countries, conducted a lobby in favour of human rights for which there is no parallel in the history of international relations, and which was largely responsible for the human rights provisions of the Charter”<sup>35</sup>.

On the other hand, Panama, when faced with the rejection of its initiative to include a Declaration of Human Rights in the United Nations Charter, proposed that the report produced by the Committee which drafted the Charter should recommend that once the United Nations Organisation had been created it should immediately embark on the production of a Declaration of Human Rights. This proposal was accepted<sup>36</sup> because all the different delegations present in San Francisco wanted one of the first tasks of the recently created organisation to be the adoption of a human rights related instrument in accordance with the provisions of the Charter.

## 2.2. *Human Rights in the United Nations Charter*

In the Preamble of the Charter the countries of the United Nations had already reaffirmed their “... faith in fundamental human rights, in

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<sup>34</sup> On the role of NGOs at the San Francisco conference, see KOREY, W.: *NGOs and the Universal Declaration of Human Rights*, St. Martin's Press, New York, 1998, especially pp. 29 ff.

<sup>35</sup> HUMPHREY, J.P.: *Human Rights & United Nations: A Great Adventure*, Transnational Publishers, New York, 1984, p. 13.

<sup>36</sup> The proposal reads as follows: “The Committee received the idea [of a Bill of Rights] with sympathy, but decided that the present Conference, if only for lack of time, could not proceed to realize such a draft in an international convention. The Organization, once formed, could better proceed to consider the suggestion, and to deal effectively with it (...). The Committee recommends that the General Assembly consider the proposal and give it effect”, quoted in JHABVALA, F.: “The Drafting...”, *op. cit.*, p. 13.



the dignity and worth of the human person, in the equal rights of men and women and of nations large and small...". It should be noted, as has been done by some of the main commentators on the United Nations Charter, that together with maintaining international peace and security, the other key point of this Preamble was the respect for human rights<sup>37</sup>. In the final paragraph of this Preamble the countries of the United Nations reaffirm their resolve "to promote social progress and better standards of life in *larger freedom*" (emphasis added). This statement which as we shall see also appears in the Preamble to the Universal Declaration of Human Rights, was to be of exceptional importance in widening the traditional concept of human rights. This traditional concept was focused exclusively on civil and political rights stemming from the 18<sup>th</sup> century liberal revolutions; with the statement regarding *larger freedom* the United Nations Charter, influenced by Roosevelt's 'Four Freedoms' speech, opens up to second generation rights: economic, social and cultural.

With this in mind, Article 1.3 of the Charter indicates that one of the purposes of the Organisation is "to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". As we can see, the programmatic section of the United Nations Charter assumes a crystal clear commitment to the human rights cause. In addition, the *principle of non-discrimination* is enshrined as a basic principle in this instrument. The inclusion of this principle in such an important section of the Charter, namely the section in which the aims of the new international organisation are established, was not at all easy and generated intense debate, mainly between the United States and the Soviet Union. Although the Cold War had not started yet, some of its most destructive effects could already be felt and greatly influenced the way in which human rights were dealt with in the United Nations Charter. Finally, following lengthy discussions, the United States, which had significant racial problems, accepted the inclusion of the principle of non-discrimination on the condition that the Soviet Union relinquish its desire to include in the Charter a clear reference to the right to work and the right to education which were particularly important rights for the socialist concept of human rights. Great Britain, which was

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<sup>37</sup> COT, J-P. and PELLET, A.: "Préambule", in COT, J-P. and PELLET, A. (sous la direction de): *La Charte des Nations Unies, Commentaire article par article*, Economica, Paris, 1985, p. 7.

still concerned that references in the Charter to human rights could interfere with its internal affairs, had no choice but to agree with the consensus which had been reached between the United States and the Soviet Union<sup>38</sup>.

The obligations accepted by States in order to achieve the objectives set out in the aforementioned Article 1.3 of the Charter are contained in its Articles 55 and 56 which open chapter IX of the Charter dedicated to "International Social and Economic Cooperation". In Article 55 the Organisation again takes on the commitment to promote universal respect for human rights without any type of distinctions, seeking to ensure their effectiveness at all times. In addition, Article 55 also establishes the principle of self-determination of peoples which, as we shall see, is not even mentioned in the Universal Declaration of Human Rights<sup>39</sup>. In accordance with Article 55:

"with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

... c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

Although the mandate entrusted to the UN in this Article 55 is extensive, it confers very limited powers. The task is assigned to the General Assembly (Article 13.1.b<sup>40</sup>) and to the Economic and Social Council (Article 62.2<sup>41</sup>), although these bodies' decisions on these issues are not legally binding. It must be said that based on this Article the United Nations, through the Commission on Human Rights and the General

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<sup>38</sup> Details of all these discussions can be found in SAMNOY, A.: *Human Rights as International Consensus...*, *op. cit.*, pp. 19 ff.

<sup>39</sup> A thought-provoking analysis of the inclusion of the principle of self-determination of peoples in the United Nations Charter can be found in DOEHRING, K.: "The Right of Self-Determination as Expressly Mentioned in the United Nations Charter", in SIMMA, B. (Ed.): *The Charter of the United Nations. A Commentary*, Oxford University Press, Oxford, 1995, pp 56-72.

<sup>40</sup> As Article 13.1.b of the United Nations Charter states, "the General Assembly shall initiate studies and make recommendations for the purpose of:... promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

<sup>41</sup> According to what is set out in Article 62.2, the Economic and Social Council "may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all".

Assembly, has performed incredibly significant work in relation to the promotion of and respect for human rights<sup>42</sup>.

While this Article 55 is aimed at the United Nations Organisation, setting out its responsibilities with regards to human rights, the aim of Article 56 however is to order States to commit, in cooperation with the United Nations, to the cause of human rights. In this Article 56, "all Members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55".

In view of the above we can currently without any doubt confirm that the obligations of Articles 55 and 56 of the United Nations Charter set out *genuine legal obligations* with regards to human rights, both for the Organisation itself and for each and every one of its Member States and not therefore merely programmatic recommendations as certain States have chosen to believe. Nevertheless, right from the very start of the United Nations both the doctrine and different States have questioned the point to which human rights are an issue which can be classed as matters "which are essentially within the domestic jurisdiction of any State" (Article 2.7 of the Charter) and that therefore interventions are not to be permitted, either from the United Nations, or from other States of the international community. Although at first there were doubts on the topic, these doubts were very soon cleared up and human rights entered into a process of internationalisation which was to progressively move them away from the internal jurisdiction of Member States<sup>43</sup>. As Jean-Bernard Marie and Nicole Questiaux have said on this matter, Article 2.7 of the Charter is a regulation with "evolutionary geometry", which means that human rights have gradually escaped from the dominion of States and have now become issues "of international concern"<sup>44</sup>. This same line of argument has been maintained in Spain by Professor Carrillo Salcedo for whom "practice has clearly confirmed this interpretation of Article 2.7 of the United Nations Charter, in accordance with which human rights have ceased to belong to the category of

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<sup>42</sup> MARIE, J-B. and QUESTIAUX, N.: "Article 55: alinéa c", in COT, J-P. and PELLET, A. (sous la direction de): *La Charte des Nations Unies...op. cit.*, pp. 870 ff. In addition, a detailed description of the main developments, both normative and institutional, which have taken place at the United Nations with regards human rights can be found in VIL-LAN DURAN, C.: *Curso de Derecho Internacional de los Derechos Humanos*, Trotta, Madrid, 2002.

<sup>43</sup> GANJI, M.: *International Protection of Human Rights*, *op. cit.*, pp. 133 ff.; CASSIN, R.: "La Déclaration Universelle et la mise en oeuvre des droits de l'homme", *op. cit.*, p. 253.

<sup>44</sup> MARIE, J-B. and QUESTIAUX, N.: "Article 55: alinéa c", *op. cit.*, p. 870.

matters which are essentially under the internal jurisdiction of States"<sup>45</sup>. A similar position is held by a relevant resolution of the International Law Institute at its session in Santiago de Compostela, which took place in September 1989, which confirms that no State which violates its international obligation to protect human rights "will be able to avoid its international responsibility on the pretext that this issue is essentially one that falls under its internal jurisdiction"<sup>46</sup>. The culmination of this process came about due to the Vienna Declaration of 1993 which stated that human rights are the "legitimate concern of the international community"<sup>47</sup>.

One should not however overlook the fact that there are serious and important gaps in the generic references to human rights found in the United Nations Charter. First of all, there is no definition of what we should understand by human rights. Secondly, the Charter does not include even a minimal list of these rights, except with its express reference to the principle of non-discrimination. And finally, it does not establish any specific mechanisms for guaranteeing human rights. Despite these deficiencies, "the inclusion of human rights provisions in the Charter changed the parameters of the debate and introduced radical new principles into world politics and International Law"<sup>48</sup>. In 1945 the United Nations Charter became the legal and conceptual framework of the process for the internationalisation of human rights.

A final relevant provision in the Charter regarding human rights, which should not be overlooked, is Article 68. This provision<sup>49</sup> allows the Economic and Social Council of the United Nations (ECOSOC) to create all the commissions necessary for the performance of its functions. The really significant fact for our purposes is that this Article 68 expressly states that ECOSOC "shall set up commissions in economic and social fields and *for the promotion of human rights...*" (emphasis added). The italicisation of the previous words is due to the fact that the phrase appears to give the impression that the Economic and Social Council

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<sup>45</sup> CARRILLO SALCEDO, J.A.: *Soberanía de los Estados y Derechos Humanos...*, *op. cit.*, p. 42.

<sup>46</sup> "La protección internacional de los derechos humanos y el principio de no intervención en los asuntos internos de los Estados", *Annuaire de l'Institut de Droit International*, vol. 63-II, 1990, pp. 338 ff.

<sup>47</sup> *Vienna Declaration and Programme of Action ...*, *op. cit.*, Part I, para. 4.

<sup>48</sup> JHABVALA, F.: "The Drafting of the Human Rights Provisions of the United Nations Charter", *op. cit.*, p. 2.

<sup>49</sup> A reflection on the problems and contents of this Article can be found in PARTSCH, K-F.: "Article 68", in SIMMA, B. (Ed.): *The Charter of the United Nations...*, *op. cit.*, pp. 875-892.

should establish a commission for the promotion of human rights. The fact is that the inclusion of this phrase in Article 68 was the result of a huge amount of intense pressure in favour of the creation of a human rights commission. Here again the 42 NGOs with consultative status in the U.S. delegation at the San Francisco conference played a determining role. Their pressure finally bore fruit, given that they had to persuade the U.S. delegation to overcome the reticence shown by Great Britain, the Soviet Union and China, who were not in favour of such an explicit provision which would facilitate the creation of a human rights commission<sup>50</sup>. In addition, it was understood that this human rights commission which would be set up by ECOSOC would be entrusted with drawing up a Declaration of Human Rights which would specify the Charter's human rights provisions<sup>51</sup>. Everything went according to the script and one of the first acts of the Economic and Social Council was to create the *Commission on Human Rights* in February 1946 which would have as its first main task to draft the Universal Declaration of Human Rights and other international human rights instruments.

### 2.3. Post-1945 legal developments

Once the activities of the new Organisation which had risen from the ashes of the Second World War had started, it became clear that its initial period was to be dedicated to specifying the somewhat vague and generic human rights provisions that appeared in the United Nations Charter. Hence the Commission on Human Rights was entrusted with the task of approving a document including the most fundamental human rights together with their protection mechanisms. However progress was slow because by then the Superpowers were completely absorbed by the Cold War and only a Universal Declaration of Human Rights was passed in 1948<sup>52</sup>. The problem facing the Universal Declaration was that it was passed by a resolution of the General Assembly of the United Nations. Such resolutions are only recommendations for Member States and are not legally binding obligations. It was therefore vital to pass of a number of human rights instruments which were fully legal in character and binding on those States which ratified them. However, like the passing of the Universal Declaration of Human Rights, this was to be a hugely complicated task. The East-West conflict was again

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<sup>50</sup> See on this subject see SAMNOY, A.: *Human Rights as International Consensus. The Making of the Universal Declaration...*, *op. cit.*, pp. 23 ff.

<sup>51</sup> HUMPHREY, J.P.: *Human Rights and United Nations...*, *op. cit.*, p. 13.

<sup>52</sup> On this topic, see Jaime Oraá's work, also in this volume.

to influence the preparation of international human rights treaties<sup>53</sup>. To form a better picture, it had initially been envisaged to pass only one human rights covenant, in other words a single covenant which would include the full gamut of fundamental rights and freedoms. Eventually, due to the conflict between the Western bloc and the Socialist bloc, two human rights covenants were approved. This means that at present we have the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, which were both paradoxically passed on the same day and at the same session of the General Assembly of the United Nations, on 16 December 1966. Notwithstanding this, a further ten years were necessary, until 1976, for these Covenants to come into force. These three basic United Nations human rights instruments, namely the Universal Declaration and the two Covenants, constitute what is known as the *International Bill of Human Rights*.

In addition to the adoption of these three documents, the United Nations has played a crucial role in the process of codifying and progressively developing International Human Rights Law<sup>54</sup> by passing a whole range of instruments on topics as diverse as children's rights, discrimination against women, the fight against torture, etc. The most significant instruments will be specifically examined in other chapters of this book.

We should not overlook the progress in the international protection of human rights through the developments within the framework of regional international organisations such as the Council of Europe, the Organisation of American States, and the Organisation for African Unity<sup>55</sup>. In these areas we have seen not only exemplary regulatory development, but also the appearance of sufficiently perfected jurisdictional mechanisms for the protection of human rights, such as the European Court of Human Rights, the Inter-American Court of Human Rights<sup>56</sup>, or the recently established African Court on Human and Peoples' Rights.

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<sup>53</sup> Regarding this issue, see ALVAREZ MOLINERO, N.: "La evolución de los derechos humanos a partir de 1948: hitos más relevantes", in INSTITUTO DE DERECHOS HUMANOS: *La Declaración Universal de Derechos Humanos en su cincuenta aniversario*, Universidad de Deusto, Bilbao, 1999, pp. 93–178.

<sup>54</sup> FERNANDEZ DE CASADEVANTE ROMANI, C.: "El Derecho Internacional de los Derechos Humanos", in FERNANDEZ DE CASADEVANTE ROMANI, C. (Coord.): *Derecho Internacional de los Derechos Humanos*, Dilex, Madrid, 2000, pp. 49–73.

<sup>55</sup> From July 2002 the OAU has become the *African Union*. See the contribution by Heyns and Killander in this volume.

<sup>56</sup> An in-depth study appears in CANÇADO TRINIDADE, A.A.: *El acceso directo del individuo...*, *op. cit.*

#### 2.4. *Indivisibility and Interdependence of all Human Rights*

Despite the fact that historically there have been two different categories or generations of human rights, civil and political rights on the one hand and economic, social and cultural rights on the other, and that as we have seen they have conventionally been recognised as two separate entities, these two types of rights do not fit into watertight compartments as two completely autonomous categories; both categories are deeply inter-related<sup>57</sup>. This overlap between civil and political rights and economic, social and cultural rights was already made manifest at the First International Conference on Human Rights held in Teheran in 1968. The Final Declaration of this Conference<sup>58</sup> pronounced the indivisibility and interdependence of both types of rights. This idea, one of enormous importance in putting human rights into practice, was reiterated in Resolution 32/130 of the General Assembly of the United Nations on 16 December 1977. Said Resolution confirmed that

“all human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion, and protection of both civil and political, and economic, social, and cultural rights; the full realisation of civil and political rights without the enjoyment of economic, social and cultural rights is impossible; the achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development...”

This indivisibility and interdependence of all human rights was again pronounced at the Second World Conference on Human Rights, held in Vienna from 13 to 24 June 1993. The Final Declaration confirms that “all human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis”.

As such, despite the fact that this distinction between, on the one hand, civil and political rights, and on the other, economic, social and cultural rights, still makes some sense in this day and age, it should be looked at in the light of the provisions mentioned above regarding the

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<sup>57</sup> Regarding this, see MEYER-BISCH, P.'s in-depth study: *Le corps des droits de l'homme. L'indivisibilité comme principe et de mise en oeuvre des droits de l'homme*, Editions Universitaires Fribourg, Fribourg, 1992.

<sup>58</sup> *Proclamation of Teheran*, ST/HR/1Rev. 5 (Vol. I, Part 2).

profound inter-relationship that must exist between the two types. The defence of human dignity needs both types of rights. This means that “under no circumstances can States hide behind the promotion and protection of a certain category of rights to avoid the promotion and protection of another category...; we should pay the same level of attention and urgency to both types of rights”<sup>59</sup>.

We must however acknowledge that economic, social and cultural rights have been “rhetorically praised but never truly dealt with at the United Nations, where the topical and the commonplace is to emphatically proclaim the indivisibility of human rights when it would really be more appropriate in accordance with the facts, as Professor Philip Alston has critically proposed, to talk of the *invisibility* of economic, social, and cultural rights”<sup>60</sup>.

## 2.5. *The Emergence of Third Generation Human Rights*

Since the 1970s a set of new human rights has been emerging which seeks to deal with the most urgent challenges facing the international community<sup>61</sup>. The following are among the human rights proposed to form part of this “new frontier in human rights”: the right to development<sup>62</sup>; the right to peace<sup>63</sup>; the right to the environment<sup>64</sup>, the right to benefit from the Common Heritage of Mankind<sup>65</sup>, or the right to humanitarian assistance<sup>66</sup>.

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<sup>59</sup> BLANC ALTEMI, A.: “Universalidad, indivisibilidad e interdependencia de los derechos humanos a los cincuenta años de la Declaración Universal”, en BLANC ALTEMI, A. (Ed.): *La protección internacional de los derechos humanos a los cincuenta años de la Declaración Universal*, Tecnos, Madrid, 2001, p. 33.

<sup>60</sup> CARRILLO SALCEDO, J.A.: *Soberanía de los Estados...*, op. cit., p. 24.

<sup>61</sup> RODRIGUEZ PALOP, M.E.: *La nueva generación de derechos humanos. Origen y justificación*, Dykinson, Madrid, 2002.

<sup>62</sup> On the growth of this new right, see, among others, M'BAYE, K.: “Le droit au développement comme un droit de l'homme”, *Revue des Droits de l'Homme*, 1972, pp. 505-534.

<sup>63</sup> See the *Declaration on the right of peoples to peace*, adopted by the General Assembly in its resolution 39/11, of the 12th of November 1984.

<sup>64</sup> FRANCO DEL POZO, M.: “El derecho humano a un medio ambiente adecuado”, *Cuadernos Deusto de Derechos Humanos*, n.º 8, 2000.

<sup>65</sup> On the innovative concept of the Common Heritage of Mankind, see: KISS, A. CH.: “La notion de patrimoine commun de l'humanité”, *RCADI*, t. 172, 1982-II, pp. 99-256; BLANC ALTEMI, A.: *El Patrimonio Común de la Humanidad. Hacia un régimen jurídico internacional para su gestión*, Bosch, Barcelona, 1992; GOMEZ ISA, F.: “Patrimonio Común de la Humanidad”, *Estudios de Deusto*, Vol. 41/2, julio-diciembre 193, pp. 119-192.

<sup>66</sup> Concerning this problematic right see ABRISKETA, J.: “El derecho a la asistencia humanitaria: fundamentación y límites”, in UNIDAD DE ESTUDIOS HUMANITARIOS: *Los desafíos de la acción humanitaria*, Icaria, Barcelona, 1999, pp. 71-100.



And the truth is that, as Karel Vasak states, “the list of human rights is not, nor will it ever be, a finished list”<sup>67</sup>. Similar opinions are expressed by Philip Alston when he states that this new generation of human rights represents “the essential dynamism of the human rights tradition”<sup>68</sup>.

There are many different factors which have brought about, and continue to bring about, the appearance of these new human rights. Firstly the 1960s decolonisation process led to a revolution in international society and, as a result, in the legal order called to regulate it, namely International Law. This change also influenced human rights theory which increasingly tends towards the specific problems and needs of the new category of countries that appeared on the international scene, namely the developing countries<sup>69</sup>. If it was the bourgeois and socialist revolutions which gave rise to the first and second generations of human rights respectively, according to Stephen Marks it will be this anti-colonialist revolution which will give rise to the emergence of third generation human rights<sup>70</sup>.

Another factor which has had a notable impact on the emergence of these solidarity rights is international society's interdependence and globalisation since the 1970s. States are becoming more and more aware of the fact that there are global problems which require coordinated responses. They require, in short, processes of international cooperation<sup>71</sup>. As a consequence of this global change, third generation rights are rights which emphasise the need for international cooperation which basically have a bearing on the collective aspects of these rights; to use Gros Espiell's expression, they are “community-oriented rights”<sup>72</sup>. Rights in other words which reveal the urgent need to make decisions and take joint actions within the framework of the international community, not only in the sphere of nation-States.

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<sup>67</sup> VASAK, K.: “Les différentes catégories des Droits de l'homme”, in *Les dimensions universelles des Droits de l'homme*, UNESCO–Bruylant, Brussels, 1990, p. 297.

<sup>68</sup> ALSTON, P.: “A third generation of solidarity rights: progressive development or obfuscation of International Human Rights Law?”, *Netherlands International Law Review*, 1982, p. 314.

<sup>69</sup> With this in mind, it is no surprise that the right to development had its origins in Africa, and that jurists from the Third World have been its most ardent defenders.

<sup>70</sup> MARKS, S.: “Emerging Human Rights: a new generation for the 1980s?”, *Rutgers Law Review*, Vol. 33, 1981, p.440.

<sup>71</sup> As such, there has been talk of the emergence of an International Law of Cooperation: FRIEDMANN, W.: *La nueva estructura del Derecho Internacional*, Ed. Trillas, Mexico, 1967, p. 90.

<sup>72</sup> GROS ESPIELL, H.: “Introduction” in BEDJAOUI, M. (Ed.): *International Law: Achievements and Prospects*, UNESCO- Martinus Nijhoff Publishers, Dordrecht, 1991, p. 1167.

The key word as regards these new rights is *solidarity*<sup>73</sup> which does not mean that these rights are the only vehicles for promoting solidarity. Human rights of the first two generations should also serve to give expression to this value which is so necessary in an international society as divided as the one in which we live today. But what certainly *is* true is that “perhaps third generation rights require a higher degree of solidarity”<sup>74</sup>.

However, this new generation of human rights has caused a series of intense debates. In the words of Angustias Moreno:

“new trends pose sufficient risk to the international protection of human rights that we have to approach them with great care; it might even, perhaps, be more profitable for us to consolidate what we have already achieved with regards to respecting human rights, before crossing new frontiers”<sup>75</sup>.

A similar opinion is held by Professor Kooijmans for whom the introduction of the idea of third generation human rights “does not only muddy the issue, it also constitutes a danger to what was at the root of the internationalisation of human rights, viz., strengthening the protection of the individual from breaches of his most fundamental human rights by the State”<sup>76</sup>.

One of the most common objections to these rights is that the excessive proliferation of human rights may weaken the protection offered to already existing human rights. This criticism has been countered by those supporting these new rights. Gros Espiell, amongst others, argues that this risk of weakening previous generations’ rights does not exist, but rather, solidarity rights “are a prerequisite for the existence and exercise of all human rights”<sup>77</sup>. In other words, rather than weakening or diluting these human rights, they would strengthen the indivisibility and interdependence of all human rights. But the truth is that, as rightly stated by Alston, “the challenge is to achieve an appropriate balance between, on the one hand, the need to maintain the integrity and credibility of the human rights tradition, and, on the other hand, the need

<sup>73</sup> MARKS, S.: “Emerging Human Rights...”, *op. cit.*, p. 441.

<sup>74</sup> GROS ESPIELL, H.: *op. cit.*, p. 1169.

<sup>75</sup> MORENO LOPEZ, A.: “Los derechos humanos de la solidaridad”, in *IV jornadas de profesores de Derecho Internacional y Relaciones Internacionales*, 4th-6th July 1979, Universidad de Granada, 1980, p. 50.

<sup>76</sup> KOOIJMANS, P.H.: “Human Rights – Universal Panacea? Some reflections on the so-called human rights of the third generation”, *Netherlands International Law Review*, 1990, p. 329.

<sup>77</sup> GROS ESPIELL, H.: *op. cit.*, p. 1168.

to adopt a dynamic approach that fully reflects changing needs and perspectives, and responds to the emergence of new threats to human dignity and well-being"<sup>78</sup>.

Another common criticism of these third generation rights is that the term "generation" seems to imply that previous generations' rights are already out-of-date or antiquated; in a word, bettered. This criticism has also been answered. On this issue Karel Vasak agrees that these new rights are *synthesis rights*, in other words rights which "cannot be realised unless other human rights, which are, in some way, their constituent parts, have been set in motion"<sup>79</sup>. And the truth is that one of the essential parts of these rights is to protect and safeguard of individual rights which they complement.

One criticism which has been fairly justified is that the demand for these solidarity rights can, on occasion, serve to justify massive violations of civil and political rights, mainly in the Third World. This situation has occurred frequently across Africa where there are many countries suffering under cruel dictatorships. Many African leaders saw in the defence of solidarity rights, mainly the right to development, a way of lengthening their period in power, ignoring individuals' rights and defending the principle of non-interference in internal affairs<sup>80</sup>. The truth is that if we really want these new rights to be credible and accepted by the international community then they must entail scrupulous respect for individual human rights, and in particular the civil and political rights.

However without doubt the main objection which can be levelled against these emerging rights is the fact that, apart from the right to benefit from the Common Heritage of Humankind<sup>81</sup>, none of the other new rights has been recognised by a universal convention, in other words by an international treaty binding on those States which have

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<sup>78</sup> ALSTON, P.: "Conjuring up new Human Rights: a proposal for quality control", *American Journal of International Law*, Vol. 78, 1984, p. 609.

<sup>79</sup> VASAK, K.: "Les différentes catégories des Droits de l'homme", in *Les dimensions universelles...*, *op. cit.*, p. 305.

<sup>80</sup> This "perversion of solidarity rights" has been discussed by many different writers, among them: MAHMUD, S.S.: "The State and Human Rights in Africa in the 1990s: perspectives and prospects", *Human Rights Quarterly*, Vol. 15, n° 3, 1993, pp. 488 ff.; HOWARD, R.E.: *Human Rights in Commonwealth Africa*, Rowman and Littlefield Publishers, New Jersey, 1986.

<sup>81</sup> The concept of the Common Heritage of Mankind has been expressly dealt with in two international treaties. The first of these is the *Agreement Governing the Activities of States on the Moon and other Celestial Bodies*, 14 December 1979. The second is the *UN Convention on the Law of the Sea*, signed in Montego Bay on 30 April 1982, which has come into force on November 1994.

ratified it. These new rights have mainly been recognised through resolutions of the General Assembly of the United Nations, which brings us to the thorny issue of the legal value of such resolutions<sup>82</sup>.

Some of the international doctrine, mainly in the West, considers the legal value of the resolutions of the General Assembly of the United Nations as "relative", depending on the circumstances under which each individual resolution was adopted (whether it was unanimously approved, whether its terms are sufficiently precise and concrete, States' opinions regarding the issue etc). Often the norms contained in these resolutions become what is known as *soft-law*, or regulations which cannot be classed as fully legal<sup>83</sup>.

However some doctrine, more committed to transforming the international legal order, purports to give such resolutions full legal effect<sup>84</sup>.

We are therefore facing new human rights which are still in the process of being formed, or human rights in *statu nascendi*, given that States, the main creators of international law, are reluctant to recognise these new rights in any other instrument than a resolution of the General Assembly of the United Nations.

We should however bear in mind that older human rights were also up against fierce resistance when they were first proclaimed as rights. This should encourage us to redouble our efforts regarding these new solidarity rights which seek to respond to the main challenges faced by the international community: development, peace, the environment, humanitarian catastrophes etc.

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<sup>82</sup> There exists abundant literature on this topic. Among the most significant pieces are: VIRALLY, M.: "La valeur juridique des recommandations de Organisations Internationales", *Annuaire Française de Droit International*, 1956, pp. 66-95; PEREZ VERA, E.: "Algunas consideraciones sobre el valor jurídico de las Resoluciones de a Asamblea General en el 26 aniversario de la ONU", *Boletín de la Universidad de Granada*, no. 105, Vol. V, 1973, pp 37 52; CASTAÑEDA, J.: "La valeur juridique des résolutions des Nations Unies", *RCADI*, 1970-I, t. 129, pp. 205-332.

<sup>83</sup> On the notion of *soft-law*, see: WEIL, P.: "Vers une normativité relative en Droit International?", *Revue Générale de Droit International Public*, 1982, pp. 6 ff.; ISA, R.: "Formation des normes internationales dans un monde en mutation: critique de la notion de *Soft-law*", in *Le Droit International au service de la paix, de la justice et du développement. Mélanges Michel Virally*, Paris, Pedone, 1991, pp. 334 ff.

<sup>84</sup> BEDJAOUI, M.: *Hacia un Nuevo Orden Económico Internacional*, UNESCO- Sigueme, Salamanca, 1979, pp. 157 ff; BEKHECHI, M.A.: "Les résolutions des Organisations Internationales dans le processus de formation de normes en Droit International", in FLORY, M.; MAHIOU, A. and HENRY, J-R.: *La formation des normes en Droit International du Développement*, Table Ronde franco-maghrébine Aix-en-Provence, October 1982, Office des Publications Universitaires, Alger et Centre National de la Recherche Scientifique, Paris, 1984, pp. 181-196.

## 2.6. *The Vienna World Conference on Human Rights*

The Vienna Conference on Human Rights was the second world conference on the issue and took place 25 years after the first world conference held in Tehran in 1968. There were high expectations that this conference would become a turning point towards the universal respect for human rights. However, the results of the Conference left a bittersweet taste in the mouths of those attending it, both for governmental delegations and for the many non-governmental organisations which took part in the debates<sup>85</sup>, although there are some who are not so pessimistic and even consider that the Vienna Conference “was a huge success for the human rights cause”<sup>86</sup>.

Many issues were discussed at Vienna with varying degrees of success. For our purposes the most important aspects were the issue of the universality of human rights; the relationship between human rights, democracy and development; the incorporation of women’s rights onto the international human rights agenda; and finally the increasing role of non-governmental organisations in the defence and promotion of human rights.

The central theme of the Vienna Conference without doubt concerned the issue of whether human rights are universal, namely applicable to all countries in the international community, or whether on the other hand they must be considered in the light of different circumstances, whether historical, cultural, religious etc. There were two conflicting theories on this issue: the universalist theory and the theory of cultural relativism. The two positions were quite far apart. While Western countries defended the universality of human rights, the Islamic countries and a significant proportion of third world countries were staunch supporters of cultural relativism, viewing the theory of universality as a new form of colonialism. The truth is that following the debates concerning this thorny issue the conclusions which were reached were not particularly satisfactory given that, as we shall see below, the Final Declaration of the Vienna Conference is extremely ambiguous on the universality

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<sup>85</sup> More than 3,500 NGOs working in the field of human rights took part in a *Parallel Conference* which took place in Vienna for the duration of the official conference. It should also be noted that the discussions which took place at the parallel conference had an influence on the final declaration of the official conference.

<sup>86</sup> These are the words of Julián Palacios, Director of the Office of Human Rights of the Spanish Ministry for Foreign Affairs at the time of the official conference, in PALACIOS, J.: “Más luces que sombras en la Conferencia Mundial de Derechos Humanos”, *Tiempo de Paz*, nº. 29-30, Autumn 1993, p. 6.

of human rights<sup>87</sup>. The Conference's Final Declaration reaches a type of consensus which, in my opinion, has still not resolved the problem because the Vienna Declaration states, after its first paragraph in which it declares that the universal nature of these rights and freedoms "is beyond question":

"... the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind"<sup>88</sup>.

Clearly this ambiguous paragraph does not openly take the side of either the universality of human rights or of the theory of cultural relativism; insofar as possible it aims to please the advocates of both views. This is because as already mentioned the sessions of the World Conference on Human Rights clearly demonstrated that the two opinions were very much opposed and that any kind of consensus was still far from possible<sup>89</sup>. The only possible way, and providing that there is sufficient political will on the part of the States, to achieve universality for at least the most fundamental human rights will be to open up a sincere and open intercultural dialogue<sup>90</sup> between the Western States and those supporting cultural relativism. Both groups of States will need to put aside dogma and preconceived ideas and be prepared through said dialogue to make some concessions in their aims. This is one of the main

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<sup>87</sup> Clear proof of the fact that the two positions were separated by a considerable distance can be found if the final documents of the preparatory Regional Meetings are compared with those of the Vienna World Conference. The first of these regional meetings was the African Regional Meeting, which took place in Tunisia from 2 to 6 November 1992, *Report of the Regional Meeting for Africa of the World Conference on Human Rights*, A/CONF.157/AFRM/14, 24 November 1992. The second meeting was the Regional Meeting for Latin America and the Caribbean, *Report of the Regional Meeting for Latin America and the Caribbean of the World Conference on Human Rights*, A/CONF.157/LACRM/15, 22 January 1993. The third was the Regional Meeting for Asia, *Report of the Regional Meeting for Asia of the World Conference on Human Rights*, A/CONF.157/ASRM/8, 7 April 1993. The European Union, for its part, also held a preparatory meeting prior to the conference, *Note verbale dated 23 April 1993 from the Permanent Mission of Denmark to the United Nations Office at Geneva, transmitting a position paper by the European Community and its member States*, A/CONF.157/PC/87, 23 April 1993.

<sup>88</sup> *Vienna Declaration and Programme of Action*, *op. cit.*, Part 1, para. 5.

<sup>89</sup> On the issue of the universality of human rights at the Vienna Conference and in its Final Declaration, see VILLAN DURAN, C.: "Significado y alcance de la universalidad de los derechos humanos en la Declaración de Viena", *Revista Española de Derecho Internacional*, Vol. XLVI, no. 2, 1994, pp. 505-532.

<sup>90</sup> ETXEBERRIA, X.: "El debate sobre la universalidad de los derechos humanos", in INSTITUTO DE DERECHOS HUMANOS: *La Declaración Universal...*, *op. cit.*, p. 385.

problems currently facing us and the future evolution of human rights in a world of conflict will greatly depend on an adequate response to this problem.

The second question dealt with at the Vienna Conference was the growing link between human rights, democracy, and development. This is one of the most developed aspects of human rights theory. The indivisibility and interdependence between human rights, democracy, and development have been openly defended in recent times. In other words, in order to effectively defend human rights and fundamental freedoms, it is vital that people live in a democratic State and that the State has achieved reached minimum levels of economic, social, cultural and political development.

This aspect was not as controversial as the issue of universality as reflected in the Conference's Final Declaration. Paragraph 8 of the Vienna Declaration states that:

"Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing... The international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world".

An issue that is closely related to this link between human rights, democracy and development is the recognition in the Vienna Declaration of the right to development. This recognition is very important given the fact that, as we have already shown, this right met with across-the-board opposition from Western countries at the time when it was first suggested. It is significant that years later, in 1993, all of the countries present in Vienna agreed to recognise the right to development. As the Final Declaration states, "the World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a *universal and inalienable right and an integral part of fundamental human rights*"<sup>91</sup> (emphasis added). Hence the right to development occupies a relatively important position in the Vienna Declaration, a fact which encouraged the already-quoted Julián Palacios to state that "the recognition of the principle of the right to development... constitutes an unprecedented success which, *ab initio*, it appeared impossible to achieve"<sup>92</sup>.

Another issue discussed in Vienna, and which finally managed to be included in the Final Declaration, was the international community's

<sup>91</sup> *Vienna Declaration and Programme of Action*, *op. cit.*, Part 1, para. 10.

<sup>92</sup> PALACIOS, J.: "Más luces que sombras...", *op. cit.*, p. 8.

acceptance of a firm commitment to make the human rights of women one of the priorities of the international human rights agenda. The fact is that the lobbying of movements in favour of the rights of women in Vienna certainly made its presence felt throughout the conference and achieved a very significant recognition in the Final Declaration. As the Vienna Conference states regarding this issue:

“The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights (...) The human rights of women should form an integral part of the United Nations human rights activities, including the promotion of all human rights instruments relating to women”<sup>93</sup>.

A final aspect dealt with at the Vienna Conference is the importance given to the non-governmental organisations working in the area of human rights. Firstly, as we have already mentioned, the NGOs participated very actively in the discussions, both at the official Conference and at the parallel Conference of NGOs. Additionally, the Final Declaration of the Vienna Conference recognises the important role which NGOs must play with regards the protection and promotion of human rights. On this matter, paragraph 38 of the Final Declaration states that:

“the World Conference on Human Rights recognizes the important role of non-governmental organizations in the promotion of all human rights and in humanitarian activities at national, regional and international levels. The World Conference on Human Rights appreciates their contribution to increasing public awareness of human rights issues, to the conduct of education, training and research in this field, and to the promotion and protection of all human rights and fundamental freedoms...”.

### 3. Conclusions

As we have seen the 20<sup>th</sup> century was very significant in evolving the protection of human rights on the international legal scene. Both the League of Nations and, above all, the United Nations worked intensively both in the regulatory ambit and in the institutional ambit in order to seek to protect the most basic human dignity. Although the progress is laudable, we are forced to recognise that there is plenty of work still to be done at the beginning of this rather uncertain 21<sup>st</sup> century.

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<sup>93</sup> *Vienna Declaration...*, *op. cit.*, Part 1, para. 18.



## Part II

# Human rights in a global context



# Globalisation and human rights

Koen de Feyter

**Summary:** 1. Introduction. 2. Adjusting State Obligations: 2.1. Duties to Protect and Privatisation. 2.2. Shared Obligations: 2.2.1. The Rights Approach to Development. 2.2.2. Extraterritorial Obligations. 2.2.3. The Right to Development. 3. Conflicts between Human Rights Obligations and other Treaty Obligations. 4. Human rights Obligations of Non-State Actors: 4.1 Intergovernmental Organisations: 4.1.1. The World Bank and Human Rights. 4.2 Private Actors: 4.2.1. Companies. 4.2.2. Non-Governmental Organisations. 5. Multi-stakeholder Agreements. 6. Localising Human Rights.

## 1. Introduction

Economic globalisation is a process aimed at breaking down State borders in order to allow the free flow of finance, trade, production, and, at least in theory, labour. While remaining sovereign, States are encouraged by a variety of public and private actors that support globalisation, not to use their sovereign powers in order to impede such free flows in to and out of their territory. In this context, the main role of the State is to create a space where domestic and foreign companies can compete freely and fairly. In addition, international economic law provides legal security to those entering domestic markets, by ensuring that State decisions to open up to the international economy cannot simply be reversed by a change of direction in national politics.

In the international human rights regime<sup>1</sup>, however, the State is not a facilitator, but the principal actor, whose human rights obligations require an intervention whenever the functioning of the market leads to human rights violations. Can the State play these twin roles simultaneously? How can it provide human rights protection while at the same time entrusting responsibility to market forces for many sectors of the

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<sup>1</sup> The international human rights regime consists of the treaties and protection mechanisms at international and regional levels that are the main focus of this Manual.

economy that are human rights sensitive, such as the exploitation of natural resources or the provision of essential services? Is the State still able to fulfil its human rights obligations in an increasingly globalising economy?

This contribution<sup>2</sup> argues that human rights protection in a globalising economy requires adjustments to the international human rights regime. Some adjustments have already occurred over the last decade; others continue today. Two basic approaches in the human rights response to economic globalisation are described<sup>3</sup>. The first is the further elaboration of State obligations that specifically address the role of the State in a context of economic globalisation. The second approach consists of the construction of human rights duties for non-State actors<sup>4</sup>.

In practice, both approaches co-exist, although they start from somewhat different assumptions. Maintaining the emphasis on the State as the principal (or only) human rights duty holder is defensible because in international relations only States (governments) have a specific responsibility to take into account the public interest. This is why governments are, at least ideally, subject to democratic control. Governing bodies of non-State actors are responsible to specific consti-  
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<sup>2</sup> This article compiles and updates some of my earlier publications, mainly *Human Rights. Social Justice in the Age of the Market*. Zed Books, London, 2005; "Introduction" and "Localising Human Rights", in BENEDEK, W., DE FEYTER, K., MARRELLA, F. (Eds.), *Economic Globalisation and Human Rights*, Cambridge University Press, Cambridge, 2007, pp. 1-14, 67-92; "Privatisation and Human Rights: an Overview", in DE FEYTER, K., GÓMEZ ISA, F. (Eds.), *Privatisation and Human Rights*, Intersentia, Antwerp, 2005, pp. 1-8; "The International Financial Institutions and Human Rights. Law and Practice", in GÓMEZ ISA F., DE FEYTER, K. (Eds.) *International Protection of Human Rights: Achievements and Challenges*. Deusto University, Deusto, 2006, pp. 561-592 and "Corporate Governance and Human Rights" in INSTITUT INTERNATIONAL DES DROITS DE L'HOMME, *World Trade and the Protection of Human Rights*. Bruylant, Bruxelles, 2001, pp. 71-110.

<sup>3</sup> Books covering the field of globalisation and human rights in a comprehensive manner include ANDERSON, G., *Constitutional Rights after Globalization*. Hart Publishing, Oxford, 2005; BENEDEK, W., DE FEYTER, K., MARRELLA, F. (Eds.), *Economic Globalisation and Human Rights*. Cambridge, Cambridge University Press, 2007; BRYSK, A. (Ed.), *Globalization and Human Rights*, University of California Press, Berkeley, 2002; GEARY, A., *Globalization and Law: Trade, Rights, War*, Rowman & Littlefield, New York, 2005; KAUFMANN, C., *Globalisation and Labour Rights*. Hart Publishing, Oxford, 2006; SALOMON, M.E., *Global Responsibility for Human Rights*, Oxford University Press, Oxford, 2007; SALOMON, M., TOSTENSEN, A., VANDENHOLE, W. (Eds.), *Casting the Net Wider: Human Rights, Development and New Duty-Bearers*. Intersentia, Antwerp, 2007.

<sup>4</sup> "Non-State actors" is used here as an umbrella term covering both intergovernmental organisations and private actors (companies and non-governmental organisations).

cies (such as shareholders or members), but not to the population. Therefore, it is not self-evident to construct a human rights responsibility on their behalf that extends to society as a whole. In addition, increasing the number of human rights duty holders may weaken the existing State responsibility for violations.

The opposite view is that adequate human rights protection can no longer be achieved by focussing on the State only, when in reality many different actors (both domestic and foreign) contribute directly to violations. States on whose territory these violations occur may lack the legal capacity, or the economic and the political power to act against actors whose presence on the territory may be essential to them for other reasons. In such circumstances, effective human rights protection requires that 'every organ of society' that is involved in human rights abuses can be held responsible-, an idea that can be traced back to the preamble of the Universal Declaration of Human Rights.

As a final preliminary remark, it may be useful to recall that the debate on the human rights response to globalisation is relevant not only to economic, social and cultural rights. The privatisation of services of general interest also impacts on civil and political rights: the privatisation of prisons is perhaps the best known example. Debates on the regulation of the internet and the extent to which private internet providers are willing to share information on the identity of users to governments that may use them for repressive ends touch upon core issues in the area of freedom of expression. In the United States, claims have been brought under the Alien Tort Claims Act against companies for complicity in political killings. Finally, globalisation has helped non-state entities in mobilizing capital and personnel across borders for the purposes of using violence. Decision-making centres are mobile, and the execution of the attacks takes place on different continents. In shaping a forceful response, States have sought to avoid or diminish legal responsibility for human rights violations by entrusting law enforcement tasks to private security firms or by establishing detention centres on foreign soil. The impact of globalisation is felt across the whole range of human rights.

## 2. Adjusting State Obligations

This section discusses three issues. Duties of protection are part of the standard typology of State obligations attached to human rights treaties. They take on a new significance, however, when States entrust non-State actors with the delivery of services of general interest.

Extraterritorial obligations of States are less well established, but are a response to the finding that populations are more vulnerable to actions and decisions taken by third States.

Finally, intergovernmental discussions on the right to development have focused on the establishment of duties of donors to assist recipient countries in complying with their human rights obligations in resource scarce societies. Discussions were at a stalemate for decades, but recently came to life again.

### 2.1 *Duties to Protect and Privatisation*

Clearly, the State cannot absolve itself of its international human rights obligations by delegating service delivery to private actors. Privatisation does not affect the legal responsibility of the State under international human rights law, but it does imply a retreat by the State from service delivery. As a result, the type of action a State needs to undertake in order to avoid a breach of its human rights obligations changes. In the context of public service delivery duties to respect and provide the right are essential. In a privatisation context, the duty to protect against human rights violations by the private actor entrusted with service delivery comes to the fore. Even after privatisation, the State will need to maintain instruments that allow it to intervene for the purposes of human rights protection. If these instruments are not available, and human rights violations occur, the State will be responsible for failure to provide protection under human rights law.

Clearly, one should not assume that privatisation always leads to worsening of the human rights situation; it may also have the opposite effect. All depends on pre-privatisation conditions, i.e. on a comparison of performances by the former public provider, and the private actor or mixed arrangement that takes over service delivery. The human rights baseline is that the mechanisms to protect human rights should be in place and effective, regardless of the actor who provides the service.

State involvement after privatisation is in itself not uncommon. Although privatisation may consist of transfer of ownership, the term is also used to describe a process involving the removal of the public authorities from the operation of an institution or a service, even if the State retains ownership. Even if there is a deliberate move towards more private and less public spending in terms of provision, financing, management and regulation, it is unlikely that the State fully withdraws from all of these aspects, or does not remain involved in some way in the monitoring of the quality of the service delivery.

Human rights safeguards in the context of privatisation are to some extent rights specific: providing humane prison conditions or access to drinking water are very different kinds of services. Any general list of safeguards tends to be somewhat abstract. Nevertheless, some points can be made.

From a human rights perspective, upfront attention to the maintenance of regulatory capacity after privatisation is essential. Legislation requiring advance consultation of the public and of users on the basis of adequate and sufficient information is important. The State needs to maintain the regulatory capacity to protect human rights after privatisation, particularly of the most vulnerable groups. New institutions need to be created that can perform this monitoring role. Many of the required devices are procedural in nature: provision needs to be made for the hearing of consumer views; performance standards for the private operator need to be agreed that tie the operator to a level of performance equal to what is required under human rights law; a system of fines needs to be in place when performance falls below such standards. Equality of arms should be ensured when disputes are litigated. Users should have access to remedies both with regard to the State and the private operator. Disconnection from a service should not happen without procedural protection. The term of the privatisation contract is important as well. Clearly, long-term contracts or contracts of unspecified duration offer much more leeway to the private operator, e.g. in setting price-levels, and are therefore risky from a human rights perspective. Public hearings during the operation of the privatised regime are a useful device to ensure that human rights concerns will be taken into account.

Finally, although user charges are generally compatible with human rights law (i.e. users can legitimately be asked to make a financial contribution to the delivery of the service), human rights also define a basic core content of a right that should be accessible to all regardless of ability to pay. User charges should not deprive people that are genuinely unable to pay of access to a minimum floor of rights realisation. In its General Comment on the Right to Water<sup>5</sup>, the UN Committee on Economic, Social and Cultural Rights addresses the issue of affordability as follows:

To ensure that water is affordable, States parties must adopt the necessary measures that may include, *inter alia*: (a) use of a range of appropriate low-cost techniques and technologies; (b) appropriate price-

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<sup>5</sup> UN Committee ESC Rights, *General Comment on the Right to Water*, UN doc. E/C.12/2002/11 (20 January 2003), para. 27.

ing policies such as free or low-cost water; and (c) income supplements. Any payment for water services has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households.

Many of the safeguard mechanisms mentioned above belong to fields of domestic law that human rights researchers or activists are not necessarily familiar with such as administrative law, the law of (international) contracts, competition law etc. At the international level also, the international financial institutions and the World Trade Organisation are important actors pushing for a liberalisation of the market in services without insisting on human rights protection, unless human rights concerns are raised by the relevant country. The UN High Commissioner for Human Rights has responded by developing a human rights perspective on these issues<sup>6</sup>. To some extent UNHCHR reports function as a counterweight, but clearly States are less vulnerable to the pressure of a human rights institution than to the conditionalities required by the international financial and economic institutions.

Similarly, disputes arising about the human rights impact of the privatisation of services of general interest will not usually be decided by human rights bodies. When the private operator is a foreign company, they will not even be decided by domestic courts. Contracts between States and foreign companies routinely provide that disputes will be settled under international law and exclusively through international arbitration. In his comment on the International Convention on the Settlement of Investment Disputes (ICSID), Muchlinski explicitly perceives of the treaty as an instrument of *delocalisation*, because the treaty severely curtails both the role of domestic courts and the applicability of domestic law<sup>7</sup>.

International arbitration tribunals are able to consider the human rights impact of disputes as a part of the applicable international law<sup>8</sup>, but this is not their usual approach. Private-public arbitration was created as a mechanism protecting the foreign investor against arbitrary

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<sup>6</sup> E.g. see Office of the High Commissioner for Human Rights, *Liberalization of Trade in Services and Human Rights*, UN doc. E/CN.4/Sub.2/2002/9 (25 June 2002).

<sup>7</sup> MUCHLINSKI, P.T., *Multinational Enterprises and the Law*, Blackwell Publishers, Oxford, 1999 pp. 547-551.

<sup>8</sup> See in general PETERSON, L.E., GRAY, K.R., *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration*, International Institute for Sustainable Development, Winnipeg, 2005; SUDA, R., "The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization", in DE SCHUTTER, O. (Ed.), *Transnational Corporations and Human Rights*, Hart, Oxford, 2006, pp. 73-160.



interventions from the State. As privatisation extends to human rights sensitive services, however, it becomes more difficult for arbiters to avoid the public dimension of their decisions. One interesting example is the ICSID dispute *Aguas Argentinas e.a. v. Argentina*<sup>9</sup>. *Aguas Argentinas*, a consortium of which Suez is the largest shareholder, took over the water and sewerage system of Buenos Aires in 1993 from a badly run state-owned water company. The take over was part of a huge privatization/deregulation/decentralization policy adopted by the Carlos Menem administration that was under pressure from the international financial institutions in order to obtain relief for Argentina's huge external debt. The relationship between the consortium and official institutions went through many ups and downs. The details of the dispute are not known, but there is little doubt that the consortium argues that it has not received a fair return on investment, due to unwarranted government interventions. Five local and international non-governmental organizations filed for the opportunity to present legal arguments as friends of the court. They asserted that the case involved matters of basic public interest and the fundamental rights of people living in the area. The Tribunal accepted that there was a justification for the acceptance of *amicus curiae* briefs in "ostensibly" private litigation when cases involved issues of public interest and because decisions in those cases had the potential, directly or indirectly, to affect persons beyond those immediately involved as parties in the case:

The factor that gives this case particular public interest is that the investment dispute centres on the water distribution and sewage systems of a large metropolitan area, the city of Buenos Aires and surrounding municipalities. Those systems provide basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations. Any decision rendered in this case, whether in favour of the Claimants or the Respondent, has the potential to affect the operation of those systems and thereby the public they serve<sup>10</sup>.

It remains to be seen whether the *amicus* briefs will have a substantive impact on actual decisions. Nevertheless, the importance of the opening up of arbitration procedures to the consideration of public concerns can hardly be overestimated. Again the main lesson is that in

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<sup>9</sup> ICSID Tribunal, *Aguas Argentinas, Suez, Sociedad General de Aguas de Barcelona and Vivendi Universal v. Argentine Republic*, Order in response to a petition for transparency and participation as *amicus curiae* (19 May 2005). The ICSID decision follows a trend that started within NAFTA.

<sup>10</sup> L.C., para. 19.

a context of economic globalisation human rights lawyers need to look beyond human rights institutions to achieve effective protection.

## 2.2. *Shared Obligations*

The human rights regime organises a division of labour between States. A State is only responsible for the human rights of the individuals within its jurisdiction, and jurisdiction is mainly based on territory. Individuals living in affluent countries stand a better chance that their rights will be respected, for the simple reason that human rights have resource implications, and are therefore easier to respect when overall State budgets are larger. The international human rights regime accepts that there is an unequal distribution of resources among countries, but expects that each country individually prioritises human rights. In international law, States can legitimately express concern over human rights violations in other countries, but they are not legally responsible for those violations. The regime is based on divided responsibility, not on shared responsibility.

Nevertheless, in a globalised world, human rights are increasingly influenced by decisions made elsewhere – by other States. These decisions may cause harm to the human rights of people who are not under their territorial control. In addition, affluent third States may well be in a position to contribute to human rights implementation in resource scarce countries by offering assistance. Hence the call for the recognition of a shared responsibility among States to contribute to the realisation of human rights.

### 2.2.1. THE RIGHTS APPROACH TO DEVELOPMENT

Perhaps the least controversial expression of a sense of shared (but not legal) responsibility is represented by the *rights based approach to development*<sup>11</sup>. The aim of this approach is to ensure that human rights are integrated in donor interventions. Donors should support programs that seek to improve the implementation of human rights in the recipient country, and should more generally be diligent in ensuring that no human rights violations occur in the context of aid sponsored activities. The origins of the approach are somewhat difficult to trace, but one of the first documents that struck a chord with the international commu-

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<sup>11</sup> In general, see SCHEININ, M., SUKSI, M. (Eds.), *Human Rights in Development. Yearbook 2002. Empowerment, Participation, Accountability and Non-Discrimination: Operationalising a Human Rights-Based Approach to Development*, Martinus Nijhoff, Leiden, 2005.

nity was *The Rights Way to Development: A Human Rights Approach to Development Assistance* by the non-governmental Human Rights Council of Australia, published in 1995.

Today, the rights based approach commands considerable support among the donor community. Over the years, the original concern with human rights as a conditionality for aid shifted to donor-recipient partnerships aiming at improving human rights compliance, particularly in resource scarce countries<sup>12</sup>. Success is primarily measured by evaluating the human rights impact of the donor intervention in the recipient country. According to Sano, the approach can make a difference in four dimensions:

[S]trengthening the link between local and global human rights actions; strengthening national advocacy practices, as well as the social and political movements behind them; a clearer rights-based definition of the accountability of state governments and non-governmental actors, and stronger protection for the social and civil rights of poor individuals and groups<sup>13</sup>.

The limitations of the rights-based approach to development also flow from its pragmatic nature. The approach takes existing donor policies and volumes as a point of departure, and then seeks to infuse a human rights dimension in these policies. There is not much emphasis on the human rights *obligations* of donors in the aid relationship<sup>14</sup>, nor is there much criticism of aid as a possibly inadequate instrument of mitigating the adverse impact of other donor policies (e.g. in the area of security or trade) on the enjoyment of human rights in recipient countries.

### 2.2.2. EXTRATERRITORIAL OBLIGATIONS

An approach that is more critical of donor policies focuses on extraterritorial obligations<sup>15</sup>. Here the argument is that States have *obliga-*

<sup>12</sup> A conditionality policy implies that the extent to which respect for human rights is shown determines the nature and/or magnitude of aid to a specific partner. Conditionality is usually set off against programs supporting human rights, i.e. reserving part of the means available for development to programs or projects specifically targeting human rights.

<sup>13</sup> SANO, H.-O., "Does Human Rights-based Development make a Difference?" in SALOMON, M., TOSTENSEN, A., VANDENHOLE, W. (Eds.), *Casting the Net Wider: Human Rights, Development and New Duty-Bearers*, Intersentia, Antwerp, 2007, p. 78.

<sup>14</sup> Donors tend to argue that they are free to decide on how to spend aid.

<sup>15</sup> See generally COOMANS, F., KAMMINGA, M. (Eds.), *Extraterritorial Application of Human Rights Treaties*, Intersentia, Antwerp, 2004; SKOGLY, S., *Beyond Borders. States' Human Rights Obligations in International Cooperation*, Intersentia, Antwerp, 2006; GONDEK, M., *Extraterritorial Application of Human Rights Treaties*, Intersentia, Antwerp, 2008.

tions towards persons outside their territories, and are legally responsible when their acts or omissions lead to human rights violations elsewhere. A consortium on extraterritorial obligations<sup>16</sup>, consisting of some 30 non-governmental organisations, university institutes and individuals was recently set up in Europe, and defines its purpose as developing the understanding of:

- the connection between the acts and omissions by States in their bilateral relations with foreign States and the resulting breaches of human rights in the territory of the latter;
- States' operations through multilateral organisations and resulting breaches of human rights;
- how the members of multilateral institutions (may) influence the decision making process to ensure human rights compliance.

An extraterritorial or transnational<sup>17</sup> reach of human rights obligations needs to be argued carefully, and demonstrated in specific factual circumstances.

In a limited number of international and regional cases States were held responsible for human rights violations occurring outside of their own territory. Not all human rights treaties use the same language in defining the geographical scope of State obligations, and consequently the case-law of each monitoring body is somewhat different. The European Court of Human Rights accepts that a State is responsible for what happens on another territory, if that State "through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government"<sup>18</sup>. The Court does not accept, however, that "anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State". In the relevant case, the result was that Belgium and nine other NATO States involved in military operations against Serbia could not be held responsible for killings of civilians that occurred as a consequence of the bombing of the Serb Radio and Television Building in Belgrade. The Court pointed out that the Eu-

<sup>16</sup> See the ETO Consortium website: <http://www.lancs.ac.uk/fass/projects/humanrights>

<sup>17</sup> SKOGLY, S., GIBNEY, M., "Transnational Human Rights Obligations", *Human Rights Quarterly*, Vol.24, 2001, pp.781-798.

<sup>18</sup> European Court of Human Rights, *Bankovic et al. v. Belgium and nine other States* (no. 52207/99), Judgment of 12 December 2001, para. 71.

ropean Convention was a mere regional instrument, not designed to be applied throughout the world, even in respect of the conduct of States that had ratified it.

The Inter-American Commission of Human Rights was willing to look into the detention and treatment by US forces of prisoners during the first days of the military campaign in Grenada because the prisoners were subject to the authority and control of the United States<sup>19</sup>. The Inter-American Commission applied the same reasoning when it ordered the United States to urgently enable a competent tribunal to determine the legal status of the detainees at Guantanamo Bay<sup>20</sup>, only to find its order ignored. The UN Human Rights Committee held Uruguay responsible for a kidnapping perpetrated by its security and intelligence forces in Argentina arguing that it “would be unconscionable (...) to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own”<sup>21</sup>.

In these cases extraterritorial human rights responsibility is only envisaged when individuals are under the effective control of (agents of) another State. There is no effective control when a developed country votes a World Bank decision with an adverse human rights impact, or adopts an agricultural policy that deprives small farmers in developing countries of their income. If any responsibility arises in such cases, it is of the cause-and-effect type that the European Court did not wish to entertain. But even if a cause-and-effect theory for establishing responsibility across borders were to be accepted, one would still need to demonstrate the causal link between the vote in the Bank’s decision-making bodies and the subsequent human rights violations in the borrower country. No doubt the Bank would argue that no such link can be established given the sovereignty of the State on whose territory the contested project takes place. The borrower country remains responsible for managing the project, including a responsibility to prevent human rights violations if the project entails human rights risks.

For the moment at least, judicial institutions are unlikely to extend extraterritorial responsibility in cases based solely on human rights im-

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<sup>19</sup> Inter-American Commission on Human Rights, *Coard et al.v. United States* (no. 109/99), report of 29 September 1999.

<sup>20</sup> Inter-American Commission on Human Rights; *Detainees in Guantanamo Bay, Cuba*, request for precautionary measures (13 March 2002).

<sup>21</sup> UN Human Rights Committee, *Lopez Burgos v. Uruguay* (no.R.12/52), decision of 29 July 1981, para. 12.3.

pact elsewhere. The UN Committee on Economic, Social and Cultural Rights, however, has more room for manoeuvre when it investigates State reports on their compliance with the Covenant. The International Covenant on Economic, Social and Cultural Rights repeatedly refers to the need to achieve ESC rights *through international assistance and co-operation*. According to the Committee, "where a State party is clearly lacking in the financial resources and/or expertise required (...) the international community has a clear obligation to assist"<sup>22</sup>. As a minimum, the duty to assist includes a duty for States to abstain from any policy that impedes on the protection of at least the core content of the economic, social and cultural rights of the affected peoples of another State<sup>23</sup>. Consequently, the Committee has started questioning developed States on whether their participation in intergovernmental organisations is in conformity with their duties of international co-operation under the Covenant, and in its concluding observations has encouraged them to ensure that it is. Non-governmental organisations have also initiated reporting on how donor countries impact on human rights elsewhere in their alternative reports to the Committee.

### 2.3. *The Right to Development*<sup>24</sup>

The idea of a human right to development was originally launched in the early seventies by two scholars/practitioners, Karel Vasak and Keba M'Baye<sup>25</sup>. Vasak argued that a new category of human rights was needed, called "solidarity rights". These rights would seek to include the human dimension into areas where it had been missing, such as development, peace and the environment. In Vasak's view, the active holders of the right to development were not only individuals, but also States and sub-national groups such as local collectivities and national,

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<sup>22</sup> UN Committee on Economic, Social and Cultural Rights, "General Comment No. 11: Plans of action for primary education". UN doc. E/C.12/1998/24, para. 9.

<sup>23</sup> UN Committee on Economic, Social and Cultural Rights, "General Comment No. 8: The relationship between economic sanctions and respect for economic, social and cultural rights", UN doc. E/C.12/1997/8, para.7.

<sup>24</sup> In general see GÓMEZ ISA, F., *El derecho al desarrollo*, Universidad de Deusto, Bilbao, 1999; ANDREASSEN, B.A., MARKS, S., *Development as a Human Right*, Harvard University Press, Cambridge, 2006; AGUIRRE, D., *The Human Right to Development in a Globalized World*, Ashgate, Aldershot, 2009; BUNN, I., *The Right to Development and International Economic Law*, Hart, Oxford, 2009.

<sup>25</sup> VASAK, K., "Le Droit International des Droits de l'Homme", *Revue des Droits de l'Homme*, Vol. 51, 1972, pp.43-51; M'BAYE, K., «Le Droit au Développement comme un Droit de l'Homme», *Revue des Droits de l'Homme*, Vol. 51, 1972, pp. 505-534.

ethnic and linguistic communities. The duty holders included not only territorially responsible States but the international community as a whole. The desired effect was to humanise the international economic order. Only if all actors on the social scene participated both as holders and duty bearers would this objective be realised.

The 1986 UN Declaration on the Right to Development<sup>26</sup> presented a much watered down version of the original idea. The non-binding Declaration perceived of the right to development as a human right of every human person and all peoples to economic, social, cultural and political development. The text identifies the human person as the central subject of development, and offers little clarification on the collective component of the right. As far as duties are concerned, the primary responsibility lies with the national State. The Declaration is cautious on international responsibilities for development: States collectively have a responsibility for the creation of “favourable international conditions” for the realisation of the right.

The United States opposed the Declaration, and a number of developed countries abstained. Subsequently, the right to development appears in a number of other non-binding texts that were adopted by consensus, such as in the Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights in 1993, and in the Millennium Declaration<sup>27</sup>.

Within the Geneva human rights system, the follow-up to the Declaration was largely institutional, as political disagreement between North and South on the implementation of the Declaration persisted. Within the Office of the High Commissioner for Human Rights, a branch dealing with the right to development was created in 1995. In 1998 the Commission on Human Rights appointed an Independent Expert on the Right to Development<sup>28</sup>, and also established an open-ended working group on the right to development that met for the first time in 2000, and continues until today. In 2004 a subsidiary body of the working group was set up: the High Level Task Force brings together human rights experts and representatives of development, finance and trade IGOs<sup>29</sup>. Substantively, the main impact of the Declaration has

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<sup>26</sup> UN General Assembly Resolution 39/11 (12 November 1986), adopted by a 146-1-8 vote.

<sup>27</sup> In UN General Assembly Resolution 55/2 ( 8 September 2000), para.11, the world heads of State and government declare that they “are committed to making the right to development a reality for everyone and to freeing the entire human race from want”.

<sup>28</sup> UN Commission on Human Rights resolution 1988/72 (22 April 1998).

<sup>29</sup> UN Commission on Human Rights resolution 2004/7 (13 April 2004).

not been on relationships between States, but on mainstreaming human rights in the UN specialised agencies.

On 30 March 2007, the United Nations Human Rights Council enabled its working group on the Right to Development to gradually move towards the consideration of “an international legal standard of a binding nature” on the right to development<sup>30</sup>. Although the resolution is tentatively worded, it does create a new dynamic that may lead to a follow-up document around the time of the 25<sup>th</sup> anniversary of the Declaration.

What could such a legally binding instrument on the right to development consist of? In current analyses of the right to development, a distinction is often made between the internal and the external dimension of the right. The internal aspect concerns the domestic State’s obligation to respect, protect and promote human rights in the context of national development policies. Clearly, there is no pressing need to draft a new normative instrument to establish that a State should abide by its human rights obligations in domestic development policy. That obligation is a consequence of the mere ratification of international human rights treaties. But if a binding instrument on the right to development were to be drafted for other reasons (as discussed below), it would be essential to include the internal dimension as well – as it is legally and politically not feasible to codify external obligations of other actors, without reaffirming a parallel obligation of the domestic State to commit available resources to the realisation of human rights.

A binding instrument on the right to development could be innovative in clarifying the external dimension of the right. One could imagine that the internal dimension of the right would be complemented by an obligation of donors to adopt a rights based approach. Such an approach might be politically feasible. In addition, one could attempt to codify the extraterritorial human rights obligations of States. Another option would be to build on the current work of the High Level Task Force. The HLTf focuses on assessing intergovernmental partnership agreements (such as the Cotonou Agreement or the OECD Paris Declaration on Aid Effectiveness) from a right to development perspective. These partnerships can be perceived as expressions of a shared responsibility for development, and as such constitute a fertile ground for a right to development based analysis. The Task Force assessments employ a list of criteria that the expert group has provisionally drawn up.

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<sup>30</sup> UN Human Rights Council Resolution 4/4 (30 March 2007), para. 2, d. The resolution was adopted without a vote.



Once these criteria are sufficiently refined, they could become part of an international treaty on the right to development<sup>31</sup>. The treaty would contain a legal commitment by both developing and developed States to ensure that partnership agreements comply with the criteria, and thus contribute to the realisation of the right to development. Yet another option is to develop a multi-stakeholder agreement on the right to development<sup>32</sup>.

### 3. Conflicts between Human Rights Obligations and other Treaty Obligations

Economic globalisation does not as such affect the State's legal obligations under international human rights treaties. A State cannot undo its consent to be bound by human rights treaties, simply by arguing that it no longer has the capacity to comply with these obligations due to globalisation. The rules on termination and suspension of the operation of treaties in the Vienna Convention on the Law of Treaties are strict, and clearly could not be invoked when lack of compliance with human rights obligations results from a conscious decision by the State to open up to economic globalisation. Defences available in the Vienna Convention based on the impossibility to perform the treaty or on a fundamental change of circumstances would not apply in such circumstances.

Issues under the Vienna Convention arise, however, when the State consents to treaty obligations in the field of economic globalisation that (may) contradict human rights. Under international human rights law, the State should not enter into such obligations. The UN Committee on Economic, Social and Cultural Rights has consistently insisted that States are obliged under the Covenant not to engage in obligations that hinder the realisation of ESC rights. For example, in its General Comment on the right to health, the Committee said:

In relation to the conclusion of other international agreements States parties should take steps to ensure that these instruments do not adversely impact upon the right to health<sup>33</sup>.

According to the Committee, the State violates its obligation to respect the right to health if it fails to take into account its human rights

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<sup>31</sup> On the current version of the criteria, see the most recent HLTF report: UN doc. A/HRC/8/WG.2/TF/2 (31 January 2008).

<sup>32</sup> See section 5.

<sup>33</sup> See UN doc. E/C.12/200/4 (11 August 2000), para. 39.

obligations when entering into agreements with other States, international organizations or companies<sup>34</sup>.

States do not always follow the Committee's good advice, however. Treaty obligations that may be difficult to reconcile with human rights obligations can originate from different sources: from a loan agreement with an international financial institution committing to cuts in public expenditure, from agreements reached within the framework of the World Trade Organisation, or from a myriad of bilateral investment treaties unconditionally opening up the market in essential services to foreign private investors.

The Vienna Convention on the Law of Treaties suggests that conflicts between treaties should be addressed by interpreting the treaties in such a way that the potential for conflict diminishes. The Convention provides that the terms of a treaty should *inter alia* be interpreted in the light of any other "relevant rules of international law applicable in the relations between the parties"<sup>35</sup>. If the conflict between the treaties cannot be resolved through interpretation, difficult legal issues arise under Article 30 of the Vienna Convention on the application of successive treaties relating to the same subject-matter. Article 103 of the UN Charter, stipulating that in the event of a conflict between obligations under the Charter and obligations under other agreements, the Charter obligations prevail, may help in ensuring the integrity of human rights commitments. The *ius cogens* provision in the Vienna Convention (Article 53) also introduces elements of hierarchy between treaty obligations, and can be used to defend the prevalence of human rights obligations. One could for instance argue that other treaty obligations should be considered void when compliance with these obligations results in violations of the peremptory norm prohibiting gross and systematic violations of human rights.

The conflict of treaties discussion has been particularly important in the debate on the compatibility between WTO and human rights treaties<sup>36</sup>. From a human rights perspective, there are different ways of tackling incompatibilities or tensions between WTO and human rights treaties.

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<sup>34</sup> *Op. cit.*, para. 50.

<sup>35</sup> Vienna Convention on the Law of Treaties (23 May 1969), Article 31, para. 3,c.

<sup>36</sup> In general, see ABBOTT, F., BREINING-KAUFMANN, C., COTTIER, T. (Eds.), *International Trade and Human Rights. Foundations and Conceptual Issues*, University of Michigan Press, Ann Arbor, 2006; COTTIER, T., PAUWELYN, J., BURGI, E. (Eds.), *Human Rights in International Trade*, Oxford University Press, Oxford, 2005; HEPPLER, B., *Labour Laws and Global Trade*, Hart Publishing, Oxford, 2005.

The WTO treaties may offer opportunities to bring in human rights concerns. Examples often referred to are the references to raising standards of living and sustainable development in the Preamble of the Agreement establishing the WTO, and the general exceptions clause in Article XX of the General Agreement on Tariffs and Trade, that under certain conditions allows taking non-GATT compliant measures that are necessary to protect public morals, to protect human life or health, to protect cultural goods, or in response to goods being produced through prison labour.

Secondly, it may be possible to interpret WTO rules in such a way that conflicts with human rights are avoided. Within the WTO dispute settlement system there is (limited) room to clarify the provisions of the agreements in accordance with customary rules of interpretation of public international law. This reference should permit taking into account the human rights obligations of WTO members, although no case-law has developed so far.

A third option is to insist on amendments to WTO rules or to the functioning of its institutions in order to prevent that conflicts with human rights arise. This could be brought about through an institutional dialogue between WTO bodies and human rights institutions, by requiring reporting on the domestic human rights impact of WTO measures in the context of the Trade Policy Review Mechanism, by amending the rules relating to WTO dispute settlement in order to ensure that the dispute settlement bodies can more fully consider public international law, or by including explicit references to human rights in WTO rules, declarations, or decisions.

All these strategies depend on the willingness of WTO bodies or of States operating within WTO institutions to take into account human rights concerns. If that willingness is not forthcoming, the only remaining argument is the one based on hierarchy of norms, i.e. the prevalence of human rights norms over trade rules.

#### **4. Human rights Obligations of Non-State Actors**

In this section the attention shifts to the growing recognition of direct human rights obligations for non-State actors. As discussed, the more traditional human rights approach is to entrust the relevant domestic State with the duty to ensure that non-State actors comply with human rights. That route remains open. For instance, the UN Committee on ESC Rights systematically argues that the human rights obligations of the State also apply when it operates as a member of an international organisation. Similarly, the State is under a duty to

protect individuals and communities from human rights abuses by companies. If abuse nevertheless occurs, it is the State that incurs responsibility.

The most compelling argument in favour of the establishment of direct human rights obligations for non-State actors is that in a context of economic globalisation, State duties may well be insufficient to provide effective human rights protection on the ground. The main objective of the international human rights regime is to provide effective protection. When the existing norms, mechanisms and remedies are insufficient to achieve this objective, they need to be amended. In present conditions, the required amendment is the establishment of norms, mechanisms and remedies that directly address the behaviour of non-State actors.

#### 4.1. *Intergovernmental Organisations*<sup>37</sup>

Intergovernmental organisations are given powers by their Member States to act on their behalf. In exercising these powers, the organisations enjoy and require a degree of autonomy.

Today, both the United Nations and the international financial institutions have field presences and operations that may result in human rights violations. The risks are particularly high when the operations take place in conflict zones, or are contested locally.

This subsection first reviews the human rights responsibilities of intergovernmental organisations generally, and then applies this general theory to the World Bank.

The attribution of powers brings with it the need for accountability on how these powers are exercised. Accountability<sup>38</sup> is a much wider concept than responsibility. In general terms, an international organisation is accountable when it meets a number of conditions. The organisation must recognise that it is subject to a duty to justify its conduct. Whether conduct can be justified needs to be assessed against previously agreed standards that are public. The assessment should be per-

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<sup>37</sup> See the special issue on the Accountability for Human Rights violations by International Organizations of the journal *Human Rights & International Legal Discourse*, Vol. 1, no. 2, 2007.

<sup>38</sup> The UN Committee on Economic, Social and Cultural Rights has made it clear that human rights demand accountability both from States and from international organisations: accountability mechanisms must be «accessible, transparent and effective” (UN Committee on Economic, Social and Cultural Rights, «Poverty and the International Covenant on Economic, Social and Cultural Rights. Statement adopted on 4 May 2001», UN doc. E/C.12/2001/10 (10 May 2001), para. 14).

formed by a credible mechanism. As a minimum credibility requires that the assessment mechanism is sufficiently independent from the actor whose conduct is assessed. And finally, if conduct cannot be justified, remedial action should be undertaken. Legal responsibility is much more specific. Legal responsibility requires the establishment of an internationally wrongful act (a violation of a rule of international law) that can be attributed to the intergovernmental organisation, and results in a duty to repair the injury. Intergovernmental organisations may recognise that they need to be accountable on how they perform their functions, also with respect to their human rights conduct, but deny that they can be held legally responsible under international law for failure to perform<sup>39</sup>.

Immunities constitute a practical barrier to holding intergovernmental organisations legally responsible before domestic courts. Diplomatic immunities protect the intergovernmental organisation as such; functional immunities apply for the staff of the organisation. Immunities may not be absolute, however, and can be waived by the organisation. International tribunals generally do not have jurisdiction to establish the international responsibility of an intergovernmental organisation. International arbitration is possible, but is dependent on the consent of the relevant organisation.

In summary, the questions that arise are whether a specific intergovernmental organisation is bound by international human rights law; whether a violation has occurred that can be attributed to an organ or an official of the organisation; whether immunities apply that would prevent a tribunal from establishing responsibility; whether alternative accountability mechanisms exist that can offer a form of remedial action when human rights violations are alleged.

On the first of these questions, - whether intergovernmental organisations are bound by international human rights law – a general theory can be developed. Human rights treaty law cannot usually be relied on directly, because intergovernmental organisations cannot accede to the core human rights treaties – the only exception is the recent UN Convention on the Rights of Persons with Disabilities<sup>40</sup>. It is undisputed, however, that intergovernmental organisations are subjects of international law, and thus capable of possessing rights and duties

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<sup>39</sup> On these issues, see KLABBERS, J., *An Introduction to International Institutional Law*, Cambridge University Press, Cambridge, 2002.

<sup>40</sup> Article 43 of the UN Convention on the Rights of Persons with Disabilities (13 December 2006) provides that the Convention is open to formal confirmation by signatory regional integration organisations.

under international law. The extent of these rights and duties depends on the purposes and functions as specified or implied in the constituent documents of the organisations and developed in practice<sup>41</sup>.

In its advisory opinion on *Interpretation of the agreement of 25 March 1951 between the WHO and Egypt*, the International Court of Justice (ICJ) clarified that as subjects of international law, international organisations are bound by:

Any obligation incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties<sup>42</sup>.

The legal question thus is whether any of the sources referred to by the ICJ contain human rights obligations incumbent upon the specific organisation under review.

Intergovernmental organisations are subject to the reach of general rules of international law, *i.e.* custom and general principles of law<sup>43</sup>. Although the establishment of the existence of both customary rules and general principles of law relies on State practice and State legislation, it is generally accepted that their scope is not limited to States. If it were, States would be able to evade their international obligations by creating international organisations acting with impunity. In addition, treaty-based intergovernmental organisations originate in international law, and it therefore follows that the general rules of that system of law apply to their conduct.

Elements of human rights law have obtained the status of custom and of general principles of law<sup>44</sup>. It is difficult, however, to draw up a full list. The International Court of Justice has not ruled on whether the Universal Declaration of Human Rights constitutes customary international law<sup>45</sup>. There is no standing body with the authority to review and

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<sup>41</sup> International Court of Justice, *Reparation for injuries suffered in the service of the United Nations*, Advisory opinion, *I.C.J. Reports 1949*, pp. 179-180.

<sup>42</sup> International Court of Justice, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*. Advisory opinion, *I.C.J. Reports 1980*, pp. 89-90.

<sup>43</sup> Compare AMERASINGHE, C.F. *Principles of the Institutional Law of International Organizations*, Cambridge University Press, Cambridge, 1996, p. 240: "... there can be no doubt that under customary international law (...), international organizations can also have international obligations towards other international persons arising from the particular circumstances in which they are placed or from particular relationships".

<sup>44</sup> For a detailed study, see MERON, T. *Human Rights and Humanitarian Norms in Customary Law*. Clarendon, Oxford, 1989.

<sup>45</sup> In *United States diplomatic and consular staff in Teheran* the International Court of Justice held that "wrongfully to deprive human beings of their freedom and subject them to physical constraint in conditions of hardship is manifestly incompatible with the

determine which norms are part of the general rules of international law. Skogly makes an appealing argument in favour of an approach suggesting that *aspects* of most civil, cultural, economic, political and social rights have attained the status of general rules<sup>46</sup>, but it is a view that anyone can challenge. Uncertainty remains, in particular with regard to economic, social and cultural rights.

In any case, intergovernmental organisations are under a negative obligation not to violate or to become complicit in the violation of general rules of human rights law by actions or omissions attributable to them<sup>47</sup>. In order to determine the exact substance and scope of the positive obligations of general human rights law that are applicable to an international organisation, the legal capacities of the organisation – as defined by its constituent documents - need to be taken into account. Positive duties apply only when the mandate of the organisation extends to a matter covered by a human right. A case can be made, for instance, that the Food and Agricultural Organisation has a positive obligation under international law to contribute to the realisation of the right to food, while the Universal Postal Union clearly does not.

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principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights”, and constitutes a violation of international law (International Court of Justice, *United States diplomatic and consular staff in Teheran* (United States v. Iran), *ICJ Reports 1980*, p. 43). In *Barcelona Traction, Light and Power Company*, the ICJ held that all States have a legal interest in protecting certain rights: the Court explicitly mentions genocide and “the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination” (International Court of Justice, *Barcelona Traction, Light and Power Company* (Belgium v. Spain), *ICJ Reports*, 1970, para. 33-34. In *East Timor* the Court confirmed that the right of peoples to self-determination had an *erga omnes* character (International Court of Justice, *Case concerning East Timor* (Portugal v. Australia), *ICJ Reports*, 1995, p. 102). Note that this right includes a prohibition to deprive a people of its own means of subsistence. This prohibition is sometimes invoked by those allegedly adversely affected by IFI interventions.

<sup>46</sup> See SKOGLY, S. *The Human Rights Obligations of the World Bank and the International Monetary Fund*, Cavendish, London, 2001, pp. 120-123.

<sup>47</sup> Compare Tomuschat: “Nobody doubts, for instance, that international organizations are committed to abide by universally or regionally applicable human rights standards”. See TOMUSCHAT, C. “International law: Ensuring the Survival of Mankind on the Eve of a new Century. General Course on Public International Law”, *Receuil des Cours*. Vol. 281, 2001, p. 138; even more specifically: “It has been suggested, for example, that the World Bank is not subject to general international norms for the protection of human rights. In our view, that conclusion is without merit, on legal or policy grounds (...). See SANDS, P., KLEIN, P., *Bowett’s Law of International Institutions*”, Sweet & Maxwell, London, 2001, p. 459.

#### 4.1.1. THE WORLD BANK AND HUMAN RIGHTS<sup>48</sup>

The international financial institutions<sup>49</sup> are intergovernmental organisations enjoying international legal personality<sup>50</sup>. The general rules of international law, as discussed above, therefore apply to their operations. Consequently, the World Bank and the International Monetary Fund are under a negative obligation to refrain from engaging in violations of the general rules of international human rights law.

As to the issue of affirmative duties to act for human rights, there are no references to human rights in the constituent documents of the international financial institutions. Article I of the IBRD Articles of Agreement provides that the World Bank shall render assistance to the reconstruction and development of the territories of its members *inter alia* by "encouraging international investment for the development of the productive resources of members, thereby assisting in raising productivity, the standard of living and conditions of labour in their territories"<sup>51</sup>. The World Bank group provides finances for the developmental needs of borrowing countries. Clearly, the concept of development currently used at the international level

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<sup>48</sup> See in general DARROW, M., *Between Light and Shadow. The World Bank, the International Monetary Fund and International Human Rights Law*, Hart, Oxford, 2003; KHALDI, A., *Le Fonds Monétaire International et les Droits de l'Homme*, Wolf Legal Publishers, Nijmegen, 2008; SKOGLY, S. *The Human Rights Obligations of the World Bank and the International Monetary Fund*, Cavendish, London, 2001; VAN GENUGTEN, W., HUNT, P., MATHEWS, S. (Eds.), *World Bank, IMF and Human Rights*, Wolf Legal Publishers, Nijmegen, 2003.

<sup>49</sup> The international financial institutions include IFAD, the International Fund for Agricultural Development, which mobilises financial resources to raise food production and nutrition levels among the poor in developing countries, the IMF, the International Monetary Fund, and the World Bank group consisting of the IBRD, International Bank for reconstruction and development, the IFC, the International Finance Corporation, which assists developing countries through investing in private sector projects, the IDA, International Development Association, which provides loans on concessional terms to poorer developing countries that may not be eligible for loans from the IBRD, ICSID, the International Centre for the Settlement of Investment Disputes and MIGA, the Multilateral Investment Guarantee Agency.

<sup>50</sup> The constituent documents of the IFIs provide that that the institutions have 'full juridical personality' including i.a. the capacity to contract and to institute legal proceedings (Article VII, section 2, IBRD Articles of Agreement (27 December 1944), Article IX, section 2, IMF Articles of Agreement (22 July 1944)). The provisions do not explicitly state that the IFIs enjoy *international* legal personality, but there is no doubt that the organisations meet the requirements set by the International Court of Justice in *Reparation for injuries*. Compare SKOGLY, S. *The Human Rights Obligations of the World Bank and the International Monetary Fund*, Cavendish, London, 2001 pp. 64-71.

<sup>51</sup> Article I, para. I, IBRD Articles of Agreement (27 December 1944).



is a multi-dimensional one that extends beyond the macroeconomic realm and includes environmental, social, human and institutional components. It also includes human rights. This is not contested by the Bank. In a paper released at the occasion of the 50<sup>th</sup> anniversary of the Universal Declaration of Human Rights, the Bank acknowledged that “creating the conditions for the attainment of human rights is a central and irreducible goal of development” and that “the Bank contributes directly to the fulfilment of many rights articulated in the Universal Declaration”<sup>52</sup>. Inevitably, the multidimensional approach to development advocated by the Bank triggers a legal obligation under international law to incorporate human rights in Bank fields of activity that are relevant to human rights, such as programs or projects involving involuntary resettlement, indigenous peoples, poverty reduction, health services, education etc.

The attribution of human rights violations to the Bank may not be self-evident. The responsibility for the implementation of Bank supported projects rests primarily with the borrowing country. It may be possible to argue a complementary responsibility, arising from the lack of due diligence on the Bank’s behalf (for failure to give due consideration to the potential adverse human rights impact).

The immunity of the Bank before domestic courts is not absolute. The IBRD Articles of Agreement provide:

Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank<sup>53</sup>.

The provision does not stand in the way of a legal action before a competent domestic court by private individuals alleging human rights violations as a consequence of Bank actions— but no such action appears to have been attempted so far.

Given the uncertainties about the possibility to hold the World Bank legally responsible for human rights violations, the wider issue of

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<sup>52</sup> GAETA, A., VASILARA, M., *Development and Human Rights: the World Bank*, IBRD, Washington, 1998, pp. 2-3.

<sup>53</sup> Article VII, para.3 IBRD Articles of Agreement (27 December 1944).

the Bank's accountability for human rights violations is relevant as well. The World Bank routinely contests that it has legal obligations under international human rights law, but the institution has self regulated on many human rights related issues, and established an accountability mechanism open to individuals claiming to be adversely affected by Bank decisions.

Self-regulation at the World Bank takes the form of Operational Policies that, when so worded, are binding on staff. When evaluating proposals by borrowers, staff needs to ensure that the conditions set by the Operational Policies are met<sup>54</sup>. Among these policies, the Safeguard Policies touch directly on many issues with human rights implications, including environmental assessment, natural habitat, forests, involuntary resettlement, indigenous peoples, safety of dams and disputed areas. Only the Operational Policy on Indigenous Peoples<sup>55</sup> refers explicitly to human rights in its first paragraph:

This policy contributes to the Bank's mission of poverty reduction and sustainable development by ensuring that the development process fully respects the dignity, human rights, economies, and cultures of Indigenous Peoples. For all projects that are proposed for Bank financing and affect Indigenous Peoples, the Bank requires the borrower to engage in a process of free, prior, and informed consultation. The Bank provides project financing only where free, prior, and informed consultation results in broad community support to the project by the affected Indigenous Peoples. Such Bank-financed projects include measures to (a) avoid potentially adverse effects on the Indigenous Peoples' communities; or (b) when avoidance is not feasible, minimize, mitigate, or compensate for such effects. Bank-financed projects are also designed to ensure that the Indigenous Peoples receive social and economic benefits that are culturally appropriate and gender and intergenerationally inclusive.

Even if the operational policies do not use human rights language, they may offer protection of a level comparable, and sometimes more detailed than the protection offered in human rights documents dealing with similar issues, such as the general comments of the Committee on Economic, Social and Cultural Rights or ILO Convention N.º 169 concerning Indigenous and Tribal Peoples in Independent Countries.

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<sup>54</sup> The Operational Policies are compiled in the Operational Manual of World Bank Policies that is available from the IBRD website. The safeguard policies are at <http://go.worldbank.org/WTA10DE7T0>.

<sup>55</sup> IBRD Operational Policy 4.10 on Indigenous Peoples (January 2005).

The World Bank created the Inspection Panel in 1993<sup>56</sup>. The Inspection Panel receives requests for inspection presented to it by an affected party<sup>57</sup> demonstrating:

That its rights or interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank (including situations where the Bank is alleged to have failed in its follow-up on the borrower's obligations under loan agreements with respect to such policies and procedures) provided in all cases that such failure has had, or threatens to have, a material adverse effect<sup>58</sup>.

At the time of its establishment, the Inspection Panel innovated the law of international organisations, because it made an international organisation directly accountable to people affected by its policies. The traditional view was that international organisations were accountable only to their Member States. Remarkably, the borrowing State does not play any role in the Inspection Panel procedure.

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<sup>56</sup> Resolution No. 93-10 of the Executive Directors establishing the Inspection Panel for the IBRD (22 September 1993) and Resolution No. 93-6 for the IDA (22 September 1993). For background on the political context leading to the establishment of the Panel, see Fox, J., "Transnational civil society campaigns and the World Bank Inspection Panel", in BRYSK, A. (Ed.), *Globalization and human rights*, University of California Press, Berkeley, 2002, p. 180. All Panel-related documents, including Panel reports and recommendations, can be found at [www.inspectionpanel.org](http://www.inspectionpanel.org). At the occasion of the 10<sup>th</sup> anniversary of the Panel, the World Bank published a useful book (available from the Bank free of charge) presenting an overview of the Panel's work: IBRD, *Accountability at the World Bank. The Inspection Panel 10 Years on*, Washington: IBRD, 2003. See also ALFREDSSON, G., RING, R. (Eds.), *The Inspection Panel of the World Bank*, Martinus Nijhoff Publishers, The Hague, 2001; BRADLOW, D., "Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions", *Georgetown Journal of International Law*, Vol. 36, 2005, pp. 403-491; CLARK, D., Fox, J., TREAKLE, K. (Eds.) *Demanding Accountability: Civil Society Claims and the World Bank Inspection Panel*, Rowman and Littlefield, Lanham, 2003; SUZUKI, E., NANWANI, S., "Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks", *Michigan Journal of International Law*, Vol. 27, 2005, pp. 177-225; CARRASCO, E., GUERNSEY, A., "The World Bank's Inspection Panel: Promoting True Accountability through Arbitration", *Cornell International Law Journal*, Vol. 41, 2008 (forthcoming).

<sup>57</sup> Interestingly, the constituent resolution of the Inspection Panel provides that at least two persons should file the request. This requirement is an indication that the aim of the procedure is to deal with collective, rather than individual harm. The mechanism is not so much about protecting the personal interest of a single individual, but about creating a platform for communities that are politically and economically marginalised in the borrowing country.

<sup>58</sup> Resolution No. 93-10 (22 September 1993), para. 12.

The Inspection Panel is limited to reporting on Bank compliance with its own policies. The Panel is not competent to establish violations of international law, including human rights law. On the other hand, nothing prevents the requesters from arguing that their *human* rights have been adversely affected by Bank action. In a number of fascinating cases<sup>59</sup>, this is what they did. Both the Management and the Inspection Panel responded substantively to the human rights claims. Violations of human rights were considered, in so far as they were related to Bank conduct under the relevant operational policies.

The Panel procedure is administrative rather than judicial in nature, allowing an important role for the Bank's highest executive body in the different stages of the procedure. Panel reports are drawn up independently, but are recommendatory only. The Executive Directors have decision-making power, both in whether or not to allow an investigation after the Panel's eligibility report, and in deciding on action after completion of the Panel's investigation. Board decisions are potentially a source of legal obligation for Bank staff, while the Inspection Panel's findings are not. In practice, the Board does not take an express position on the findings of the Inspection Panel. The Board decides on action, not on law. Decisions on action after a Panel investigation are "case by case, tailor-made"<sup>60</sup>, and in response to action points proposed by Management. At best, Board decisions constitute an implicit endorsement of the Panel's findings on non-compliance.

The Inspection Panel procedure does not provide for compensation by the Bank to persons adversely affected by Bank action that was held to be in violation of Bank operational policies. Neither does the Inspection Panel have a role in monitoring the implementation of the remedial action plan as approved by the Board following an investigation.

In conclusion, the Inspection Panel qualifies as a mechanism ensuring a degree of accountability for the World Bank, but the Panel is not a human rights monitoring body: it does not apply human rights law, and does not offer reparation to victims. Nevertheless, the Inspection Panel pushes Bank practice towards improved human rights compliance.

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<sup>59</sup> Examples include the following Inspection Panel reports: *India: Ecodevelopment project* (21 October 1998), *Nigeria: Lagos drainage and sanitation project* (6 November 1998), *China: Western Poverty reduction project* (28 April 2000), *Chad: Petroleum development and pipeline project* (17 July 2002), *DR Congo: Transitional Support for Economic Recovery Grant and Emergency Economic and Social Reunification Support Project* (31 August 2007).

<sup>60</sup> UMANA, A., "Some Lessons from the Inspection Panel's Experience" in ALFREDSSON, G., RING, R. (Eds.), *The Inspection Panel of the World Bank*, Martinus Nijhoff Publishers, The Hague, 2001, p. 139. The author is a former Chairperson of the Inspection Panel.

## 4.2. *Private Actors*

International organisations institutionalise international cooperation between States, the traditional subjects of international law. The organisations derive their legal personality from international law. The international legal order is the level of regulation that naturally applies to their activities. The application of human rights law as a part of international law to intergovernmental organisations is therefore, at least in theory, not problematic.

Private actors, however, derive their legal personality from domestic law. Domestic law deals with the relationship between the State and private actors within its jurisdiction. Private actors are not usually recognised as subjects of international law. International law does not dispose of many instruments to create direct obligations for private actors. Treaties are usually only open to public actors. Customary law is based on the practice and *opinio juris* of States.

Attempts to define the human rights responsibility of private actors have therefore taken place at different levels of regulation: at the level of international law, but also in various domestic legal orders, and through self-regulation. The relevance of international law has nevertheless increased, as both companies and non-governmental organisations organise across borders. While centres of decision-making may be located in a specific territory, implementation may occur in many different domestic legal orders, creating the need for an internationally coordinated response if harmful behaviour occurs.

This section deals with two types of private actors: companies and, more briefly, non-governmental organisations. The main objective of companies is to make profit; non-governmental organisations are not for profit, and seek to contribute to the realisation of self-defined societal goals.

### 4.2.1. COMPANIES<sup>61</sup>

International law tends to deal with corporate responsibility for human rights either indirectly, or through informal soft law instruments that companies may be able to adhere to directly.

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<sup>61</sup> On this issue, see ADDO, M.K. (Ed.), *Human rights standards and the responsibility of transnational corporations*, Kluwer Law International, The Hague, 1999; DE SCHUTTER, O., *Transnational Corporations and Human Rights*, Hart, Oxford, 2006; DINE, J., *Companies, International Trade and Human Rights*, Cambridge University Press, New York, 2005; FRYNAS, J., PEGG, S. *Transnational Corporations and Human Rights*, Palgrave MacMillan, Houndmills, 2003; JAGERS, N., *Corporate Human Rights Obligations: In Search of Ac-*

Corporate behaviour is regulated indirectly in two ways. Corporate officials can be held individually responsible at the international level. It is now generally accepted that individuals have duties under international law. A historical antecedent of the application of the theory of individual criminal responsibility to corporate officials is the *The United States of America vs. Alfred Krupp, et al.* (31 July 1948) case<sup>62</sup> before the United States military tribunal at Nuremberg. The tribunal held:

Officers, directors, or agents of a corporation participating in a violation of law in the conduct of the company's business may be held criminally liable individually therefore. (...) He is liable when his (...) authority is established, or where he is the actual present and efficient actor.

Today, the Statute of the International Criminal Court (17 July 1998) establishes individual responsibility for international crimes. Nothing prevents the application of the Statute to corporate officials, but the scope of the Statute is limited to particularly grave breaches of human rights (e.g. amounting to genocide, crimes against humanity and crimes of war). Legal persons (as opposed to natural persons), i.e. the companies themselves, cannot be brought before the Court.

A second route is the creation of an international obligation or a recommendation to the State to regulate the behaviour of companies in domestic law. Such an international instrument may define the rules that companies are expected to abide by, but these rules will need to be incorporated by the State in domestic legislation to become directly binding on the companies.

The most comprehensive international document dealing with corporate responsibility in this way is the OECD Guidelines for Multinational Enterprises that were first adopted in 1976, and revised on 27 June 2000. In fact, the Guidelines are a recommendatory instrument that in addition deals with corporate behaviour indirectly.

The Organisation for Economic Cooperation and Development consists of the industrialised countries that are home States to many multinational companies. The OECD Guidelines are recommendations addressed by governments to multinational enterprises. The Guidelines explicitly state that observance by enterprises is "voluntary and not le-

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*countability*, Intersentia, Antwerp, 2002; JOSEPH, S., *Corporations and Transnational Human Rights Litigation*, Hart, Oxford, 2004, KAMMINGA, M., ZARIFI, Z.S., *Liability of Multinational Corporations under International Law*, Kluwer Law International, The Hague, 2000.

<sup>62</sup> See *Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission*. Vol. X, H.M.S.O., London, 1947-49, pp. 130-159.

gally enforceable". On the other hand, the Guidelines are said to reflect good practice consistent with applicable laws. The Guidelines are presented as a crystallisation of existing legislation in the member countries. They may therefore function as an incentive to States that have not yet done so, to incorporate the Guidelines into domestic law, and thus to render their content binding under domestic law.

Governments adhering to the Guidelines are expected to promote and encourage their use. They are required to establish so-called National Contact Points that can be approached by persons or organisations (usually NGOs) that wish to raise concerns about a company's compliance with the Guidelines. The National Contact Point is expected to help resolve such issues by facilitating a confidential dialogue between the parties. The dialogue may or may not result in a public statement released by the National Contact Point.

At the occasion of the revision of the Guidelines in 2000, a general human rights clause was added to the text, encouraging enterprises to "respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments"<sup>63</sup>. Apart from this broad general clause, section IV of the Guidelines deals with Employment and Industrial Relations, and contains a catalogue of labour rights.

Since the 2000 revision, the Guidelines deal with the behaviour of companies "wherever they operate", so also outside of the OECD zone. As a result, National Contacts Points are now frequently approached by development NGOs, challenging the behaviour of OECD companies in developing countries.

The UN Global Compact is an example of an international soft law document that companies can adhere to directly<sup>64</sup>. The initiative was launched by the United Nations in 1999, and is described as "a framework for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labour, the environment and anti-corruption". Under the heading "Human rights" – separated awkwardly from a different heading on labour standards – companies are asked to support and respect the protection of internationally proclaimed human rights; and to make sure that they are not complicit in human rights abuses.

At the time of writing, more than 4000 companies have subscribed to the ten principles. Monitoring of compliance with the principles is

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<sup>63</sup> Article II, para.2, OECD Guidelines on Multinational Enterprises (27 June 2000).

<sup>64</sup> See [www.unglobalcompact.org](http://www.unglobalcompact.org).

not provided for. Companies are expected to report annually on progress, and may be delisted if they fail to do so for three consecutive years. In addition, a cumbersome process deals with “allegations of systematic or egregious abuses” that can result in the removal of a company from the list if this is considered necessary to safeguard the reputation and integrity of the initiative. The Global Compact has developed into a forum for dialogue between the United Nations, the corporate world and the NGO community, and has produced interesting research and tools, e.g. on the operation of business in conflict zones. In June 2006 the Global Compact Board endorsed the idea of establishing a multi-stakeholder working group on human rights.

In August 2003, the UN Sub-Commission on the promotion and protection of human rights adopted by consensus Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights<sup>65</sup>. The first operative paragraph introduces the notion that States and companies share responsibility for human rights:

States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of, and protect human rights recognised in international as well as national law, including assuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of, and protect human rights recognized in international as well as national law.

The Norms nevertheless establish an autonomous, direct corporate responsibility for human rights, limited to the company's “spheres of activity and influence”. The novelty of the Norms resided in the fact that they attempt to describe this direct corporate responsibility for human rights as comprehensively as possible. According to the Norms, corporate human rights responsibility extends to the right to equal opportunity and non-discriminatory treatment, the rights of workers, the respect for national sovereignty and human rights, obligations with regard to consumer protection, and to obligations with regard to environmental protection.

The Norms were adopted in the form of a non-binding resolution of the Sub-Commission, and were not endorsed by any organ higher up in the UN hierarchy. According to the main draughtsman of the

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<sup>65</sup> UN doc. E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003).



text, Sub-Commission expert David Weissbrodt, however, the Norms simply applied “human rights law under ratified conventions to the activities of transnational corporations and other business enterprises”. The Norms clarified existing law, and it followed that adherence was “not entirely voluntary”<sup>66</sup>.

In 2005, the UN Commission on Human Rights requested the Secretary-General to appoint a Special Representative on the issue of human rights and transnational corporations and other business enterprises<sup>67</sup>. The Special Representative quickly became the focal point of discussions within the United Nations on corporate responsibility for human rights. John Ruggie delivered the final report under his initial mandate to the UN Human Rights Council in 2008<sup>68</sup>. In this report, the Special Representative argues that the baseline responsibility of companies is to *respect* human rights, a duty that exists independently of States’ duties. To discharge the responsibility to respect requires due diligence, a concept describing the steps a company must take to become aware of, prevent and address adverse human rights impacts. Companies carrying out due diligence need to: adopt a human rights policy; engage in human rights impact assessments; integrate human rights policy throughout the company; and track performance through monitoring and auditing processes. The study also insists that effective grievance mechanisms are available, allowing those who believe they have been harmed access to a remedy. The study finds that “the current patchwork of mechanisms remains incomplete and flawed”<sup>69</sup>.

Apart from international law, a second level used to regulate corporate responsibility for human rights is domestic law. With regard to multinational companies, two domestic legal systems are particularly relevant: the law of the host State, i.e. the law of the country where a company develops activities, and the law of the home State, i.e. the law of the country where the company is incorporated or has its home office.

No particular legal difficulties arise in applying the law of the host State to the company’s activities. It is undisputed that companies need to abide by the domestic laws of the countries where they operate. The difficulty is economic, rather than legal. Developing and transition countries compete to attract foreign investment and technology to ex-

<sup>66</sup> UN doc. E/CN.4/Sub.2/2003/13 (6 August 2003), para. 12-14.

<sup>67</sup> UN Commission on Human Rights resolution 2005/69 (20 April 2005).

<sup>68</sup> UN doc. A/HRC/8/5 (7 April 2008).

<sup>69</sup> *Op. cit.*, para. 87.

exploit natural resources, and are often reluctant to impose human rights and other conditions on foreign companies.

The home State is faced with the difficulty that, in principle, the reach of domestic law is limited to its own territory. Extraterritorial application is required when a domestic company violates human rights elsewhere: the standards of the home State will need to be applied to activities within the jurisdiction of the host State. This is problematic when the host State does not have similar legislation. The spectre of a breach of sovereignty is raised. The problem is less acute when the relevant norms are part of customary international law, or of human rights treaties ratified by both States (even if, for instance, the treaty cannot be invoked directly before the courts of the host State).

The best known example of a domestic human rights law with extraterritorial reach is the United States Alien Tort Claims Act (ATCA), a law originally adopted in 1789, but revived in the nineties in cases dealing with corporate responsibility for human rights. Under the Alien Tort Claims Act, “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”. The law deals with torts, not criminal law. It applies to events outside the United States, and can be invoked by foreigners against non US-companies. Nevertheless, for US courts to be competent, an assessment will be made of whether courts elsewhere are not better placed to hear the case. The law empowers judges to decide which international legal standards are defined specifically enough to be considered in violation of the law of nations as recognised by the United States, and whether the conduct in question violates those standards.

A typical ATCA claim argues that companies aided and abetted human rights abuses of repressive governments with whom they did business. Over the last fifteen years, none of these claims have been completely successful in the sense that they resulted in a court order to pay damages. Most cases are dismissed before they reach the final stages of the trial, a process that may take many years. In July 2007, in the first case to reach the jury stage, a federal jury found the US Drummond Coal Company not complicit in the 2001 murder of three union leaders at one of its mines in Colombia<sup>70</sup>. In a number of cases, companies settled out of court, after judges had found that the companies had a *prima facie* case to answer. In December 2004 UNOCAL famous-

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<sup>70</sup> *Rodriguez and others v Drummond*, Case No. CV-02-BE-0665-W, US Federal District Court in and for the Northern District of Alabama.

ly agreed to settle a case brought by 13 Burmese villagers for involvement of the company in forced labour in the construction of the Yadana gas pipeline project in Myanmar. In November 2007, Yahoo settled a case alleging that the company had facilitated the arrest of Chinese dissidents using the internet by providing information to the Chinese authorities. The amounts of these settlements are not disclosed. Pending cases include suits against Chiquita for payments to Colombian paramilitaries, and against more than fifty multinational corporations for aiding and abetting the former apartheid government in South Africa<sup>71</sup>.

Finally, an increasing number of multinational corporations self-regulate<sup>72</sup> on human rights, by adopting corporate codes of conduct, or by subscribing to sectoral private codes.

Self-regulation is not law; it depends on voluntary compliance. Corporate codes of conduct can be changed when senior management so decides, and therefore do not offer much legal security. In the absence of legislation, self-regulation may nevertheless be important. The proponents of self-regulation argue that a change in corporate culture rather than external intervention is needed to produce sustainable improvement in the human rights record of companies.

A number of factors can be taken into account in order to assess the credibility of private codes of conduct:

- How does the substance of the code of conduct compare with international norms dealing with the same issue? Corporate codes of conduct often avoid using language identical to that found in international treaties or declarations, in order to avoid the impression that they recognise legal responsibility under international law.
- How is the code of conduct implemented within the company?
- How is monitoring of the code organised? Is this done by corporate officials, auditing firms or non-governmental organisations that receive payment from the company, or by a body financially disconnected from the company?
- Is a complaints mechanism provided for that is open to external actors who allege harm because of non-compliance with the code?

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<sup>71</sup> Please consult [www.business-humanrights.org](http://www.business-humanrights.org) for regularly updated information on ATCA cases.

<sup>72</sup> For a detailed, sympathetic study of one company's approach, see SCHOENBERGER, K., *Levi's Children: Coming to Terms with Human Rights in the Global Marketplace*, Atlantic Monthly Press, New York, 2000.

—What form of reparation is available in cases of non-compliance with the code?

One final issue worth drawing attention to is that additional legal difficulties may arise in holding companies responsible for human rights violations, when corporations themselves are deemed to be entitled to human rights protection<sup>73</sup>. So far there is little recognition of corporations as holders of human rights in international human rights law. Under American constitutional law, however, the US Supreme Court has since the 19<sup>th</sup> century enabled corporations to rely on some of the rights offered to human beings under the Constitution. Although not undisputed, this use of the legal fiction of corporate personhood continues until today. Similarly, the European Court of Human Rights has held in a variety of cases that corporations are entitled to the right to fair trial, the right to privacy, and last but not least, the right to the peaceful enjoyment of their possessions. Clearly such findings matter in cases where corporate “human” rights are pitched against human rights of human beings.

#### 4.2.2. NON-GOVERNMENTAL ORGANISATIONS<sup>74</sup>

No general regulation of the activities of non-governmental organisations exists at the international level. International organisations use definitions of NGOs that apply only within the organisation; requirements often relate to the relevance of the work of the NGO to the specific mandate of the IGO<sup>75</sup>.

Non-governmental organisations regularly engage in human rights sensitive development activities. International, foreign or local NGOs may provide relief aimed at the immediate satisfaction of survival needs particularly in crisis situations; they may assist in building the capacity of local communities to become more self-reliant; or they may engage in political advocacy to support marginalised groups. From a human rights perspective, difficult questions arise when humanitarian and development NGOs provide services in a context where the relevant State

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<sup>73</sup> See EMBERLAND, M., *The Human Rights of Companies. Exploring the structure of ECHR Protection*, Oxford University Press, Oxford, 2006.

<sup>74</sup> On non-governmental organisations, see LINDBLOM, K., *Non-Governmental Organisations in International Law*, Cambridge University Press, Cambridge, 2005.

<sup>75</sup> E.g. non-governmental organisations applying for consultative status with the United Nations need to demonstrate that their aims and purposes are in conformity with the spirit, purposes and principles of the Charter of the United Nations. See UN ECOSOC resolution 1996/31 (25 July 1996).

is failing to provide development. If such failure is not the consequence of lack of political will, it is not self-evident that NGOs should fill the gap, as it may be argued that they are then assisting the government in perpetuating policies that are discriminatory, or violate human rights in other ways. International non-governmental organisations have become increasingly aware of the need to legitimize their work by providing accountability, also in terms of its human rights impact, and have started to engage in self-regulation.

In recent years, NGOs have adopted a number of codes of conduct that define the organisations' accountability to various stakeholders. Two examples are discussed here: the first is a code adopted by relief organisations, the second by a coalition of NGOs working on a variety of issues.

The Code of Conduct for The International Red Cross and Red Crescent Movement and NGOs in Disaster Relief<sup>76</sup> was developed and agreed upon by eight of the world's largest disaster response agencies in the summer of 1994. The text has been signed by over 400 relief organisations. The Code of Conduct is a voluntary text. Compliance is not monitored. No international association of relief NGOs exists that would have the authority to sanction its members.

The Code proclaims a right to receive humanitarian assistance, and to offer it, as a fundamental humanitarian principle which should be enjoyed by all citizens of all countries. Organisations subscribing to the Code pledge to give aid regardless of the race, creed or nationality of the recipients and without adverse distinction of any kind. Aid priorities are to be calculated on the basis of need alone. The organisations will endeavour to respect the culture of the communities and countries they are working in. They also recognise a degree of accountability to their beneficiaries. Disaster assistance, the Code provides, should never be imposed upon the beneficiaries:

Effective relief and lasting rehabilitation can best be achieved where the intended beneficiaries are involved in the design, management and implementation of the assistance programme. We will strive to achieve full community participation in our relief and rehabilitation programmes.

The International Non-Governmental Organisations Accountability Charter<sup>77</sup> was adopted on 6 June 2006 by eleven international non-governmental organisations engaged in poverty alleviation, human

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<sup>76</sup> See [www.ifrc.org/publicat/conduct/code.asp](http://www.ifrc.org/publicat/conduct/code.asp).

<sup>77</sup> See <http://www.ingoaccountabilitycharter.org>.

rights, citizen participation, women's rights, environmental advocacy, labour rights and good governance<sup>78</sup>. The organisations recognise that they work across a wide range of countries and cultures, and base their right to act on universally recognised freedoms of speech, assembly and association. They acknowledge accountability to a range of stakeholders, including the peoples whose rights they seek to protect and advance. In their actions, the organisations commit to respect the equal rights and dignity of all human beings, and to value, respect and seek to encourage diversity. To this end, each organisation will have policies to promote diversity, gender equity and balance, impartiality and non-discrimination in all their activities, both internal and external. They acknowledge that they should be "held responsible" for their actions and achievements.

We shall do this by: having a clear mission, organisational structure and decision-making processes; by acting in accordance with stated values and agreed procedures; by ensuring that our programmes achieve outcomes that are consistent with our mission; and by reporting on these outcomes in an open and accurate manner.

According to the signatories, the Charter is merely a starting point. The intention is to implement a system that not only sets common standards of conduct for NGOs but also creates mechanisms to report, monitor and evaluate compliance as well as provide redress.

## 5. Multi-stakeholder Agreements

When human rights conditions are impacted upon by different parties, it makes sense to think in terms of agreements subscribed to by all parties, whether domestic or foreign, or private or public. The approach connects to the proposals by Vasak and M'Baye on the right to development: a humanisation of the global economy requires the construction of mutual responsibilities of all actors that impact on human rights in practice.

Multi Stakeholder agreements are no longer unusual in international relations. They are particularly prevalent in the area of development, where a variety of actors operate in the field. This variety creates the need for partnerships, harmonisation of policies, and mutual accounta-

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<sup>78</sup> ActionAid International, Amnesty International, CIVICUS World Alliance for Citizen Participation, Consumers International, Greenpeace International, Oxfam International, International Save the Children Alliance, Survival International, International Federation Terre des Hommes, Transparency International and the World YWCA.

bility – that are shaped in agreements that take a legal form. The legal instruments used vary from private rules over soft law instruments to contracts under domestic or international law. The diversity in legal techniques is itself a reflection of the limitations of public international law in dealing with public-private relationships.

The *OECD Paris Declaration on Aid Effectiveness* (2 March 2005) is the main current instrument for the harmonisation of development policies. The document was adhered to not only by Ministers of developed and developing States, but also by Heads of multilateral and bilateral development institutions. All parties resolve to take far-reaching and monitorable actions to reform aid delivery and management. The OECD Paris Declaration is a non-binding instrument, but its impact on donor policy is considerable. Human rights are not explicitly addressed in the text.

The *Partnerships for Sustainable Development* are voluntary, multi-stakeholder initiatives aimed at implementing sustainable development. They were established as a side-product of the World Summit on Sustainable Development (in Johannesburg, 2002). The UN Commission on Sustainable Development acts as the focal point for discussion on these partnerships. Here, partnerships are defined as voluntary initiatives undertaken by governments and relevant stakeholders, e.g. major groups<sup>79</sup> and institutional stakeholders<sup>80</sup> that contribute to the implementation of Agenda 21. As of June 2006, a total of 321 partnerships had been registered with the Secretariat of the Commission<sup>81</sup>.

Intergovernmental and non-governmental organisations cooperate closely in the delivery of humanitarian relief. Both the World Food Programme<sup>82</sup> and UNHCR<sup>83</sup> regularly conclude *Memoranda of Understanding* (MOU) with non-governmental partners. Such MOUs are used both to establish a framework for institutional cooperation, as

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<sup>79</sup> Agenda 21 recognises nine 'major groups': Women, Children and Youth, Indigenous Peoples, NGOs, Local Authorities, Workers and Trade Unions, Business and Industry, Scientific and Technological Communities, Farmers. In practice, NGOs, business and industry, scientific and technological communities and local authorities are best represented in the partnerships.

<sup>80</sup> In practice, mostly UN system and other intergovernmental organisations.

<sup>81</sup> For a critical review, see Jens MARTENS, *Multi Stakeholder Partnerships – Future Models of Multilateralism?* Occasional Paper Friedrich Ebert Stiftung, Berlin, January 2007.

<sup>82</sup> A recent example of a WFP/NGO cooperation agreement is the December 2006 Memorandum of Understanding between WFP and Islamic Relief.

<sup>83</sup> United Nations High Commissioner for Refugees. Recent examples of a UNHCR/NGO cooperation agreement are the 2007 Memoranda of Understanding signed with two US-based NGOs, the International Rescue Committee and the International Medical Corps.

well as for more contract-like agreements with locally active NGOs for specific operations. According to Anna-Karin Lindblom, the legal character of the Memoranda demonstrates a scale where some are clearly intended to be binding; some are not, and others are difficult to characterise<sup>84</sup>. There is little doubt, however, that agreements on specific operations in particular are intended to be binding, as they spell out rights and duties of the parties (including financial obligations). Interestingly, these agreements also contain dispute settlement provisions, with disputes to be decided under UNCITRAL arbitration rules by an international arbiter, or by the International Chamber of Commerce, leading to the application of general principles of international law to the dispute. As Lindblom argues, increasing responsibilities for NGOs in field operations may create a need for explicit provisions in the agreements requiring compliance with international humanitarian law and human rights<sup>85</sup>.

The *Global Aids Fund* gathers resources in order to reduce the effects of HIV/AIDS, tuberculosis and malaria in countries in need, as part of a strategy aiming at the realisation of the Millennium Development Goals. The Fund is a financial instrument, not an implementing agency. Participation of communities affected by the three diseases in the development of proposals submitted for funding to the Fund is particularly encouraged. The By-laws of the Fund<sup>86</sup> establish the Fund as a non-profit Foundation under Swiss Law. The Foundation Board sets policies and makes funding decisions; it consists of twenty voting members and four non-voting members<sup>87</sup>. Each voting member has one vote. The twenty voting members are:

- Seven representatives from developing countries, one representative based on each of the six World Health Organization (“WHO”) regions and one additional representative from Africa;
- eight representatives from donors<sup>88</sup>, and
- five representatives from civil society and the private sector (one representative of a non-governmental organization (“NGO”))

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<sup>84</sup> Anna-Karin LINDBLOM, *Non-governmental Organisations in International Law*, Cambridge, Cambridge University Press, 2005, p. 507.

<sup>85</sup> *Op. cit.*, p. 509.

<sup>86</sup> By-Laws of the Global Aids Fund (as amended 12 November 2007) – available from the Fund’s website at [www.theglobalfund.org](http://www.theglobalfund.org). The Fund secretariat is in Geneva.

<sup>87</sup> Including one representative from the World Health Organization, and one from UNAids.

<sup>88</sup> Representatives from six developed States, but also the European Community and the World Bank.



from a developing country, one representative of an NGO from a developed country, one representative of the private sector<sup>89</sup>, one representative of a private foundation<sup>90</sup>, and one representative of an NGO who is a person living with HIV/AIDS or from a community living with tuberculosis or malaria.

The Board decides by consensus if possible, or by voting (motions require a 2/3 majority of those present of both the group encompassing the eight donor seats and the two private sector seats and of the group encompassing the seven developing country seats and the three NGO representatives). Decisions can also be taken on a no-objection basis<sup>91</sup>.

The *Voluntary Principles on Security and Human Rights* are a multi-stakeholder initiative established in 2000 that introduced a set of principles to guide extractive companies in maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms. The participants to the Voluntary Principles include four governments<sup>92</sup> and a number of multinational corporations and international human rights NGOs<sup>93</sup>. Under the scheme<sup>94</sup> all participants agree to meet a set of criteria, and are permitted to raise concerns about another participant's lack of effort to implement the Principles. If concerns persist, participants agree to engage in consultations facilitated by the organs established in the Voluntary Principles: the Steering Committee and the Plenary. The expulsion of a participant requires a unanimous decision of the Plenary, but recommendations can be adopted by a special majority consisting of 66% of the government vote, 51% of the NGO participants vote, and 51% of company participants. The Voluntary Principles do not create legally binding standards, and participants explicitly agree that al-

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<sup>89</sup> Currently, a Senior Partner in the consulting firm McKinsey & Company.

<sup>90</sup> Currently, the Bill and Melinda Gates Foundation.

<sup>91</sup> On such basis, a motion is approved unless four Board members of one of the voting groups objects to the motion, except that a motion not to take a funding commitment can be approved unless four Board members of each of the voting groups object to the motion.

<sup>92</sup> The Netherlands, Norway, United States of America, United Kingdom

<sup>93</sup> The International Committee of the Red Cross, the International Council on Mining & Metals and the International Petroleum Industry Environmental Conservation Association act as observers.

<sup>94</sup> New participation criteria and mechanisms were adopted at a Plenary Meeting on 7-8 May 2007. See [www.voluntaryprinciples.org](http://www.voluntaryprinciples.org). The original requirement that companies and non-governmental organizations could participate in the Plenary only if their home government was also a participant, was also dropped.

leged failures to abide by the Voluntary Principles shall not be used in legal or administrative proceedings. This does not mean, however, that the Voluntary Principles do not have an external impact. In the context of the review of its social and environmental performance standards<sup>95</sup>, the International Finance Corporation built on the Voluntary Principles. As a result, any extractive industry project wishing to secure MIGA<sup>96</sup>/IFC support must now implement not only the IFC's own standards, but also operate consistently with the Voluntary Principles. The voluntary character of the Principles has thus hardened into a MIGA/IFC conditionality.

Multi-stakeholder agreements can potentially be binding under international law. The Vienna Convention on the Law of Treaties applies to agreements between States, but explicitly provides that agreements concluded by non-State actors can also be binding. Article 3, a. of the Vienna Convention on the Law of Treaties reads:

The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:  
(a) the legal force of such agreements (...)<sup>97</sup>.

As an alternative to the proposals discussed earlier, a future legally binding instrument on to the right to development could be open to a multiplicity of actors, including intergovernmental organisations and private actors. Such a multi-stakeholder agreement would differ considerably from the core human rights treaties that currently exist. The objective would be to bring together a coalition of the willing, consisting of a variety of public and private actors, committed to demonstrating that the right to development can be implemented in a meaningful way through joint initiatives. The main instrument through which the Agreement (and its parties) would seek to contribute to the realisation

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<sup>95</sup> The review was concluded in 2006, and led to the adoption of the IFC Performance Standards on Social & Environmental Sustainability, that entered into force on 30 April 2006. The standards are available from the IFC website.

<sup>96</sup> Multilateral Investment Guarantee Agency.

<sup>97</sup> The reference to 'subjects of international law' in Article 3, para. a. should not prevent private actors from acceding to the Agreement. Although companies and NGOs are not usually considered as subjects of international law, this has not prevented them from concluding agreements governed by international law, or from submitting claims to (certain) international tribunals on an *ad hoc* basis. As Lindblom argues, it is the consent of the parties that enables agreements to be placed under international law. See A.-K. LINDBLOM, *op. cit.*, p. 492.

of the right to development could be to provide assistance to communities in adhering States whose human rights have been adversely affected as a consequence of both internal and external factors. The parties to the Agreement would therefore seek to support communities whose rights have suffered as a consequence of globalisation, i.e. whose human rights have been affected by the actions of both domestic and external actors. The focus would thus be on situations where both the internal and the external dimension of the right to development are relevant. The Agreement could organise the implementation of the commitment either via the establishment of a central Fund that would provide assistance to selected projects; or by setting up a system of registration and monitoring of partnership agreements concluded by the parties to the Agreement, when they satisfy the criteria (along the lines of the work of the High Level Task Force) of right to development partnership agreements.

## 6. Localising Human Rights<sup>98</sup>

Inevitably, an important part of the human rights response to economic globalization needs to take place at the global level – hence the discussions on the human rights accountability of the World Bank, the role of human rights in the WTO dispute settlement system, or the efforts to codify the human rights responsibility of corporations. Maintaining the common language of global rights is also essential for the purposes of identifying common causes of violations in different countries. In the context of economic globalization, such causes are not purely domestic, but regional and global as well.

Nevertheless, whether and to what extent aspects of economic globalization have adverse impacts on human rights protection will differ from society to society. The human rights needs of slum dwellers confronted with a private company charged with urban renewal are very different from the needs of industrial workers faced with the relocation

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<sup>98</sup> On this issue, see COTTERRELL, R., *Law, Culture and Society*, Ashgate, Aldershot, 2006; ENGLE MERRY, S., *Human rights & Gender Violence. Translating International Law into Local Justice*, University of Chicago Press, Chicago, 2006; GOODALE, M., ENGLE MERRY, S., *The Practice of Human Rights. Tracking Law between the Global and the Local*, Cambridge University Press, Cambridge, 2007; MECKLED-GARCIA, S., CALI, B., *The Legalization of Human Rights*, Routledge, Abingdon, 2006, ORE AGUILAR, G., *The Local Relevance of Human Rights. A Methodological Approach*, Discussion paper, Institute of Development Policy and Management, Antwerp, 2008.

of their industry to low-income economies. For human rights to be relevant to all, they will need to be situation-specific. They will need to be *localised*. Localization implies taking the human rights needs as formulated by local people (in response to the impact of economic globalisation on their lives) as the starting point both for the further interpretation and elaboration of human rights norms, and for the development of human rights action, at all levels ranging from the domestic to the global. In order to provide efficient protection against the adverse impact of economic globalisation – itself inevitably a top-down process – human rights need to be as locally relevant as possible. Global human rights need an infusion from below.

Why is the contribution of local communities to the interpretation and further normative development of human rights so essential? Human rights crises emerge at the local level. It is at the local level that abuses occur, and where a first line of defence needs to be developed, first and foremost by those that are threatened. It is when people face abuse in their personal experience and in their immediate surroundings that they 'have' to engage in collective action for the defence of their rights. It is at this time that the efficacy of mechanisms of protection is tested. It is at the local level that having human rights either proves vital or illusory.

The communities that go through a human rights crisis build up knowledge – a usage of human rights linked to concrete living conditions. The recording and transmission of this knowledge (regardless of whether the appeal to human rights was successful or not) is essential if human rights are ever to develop into a global protection tool. Human rights need to develop in light of the lessons learned from attempts to put them into practice at the local level. Grounding human rights in local experiences also offers the human rights movement the opportunity to emphasize similarities between the challenges facing different communities, and translating them into improved global norms. Finally, localisation avoids building the human rights movement as a one-way relationship between those who offer solidarity (the "saviours") and those who benefit from it (the "victims").

If the experience of local communities is to inspire the further development of human rights, community based organizations will need to be the starting point. The World Bank study *Voices of the Poor*<sup>99</sup> describes community based organizations as "grassroots organizations

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<sup>99</sup> NARAJAN, D., *Voices of the Poor. Can Anyone hear us?*, Oxford University Press, New York, 2000, p. 143.

managed by members on behalf of members”, and distinguishes them from other civil society organizations such as non-governmental organizations and networks of neighbourhood or kin. Not all community-based organizations will define their work in terms of human rights. They may remain aloof from the political realm, or may simply not be granted the space by local authorities to engage in political action and work within the ideology of the dominant sector of society (which may not be human rights friendly at all). From a human rights perspective, community based organizations are of particular interest when they start using the language of rights as a defence against the threats they face. Of key importance is the perception of a community that a certain practice violates the human rights of the members of the group, even if at the time when the claim is formulated, it may not yet be possible to validate it under the domestic or international legal system. If the general findings of the *Voices of the Poor* study are correct, the likelihood that a community organization will address an issue in terms of human rights is much higher if the organization is connected to other organizations like it (which facilitates the detection of common causes affecting the communities) and if it is connected to groups of a different nature<sup>100</sup>.

Those “different groups” in our case are groups with a specific commitment to human rights, i.e. local human rights NGO’s. ‘Local’ in this context means that they are based in the same country as the relevant community based organizations. They may well be in the capital, however (and thus physically far away from the community organizations) and be based on expertise, rather than grassroots membership. Local human rights NGOs are important in assisting community organizations in identifying the human rights angle to the situation they face, and in offering them support in the human rights strategy the community may wish to develop, particularly at the national level. It is worth recalling that the level of municipal law is by far the most important level for the purposes of human rights protection. This is true generally, and in particular if one seeks to address the human rights impact of private actors (such as corporations).

It is of equal importance, however, that local human rights NGOs learn from community organizations about the reality of human rights related struggles on the ground, and that they transmit lessons learned to the international level. Very often community organizations will not have contacts with the international human rights regime, and will

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<sup>100</sup> *Op. cit.*, pp. 150-151.

need to rely on specialized human rights NGOs to establish the connection. International non-governmental human rights organizations are the third link in the chain: organizations with an international membership that act across national borders in defence of the human rights of a wide variety of individuals and groups. The involvement of INGOs is essential when the domestic political space is very limited, and in particular when restrictive domestic legislation curtails the actions of local human rights NGOs. In addition, in a globalized world, the causes of human rights violations are increasingly not exclusively domestic. Powerful States take decisions that have extraterritorial effects. Intergovernmental organizations affect standards of living. Companies organize across borders. Domestic actors face constraints in their response because their range is limited geographically. Not only is there a need for global rules, there is also a need for globally concerted action.

Nevertheless, the relationship should not only be top-down—INGOs coming in to assist domestic actors in a human rights struggle whenever such an action fits within the INGO's mission or strategic plan— but also bottom-up. Missions and strategic decisions of international human rights NGOs, including policies on the normative development of human rights, should reflect the perceptions of human rights needs at the local level, where the purported beneficiaries of their actions live. It is not at all sure that this is current practice— accountability to beneficiaries is generally not strength of international human rights NGOs. *Voices of the poor* for example reports that organizations “known worldwide for their excellent work” are mentioned only infrequently by the poor.

Civil society organizations cannot make law directly. As Rajagopal points out, in international law, their “texts of resistance” are not a source of law<sup>101</sup>, nor do they have any law-making authority in domestic law. They are able to monitor compliance with laws, but civil society monitoring mechanisms have no powers of enforcement. Nor should they have any – they lack the democratic legitimacy necessary to exact discipline. In the fields of law-making and enforcement civil society organizations are dependent on alliances with others who do enjoy such competencies, *i.e.* governments and inter-governmental organizations. This takes us to the fourth link in the chain. Keck and Sikkink's well-known work on transnational advocacy networks<sup>102</sup>. Such networks

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<sup>101</sup> RAJAGOPAL, B., *International law from below*, Cambridge University Press, Cambridge, 2003, p. 233.

<sup>102</sup> KECK, M., SIKKINK, K., *Activists beyond borders*, Cornell University Press, Ithaca, 1998.

may include the following players: international and domestic non-governmental research and advocacy organizations; local social movements; foundations; the media; churches, trade unions, consumer organizations and intellectuals; parts of regional and international intergovernmental organizations; and parts of the executive and/or parliamentary branches of governments. Keck and Sikkink suggest that such networks are most prevalent in issue areas characterized by high value content and informational uncertainty.

Human rights are one of these issue areas. In his analysis of recent major international human rights campaigns, Gready<sup>103</sup> confirms that most were based on “mixed actor coalitions”, NGO-led but involving a broad range of other parties including business, governments, IGOs, and parts of and personnel within these actors. Alliances with governments proved to be challenging, but the trend is that NGOs increasingly work with sympathetic States, or with sympathetic individuals within States. In the context of international alliances, ‘government’ primarily means the executive branch – ministers, diplomats and civil servants that engage in diplomatic negotiations. At the domestic level, however, it is equally important to be able to rely on judges that are willing to give domestic effect to human rights, and on members of parliament that are willing to take legislative initiatives in the field of human rights.

In summary, a bottom-up approach to human rights is dependent on the existence of a network consisting of four partners: community based organizations, local human rights NGOs, international human rights NGOs and allies in governmental and intergovernmental institutions. Although some such networks may exist, or have functioned in the context of specific campaigns, it is not contended that this type of networking is current general practice. There are plentiful examples of community based organizations without human rights awareness, of local human rights NGOs disconnected from grassroots organizations, of international human rights NGOs that self-define their priorities without any reference to local partners, and of governmental and intergovernmental actors that persevere in perceiving of international relations and international law as the reserved domain of governments. For many actors at the different levels – whether governmental or non-governmental –, opening up to bottom-up networking, will pose a challenge and require a change in their working methods.

Nor does the creation of a network in itself suffice to ensure that human rights will be built from below. A bottom-up approach requires

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<sup>103</sup> GREASY, P. (Ed.), *Fighting for human rights*, Routledge, London, 2004.

that the human rights experiences of communities set the agenda for the entire network. Whether this will happen, depends on the relationships between the actors in the network. Ideally, the relationships within a network are based on an egalitarian discourse resulting in a common understanding of human rights and of the strategy to be pursued. In reality, resources may be divided unequally among the actors, and top-down hierarchy may set in, unless power balances are negotiated very carefully. It is to be expected that discussions will emerge within human rights networks about the tension between the shared global view of human rights and the vision of local organizations on the reality of human rights struggles of the ground. On the other hand, such discussions are exactly what are required in order to improve the universal relevance of human rights.



# Toward a multicultural conception of human rights\*

Boaventura de Sousa Santos

**Summary:** 1. Introduction. 2. On Globalizations. 3. Human Rights as an emancipatory script. 4. Towards a diatopical hermeneutics. 5. Difficulties of a progressive multiculturalism. 6. Conditions for a progressive multiculturalism. 6.1. From completeness to incompleteness. 6.2. From narrow to wide versions of cultures. 6.3. From unilateral to shared times. 6.4. From unilaterally imposed to mutually chosen partners and issues. 6.5. From equality or difference to equality and difference. 7. Conclusion.

## 1. Introduction

For the past few years I have been puzzled by the extent to which human rights have become the language of progressive politics. Indeed, for many years after the Second World War human rights were very much part and parcel of cold war politics, and were so regarded by the Left. Double standards, complacency towards friendly dictators, the defense of tradeoffs between human rights and development—all this made human rights suspect as an emancipatory script. Whether in core countries or throughout the developing world, the progressive forces preferred the language of revolution and socialism to formulate an emancipatory politics. However, with the seemingly irreversible crisis of these blueprints of emancipation, those same progressive forces find themselves today resorting to human rights to reconstitute the lan-

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\* Earlier versions of this paper prompted intense debates on different occasions and it would be fastidious to mention all the people from whose comments this version has so much benefited. Nevertheless, I would like to mention two crucial moments in the framing of my ideas as they stand now: the “First National Seminar on Indigenous Special Jurisdiction and Territorial Autonomy” held in the first week of March 1997 in Popayan (Colombia), organized by the Consejo Regional Indigena del Cauca (CRIC) and by the Colombian Government and attended by more than 500 indigenous leaders and activists; an unforgettable seminar at the Center for the Study of Developing Societies in New Delhi, on April 25, 2000, in which participated, among others, D.L. Sheth, Ashis Nandy, Shiv Visvanathan, Shalini Randeria, Achyut Yagnik, Gabrielle Dietrich and Nalini Nayak. Many thanks to all of them, and also to Rajeev Bhargava and Elizabeth Garcia. My special thank-you to Maria Irene Ramalho.

guage of emancipation. It is as if human rights were called upon to fill the void left by socialist politics. Can in fact the concept of human rights fill such a void? My answer is a qualified yes. Accordingly, my analytical objective here is to specify the conditions under which human rights can be put at the service of a progressive, emancipatory politics.

The specification of such conditions leads us to unravel some of the dialectical tensions that lie at the core of Western modernity<sup>1</sup>. The crisis now affecting these tensions signals better than anything else does the problems facing Western modernity today. In my view, human rights politics at the end of the century is a key factor to understand such crisis.

I identify three such tensions. The first one occurs between social regulation and social emancipation. I have been claiming that the paradigm of modernity is based on the idea of a creative dialectical tension between social regulation and social emancipation, which can still be heard, even if but dimly, in the positivist motto of "order and progress". At the end of this century this tension has ceased to be a creative tension. Emancipation has ceased to be the other of regulation to become the double of regulation. While until the late sixties the crisis of social regulation was met by the strengthening of emancipatory politics, today we witness a double social crisis: the crisis of social regulation, symbolized by the crisis of the regulatory state and the welfare state, and the crisis of social emancipation, symbolized by the crisis of the social revolution and socialism as a paradigm of radical social transformation. Human rights politics, which has been both a regulatory and an emancipatory politics, is trapped in this double crisis, while attempting, at the same time, to overcome it.

The second dialectical tension occurs between the state and civil society. The modern state, though a minimalist state, is potentially a maximalist state, to the extent that civil society, as the other of the state, reproduces itself through laws and regulations which emanate from the state and for which there seems to be no limit, as long as the democratic rules of law making are respected. Human rights are at the core of this tension: while the first generation of human rights was designed as a struggle of civil society against the state, considered to be the sole violator of human rights, the second and third generations of human rights resort to the state as the guarantor of human rights.

Finally, the third tension occurs between the nation state and what we call globalization. The political model of Western modernity is one

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<sup>1</sup> Elsewhere, I deal at length with the dialectical tensions in Western modernity, in SANTOS, B.: *Toward a New Common Sense. Law, Science and Politics in the Paradigmatic Transition*, Routledge, New York, 1995.

of sovereign nation states coexisting in an international system of equally sovereign states, the interstate system. The privileged unit and scale both of social regulation and social emancipation is the nation state. On the one hand, the interstate system has always been conceived of as a more or less anarchic society, run by a very soft legality; on the other, the internationalist emancipatory struggles, namely, working class internationalism, have always been more an aspiration than a reality. Today, the selective erosion of the nation state due to the intensification of globalization raises the question whether both social regulation and social emancipation are to be displaced to the global level. We have started to speak of global civil society, global governance, global equity, transnational public spheres. Worldwide recognition of human rights politics is at the forefront of this process. The tension, however, lies in the fact that in very crucial aspects human rights politics is a cultural politics. So much so that we can even think of human rights as symbolizing the return of the cultural and even of the religious at the end of the century. But to speak of culture and religion is to speak of difference, boundaries, particularity. How can human rights be both a cultural and a global politics?

My purpose here is, therefore, to develop an analytical framework to highlight and support the emancipatory potential of human rights politics in the double context of globalization, on the one hand, and cultural fragmentation and identity politics, on the other. My aim is to establish both global competence and local legitimacy for a progressive politics of human rights: human rights as both the driving force and the language of evermore inclusive local, national, and transnational public spheres<sup>2</sup>.

## 2. On Globalizations

I shall start by specifying what I mean by globalization. Globalization is very hard to define. Most definitions focus on the economy, that is to say, on the new world economy that has emerged in the last three decades as a consequence of the globalization of the production of

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<sup>2</sup> By public sphere I mean a field of social interaction and decision in which individuals, groups, and associations, through dialogic rhetoric and shared procedural rules, (1) define equivalencies as well as hierarchies among interests, claims and identities; and (2) accept that both rules and definitions be challenged overtime by previously excluded, unrecognized or silenced interests, claims, and identities of the same or other individuals, groups, and associations.

goods and services, and financial markets. This is a process through which the transnational corporations and multilateral financial institutions have risen to a new and unprecedented preeminence as international actors.

For my analytical purposes I prefer a definition of globalization that is more sensitive to the social, political, and cultural dimensions. I start from the assumption that what we usually call globalization consists of sets of social relations; as these sets of social relations change, so does globalization. There is strictly no single entity called globalization; there are, rather, globalizations, and we should use the term only in the plural. Any comprehensive concept should always be procedural, rather than substantive. On the other hand, if globalizations are bundles of social relations, the latter are bound to involve conflicts, hence, both winners and losers. More often than not, the discourse on globalization is the story of the winners as told by the winners. Actually, the victory is apparently so absolute that the defeated end up vanishing from the picture altogether.

Here is my definition of globalization: it is the process by which a given local condition or entity succeeds in extending its reach over the globe and, by doing so, develops the capacity to designate a rival social condition or entity as local.

The most important implications of this definition are the following. First, in the conditions of Western capitalist world system there is no genuine globalization. What we call globalization is always the successful globalization of a given localism. In other words, there is no global condition for which we cannot find a local root, a specific cultural embeddedness. The second implication is that globalization entails localization. In fact, we live in a world of localization, as much as we live in a world of globalization. Therefore, it would be equally correct in analytical terms if we were to define the current situation and our research topics in terms of localization, rather than globalization. The reason why we prefer the latter term is basically because hegemonic scientific discourse tends to prefer the story of the world as told by the winners. Many examples of how globalization entails localization can be given. The English language, as *lingua franca*, is one such example. Its expansion as global language has entailed the localization of other potentially global languages, namely, the French language.

Therefore, once a given process of globalization is identified, its full meaning and explanation may not be obtained without considering adjacent processes of relocalization occurring in tandem and intertwined with it. The globalization of the Hollywood star system may involve the

ethnicization of the Hindu star system produced by the once strong Hindu film industry. Similarly, the French or Italian actors of the 60's—from Brigitte Bardot to Alain Delon, from Marcello Mastroiani to Sofia Loren—who then symbolized the universal way of acting, seem today, when we see their movies again, as rather ethnic or parochially European. Between then and now, the Hollywoodesque way of acting has managed to globalize itself.

One of the transformations most commonly associated with globalization is time-space compression, that is to say, the social process by which phenomena speed up and spread out across the globe. Though apparently monolithic, this process does combine highly differentiated situations and conditions, and for that reason it cannot be analyzed independently of the power relations that account for the different forms of time and space mobility. On the one hand, there is the transnational capitalist class, really in charge of the time-space compression and capable of turning it to its advantage. On the other hand, the subordinate classes and groups, such as migrant workers and refugees, that are also doing a lot of physical moving but not at all in control of the time-space compression. Between corporate executives and immigrants and refugees, tourists represent a third mode of production of time-space compression.

There are also those who heavily contribute to globalization but who, nonetheless, remain prisoners of their local time-space. The peasants of Bolivia, Peru and Colombia, by growing coca, contribute decisively to a world drug culture, but they themselves remain as “localized” as ever. Just like the residents of Rio's favelas, who remain prisoners of the squatter settlement life, while their songs and dances are today part of a globalized musical culture. Finally and still from another perspective, global competence requires sometimes the accentuation of local specificity. Most of the tourist sites today must be highly exotic, vernacular and traditional in order to become competent enough to enter the market of global tourism.

In order to account for these asymmetries, globalization, as I have suggested, should always be referred to in the plural. In a rather loose sense, we could speak of different modes of production of globalization to account for this diversity. I distinguish four modes of production of globalization, which, I argue, give rise to four forms of globalization.

The first one I would call *globalized localism*. It consists of the process by which a given local phenomenon is successfully globalized, be it the worldwide operation of TNCs, the transformation of the English language in *lingua franca*, the globalization of American fast food or

popular music or the worldwide adoption of American intellectual property law as new *lex mercatoria*.

The second form of globalization I would call *localized globalism*. It consists of the specific impact of transnational practices and imperatives on local conditions that are thereby destructured and restructured in order to respond to transnational imperatives. Such localized globalisms include: free-trade enclaves; deforestation and massive depletion of natural resources to pay for the foreign debt; touristic use of historical treasures, religious sites or ceremonies, arts and crafts, and wildlife; ecological dumping; conversion of sustainability-oriented agriculture into export-oriented agriculture as part of the "structural adjustment"; the ethnicization of the workplace.

The international division of globalism assumes the following pattern: the core countries specialize in globalized localisms, while the choice of localized globalisms is imposed upon the peripheral countries<sup>3</sup>. The world system is a web of localized globalisms and globalized localisms.

However, the intensification of global interactions entails two other processes that are not adequately characterized either as globalized localisms or localized globalisms. The first one I would call *cosmopolitanism*. The prevalent forms of domination do not exclude the opportunity for subordinate nation-states, regions, classes or social groups and their allies to organize transnationally in defense of perceived common interests and use to their benefit the capabilities for transnational interaction created by the world system. Cosmopolitan activities involve, among others, South-South dialogues and organizations, new forms of labor internationalism, transnational networks of women's groups, indigenous peoples and human rights organizations, crossborder alternative legal services, North/South anticapitalist solidarity, transformative advocacy NGOs, networks of alternative development and sustainable environment groups, literary, artistic and scientific movements in the periphery of the world system in search of alternative, non-imperialist cultural val-

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<sup>3</sup> It has been claimed that the new global economy, based on informational capital, has eliminated the distinction between core, peripheral, and semiperipheral countries, in CASTELLS, M.: *The Rise of Network Society*, Blackwell, Oxford, 1996, pp. 92 and following. In my view, the distinction holds as well as the hierarchy it contains. More than ever it resides in the specific mix of core and peripheral activities, productions, sectors, employment systems, etc., in each country. The predominance of core traits in the mix implies that the country specializes in globalized localisms; the predominance of peripheral traits, on the contrary, brings with it the predominance of localized globalisms. The semiperipheral countries are those with an unstable balance between localized globalisms and globalized localisms.

ues, engaging in postcolonial research, subaltern studies, and so on. In spite of the heterogeneity of the organizations involved, the contestation of the World Trade Organization meeting in Seattle (November 30, 1999) was a good example of what I call cosmopolitanism<sup>4</sup>.

The other process that cannot be adequately described either as globalized localism or as localized globalism is the emergence of issues which, by their nature, are as global as the globe itself and which I would call, drawing loosely from international law, the *common heritage of humankind*. These are issues that only make sense as referred to the globe in its entirety: the sustainability of human life on earth, for instance, or such environmental issues as the protection of the ozone layer, the Amazon, the Antarctica, biodiversity or the deep seabed. I would also include in this category the exploration of the outer space, the moon and other planets, since the interactions of the latter with the earth are also a common heritage of humankind. All these issues refer to resources that, by their very nature, must be administered by trustees of the international community on behalf of present and future generations.

The concern with cosmopolitanism and the common heritage of humankind has known great development in the last decades; but it has also elicited powerful resistance. The common heritage of humankind in particular has been under steady attack by hegemonic countries, specially the USA. The conflicts, resistances, struggles and coalitions clustering around cosmopolitanism and the common heritage of humankind show that what we call globalization is in fact a set of arenas of cross-border struggles.

For my purpose in this paper, it is useful to distinguish between globalization from above and globalization from below, or between hegemonic and counter-hegemonic globalization. What I called *globalized*

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<sup>4</sup> I don't use cosmopolitanism in the conventional, modern sense. In Western modernity cosmopolitanism is associated with rootless universalism and individualism, world citizenship, negation of territorial or cultural borders or boundaries. This idea is expressed in Pitagoras' «cosmic law», in Democritus' *philallelia*, in the medieval ideal of the *res publica christiana*, in the Renaissance conception of "humanitas", in Voltaire's saying that "to be a good patriot one needs to become the enemy of the rest of the world" and, finally, in early twentieth-century labor internationalism.

For me, cosmopolitanism is the crossborder solidarity among groups that are exploited, oppressed or excluded by hegemonic globalization. Either as hiper-localized populations (e.g. the indigenous peoples of the Andean cordillera) or as hiper-transnationalized populations (e.g. indigenous peoples in Brazil, Colombia or India displaced by "development projects", illegal immigrants in Europe and North America), these groups experience a space-time compression over which they have no control.

*localism* and *localized globalisms* are globalizations from above; *cosmopolitanism* and the *common heritage of humankind* are globalizations from below.

### 3. Human Rights as an emancipatory script

The complexity of human rights is that they may be conceived either as a form of globalized localism or as a form of cosmopolitanism or, in other words, as a globalization from above or as a globalization from below. My purpose is to specify the conditions under which human rights may be conceived of as globalizations of the latter kind. In this paper I will not cover all the necessary conditions but rather only the cultural ones. My argument is that as long as human rights are conceived of as universal human rights, they will tend to operate as a globalized localism, a form of globalization from above. To be able to operate as a cosmopolitan, counter-hegemonic form of globalization human rights must be reconceptualized as multicultural. Conceived of, as they have been, as universal, human rights will always be an instrument of Samuel Huntington's "clash of civilizations", that is to say, of the struggle of the West against the rest. Their global competence will be obtained at the cost of their local legitimacy. On the contrary, progressive multiculturalism, as I understand it, is a precondition for a balanced and mutually reinforcing relationship between global competence and local legitimacy, the two attributes of a counter-hegemonic human rights politics in our time.

We know, of course, that human rights are not universal in their application. Four international regimes of human rights are consensually distinguished in the world in our time: the European, the Inter-American, the African and the Asian regime<sup>5</sup>. But are they universal as a cultural artifact, a kind of cultural invariant, a global culture? My answer is no. Even though all cultures tend to define ultimate values as the most widespread, only the Western culture tends to focus on universality. The question of the universality of human rights betrays the universality of what it questions by the way it questions it. In other words, the question of universality is a particular question, a Western cultural question.

The concept of human rights lies on a well-known set of presuppositions, all of which are distinctly Western, namely: there is a universal

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<sup>5</sup> For an extended analysis of the four regimes, and the bibliography cited there, see SANTOS, B.: *Toward a New Common Sense...*, *op. cit.*, pp. 330-337.



human nature that can be known by rational means; human nature is essentially different from and higher than the rest of reality; the individual has an absolute and irreducible dignity that must be defended against society or the state; the autonomy of the individual requires that society be organized in a nonhierarchical way, as a sum of free individuals<sup>6</sup>. Since all these presuppositions are clearly Western and liberal, and easily distinguishable from other conceptions of human dignity in other cultures, one might ask why the question of the universality of human rights has become so hotly debated, why, in other words, the sociological universality of this question has outgrown its philosophical universality.

If we look at the history of human rights in the post-war period, it is not difficult to conclude that human rights policies by and large have been at the service of the economic and geo-political interests of the hegemonic capitalist states. The generous and seductive discourse on human rights has allowed for unspeakable atrocities and such atrocities have been evaluated and dealt with according to revolting double standards. Writing in 1981 about the manipulation of the human rights agenda in the United States in conjunction with the mass media, Richard Falk spoke of a "politics of invisibility" and of a "politics of supervisibility"<sup>7</sup>. As examples of the politics of invisibility he spoke of the total blackout by the media on news about the tragic decimation of the Maubere People in East Timor (taking more than 300,000 lives) and the plight of the hundred million or so "untouchables" in India. As examples of the politics of supervisibility Falk mentioned the relish with which post-revolutionary abuses of human rights in Iran and Vietnam were reported in the United States. Actually, the same could largely be said of the European Union countries, the most poignant example being the silence that kept the genocide of the Maubere people hidden from the Europeans for a decade, thereby facilitating the ongoing smooth and thriving international trade with Indonesia.

But the Western and indeed the Western liberal mark in the dominant human rights discourse could be traced in many other instances: in the Universal Declaration of 1948, which was drafted without the participation of the majority of the peoples of the world; in the exclusive recognition of individual rights, with the only exception of the collective right to self-determination which, however, was restricted to the

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<sup>6</sup> PANIKKAR, R.: "Is the notion of Human Rights a Western Concept?", *Cahier*, vol. 81, pp. 28-47.

<sup>7</sup> FALK, R.: *Human Rights and State Sovereignty*, Holmes and Meier Publishers, New York, 1981.

peoples subjected to European colonialism; in the priority given to civil and political rights over economic, social and cultural rights, and in the recognition of the right to property as the first and, for many years, the sole economic right.

But this is not the whole story. Throughout the world, millions of people and thousands of nongovernmental organizations have been struggling for human rights, often at great risk, in defense of oppressed social classes and groups that in many instances have been victimized by authoritarian capitalistic states. The political agendas of such struggles are usually either explicitly or implicitly anti-capitalist. A counter-hegemonic human rights discourse and practice has been developing, non-Western conceptions of human rights have been proposed, cross-cultural dialogues on human rights have been organized. The central task of emancipatory politics of our time, in this domain, consists in transforming the conceptualization and practice of human rights from a globalized localism into a cosmopolitan project.

What are the premises for such a transformation? The first premise is that it is imperative to transcend the debate on universalism and cultural relativism. The debate is an inherently false debate, whose polar concepts are both and equally detrimental to an emancipatory conception of human rights. All cultures are relative, but cultural relativism, as a philosophical posture, is wrong. All cultures aspire to ultimate concerns and values, but cultural universalism, as a philosophical posture, is wrong. Against universalism, we must propose cross-cultural dialogues on isomorphic concerns. Against relativism, we must develop cross-cultural procedural criteria to distinguish progressive politics from regressive politics, empowerment from disempowerment, emancipation from regulation. To the extent that the debate sparked by human rights might evolve into a competitive dialogue among different cultures on principles of human dignity, it is imperative that such competition induces the transnational coalitions to race to the top rather than to the bottom (what are the absolute minimum standards? The most basic human rights? The lowest common denominators?). The often voiced cautionary comment against overloading human rights politics with new, more advanced rights or with different and broader conceptions of human rights<sup>8</sup>, is a latter day manifestation of the reduction of the emancipatory claims of Western modernity to the low degree of emancipation made possible or tolerated by world capital-

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<sup>8</sup> DONELLY, J.: *Universal Human Rights in Theory and Practice*, Cornell University Press, Ithaca, 1989, pp. 109-124.

ism. Low intensity human rights as the other side of low intensity democracy.

The second premise is that all cultures have conceptions of human dignity but not all of them conceive of it as human rights. It is therefore important to look for isomorphic concerns among different cultures. Different names, concepts, and *Weltanschauungen* may convey similar or mutually intelligible concerns or aspirations.

The third premise is that all cultures are incomplete and problematic in their conceptions of human dignity. The incompleteness derives from the very fact that there is a plurality of cultures. If each culture were as complete as it claims to be, there would be just one single culture. The idea of completeness is at the source of an excess of meaning that seems to plague all cultures. Incompleteness is thus best visible from the outside, from the perspective of another culture. To raise the consciousness of cultural incompleteness to its possible maximum is one of the most crucial tasks in the construction of a multicultural conception of human rights.

The fourth premise is that all cultures have different versions of human dignity, some broader than others, some with a wider circle of reciprocity than others, some more open to other cultures than others. For instance, Western modernity has unfolded into two highly divergent conceptions and practices of human rights — the liberal and the social-democratic or Marxist — one prioritizing civil and political rights, the other prioritizing social and economic rights<sup>9</sup>.

Finally, the fifth premise is that all cultures tend to distribute people and social groups among two competing principles of hierarchical belongingness. One operates through hierarchies among homogeneous units. The other operates through separation among unique identities and differences. The two principles do not necessarily overlap and for that reason not all equalities are identical and not all differences are unequal.

These are the premises of a cross-cultural dialogue on human dignity which may eventually lead to a *mestiza* conception of human rights, a conception that instead of resorting to false universalisms, organizes itself as a constellation of local and mutually intelligible local meanings, networks of empowering normative references.

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<sup>9</sup> See, for instance, POLLIS, A. and SCHWAB, P. (Eds.): *Human Rights. Cultural and Ideological Perspectives*, Praeger, New York, 1979; AN-NA'IM, A.A.: *Human Rights in Cross-Cultural Perspectives. A Quest for Consensus*, University of Pennsylvania Press, Philadelphia, 1992.

#### 4. Towards a diatopical hermeneutics

In the case of a cross-cultural dialogue the exchange is not only between different knowledges but also between different cultures, that is to say, between different and, in a strong sense, incommensurable universes of meaning. These universes of meaning consist of constellations of strong *topoi*. These are the overarching rhetorical commonplaces of a given culture. They function as premises of argumentation, thus making possible the production and exchange of arguments. Strong *topoi* become highly vulnerable and problematic whenever “used” in a different culture<sup>10</sup>. The best that can happen to them is to be moved “down” from premises of argumentation into arguments. To understand a given culture from another culture’s *topoi* may thus prove to be very difficult, if not at all impossible. I shall therefore propose a *diatopical hermeneutics*. In the area of human rights and dignity, the mobilization of social support for the emancipatory claims they potentially contain is only achievable if such claims have been appropriated in the local cultural context. Appropriation, in this sense, cannot be obtained through cultural cannibalization. It requires cross-cultural dialogue and diatopical hermeneutics.

Diatopical hermeneutics is based on the idea that the *topoi* of an individual culture, no matter how strong they may be, are as incomplete as the culture itself. Such incompleteness is not visible from inside the culture itself, since aspiration to the totality induces taking *pars pro toto*. The objective of diatopical hermeneutics is, therefore, not to achieve completeness—that being an unachievable goal—but, on the contrary, to raise the consciousness of reciprocal incompleteness to its possible maximum by engaging in the dialogue, as it were, with one foot in one culture and the other in another. Herein lies its *dia-topical* character<sup>11</sup>.

A diatopical hermeneutics can be conducted between the *topos* of human rights in Western culture and the *topos* of *dharma* in Hindu culture, and the *topos* of *umma* in Islamic culture. It may be argued that to compare or contrast a secular conception of human dignity (the Western one) with religious ones (the Islamic and the Hindu) is incor-

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<sup>10</sup> In inter-cultural exchanges one very often experiences the need to explain and justify ideas and courses of action which in one’s culture are so self-evident and commonsensical that to provide an explanation or justification for them would be strange, awkward, if not utterly foolish.

<sup>11</sup> See also PANIKKAR, R.: *op. cit.*, p. 28. Etymologically, *diatopical* evokes *place* (Gr. *topos*), *two* (Gr. *di-*), and *through* or *cross* (Gr. *dia-*).

rect or illegitimate<sup>12</sup>. Against this argument, I have two responses. First, the secular/religious distinction is a distinctly Western one and thus what it distinguishes when applied to the Western culture is not equivalent to what it distinguishes when applied to a non-Western culture. For instance, what counts as secular in a society in which one or several non-Western cultures predominate is often considered, when viewed from inside these cultures, as a variety of the religious. The second response is that in the West secularization has never been fully accomplished. What counts as secular is the product of a consensus, at best democratically obtained, over a compromise with some religious claim. For this reason, the conceptions of secularism vary widely among the European countries. In any case, the Judeo-Christian roots of human rights — starting with the early modern natural law schools — are all too visible<sup>13</sup>. Under such conditions, I argue, the secular/religious distinction must be itself subjected to the diatopical hermeneutics.

According to Panikkar, *dharma* “is that which maintains, gives cohesion and thus strength to any given thing, to reality, and ultimately to the three worlds (*triloka*). Justice keeps human relations together; morality keeps oneself in harmony; law is the binding principle for human relations; religion is what maintains the universe in existence; destiny is that which links us with the future; truth is the internal cohesion of a thing ... Now a world in which the notion of Dharma is central and nearly all-pervasive is not concerned with finding the ‘right’ of one individual against another or of the individual vis-à-vis society but rather

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<sup>12</sup> It has often been stated that Hinduism is not a well-defined, clearly identifiable religion in the sense of Christianity or Islam «but rather a loosely coordinated and somewhat amorphous conglomeration of ‘sets’ or similar formations», in HALBFASS, W.: *Tradition and Reflection. Explorations in Indian Thought*, State University of New York Press, New York, 1991, p. 51.

<sup>13</sup> Ashis Nandy has been one of the most influential and consistent critics of Western secularism applied to the Indian context; he has shown how the recent revival of religious ideology in India (Hindutva and the Bharatiya Janata Party) is part and parcel of a secularized politics, in NANDY, A.: “The Politics of Secularism and the Recovery of Religious Tolerance”, *Alternatives*, Vol. XIII, 1988, pp. 177-194; NANDY, A.: “The Twilight of Certitudes: Secularism, Hindu Nationalism and Other Masks of Deculturation”, *Postcolonial Studies*, Vol. 1, no. 3, 1998, pp. 283-298. Bhargava provides a detailed and insightful analysis of the concept of secularism. He highlights the complex issues raised by the concept in the Indian context and offers a new and innovative perspective on secularism in Western societies, in BHARGAVA, R.: “Religious and Secular Identities”, in PAREKH, B. and BAKSHI, U. (Eds.): *Crisis and Change in Contemporary India*, Sage, New Delhi, 1995, pp. 317-349; BHARGAVA, R. (Ed.): *Secularism and its Critics*, Oxford University Press, New Delhi, 1998. For a discussion of secularism and the rights of religious minorities, see also CHANDHOKE, N.: *Beyond Secularism. The Rights of Religious Minorities*, Oxford University Press, New Delhi, 1999.

with assaying the dharmic (right, true, consistent) or adharmic character of a thing or an action within the entire the anthropocosmic complex of reality"<sup>14</sup>. Seen from the *topos* of *dharma*, human rights are incomplete in that they fail to establish the link between the part (the individual) and the whole (reality), or even more strongly in that they focus on what is merely derivative, on rights, rather than on the primordial imperative, the duty of individuals to find their place in the order of the entire society, and of the entire cosmos. Seen from *dharma* and, indeed from *umma* also, the Western conception of human rights is plagued by a very simplistic and mechanistic symmetry between rights and duties. It grants rights only to those from whom it can demand duties. This explains why according to Western human rights nature has no rights: because it cannot be imposed any duties. For the same reason, it is impossible to grant rights to future generations: they have no rights because they have no duties.

On the other hand, seen from the *topos* of human rights, *dharma* is also incomplete due to its strong undialectical bias in favor of the harmony of the social and religious *status quo*, thereby occulting injustices and totally neglecting the value of conflict as a way toward a richer harmony. Moreover, *dharma* is unconcerned with the principles of democratic order, with individual freedom and autonomy, and it neglects the fact that, without primordial rights, the individual is too fragile an entity to avoid being run over by whatever transcends him or her. Moreover, *dharma* tends to forget that human suffering has an irreducible individual dimension: societies don't suffer, individuals do.

At another conceptual level, the same diatopical hermeneutics can be attempted between the *topos* of human rights and the *topos* of *umma* in Islamic culture. The passages in the Qur'an in which the word *umma* occurs are so varied that its meaning cannot be rigidly defined. This much, however, seems to be certain: it always refers to ethnical, linguistic or religious bodies of people who are the objects of the divine plan of salvation. As the prophetic activity of Muham-

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<sup>14</sup> PANIKKAR, R.: *op. cit.*, p. 39. See also HALBFASS, W.: *op. cit.*; INADA, K.: "A Buddhist Response to the Nature of Human Rights", in WELCH, C. and LEARY, V. (Eds.): *Asian Perspectives on Human Rights*, Wetsview Press, Boulder, 1990, pp. 91-101; MITRA, K.: "Human Rights in Hinduism", *Journal of Ecumenical Studies*, Vol. 19, no. 3, 1982, pp. 77-84; THAPAR, R.: "The Hindu and Buddhist Traditions", *International Social Science Journal*, Vol. 18, no. 1, 1996, pp. 31-40. According to Knipe, *dharma* is "the spiritual duty in accord with cosmic law and order; perhaps the closest Sanskrit word for 'religion'", in KNIFE, D.M.: *Hinduism. Experiments in the Sacred*, Harper, San Francisco, 1991, p. 156.

mad progressed, the religious foundations of *umma* became increasingly apparent and consequently the *umma* of the Arabs was transformed into the *umma* of the Muslims. Seen from the *topos* of *umma*, the incompleteness of the individual human rights lies in the fact that on its basis alone it is impossible to ground the collective linkages and solidarities without which no society can survive, and much less flourish. Herein lies the difficulty in the Western conception of human rights to accept collective rights of social groups or peoples, be they ethnic minorities, women, or indigenous peoples. This is in fact a specific instance of a much broader difficulty: the difficulty of defining the community as an arena of concrete solidarity, and as a horizontal political obligation. Central to Rousseau, this idea of community was flushed away in the liberal dichotomy that set asunder the State and civil society.

Conversely, from the *topos* of the individual human rights, *umma* overemphasizes duties to the detriment of rights and, for that reason, is bound to condone otherwise abhorrent inequalities, such as the inequality between men and women and between Muslims and non-Muslims. As unveiled by the diatopical hermeneutics, the fundamental weakness of Western culture consists in dichotomizing too strictly between the individual and society, thus becoming vulnerable to possessive individualism, narcissism, alienation, and anomie. On the other hand, the fundamental weakness of Hindu and Islamic culture consists in that they both fail to recognize that human suffering has an irreducible individual dimension, which can only be adequately addressed in a society not hierarchically organized.

The recognition of reciprocal incompletenesses and weaknesses is a *condition-sine-qua-non* of a cross-cultural dialogue. Diatopical hermeneutics builds both on local identification of incompleteness and weakness and on its translocal intelligibility. In the area of human rights and dignity, the mobilization of social support for the emancipatory claims they potentially contain is only achievable if such claims have been appropriated in the local cultural context. Appropriation, in this sense, cannot be obtained through cultural cannibalization. It requires cross-cultural dialogue and diatopical hermeneutics. A good example of diatopical hermeneutics between Islamic and Western culture in the field of human rights is given by Abdullahi Ahmed An-na'im<sup>15</sup>.

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<sup>15</sup> AN-NA'IM, A.: *Toward Islamic Reformation*, Syracuse University Press, Syracuse, 1990; AN-NA'IM, A.: *Human Rights in Cross-Cultural Perspectives...*, *op. cit.*

There is a long-standing debate on the relationships between Islamism and human rights and the possibility of an Islamic conception of human rights<sup>16</sup>. This debate covers a wide range of positions, and its impact reaches far beyond the Islamic world. Running the risk of excessive simplification, two extreme positions can be identified in this debate. One, absolutist or fundamentalist, is held by those for whom the religious legal system of Islam, the Shari'a, must be fully applied as the law of the Islamic state. According to this position, there are irreconcilable inconsistencies between the Shari'a and the Western conception of human rights, and the Shari'a must prevail. For instance, regarding the status of non-Muslims, the Shari'a dictates the creation of a state for Muslims as the sole citizens, non-Muslims having no political rights; peace between Muslims and non-Muslims is always problematic and confrontations may be unavoidable. Concerning women, there is no question of equality; the Shari'a commands the segregation of women and, according to some more strict interpretations, even excludes them from public life altogether.

At the other extreme, there are the secularists or the modernists, who believe that Muslims should organize themselves in secular states. Islam is a religious and spiritual movement, not a political one and, as such, modern Muslim societies are free to organize their government in whatever manner they deem fit and appropriate to the circumstances. The acceptance of international human rights is a matter of political decision unencumbered by religious considerations. Just one example, among many: a Tunisian law of 1956 prohibited polygamy altogether on the grounds that it was no longer acceptable and that the Qur'anic requirement of justice among co-wives was impossible for any man, except the Prophet, to achieve in practice.

An-na'im criticizes both extreme positions. The *via per mezzo* he proposes aims at establishing a cross-cultural foundation for human

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<sup>16</sup> Besides AN-NA'IM, A.: *Toward Islamic...*, *op. cit.*, see DWYER, K.: *Arab Voices. The Human Rights Debate in the Middle East*, University of California Press, Berkeley, 1991; MAYER, A.E.: *Islam and Human Rights. Tradition and Politics*, Westview Press, Boulder, 1991; LEITES, J.: "Modernist Jurisprudence as a Vehicle for Gender Role Reform in the Islamic World", *Columbia Human Rights Law Review*, Vol. 22, 1991, pp. 251-330; AFKHAM, M. (Ed.): *Faith and Freedom. Women's Human Rights in the Muslim World*, Syracuse University Press, Syracuse, 1995; HASSAN, R.: "On Human Rights and the Qur'anic Perspective", *Journal of Ecumenic Studies*, Vol. 19, no. 3, 1982, pp. 51-65; AL FARUQUI, I.: "Islam and Human Rights", *The Islamic Quarterly*, Vol. 27, no. 1, 1983, pp. 12-30. On the broader issue of the relationship between modernity and Islamic revival, see, for instance, SHARABI, H.: "Modernity and Islamic Revival: The Critical Tasks of Arab Intellectuals", *Contention*, Vol. 2, no. 1, pp. 127-147; SHARIATI, A.: *What is to be done: The Enlightened Thinkers and an Islamic Renaissance*, The Institute for Research and Islamic Studies, Houston, 1986.



rights, identifying the areas of conflict between the Shari'a and "the standards of human rights" and seeking a reconciliation and positive relationship between the two systems. For example, the problem with historical Sahri'a is that it excludes women and non-Muslim from the application of this principle. Thus, a reform or reconstruction of the Shari'a is needed. The method proposed for such "Islamic Reformation" is based on an evolutionary approach to Islamic sources that looks into the specific historical context within which the Shari'a was created out of the original sources of Islam by the founding jurists of the eighth and ninth centuries. In the light of such a context, a restricted construction of the other was probably justified. But this is no longer so. On the contrary, in the present different context there is within Islam full justification for a more enlightened view.

Following the teachings of *Ustadh* Mahmoud, An-na'im shows that a close examination of the content of the Qur'an and Sunna reveals two levels or stages of the message of Islam, one of the earlier Mecca period and the other of the subsequent Medina stage. The earlier message of Mecca is the eternal and fundamental message of Islam and it emphasizes the inherent dignity of all human beings, regardless of gender, religious belief or race. Under the historical conditions of the seventh century (the Medina stage) this message was considered too advanced, was suspended, and its implementation postponed until appropriate circumstances would emerge in the future. The time and context, says An-na'im, are now ripe for it.

It is not for me to evaluate the specific validity of this proposal within Islamic culture. This is precisely what distinguishes diatopical hermeneutics from Orientalism. What I want to emphasize in An-na'im's approach is the attempt to transform the Western conception of human rights into a cross-cultural one that vindicates Islamic legitimacy rather than relinquishing it. In the abstract and from the outside, it is difficult to judge whether a religious or a secularist approach is more likely to succeed in an Islam-based cross-cultural dialogue on human rights. However, bearing in mind that Western human rights are the expression of a profound, albeit incomplete process of secularization which is not comparable to anything in Islamic culture, one would be inclined to suggest that, in the Muslim context, the mobilizing energy needed for a cosmopolitan project of human rights will be more easily generated within a enlightened religious framework. If so, An-na'im's approach is very promising.

In India, a similar *via permezzo* is being pursued by some human rights groups and, particularly, by untouchable social reformers. It consists in grounding the struggle of the untouchables for justice and

equality in the Hindu notions of *karma* and *dharma*, revising and re-interpreting them or even subverting them selectively in such a way as to turn them into sources of legitimacy and strength for contestations and protests. An illustration of such revisions is the increasing emphasis given to “*common dharma*” (*sadharana dharma*) in contrast with the “*specialized dharma*” (*visesa dharma*) of caste rules, rituals and duties. According to Khare, the common dharma,

based on the spiritual sameness of all creatures, traditionally promotes a shared sense of mutual care, avoidance of violence and injury, and a pursuit of fairness. It traditionally promotes activities for public welfare and attracts progressive reformers. Human rights advocates might locate here a convergent indigenous Indian impulse. The *common dharma* ethic also eminently suits untouchable social reformers<sup>17</sup>.

The “Indian impulse” of the “common dharma” provides human rights with cultural embededness and local legitimacy whereby they cease to be a globalized localism. The revision of the Hindu tradition to create an opening for human rights claims is thus another good example of diatopical hermeneutics. The outcome is a culturally hybrid claim for human dignity, a *mestiza* conception of human rights.

Diatopical hermeneutics is not a task for a single person writing within a single culture. For example, An-na'im's approach, though a true *exemplar* of diatopical hermeneutics, is conducted with uneven consistency. In my view, An-na'im accepts the idea of universal human rights too readily and acritically. Even though he subscribes to an evolutionary approach and is quite attentive to the historical context of Islamic tradition, he becomes surprisingly ahistorical and naively universalist as far as the Universal Declaration goes. Diatopical hermeneutics requires not only a different kind of knowledge, but also a different process of knowledge creation. It requires the production of a collective and participatory knowledge based on equal cognitive and emotional exchanges, a knowledge-as-emancipation rather than a knowledge-as-regulation<sup>18</sup>.

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<sup>17</sup> KHARE, R.S.: “Elusive Social Justice, Distant Human Rights: Untouchable Women's Struggles and Dilemmas in Changing India”, in ANDERSON, M. and GUHA, S. (Eds.): *Changing Concepts of Rights and Justice in South Asia*, Oxford University Press, New Delhi, 1998, pp. 198-219.

<sup>18</sup> See SANTOS, B.: *op. cit.*, 1995, p. 25 for the distinction between these two forms of knowledge, one that progresses from chaos to order (knowledge-as-regulation), and another that progresses from colonialism to solidarity (knowledge-as-emancipation).

The diatopical hermeneutics conducted by An-na'im, from the perspective of Islamic culture, and the human rights struggles organized by Islamic feminist grassroots movements following the ideas of "Islamic Reformation" proposed by him, must be matched by a diatopical hermeneutics conducted from the perspective of other cultures and namely from the perspective of Western culture. This is probably the only way to embed in the Western culture the idea of collective rights, rights of nature and future generations, and of duties and responsibilities vis-à-vis collective entities, be they the community, the world, or even the cosmos.

## 5. Difficulties of a progressive multiculturalism

The diatopical hermeneutics offers a wide field of possibilities for debates going on, in the different cultural regions of the world system, on the general issues of universalism, relativism, cultural frames of social transformation, traditionalism, and cultural revival<sup>19</sup>. However, an idealistic conception of cross-cultural dialogue will easily forget that such a dialogue is only made possible by the temporary simultaneity of two or more different contemporaneities. The partners in the dialogue are only superficially contemporaneous; indeed each of them

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<sup>19</sup> For the African debate, see OLADIPO, O.: "Towards a Philosophical Study of African Culture: A Critique of Traditionalism", *Quest*, Vol. 3, no. 2, 1989, pp. 31-50; ORUKA, H.O.: "Cultural Fundamentals in Philosophy", *Quest*, Vol. 4, no. 2, 1990, pp. 21-37; WIREDU, K.: "Are There Cultural Universals?", *Quest*, Vol. 4, no. 2, 1990, pp. 5-19; WAMBA DIA WAMBA, E.: "Some Remarks on Culture, Development and Revolution in Africa", *Journal of Historical Sociology*, Vol. 4, 1991, pp. 219-235; WAMBA DIA WAMBA, E.: "Beyond Elite Politics of Democracy in Africa", *Quest*, Vol. 5, no. 1, 1991, pp. 28-42; PROCEE, H.: "Beyond Universalism and Relativism", *Quest*, Vol. 6, no. 1, 1992, pp. 45-55; RAMOSE, M.B.: "African Democratic Traditions: Oneness, Consensus and Openness", *Quest*, Vol. 6, no. 1, 1992, pp. 63-83. A sample of the rich debate in India can be found in NANDY, A.: "Cultural Frames for Social Transformation: A Credo", *Alternatives*, Vol. 12, 1987, pp. 113-123; NANDY, A.: *Traditions, Tyranny and Utopias. Essays in the Politics of Awareness*, Oxford University Press, Oxford, 1987; NANDY, A.: "The Politics of Secularism and the Recovery of Religious Tolerance", *Alternatives*, Vol. 13, 1988, pp. 177-194; CHATTERJEE, P.: "Gandhi and the Critique of Civil Society", in GUHA, R. (Ed.): *Subaltern Studies III: Writings on South Asian History and Society*, Oxford University Press, New Delhi, 1984, pp. 153-195; PANTHAM, T.: "On Modernity, Rationality and Morality: Habermas and Gandhi", *The Indian Journal of Social Science*, Vol. 1, no. 2, 1988, pp. 187-208; BHARGAVA, R. (Ed.): *op. cit.*, 1998; BHARGAVA, R.; BAGCHI, A. and SUDARSHAN, R. (Eds.): *Multiculturalism, Liberalism and Democracy*, Oxford University Press, New Delhi, 1999. A bird's-eye view of cultural differences can be found in GALTUNG, J.: "Western Civilization: Anatomy and Pathology", *Alternatives*, Vol. 7, 1981, pp. 145-169.

feels himself or herself only contemporaneous with the historical tradition of his or her respective culture. This is most likely the case when the different cultures involved in the dialogue share a past of interlocked unequal exchanges. What are the possibilities for a cross-cultural dialogue when one of the cultures *in presence* has been itself molded by massive and long lasting violations of human rights perpetrated in the name of the other culture? When cultures share such a past, the present they share at the moment of starting the dialogue is at best a *quid pro quo* and at worst a fraud. The cultural dilemma is the following: since in the past the dominant culture rendered unpronounceable some of the aspirations of the subordinate culture to human dignity, is it now possible to pronounce them in the cross-cultural dialogue without thereby further justifying and even reinforcing their unpronounceability?

Cultural imperialism and epistemicide are part of the historical trajectory of Western modernity. After centuries of unequal cultural exchanges, is equal treatment of cultures fair? Is it necessary to render some aspirations of Western culture unpronounceable in order to make room for the pronounceability of other aspirations of other cultures? Paradoxically — and contrary to hegemonic discourse — it is precisely in the field of human rights that Western culture must learn from the South<sup>20</sup>, if the false universality that is attributed to human rights in the imperial context is to be converted into the new universality of cosmopolitanism in a cross-cultural dialogue. The emancipatory character of the diatopical hermeneutics is not guaranteed *a priori* and indeed multiculturalism may be the new mark of a reactionary politics. Suffice it to mention the multiculturalism of the Prime Minister of Malaysia or Chinese gerontocracy, when they speak of the “Asian conception of human rights”.

One of the most problematic presuppositions of diatopical hermeneutics is the conception of cultures as incomplete entities. It may be argued that, on the contrary, only complete cultures can enter the inter-cultural dialogue without risking being run over by and ultimately dissolved into other, more powerful cultures. A variation of this argument states that only a powerful and historically victorious culture, such as the Western culture, can grant itself the privilege of proclaiming its own incompleteness without risking dissolution. Indeed, cultural incompleteness may be, in this case, the ultimate tool of cultural he-

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<sup>20</sup> Elsewhere, I deal in detail with the idea of «learning from the South», in SANTOS, B.: *Toward a New Common Sense...*, *op. cit.*, pp. 475-519.

gemony. None of the non-Western cultures are allowed today such a privilege.

This line of argumentation is particularly convincing when applied to those non-Western cultures that endured in the past the most destructive "encounters" with the Western culture. So destructive indeed were they that they led in many cases to utter cultural extinction. This is the case of indigenous peoples cultures in the Americas, Australia, New Zealand, India, etc. These cultures have been so aggressively *in-completed* by Western culture that the demand for incompleteness, as a precondition for a diatopical hermeneutics is, at least, a ludicrous exercise<sup>21</sup>.

The problem with this line of argumentation is that it leads, logically, to two alternative outcomes, both of them quite disturbing: cultural closure or conquest as the sole realistic alternative to inter-cultural dialogues. In a time of intensified transnational social and cultural practices, cultural closure is, at best, a pious aspiration that occults and implicitly condones chaotic and uncontrollable processes of destructuring, contamination, and hybridization. Such processes reside in unequal power relations and in unequal cultural exchanges, so much so that cultural closure becomes the other side of cultural conquest. The question is then whether cultural conquest can be replaced by inter-cultural dialogues based on mutually agreed conditions and if so on what conditions.

The dilemma of cultural completeness, as I would call it, may be formulated as follows: if a given culture considers itself complete, it sees no interest in entertaining inter-cultural dialogues; if, on the contrary, it enters such a dialogue out of a sense of its own incompleteness, it makes itself vulnerable and, ultimately, offers itself to cultural conquest. There is no easy way out of this dilemma. Bearing in mind that cultural closure is self-defeating, I don't see any other way out but raising the standards for inter-cultural dialogue to a threshold high enough to minimize the possibility of cultural conquest, but not

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<sup>21</sup> In this paper I concentrate on the diatopical hermeneutics between the Western culture and the «great Oriental cultures» (Hinduism and Islamism). I am aware that a diatopical hermeneutics involving the indigenous peoples' cultures raises other analytical issues and demands specific preconditions. Focusing on the indigenous peoples of Latin America, I deal with this topic in SANTOS, B.: "Pluralismo Jurídico y Jurisdicción Especial Indígena", in VARIOS AUTORES: *Del Olvido Surgimos para traer Nuevas Esperanzas. La Jurisdicción Especial Indígena*, Ministerio de Justicia y Derecho-Consejo Regional Indígena del Cauca-Ministerio del Interior, Bogotá, 1997, pp. 201-211; SANTOS, B. y GARCÍA VILLEGAS, M.: *El Caleidoscopio de Justicias en Colombia*, Unianandes y Siglo del Hombre, Bogotá, 2000.

so high as to preclude the possibility of dialogues altogether (in which case it would revert into cultural closure and, hence, into cultural conquest).

## 6. Conditions for a progressive multiculturalism

The conditions for a progressive multiculturalism vary widely across time and space and mainly according to the specific cultures involved and the power relations among them. However, I venture to say that the following contextual procedural orientations and transcultural imperatives must be accepted by all social groups interested in inter-cultural dialogues.

### 6.1. *From completeness to incompleteness*

As I said above, cultural completeness is the starting point, not the arriving point. Indeed, cultural completeness is the condition prevailing before the inter-cultural dialogue starts. The true starting point of this dialogue is a moment of discontent with one's culture, a diffuse sense that one's culture does not provide satisfying answers to some of one's queries, perplexities or expectations. This diffuse sensibility is linked to a vague knowledge of and an inarticulate curiosity about other possible cultures and their answers. The moment of discontent involves a pre-understanding of the existence and possible relevance of other cultures and translates itself in an unreflective consciousness of cultural incompleteness. The individual or collective impulse for inter-cultural dialogue and thus for diatopical hermeneutics starts from here.

Far from turning cultural incompleteness into cultural completeness, diatopical hermeneutics deepens, as it progresses, the cultural incompleteness, and transforms the vague and largely unreflective consciousness of it into a self-reflective consciousness. The objective of diatopical hermeneutics is thus to create self-reflective consciousness of cultural incompleteness. In this case, self-reflectivity means the recognition of the cultural incompleteness of one's culture as seen in the mirror of the cultural incompleteness of the other culture in the dialogue.

### 6.2. *From narrow to wide versions of cultures*

As I mentioned above, far from being monolithic entities, cultures comprise rich internal variety. The consciousness of such variety increases as the diatopical hermeneutics progresses. Of the different versions

of a given culture, that one must be chosen which represents the widest circle of reciprocity within that culture, the version that goes farthest in the recognition of the other. As we have seen, of two different interpretations of the Qur'an, An-na'im chooses the one with the wider circle of reciprocity, the one that involves Muslims and non-Muslims, men and women alike. In the same way and for the same reason, the untouchable social reformers emphasize "*common dharma*" to the detriment of "*specialized dharma*". I think the same must be done within Western culture as well. Of the two versions of human rights existing in our culture — the liberal and the social-democratic or marxist — the social-democratic or Marxist one must be adopted for it extends to the economic and social realms the equality that the liberal version only considers legitimate in the political realm.

### 6.3. *From unilateral to shared times*

The time for inter-cultural dialogue cannot be established unilaterally. Each culture and therefore the community or communities that sustain it must decide if and when they are ready for inter-cultural dialogue. Because of the fallacy of completeness, when one given culture starts feeling the need for inter-cultural dialogue it tends to believe that the other cultures feel an equal need and are equally eager to engage in dialogue. This is probably most characteristically the case of Western culture, which for centuries felt no need for mutually accepted inter-cultural dialogues. Now, as the unreflective consciousness of incompleteness sets in in the West, Western culture tends to believe that all the other cultures should or indeed must recognize their own incompleteness and be ready and eager to enter inter-cultural dialogues with the West.

If the time to enter an inter-cultural dialogue must be agreed upon by the cultures and social groups involved, the time to end it provisionally or permanently must be left to the unilateral decision of each culture and social group involved. There should be nothing irreversible about the diatopical hermeneutics. A given culture may need a pause before entering a new stage of the dialogue; or feel that the dialogue has brought it more damage than advantage and, accordingly, that it should be ended indefinitely. The reversibility of the dialogue is indeed crucial to defend the latter from perverting itself into unassumed reciprocal cultural closure or unilateral cultural conquest. The possibility of reversion is what makes the inter-cultural dialogue into an open and explicit political process. The political meaning of a unilateral decision to terminate the inter-cultural dialogue is different when the decision is

taken by a dominant culture or by a dominated culture. While in the latter case it may be an act of self-defense, in the former case it will be most probably an act of aggressive chauvinism. It is up to the politically progressive forces inside a given culture and across cultures — what I called above cosmopolitanism — to defend the emancipatory politics of diatopical hermeneutics from reactionary deviations.

#### 6.4. *From unilaterally imposed to mutually chosen partners and issues*

No culture will possibly enter a dialogue with any other possible culture on any possible issue. The inter-cultural dialogue is always selective both in terms of partners and of issues. The requirement that both partners and issues cannot unilaterally be imposed and must rather be mutually agreed upon is probably the most demanding condition of diatopical hermeneutics. The specific historical, cultural and political process by which the otherness of a given culture becomes significant for another culture at a given point in time varies widely. But, in general, colonialism, liberation struggles, and postcolonialism have been the most decisive processes behind the emergence of significant otherness. Concerning issues, the agreement is inherently problematic not only because issues in a given culture are not easily translatable into another culture, but also because in every culture there are always non-negotiable or even unspoken about issues, taboos being a paradigmatic example. As I discussed above, diatopical hermeneutics has to focus, rather than on “same” issues, on isomorphic concerns, on common perplexities and uneasinesses from which the sense of incompleteness emerges.

#### 6.5. *From equality or difference to equality and difference*

Probably all cultures tend to distribute people and groups according to two competing principles of hierarchical belongingness — unequal exchanges among equals, such as exploitation, and unequal recognition of difference such as racism or sexism — and thus according to competing conceptions of equality and difference. Under such circumstances, neither the recognition of equality nor the recognition of difference will suffice to found an emancipatory multicultural politics. The following transcultural imperative must thus be accepted by all partners in the dialogue if diatopical hermeneutics is to succeed: people have the right to be equal whenever difference makes them inferior, but they also have the right to be different whenever equality jeopardizes their identity.



## 7. Conclusion

As they are now predominantly understood, human rights are a kind of esperanto, which can hardly become the everyday language of human dignity across the globe. It is up to the diatopical hermeneutics sketched above to transform human rights into a cosmopolitan politics networking mutually intelligible and translatable native languages of emancipation. This project may sound rather utopian. But, as Sartre once said, before it is realized an idea has a strange resemblance with utopia.



# The legitimization of the use of torture in a post-September 11 scenario

Mariano Aguirre

**Summary:** 1. Violence and entertainment. 2. Dangerous tasks. 3. Whitewashing. 4. The *Habeas Corpus* controversy. 5. All Power to the President. 6. Extraordinary complicity. 7. The legitimization of torture. 8. Dirty work. 9. Critical reaction. 10. The State against itself? 11. The future.

On October 2007 former US President James Carter said in a CNN interview that his “country for the first time in my life time has abandoned the basic principle of human rights”. He added: “We’ve said that the Geneva Convention does not apply to those people in Abu Ghraib prison and Guantanamo, and we’ve said we can torture prisoners and deprive them of an accusation of a crime”. Enumerating the interrogation techniques that different US forces and Departments have been using since 2001, and in response to President Bush’s denial that torture was being used, Carter said: “You can make your own definition of human rights and say we don’t violate them, and you can make your own definition of torture and say we don’t violate them”<sup>1</sup>.

James Carter has a crucial point: the problem is not only of torture as a violation of human rights but the fact that there has been a political process of redefining human rights and torture; in a way, 50 years of advances in human rights protection and legal guarantees are being dismissed. Perhaps, the real dilemma here is that a powerful country considered being the incarnation of democracy and liberty is promoting new definitions of torture because this poses a dilemma for all countries. Many dictators and authoritarian governments will feel they have the legitimacy to revisit the concept of human rights and the practice of torture.

The George W. Bush Administration will end its mandate in 2009, but the impact of these revisions in the definition of human rights and the concept and practice of torture will remain with US society and the rest of the world for a long time. To date there have been predictably

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<sup>1</sup> The Associated Press, *Jimmy Carter: US Tortures Prisoners*, 11 October 2007.

negative results. The US judicial system, courageous human rights organizations and a number of journalists have challenged the Bush Team's definition of torture. Thanks to them the human rights system has not been defeated but we are entering what could be a long period of tension between lawful and unlawful interpreters, between authoritarian populists and just democrats, and the debate will be tough. The attacks on human rights during the first decade of the 21<sup>st</sup> century have been outrageous and to understand this story more fully we need to go back to 2001.

Shortly after the US war in Afghanistan began in October 2001, the then Secretary of Defense, Donald Rumsfeld, considered that the security forces were constrained by legal limits. Other Government officials also thought that it was necessary to obtain information rapidly from people arrested in Afghanistan in order to fight the war and prevent more terrorist attacks such as the one that had happened on September 11<sup>th</sup>. Rumsfeld ordered a secret plan in the Pentagon that involved the Central Intelligence Agency and the National Security Agency. The then National Security Advisor Condoleezza Rice and President George W. Bush Jr. were informed.

About 200 officials from different government agencies were involved in this operation which formed part of the so-called "war against terror" that the United States government launched after September 2001. Special powers were already available after the *Anti Patriotic Act* was passed as it provided wide-ranging executive powers, establishing security provisions and enhancing law enforcement measures against real or alleged terrorists.

Rumsfeld's idea was that Special Forces could travel to different countries unimpeded by borders and authorizations. In addition, prisoners could be transferred between allied countries and taken to the American base in Guantanamo (Cuba), or to third countries to be interrogated without legal hindrances. The Secretary of Defense created a team of officials and advisors on security and legal affairs in the Office of Legal Counsel (OLC), which operates within the Department of Justice. These officials included the White House legal advisor (and later United States Attorney General) Alberto Gonzales, the then OLC Director Jay S. Bybee (who is now a federal judge), lawyer John Yoo, and Lieutenant General William G. Boykin (in a 2004 speech he linked the Muslim world to Satan).

This legal team played a key role in:

—Providing arguments to legitimise torture by redefining the type of war the United States was fighting against terrorism.

- Blurring the border between torture and *coercive interrogation*.
- Strengthening Executive power at the expense of the Legislative and Judicial branches.
- Attempting to reformulate US compliance with the Geneva Convention.
- Encouraging active complicity of allied countries within the international system by requesting their cooperation in the decentralised practice of torture and their acceptance of the new American conceptualisation of torture.
- Legitimising the restriction of public freedoms in the United States.

The ideas put forward by this group of lawyers were, and continue to be, spread by President Bush and his administration and by academics and commentators in the media. The result is very serious for human rights protection within the international system, particularly because one of the strongest countries in the world, with a prestigious track record in promoting and defending human rights, is officially legitimising their violation.

## 1. Violence and entertainment

From 2001 onwards, human rights organisations and a number of journalists began to condemn mistreatment in detention centres in Afghanistan. In December 2002 the NGO Human Rights Watch urged the Government to investigate and take measures against reports of torture in Afghanistan published by the *Washington Post*<sup>2</sup>. In January 2004 a military police officer assigned to Abu Ghraib informed his superiors about the torture incidents in a report and a series of photographs on a CD. This information reached Rumsfeld and President Bush. By then several soldiers were sending information and photos to relatives and friends. In April, the CBS television programme *60 Minutes II* broadcast some of the photos in which men and women soldiers could be seen humiliating naked detainees, laughing beside the dead body of a detainee and threatening others with dogs. Immediately Seymour Hersh published two articles explaining Rums-

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<sup>2</sup> "U.S. Decries Abuse but Defends Interrogations", *The Washington Post*, 25 December 2004, and Human Rights Watch: *United States: Report of Al-Qaeda Suspects*, 2004, [www.hrw.org](http://www.hrw.org).

feld's plan and giving details of the torture in the weekly magazine *The New Yorker*<sup>3</sup>.

The writer Susan Sontag then wrote an essay on the use of photography in Abu Ghraib: "America has become a country in which the fantasies and the practice of violence are seen as good entertainment, fun"<sup>4</sup>. Given the overarching doctrine of the endless war on terror Sontag suggested that once the photographs were disseminated, there was a risk of increasing the acceptance of torture in American society as just another form of entertainment. This increasing tolerance was also related to the legitimisation of torture by the Government and by a number of intellectuals.

Sontag's analysis was correct. An enduring example is *24*, a highly successful television series both in the States and elsewhere, produced by the conservative TV channel Fox with Kiefer Sutherland in the leading role (Jack Bauer). This series narrates the adventures of an elite government group acting outside the law to defend America from terrorism. To achieve their ends they resort to every conceivable method, including the torture of suspects and even of members of the elite group itself and their relatives, in case they have been "brainwashed". The methods shown on the series include electric shock, breaking prisoners' bones, and chemical injection. The lawyers of a fictitious organisation called "Amnesty Global" are, in the series, considered enemies because they fight to free dangerous suspects and terrorists.

A *New York Times* TV critic stated that *24* will be remembered for "its portrayal of torture in prime time". Adam Green wrote that the series has focussed debate on violent interrogations by making out that torture is normal and can even be used as a form of relationship between people. The series, he says, portrays torture as normal and therefore justifiable, and "may say a great deal about what sort of society we are in the process of becoming"<sup>5</sup>.

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<sup>3</sup> HERSH, S.H.: "The Grey Zone", *The New Yorker*, 24 May and "Torture at Abu Ghraib", 10 May 2004.

<sup>4</sup> SONTAG, S.: "Regarding the Torture of Others", *The New York Times Magazine*, 23 May 2004, pp. 24-31.

<sup>5</sup> GREEN, A.: "Normalizing Torture, One Rollicking Hour At a Time", *The New York Times*, 22 May 2005. See WIENER, J.: "24": Torture on TV, *The Nation*, 15 January 2007. <http://www.thenation.com/blogs/notion?pid=157437>. The writer Mario Vargas Llosa praised the series in his article "Héroe de Nuestro Tiempo", *EL PAIS*, 10 September 2006, by arguing that Jack Bauer and his team protect us, although their methods are dirty: "those terrible law upholders who like Amadís or D'Artagnan are covered with blood and horror to save us, and enable us to live with an easy conscience".

The essayist Richard Kim considers that *24*, along with many other television series, “rationalises torture as necessary to preserve not just US National Security but law, authority and agency in general”<sup>6</sup>. The producers of *24* have stated that their programme is not political and that it is fictional entertainment. However, the correlation between the series and political and intellectual reasoning suggests two options: either certain sectors of the media, politicians and academics are all coordinated (unlikely); or series such as *24*, and other political and cultural manifestations, form part of an extended and complex discourse that tends to imitate arguments and use circular reasoning, generating a climate that favours the legitimization of torture. As a matter of fact there are testimonies that *24* were used as a tool for discussions about the use of torture in Guantanamo<sup>7</sup>.

Another illustrative example of how the culture of violence, the use of new technology and violations of human rights has become intertwined is the testimony of specialist Sabrina Hartman, who was assigned to Abu Ghraib. There she took thousands of digital photos and send them to her partner in the US. Two of those photographs became very famous around the world in 2004. The first one shows a man, his head covered with a black hood, dressed with a sort of poncho, standing on a chair and with wires on his hands. The second, a smiling young woman stands very close to a corpse, a dead man in a body bag. He seems to be frozen. She is giving the thumbs up.

Hartman gave a long testimony to two journalists who wrote a book and produced a film<sup>8</sup>, explaining how she chose the Army in order to pay for her studies. She found herself in Abu Ghraib without any training in how to deal with prisoners and complex situations, without any knowledge of the Geneva conventions and under the command of violent military leaders. Hartman’s testimony is a descent into the Inferno, where there were nights of lawless violence, sexual relationships between the jailers, and sexual excitement among the officers while they were torturing and killing Iraqis. As a reviewer said, the pornography of violence, that is never actually seen in the film or the book, should not distract us from the fact that a group of respectable lawyers, politicians and bureaucrats were behind the rules that allowed other people to commit the crimes<sup>9</sup>.

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<sup>6</sup> KIM, R.: “Pop Torture”, *The Nation*, 26 December 2005, pp. 37-39.

<sup>7</sup> BURUMA, I.: “Ghosts”, *The New York Review of Books*, 26 June 2008, p. 8.

<sup>8</sup> MORRIS, E.: *Standard Operating Procedures*, Film, GOUREVITCH, P. and MORRIS, E.: *Standard Operating Procedure*, London, Penguin, 2008.

<sup>9</sup> BURUMA, I.: *op. cit.*, p. 10.

## 2. Dangerous tasks

President Bush described what had happened in Abu Ghraib as “the disgraceful conduct of a few American soldiers, who dishonoured our country and disregarded our values”. But after 2001 the Government had made statements to the effect that:

- a) This war is unconventional and the end is not in sight.
- b) It is being fought against an almost inhuman enemy with no values.
- c) Brutal methods would have to be used occasionally.
- d) Terrorism poses the dilemma between security and freedom, and the Government opts for the former.
- e) The President needs flexibility and should not be limited by Congress nor the judicial system in fighting the “war on terrorism”.

Vice-President Richard Cheney warned in 2001 that to combat terrorism it was necessary to move in an “unpleasant, dangerous” way, because “out there, there are dirty matters, and we have to operate in this field”. President Bush said that the battle against terrorism “is a different sort”. Rumsfeld likewise referred to an enemy “*unburdened by bureaucracy or regulation*, - or any legal, moral or structural constraints. The enemy is not easily described. It is not a nation, not a religion, nor even one particular organisation”. He also said that in this “complex and multidimensional struggle, *the President needs flexibility* to choose which instrument of national power, from within which agency, may be best suitable for a given situation, challenge, region or country”<sup>10</sup>.

The then Sub-Secretary of Defence Paul Wolfowitz (and former World Bank director and currently researcher at the right wing think-tank American Enterprise Institute) responded, when asked if the prisoners in Guantanamo should remain there indefinitely that “I think that’s probably a good way to think about it” and legal advisor John Yoo asked the rhetorical question: “Does it make sense ever to release them if you think they are going to continue to be dangerous even though you can’t convict them of a crime?”<sup>11</sup>. Still in 2006 Vice-President Cheney said ambiguously: “we do not torture and we live up to our international treaty obligations. But the fact is that you can have a strong interrogation programme without torture, and we

<sup>10</sup> <http://www.defenselink.mil/speeches/speech.aspx?speechid=72> emphasis added.

<sup>11</sup> Quoted in LELYVELD, J.: “Guantanamo”, *The New York Review of Books*, 7 November 2002, p. 62.



need to be capable of achieving it". In the same interview, the Vice-President confirmed that the technique of waterboarding was used on the Al Qaeda prisoner Khaled Sheik Mohammed, and that he approved it<sup>12</sup>.

The secret programme promoted by the Pentagon for Afghanistan began to operate in Iraq in 2003, shortly after Washington and London declared war on the country. In 2004 it was becoming obvious that the war was going badly: insurgency was on the increase, ever more diversified, powerful and difficult to penetrate. In particular it was becoming more effective at killing US soldiers and committing attacks on officials named by the Provisional Coalition Authority and also on the civilian population.

Rumsfeld and his team considered that it was necessary to use more forceful tactics to gain intelligence. They started to use the coercive methods already developed in Guantanamo. Special commandos and even personnel from private security firms contracted by the Pentagon were employed in Abu Ghraib prison just as they were in Bagram prison in Afghanistan. In order to carry out this operation effectively, officers were transferred between Delta Camp (Guantanamo) and Abu Ghraib, and two lines of action were adopted: prisoners were considered "illegal combatants", who could not as such benefit from the protection afforded by the Geneva Convention for prisoners of war; tougher interrogation methods were to be used, including sexual humiliation.

Between 2002 and 2003, the Defence Secretary approved a number of techniques to "soften up" prisoners with the aim of obtaining information that would enable immediate action to be taken, in other words to produce "*actionable intelligence*" in the felicitous phrasing of military orders. The idea was to "take the gloves off" and resort to more severe interrogation of combatants who were not considered soldiers but individuals who had no rights. A member of Military Police Company 377 declared: "we were pretty much told that they were nobodies, that they were just enemy combatants"<sup>13</sup>.

The techniques approved included: forcing prisoners to stand or remain in stress positions for long periods of time, holding prisoners naked for days or weeks, prolonged total isolation for periods over 30 days, the use of dogs to terrify prisoners, manipulating the prison-

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<sup>12</sup> SEVASTOPULO, D.: "Cheney Endorses Simulated Drowning", *Financial Times*, 27 October 2006.

<sup>13</sup> JEHL, D. and ELLIOT, A.: "Cuba Base Sent Its Interrogators to Iraqi Prison", *The New York Times*, 29 May 2004.

er's environment by subjecting them to extreme changes in temperature, noise and light bombardment, blasting them with extremely loud music, sleep deprivation, holding the head in water until almost waterboarding, a diet of bread and water. In a report prepared by the Justice Department Inspector General about techniques used in the interrogations in Guantanamo, Iraq and Afghanistan there are descriptions of Muslim men being stripped naked in front of female guards and sexually humiliated, a prisoner forced to wear a dog collar, another man hooded with women's underwear and some threatened with attack dogs<sup>14</sup>.

All these techniques have been criticised by the United States Government when they are used by Egypt, Iran, North Korea, Turkey or Syria<sup>15</sup>. Washington, however, has reinterpreted the definition of "severity" considering that *severe* should be used when the pain or suffering is of such a high level that it is difficult for the subject to bear it. In addition, other practices have been used such as hitting the stomach with an open hand, being forced to stand in a cold cell and sprayed with cold water, kept standing for over 40 hours, being chained hand and foot in a squatting position for a whole day and water privation. In other cases the prisoner is hooded so that he cannot see or breathe properly thus causing disorientation so that he does not know when the next blow is coming. Flexible handcuffs cause injuries to the wrist, prisoners are beaten by weapons, and forced to take part in humiliating sexual acts in group or individually in front of guards (men and women). This type of humiliation included forcing prisoners to masturbate in public, simulate homosexual sex acts and make human pyramids while naked. Prisoners were told to have sexual intercourse with female soldiers, and were threatened with their wives and sisters being brought in to take part in sexual acts in front of soldiers<sup>16</sup>.

General Geoffrey Miller, who was commander of Guantanamo until April 2004, stated in an interview that interrogations carried out by women were more effective. As recorded by Mark Danner, who has done excellent research into torture cases: "While many of the elements of abuses (...) especially sense privation and "stressful positions"

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<sup>14</sup> Editorial: "What FBI Agents Saw During US Interrogations", *International Herald Tribune*, 23 May 2008.

<sup>15</sup> Compiled by MALINOVSKI, T.: "Banned State Department Practices", in ROTH, K., WORDEN, M., and BERNSTEIN, A.D.: *Torture. A Human Rights Perspective*, New York, The New Press, 2005, pp. 142-144.

<sup>16</sup> See LAZREG, M.: *Torture and the Twilight of Empire. From Algiers to Baghdad*, Princeton, Princeton University Press, 2008. This book explores "the sexual core of torture".

resemble methods used by modern intelligence services, including the Israelis and the British in Northern Ireland, some of the techniques seem clearly designed to exploit the special sensitivities of Arab culture to public embarrassment, particularly in sexual matters"<sup>17</sup>.

The use of sexual humiliation was specifically considered to be an interrogation instrument. According to Hersh, the contents of the book *The Arab Mind*, by the late academic Rafael Patai, led neoconservatives and the Pentagon to consider this type of humiliation. The dissemination of sexually humiliating acts among friends and relatives through photographs was seen as a means to intensify shame and force prisoners to cooperate. On the other hand, on 3 June 2005, a commission headed by General Jay Hood revealed that US troops in Guantanamo had kicked copies of the Koran and "urinated on a copy unintentionally". *Newsweek* condemned the use of the Koran as a means of humiliating prisoners<sup>18</sup>.

Danner pointed out that the humiliations of prisoners was carried out publicly, not only in front of other soldiers and prisoners, but in full view of the world in general owing to the "shame multiplier" effect of digital cameras and the photos that soldiers, and later the press, spread throughout the world. In short, even if the prisoner decided to collaborate, his shame was already globally ensured<sup>19</sup>. These practices were called *Enhanced Interrogation Techniques* by the Government.

Several official reports and testimonies by soldiers and prisoners were compiled between 2002 and 2007 on abuses and torture by American security and intelligence forces in Guantanamo, Abu Ghraib, Camp Nama and other places<sup>20</sup>. There have also been reports of rape cases and even murder by US soldiers and in some cases British<sup>21</sup>. According to military documents, between 2002 and 2005, 112 detainees

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<sup>17</sup> DANNER, M.: "The Logic of Torture", *The New York Review of Books*, 27 May 2004. Reproduced in *Abu Ghraib. The Politics of Torture*, Berkeley, North Atlantic Books, 2004. This book contains essays by Danner, John Grey and other authors on this subject. See STRASSER, S.: *The Abu Ghraib Investigations. The Official Report of the Independent Panel and Pentagon on the Shocking Prisoner Abuse in Iraq*, New York, Public Affairs, 2004.

<sup>18</sup> *Newsweek*, 6 May 2005.

<sup>19</sup> *Ibidem*, p. 33.

<sup>20</sup> See, for example, the Human Rights Watch Report entitled *Leadership Failure: Firsthand Accounts of torture of Iraq Detainees by the US Army's 82<sup>nd</sup> Airborne Division*, 25 September 2005, [hrw.org/report/2005/us0905](http://hrw.org/report/2005/us0905). Partially reproduced as "Torture in Iraq", *The New York Review of Books*, 3 November 2005, pp. 67-72.

<sup>21</sup> For example, the case of an Iraqi family who were partially murdered and one of the daughters was repeatedly raped by US soldiers. See the article "Violada Por Turno, Tiroteada y Quemada en Irak", *EL PAIS*, 8 August 2006.

who were in US custody in Iraq and Afghanistan died. A study by Medscape General Medicine indicates that a large number died of suffocation, others due to enemy shelling because they were in dangerous areas of the prisons, and others died from unclear causes<sup>22</sup>.

In March 2006, for example, the *New York Times* published a report on "the black room" where armed forces personnel "mistreated prisoner months before and after the photographs of abuse from Abu Ghraib were made public in April 2004, and it helps to belie the original Pentagon assertion that abuse was confined to a small number of rogue reservists at Abu Ghraib"<sup>23</sup>. A logical consequence has been that the Iraqi security forces also systematically use torture<sup>24</sup>.

### 3. Whitewashing

Since 2004, the Pentagon has conducted seven investigations that have gradually established the systematic use of torture, the transfer of information and advisors from Guantanamo to Abu Ghraib and between Iraq and Afghanistan, and the illegal transfer of prisoners between several countries. At the same time all the reports have tried to clear senior civilian officials and military officers of any responsibility<sup>25</sup>. In fact, no military or government official has been brought to trial for torture in detention centres run by the US since 2001 and only a small number of soldiers have been convicted for torturing prisoners.

The International Committee of the Red Cross (ICRC) also prepared a confidential report in 2004, but it was made known by the *New York Times*. This report considered that the techniques used were "tantamount to torture" and the medical staff assigned to Guantanamo "flagrantly" violated the ethical norms of their profession by collaborating with these practices. The Red Cross pointed out to the US Government that between 2002 and 2004, the forms of torture had become more

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<sup>22</sup> ALLEN, S. and XENAKIS, S.: "Protecting War Detainees", *International Herald Tribune*, 22 June 2007.

<sup>23</sup> SCHMITT, E. and MARSHALL, C.: "In Secret Unit's "Black Room," A Grim Portrait of U.S. Abuse", *The New York Times*, 19 March 2006.

<sup>24</sup> See, for example, the report by BEAUMONT, P.: "Revealed: Grim World of New Iraqi Torture Camps", *The Observer*, 3 July 2005 and COCKBURN, P.: "New Terror That Stalks Iraq's Republic of Fear", *The Independent*, 22 September 2006.

<sup>25</sup> The reports compiled in DANNER, M.: *Torture and Truth: America, Abu Ghraib, and the War on Terror*, New York, New York Review of Books, 2004. Also in GREENBERG, K. and DRATEL, J.L.: *The Torture Papers: the Road to Abu Ghraib*, Cambridge, Cambridge University Press, 2005.

sophisticated and “more refined and repressive” and that Guantanamo could be considered a “system of cruel, degrading and unusual treatment and a form of torture”<sup>26</sup>.

It is now known that officers and soldiers in charge of prisoners in Abu Ghraib received instructions to use coercive methods and that they were permitted to act outside the Geneva Convention. Lieutenant General Ricardo Sánchez, who was top commander in Iraq, gave orders to “manipulate prisoners’ emotions and weaknesses”. To increase the severity of the treatment, personnel from the Military Police Company 372, notorious for their brutality in treating prisoners in the US, were transferred to the prisons<sup>27</sup>. At the same time, members of the Special Forces had “special access” to prisoners, in some cases without the knowledge of prison commanders, or with their implicit connivance<sup>28</sup>. Some torture sessions were (and are) supervised by American doctors and psychiatrists who also offered advice on how to carry out the interrogations<sup>29</sup>.

Another irregular situation relating to human rights violations has been the subcontracting of private security firms, such as the companies CACI International and Titan Corporation. Amnesty International has denounced that some of the 25,000 individuals contracted by the Pentagon to carry out military tasks have been involved in mistreatment in Abu Ghraib and that on numerous occasions they have fired upon civilians<sup>30</sup>.

In their 2005 report, Human Rights Watch summarised the illegal practices used by the US:

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<sup>26</sup> LEWIS, N.A.: “Red Cross Finds Detainee Abuse in Guantanamo”, *The New York Times*, 30 November 2004. See also Delegates of the International Committee of the Red Cross: *Report the International Committee of the Red Cross on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation*, February 2004. [http://www.globalsecurity.org/military/library/report/2004/icrc\\_report\\_iraq\\_feb2004.htm](http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.htm).

<sup>27</sup> Sub-official Charles Graner Jr, one of the protagonists of the Abu Ghraib photographs, is an ex-Marine and ex-prison warden. See ABRAMSKY, S.: “Seeds of Abu Ghraib”, *The Nation*, 26 December 2005, pp. 20-24.

<sup>28</sup> Summary of several sources of information about how the operation began, based particularly on HERSH, S.H.: “The Grey Zone”, *The New Yorker*, 24 May 2004, pp. 38-44. See also Hersh, S.H.: *Obediencia debida. Del 11-S a las torturas de Abu Ghraib*, Madrid, Aguilar, 2004 and BARRY, J., HIRSH, M. and ISIKOFF, M.: “The Roots of Torture”, *Newsweek*, 24 May 2004.

<sup>29</sup> MARKS, J.H.: “The Silence of the Doctors”, *The Nation*, 26 December 2005, pp. 26-32. See also [www.aclu.org/safefree/torture/35110res20080430.html](http://www.aclu.org/safefree/torture/35110res20080430.html).

<sup>30</sup> Declarations by Larry Cox, Executive Director of Amnesty International USA, 23 May 2006. <http://www.amnestyusa.org/annualreport/2006.statement.html>.

- Not applying the Geneva Convention against torture and ill-treatment of prisoners considered “enemy combatants”.
- Producing legal memoranda that reinterpret the concept of torture: torturing in Abu Ghraib, Guantanamo and Afghanistan.
- Lack of trials against military and civilian officials for these violations.
- The creation of self-legitimization commissions.
- Keeping prisoners incommunicado and without charges for over two years. Sending prisoners to Syria, Egypt and Uzbekistan to be interrogated without legal controls<sup>31</sup>.

#### 4. The *Habeas Corpus* controversy

The accusations and controversy surrounding the use of torture led a number of Congress members to prepare a bill in September 2006 with the aim of banning these practices. The Government reacted harshly and in the end several senators, among them the Republican and currently Presidential candidate John McCain, reached a compromise formula called the Military Commissions Act (MCA) which ostensibly defends prisoner’s rights but in fact concedes the Government’s position<sup>32</sup>.

The MCA deals with a number of issues relating to US domestic laws and it reinterprets international law and international humanitarian law. While cruel treatment is forbidden, it allows evidence to be obtained under coercion in order to charge prisoners. The CIA is authorised to retain prisoners in secret prisons around the world and it prevents prisoners in Guantanamo from being tried by American courts.

At the same time, the MCA reverses the Supreme Court decision on the application of *Habeas Corpus* to prisoners in Guantanamo; it prohibits the United States from using international laws to interpret war crimes governed by American law; it exempts special tribunals from being accused of violating the Geneva Convention and it grants the President the capacity to “interpret the meaning and application” of the Geneva Convention.

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<sup>31</sup> Human Rights Watch: *World Report*, New York, Human Rights Watch, 2005 [www.hrw.org](http://www.hrw.org)

<sup>32</sup> Military Commissions Act of 2006. S.3930. One Hundred Ninth Congress of the United States of America. [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_cong\\_bills&docid=f:s3930enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s3930enr.txt.pdf)

David Luban, Professor of Law at Georgetown University, believes that these aspects of the MCA reveal the influence of the Office of Legal Counsel Memorandums, and the arguments put forward by the lawyers John Yoo, Jay S. Bybee and Alberto Gonzales. Luban fears that they could affect the "history of liberties in the United States in the coming decades"<sup>33</sup>.

The International Committee of the Red Cross expressed its concern about the *Military Commission Act* insofar as it creates special commissions for trying prisoners in Guantanamo and it redefines the obligations of the United States with regard to the Geneva Convention. The ICRC President, Jakob Kellenberger, expressed his unease over issues such as "the very broad definition of who is an "unlawful enemy combatant" and the fact that there is not an explicit prohibition on the admission of evidence obtained by coercion". At the same time, he was concerned about the way that the MCA "has created two tiers of prohibitions out of those listed in common Article 3" of the Geneva Conventions.

In fact, the MCA adds new violations that are considered breaches of that article (for example, rape and sexual assaults) but they are defined rather vaguely and only in cases where there is physical contact. As a result, sexual intimidation or humiliations are not included<sup>34</sup>. At the same time, it omits other violations that are contemplated as war crimes in domestic American Law. Of these, the most notable absence is the "prohibition of the denial of the right to a fair trial". This is a basic protection provided for in international law and is precisely the issue that is at stake owing to the fact that Washington maintains prisoners without charges or trial in illegal prisons, especially Guantanamo. According to Kellenberger, "this distinction between the different violations disrupts the integrity of common Article 3"<sup>35</sup>.

The aim of the Bush Administration was to defend that the language of Article 3 was too vague and that then it is an obstacle to fight terrorists. The strategic idea was that Congress would prohibit the

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<sup>33</sup> LUBAN, D.: "The Defense of Torture", *The New York Review of Books*, 15 March 2007, p. 40. See the Editorial: "Under Bush's Law, Guilty Until Confirmed Guilty", *International Herald Tribune*, 17 October 2006.

<sup>34</sup> The conceptualization of sexual crimes in situations of war and genocide has thus taken a backward step. See the Editorial: "A Flawed Bill on Rape", *International Herald Tribune*, 26 September 2006.

<sup>35</sup> Interview with Jacob Kellenberger, "Developments in US Policy and Legislation Towards Detainees: the ICRC Position", <http://www.icrc.org/web/eng/siteeng0.nsf/html/kellenberger-interview-191006>.

use of the Geneva Conventions. But the ICRC President considers that this humanitarian organisation should be notified of all people detained in relation to the fight against terrorism. The ICRC has repeatedly expressed concern about detainees in undisclosed detention, and it is concerned about “any type of secret detention as such detention is contrary to a range of safeguards provided for under the relevant international standards”<sup>36</sup>.

Common Article 3 stipulates that each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

“1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2) The wounded and sick shall be collected and cared for”<sup>37</sup>.

## 5. All Power to the President

The legitimization of torture has been linked to the attempt to strengthen the power of the President, and his cabinet, based on the idea that the Head of State should make all major decisions in times of war. Following this logic, the idea is promoted that the President should have *flexibility* and that he should not be subject to the control of Congress in order to declare war, deal with foreign policy and national and international legislation. Insofar as he is the Commander

<sup>36</sup> *Ibidem*.

<sup>37</sup> <http://www.icrc.org/Web/spa/sitespa0.nsf/html/5TDLRM> <http://www.icrc.org/ihl.nsf/WebART/375-590006>.



in Chief of the armed forces, he should be granted special functions in a time of crisis. Given that Bush's Government has time and again stated that the war on terrorism would be a long haul, and that the country is constantly under threat, this Presidentialism would be logically justified because the US would be living in a *permanent state of emergency*.

John Yoo, Professor of Law at the Berkeley School of Law (Boalt Hall) and ex-member of the Office for Legal Counsel of the Justice Department wrote a series of reports, known as *Memorandums*, between September 2001 and August 2002, in which he stated that the President could initiate war and interpret foreign policy without congressional approval, and that he could order the use of torture as long as this does "not threaten imminent death". Likewise, if drugs are used to make a prisoner reveal information, this practice will not be considered torture insofar as the drugs "do not penetrate to the core of an individual's ability to perceive the world around him"<sup>38</sup>. Yoo worked hand in hand with David Addington, who was Vice-President Richard Cheney's counsel on security matters from 2001 to 2005. Addington played a crucial role in the definition of US policy on the use of torture and was instrumental to Cheney's authoritarian vision<sup>39</sup>.

In the memorandums and in two books published since then, Yoo has defended his stance and that of the Government. He considers that in view of the unconventional war methods used by Al Qaeda, the border between "the battle field and the inner front" has been blurred. Therefore the President should have special powers not accountable to Congress and he can fight that war and use all accessible methods of intelligence (including spying on the country's own citizens.) For this lawyer, the protection and guarantees that can be applied to criminals do not apply in the case of the war on terrorism. Yoo has provided the President with arguments to use these unconventional methods and to keep those suspected of terrorist acts, or those who might commit them, in prison with no charges, and to transfer prisoners to countries where they can be interrogated in ways that in the United States would be legally restricted.

In this way, the lawyer defines an unconventional war and tries to justify presidentialism on the basis of a tradition within the history of American Constitutionalism. In fact, since the founding of the State in

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<sup>38</sup> A discussion of the memorandums and John Yoo's ideas in COLE, D.: "What Bush Wants to Hear", *The New York Review of Books*, 17 November 2005.

<sup>39</sup> COLE, D.: "The Man Behind the Torture", *The New York Review of Books*, 2007, pp. 38-41.

the 18<sup>th</sup> Century there has been debate surrounding the degree of independence of the Executive power over the Legislative branch to declare and make war. The Bush presidency is not the first to try and gain leeway to make war, order covert operations and cut back public freedoms. However, this Government has taken big steps in the direction of institutionalising presidential power, reducing the power of Congress structurally and definitively, and reforming legislation<sup>40</sup>. The regressive measures taken by the Bush presidency, the passive attitude of Congress since 2001, and the triumph of the Democratic party in the legislative elections in November 2006 was the starting moment of a strong tension between the members of Congress who want to regain lost power and set limits to the dangerous presidentialism and the core of power made up by the President, the Justice Department, the State Attorney and sectors of the armed forces.

In the memorandums prepared by the Department of Justice, torture was narrowly defined and the orientation of responsibility was shifted from *action* to *intention*. In this way, if an interrogator knows that severe pain could be produced by his violent act, but causing that pain is not the objective, this means that the requirement of specific intention is lacking. Torture (or eventually murder) depends on the executor's intention. Yoo's advice was adopted by Alberto Gonzales Jr., then legal advisor for the Department of Defense and now Attorney General. After leaving his post, Yoo returned to the academic world and now advocates the capturing of prisoners and delegating their interrogation to third countries where torture is employed<sup>41</sup>. His theses have been criticised fundamentally because of the contradiction raised in talking of "war" against an unclear, non-state enemy, while at the same time advocating the application of exceptional measures for times of war but not applying wartime laws.

Secondly, he is criticised because placing the American legal system in a permanent state of emergency concedes a victory to the terrorists. At the same time, if the open, liberal American legal system is the most appealing political paradigm for other societies and States, dismantling this system of rights and liberties effectively reveals the system's weakness and its repressive capacity when attacked<sup>42</sup>. The unpopularity of

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<sup>40</sup> Yoo, J.: *War By Other Means: An Insider's Account of the War on Terror*, New York, Atlantic Monthly Press, 2006.

<sup>41</sup> Yoo, J.: *The powers and peace: the Constitution and Foreign Affairs After 9/11*, Chicago, University of Chicago Press, 2005.

<sup>42</sup> A summary of these criticisms in ZAKARIA, F.: "Habeas Corpus on the Ropes in a Shadowy War", *International Herald Tribune*, 16 December 2006.

the United States in recent years in almost the whole world proves that this criticism is true.

## 6. Extraordinary complicity

The practice of transferring prisoners and holding them in third countries recommended by Yoo has been investigated by several European countries, after reports by Human Rights Watch about the alleged collaboration of some eastern European States. The EU requested information from the US about the illegal transferring of prisoners using the airspace and airports in a number of countries. Many European governments did not take part in the investigation and tried to conceal information. In June 2006 the Council of Europe, and in November the European Parliament, presented reports which proved the complicity of many European countries with American intelligence services in transferring prisoners extra judicially or allowing them to be kidnapped on their territory<sup>43</sup>. Amnesty International considers that the governments of Bosnia, Germany, Italy, Macedonia, Sweden, Turkey and the United Kingdom should be held accountable for these actions<sup>44</sup>.

The transferring of prisoners to other countries known as *extraordinary renditions*<sup>45</sup> with the aim of interrogating them without legal restrictions began in 1986 during Ronald Reagan's presidency and was applied to alleged terrorists who had attacked the United States headquarters in Beirut in 1983. President Bill Clinton authorised them again to interrogate terrorists and narcotraffic leaders. Between 1995 and 1999 over twenty people were transferred, especially to Egypt.

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<sup>43</sup> Report Committee on Legal Affairs and Human Rights Rapporteur: Mr Dick Marty, Switzerland, Alliance of Liberals and Democrats for Europe. Doc. 10957, <http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.htm?link=/Documents/WorkingDocs/Doc06/EDOC10957.htm>.

<sup>44</sup> See PAGLEN, T. and THOMPSON, A.C.: *Torture Taxi. On the Trail of the CIA's Rendition Flights*, New Jersey, Melville House Publishing, 2006. For the Spanish case see the investigation by reporters from the newspaper *Diario de Mallorca* on CIA flights in the Balearic Islands. According to investigations by the newspaper *EL PAIS*, José M. Aznar's government permitted illegal flights and visited prisoners in Guantanamo who were thought to have important information for Spain. See *EL PAIS*, from 12 to 15 February, 2007.

<sup>45</sup> The term is an euphemism given that an "extraordinary rendition" does not exist in international or national legislation. However, the handing over of prisoners to another country where they may be tortured is forbidden by Common Article 3 of the Geneva Conventions.

After September 2001 the Bush Government authorised this practice secretly<sup>46</sup>. The then director of the CIA, George Tenet, suggested to the White House that prisoners should be transferred to third countries for aggressive interrogation, and that official planes should not be used<sup>47</sup>.

With the partial information that is available, several cases of illegal prisoners and extrajudicial transfers have come to light and this has led the Italian courts to bring charges against 26 CIA agents implicated in the abduction of Osama Asan Mustafa Nasr. The German citizen Khaled El-Masri was kidnapped in Macedonia in 2003 and taken to Afghanistan and after being tortured there he was sent to Albania. Another case is the Canadian Maher Arar, who was captured by the United States and sent to Syria. After a meeting with the Secretary of State Condoleezza Rice, a number of governments then knew that Washington had "sent many people around the world", and they asked her to confirm that the US had not used Europe for this policy. Rice asked them to be firm in their support of the United States in this war against "a stateless enemy"<sup>48</sup>.

The situation remains very serious. On December 2007, the prestigious Woodrow Wilson International Center presented a seminar report indicating that "the question of exactly what happens to terror suspects who are in the custody of the United States or who have been subject to extraordinary renditions remains"<sup>49</sup>. There is no accurate information on how many secret prisons the CIA and other US agencies run, but some analysts estimate that there could be (or were active until accusations arose) about 50 spread among Egypt, Jordan, Iraq, Afghanistan, Pakistan, Libya, Morocco, Diego García, the Czech Republic, Poland, Hungary, Germany, Armenia, Georgia, Bulgaria, among other countries. At the Bagram prison in Afghanistan there are 630 prisoners in similar conditions to those in Guantanamo. The Red Cross has presented several complaints to the US Government about the "inhuman treatment" that they suffer<sup>50</sup>.

<sup>46</sup> BOWERS, F.: "Interrogation Tactics Draw Fire", *The Christian Science Monitor*, 30 March 2005.

<sup>47</sup> BARRY, J., HIRSH, M. and ISIKOFF, M.: "The Roots of Torture", *Newsweek*, 24 May 2004.

<sup>48</sup> See the interesting report on the interview by a group of EU Foreign Ministers with Rice in CARBAJOSA, A.: "La Doma del Gorila", *EL PAIS*, 26 January 2007.

<sup>49</sup> ARNSON C. and STRUM, P.: *Legal Standards and the Interrogation of Prisoners in the War on Terror*, Washington D.C., Woodrow Wilson International Center for Scholars, 2007, p. 3.

<sup>50</sup> "EE.UU Aplica en Afganistán las Reglas de Guantanamo", *EL PAIS*, 8 January 2008.

In addition, American war ships and plane carriers have been used as the first stop for detainees<sup>51</sup>. The European media have reported that assault warships such as the *USNS Stockham* are being used as “floating Guantanos” navigating in a legal limbo. Of particular concern to organizations in the United Kingdom is the use that the United States is making of the Diego García naval base in the Indian Ocean. The London based NGO Reprieve have denounced that there are about 17 of these warships loaded with prisoners and that there have been more than 200 new cases of rendition since 2006, when President George Bush declared that the practice had stopped<sup>52</sup>.

The number of detainees who have not been tried is also unknown and variable, but Amnesty International considers that in 2006 about 14,000 people were in this legal limbo, most of them in Iraq<sup>53</sup>. Human Rights Watch stated that in 2006 people were still being illegally detained by the United States and transferred from Pakistan to other Middle Eastern countries<sup>54</sup>. The same NGO launched a report on 2008 indicating that 185 out of the 270 detainees at Guantanamo were being housed in rougher conditions than the highest security prisons in the US. They spent 22 hours a day in cells with little, if any, light, and are only allowed two hours of exercise each day. They are not allowed to have family visits. The Pentagon allows them to make one phone call a year to their families. For Human Rights Watch, “extreme social isolation” causes mental health problems<sup>55</sup>.

In 2007 the lawyer Karen Greenberg, Executive Director of the Center on Law and Security of the New York University School of Law, visited Guantanamo base and described the way in which the American army explained the situation at the base:

- a) It is not a prison but a detention facility.
- b) Given that it is not a prison there are no prisoners. Instead they are “unlawful enemy combatants” or “detained enemy combatants”.

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<sup>51</sup> Extensive information and sources about the clandestine prisons in [http://en.wikipedia.org/wiki/Black\\_site](http://en.wikipedia.org/wiki/Black_site)

<sup>52</sup> [http://www.reprieve.org.uk/Press\\_Reprieve\\_commends\\_Foreign\\_Affairs\\_Committee.htm](http://www.reprieve.org.uk/Press_Reprieve_commends_Foreign_Affairs_Committee.htm); and CAMPBELL, D. and NORTON-TAYLOR, R.: “US Accused of Holding Terror Suspects on Prison Ships”, *The Guardian*, 2008; Irujo, J.M.: “El Limbo en el Mar de la CIA”, *EL PAIS*, 2008.

<sup>53</sup> “U.S. War Prisons Legal Vacuum for 14.000”, Report by Associated Press, 17 September 2006. Amnesty International: *Beyond Abu Ghraib: Detention and Torture in Iraq*, 2006

<sup>54</sup> DINMORE, G.: “US Tries to Assure Allies That Extraordinary Renditions Are Over”, *Financial Times*, 27 December 2006.

<sup>55</sup> *Financial Times*, 11 June 2008.

- c) Guantanamo is not about guilt or innocence, only enemies. The lawyer quotes Admiral Harry B. Harris Jr, Commanding Officer of Guantanamo who tells her that "they are all unlawful enemy combatants".
- d) Trustworthy lawyers are denied access to Guantanamo. Military personnel at the base speak scornfully of "*habeas lawyers*", referring to professionals who try to ensure that some of the detainees are tried in U.S. courts. According to the army, lawyers are "unwitting pawns of terrorism" who transmit information to other terrorists and, therefore, they are denied access.
- e) Visitors, journalists or lawyers, cannot speak to the prisoners or move freely in the prison.
- f) The army maintains that after five years of detention and no communication with the outside world, the "combatants", who are never referred to by name but by number, could still possess valuable information<sup>56</sup>.

The Spanish journalist Yolanda Monge has also reported on the travesty of justice suffered by Guantanamo prisoners - no specific charges, no jury and no legal process. Describing the summary trial that she witnessed of an Afghan prisoner whose name was not revealed, she says: "There are no witnesses, no lawyers. He is being judged in a room before seven Army officials. His eyes reveal that he is aware of the fact that he could be trapped in the black hole of Guantanamo for the rest of his life or until the new order set up by Bush collapses"<sup>57</sup>.

On February 2008 Brigadier General Thomas W. Hartmann announced that the trials against six men charges with the September 11<sup>th</sup> attacks will start in Guantanamo and that their rights were "virtually identical" to those accorded to military personnel tried in courts-martial. As Raymond Bonner indicates: "The word *virtually* may conceal further limits on the rights of defendants, but still, it has taken six years to arrive at the standards of judicial procedure that the military lawyers were arguing"<sup>58</sup>.

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<sup>56</sup> GREENBERG, K.J.: "Guantanamo Is Not a Prison", in TomDispatch.Com. 9 March 2007. <http://www.tomdispatch.com/index.mhtml?emx=x&pid=172761> See also GREENBERG, K.: "Scars and Strips", *Financial Times*, 31 May 2008.

<sup>57</sup> MONGE, Y.: "Parodia Judicial en Guantanamo", *EL PAIS*, 22 October 2006, pp. 2-3.

<sup>58</sup> BONNER, R.: "Forever Guantanamo", *The New York Review of Books*, 17 April 2008.

## 7. The legitimization of torture

Torture has been present throughout the history of humankind but it was during the 20<sup>th</sup> century that national and international legislation was developed that enabled it to be banned as a means of obtaining information or as a punishment or for any other use<sup>59</sup>. Torture, therefore, is not a practice that the US began to use in Afghanistan and Iraq. In previous wars and interventions, both direct and indirect, for example in Guatemala and Vietnam, it practised or helped other governments to practice this violation of human rights. A number of studies reveal the history of the use of torture by the US since the 50s<sup>60</sup>. The CIA carried out experiments in psychological torture, advised governments such as General Augusto Pinochet's in Chile, and CIA agents practised torture in Central America in the 80s.

Torture was also used by France in Algeria and Vietnam, Great Britain in Northern Ireland, Portugal in its former Portuguese colonies, just to name a few cases. In some cases the connection between experiences acquired and practices transmitted has been established<sup>61</sup>. The CIA, for example, took officers of the repression in Argentina during the 70s to Honduras in the 80s, to train Honduran soldiers and officers in interrogation techniques<sup>62</sup>.

After the Second World War, governments that used torture denied it systematically. Legal progress made it evident that brutal methods in punishing misdeeds and obtaining information were not acceptable. From the late 40s onwards, legal instruments relating to human rights, which were strengthened by the creation of the United Nations, provided the baseline for acts considered to be legal or illegal,

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<sup>59</sup> See REJALI, D.M.: *Torture and Democracy*, Princeton, Princeton University Press, 2007.

<sup>60</sup> MCCOY, A.W.: *A Question of Torture: CIA Interrogation from the Cold War to the War on Terror*, New York, Metropolitan Books, 2006.

<sup>61</sup> For example, the French film-maker Marie-Monique Robin made a documentary entitled *Death Squadrons: The French School in 2004*. It dealt with the way in which French officials who fought in Algeria exported and advised on the use of torture in counterinsurgency wars against dictators in Latin America in the 70s and 80s. See ROBIN, M-M.: "Counterinsurgency and Torture", in ROTH, K. and WORDEN, M. (Eds.): *Torture. Does it Make us Safer? Is it Ever OK?*, New York, The New Press-Human Rights Watch, 2005, pp. 44-54.

<sup>62</sup> LEMOYNE, J.: "Testifying to Torture", *The New York Times Magazine*, 5 June 1988. The US Ambassador in Honduras at the time was John Negroponte, currently the ambassador in Iraq and he has also been Director of National Intelligence and Sub-Secretary for State with Bush Jr.'s Government. <http://select.nytimes.com/search/restricted/article?res=FB0711FF395D0C768CDDAF0894D0484D81>.

acceptable or despicable. The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984) defined all those acts that were described and prohibited as torture and ill treatment. The birth of organisations such as Amnesty International and Human Rights Watch was vital as they have denounced and shamed governments who implement or allow the use of torture. In 2001 the ICRC lawyer Francois Buignion considered that the Geneva Conventions would remain of the utmost importance during the new millennium and that they should be supported by the international community as a whole<sup>63</sup>.

The United States is party to the Geneva Conventions and it incorporated the prohibitions of these Conventions in its Uniform Code of Military Justice (UCJM). In 1990 the federal statutes against torture and war crimes were approved and in 1992 Congress approved the Torture Victim Protection Act<sup>64</sup>. Despite this record, the Bush Government is the first in decades that is attempting to normalize the use of torture and ill treatment, and it is in the process of reviewing national legislation at the expense of international legislation with the aim of exercising greater domestic control and convincing other countries to question the instruments for protecting human rights. This political programme has several goals.

In the first place, it seeks to weaken the international regime for protecting human rights. Second, it wants to strengthen US leadership over other countries and within the multilateral system in general. Third, it wants to limit civil rights within the US, by imposing an authoritarian government. Fourth, it seeks to reinforce the authority of the Executive over the Judicial and Legislative branches.

The climate created in the US and within the international system after September 2001 enabled the Government to move forward along these lines. Commentators in the press, academics, journalists, television and radio programme makers, politicians (including most of the Democratic Party) supported the need for the US to lead the war on terror given that Europeans, Canadians and the United Nations were, according to the argument, weak, cowardly and too slow and conciliatory and they had got used to not fighting wars.

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<sup>63</sup> BUGNION, F.: "The Geneva Conventions of 12 August 1949: From the 1949 Diplomatic Conference to the Dawn of the New Millenium", *International Affairs*, Vol. 76, 2000, p. 50.

<sup>64</sup> A summary of American legal instruments against torture and about the "new paradigm" for using torture in AJAR, L.: "Torture and the Lawless 'New Paradigm'", *Middle East Report on Line*, 2005, [www.merip.org](http://www.merip.org).



Apart from certain governments such as the British, the Spanish during José Maria Aznar's presidency and the Australian under Michael Howard, there was not much enthusiasm for participating in or supporting the war in Iraq. Neither was there much sympathy for the methods proposed by the US to fight the war on terrorism. However, a number of governments, among them European ones, allowed the US to use their airports, airspace and official and unofficial detention centres for transporting and interrogating CIA prisoners without judicial limits.

The climate for legitimizing torture was created by using a systematic discourse, multiple faceted because it came from several sectors and at the same time simple. Some analysts suggested that after 2001, Europe's good political and economic health was thanks to US protection and Europe was not aware of the danger posed by terrorism – thesis proposed by the neo-conservative Robert Kagan and the now repentant neo-conservative Francis Fukuyama. Others openly advocated US leadership, for example the human rights expert Michael Ignatieff.

At the same time, some academics and commentators began to theorise about the need to reformulate the concept of torture within the framework of the war against terrorism. They launched the message that the international legal framework limited US actions and that the Constitution should adapt to the terrorist challenge in order to defend the democratic system. To achieve this, the President should be allowed to conduct intrusive intelligence collection on private citizens and practise coercive interrogations<sup>65</sup>.

The defining characteristic of a stateless enemy - fanatical and totalising in its destructive intention - allows two legal measures to be applied. First, insofar as terrorist groups do not belong to any State in particular, Public International Law is not applicable to them. Laws that were developed to govern relations between States, in peace and in war, disappear. Second, if neither the individuals that form part of these terrorist groups are not citizens of any State, insofar as they have become global terrorists, then International Humanitarian Law will not be applied nor any other legal instrument of protection and guarantees<sup>66</sup>.

Political commentator Jonathan Alter was a precursor and wrote in 2001: "We cannot legalise torture: it is contrary to American values.

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<sup>65</sup> POSNER, R.: *Not a Suicide Pact: the Constitution in a Time of National Emergency*, New York, Oxford University Press, 2006.

<sup>66</sup> See ZIZEK, S.: "Sobre Terrorismo y Tortura", *Pasajes de Pensamiento Contemporáneo*, no. 17, 2005, pp. 21-27. DE LUCAS, J.: "Un Cáncer Que Crece. Tortura y Democracia", *Pasajes de Pensamiento Contemporáneo*, no. 17, 2005, pp. 41-48.

But, while we continue declaring our opposition to human rights violations that happen all over the world, we cannot forget about certain measures in the anti-terrorist fight, such as legally authorised psychological interrogations. And we will have to start transferring some suspects, by handing them over to our allies who are not so squeamish, even if it is hypocritical. Nobody said that the war on terrorism would be pleasant"<sup>67</sup>.

Charles Krauthammer is one of the most well-known right-wing US journalists and he writes a column in *The Washington Post*. His moment of fame came during Ronald Reagan's presidency, when he supported the war against Nicaragua in which the US used the *contras*. He was critical of any approaches made to the former USSR and he is an unconditional supporter of Israel against the Palestinians. In May 2005, Krauthammer wrote in *The Weekly Standard*, the most popular neocon mass media, an article defending the use of torture. He stated and synthesized all the arguments that in one way or another are used to legitimise it.

His argument was based on the fact that professional soldiers form part of state armed forces and that they deserve to be treated according to series of regulations because they are uniformed citizens. A terrorist, on the contrary, is "by profession and by definition a lawless combatant". Terrorists live outside the laws of war "because they do not wear a uniform", "they hide among civilians" and they target them. Therefore, "they do not deserve any protection". According to Krauthammer, the Geneva Conventions were drawn up so that soldiers who were captured would be treated well by other soldiers who captured them, and vice versa. This reciprocity, in the case of terrorists, does not exist because they kill civilians and soldiers unceremoniously. In any case, terrorists in custody, he says, are fed, receive medical treatment and are allowed to read the Koran.

The next issue in his argument is that "terrorists have information". If a terrorist knows where a bomb is going to explode in New York, that will kill a million people, what should be done? The author declares that he has no doubts: "Not only is it permissible to hang this miscreant by his thumbs. It is a moral duty". Israelis call this dilemma "the ticking bomb problem".

Consequently, the question is not whether torture is permitted but rather in what situations it can be used. If a terrorist has important information, the argument continues, he should be kept isolated, disori-

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<sup>67</sup> ALTER, J.: "Time to Think about Torture", *Newsweek*, 5 November 2005.

ented, alone, despairing, cold and sleepless. Furthermore, Krauthammer thinks that Israel's model should be followed, whereby during a *legally* time period coercive interrogation could take place and that on prisoners considered to be dangerous, techniques such as waterboarding or injecting sodium pentathol could be used, so as to induce the prisoner to speak without inhibitions.

The argument continues with legal procedures. The use of torture should be prohibited except in two contingencies: the ticking time bomb and if a terrorist leader has been captured, who is considered by the White House to be a High Value Target. Who can use torture? Only expert personnel, responsible and well-trained, who have legal permission to conduct torture and who can assure that it will be used to obtain information and not as a means of reprisal<sup>68</sup>.

Over the last six years, the use of torture has become Government policy, a subject of debate in parliamentary and academic circles, and it has created confrontation between those who defend a constitutional system with strict safeguards preventing exceptions to the Rule of Law, and those who propose a flexible constitutionalism according to the needs of political power. This debate and confrontation reflect several issues.

First, the traditional messianic view of American religious-political culture which considers it legitimate to expand and promote its political model in the world and which has gone from strength to strength since the late 90s. Neo-conservative ideology, considered *idealistic* because of its goal of democratising the world, has created the link between expanding democracy and the use of certain levels of force (torture, pre-emptive strikes, wars to change regimes). The neoconservative consider, furthermore, that one way of guaranteeing US security in the face of terrorism after the attacks in September 2001 would be to change the political regimes of societies with Islamic religious culture and to consolidate Israel's role in the Middle East.

Second, this neoconservative ideology has become linked to culturally violent tendencies and to traditional conservative isolationism. The defence of human rights is seen as something related to liberals while the American people know how to confront their enemies, dirtying their hands if necessary.

Third, this ideology is also based on the supposed exceptionalism of the US, that is to say, the idea that it is a special country, with singular

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<sup>68</sup> KRAUTHAMMER, CH.: "The Truth About Torture", *The Weekly Standard*, 12 May 2005. <http://www.weeklystandard.com/Content/Public/Articles/000/000/006/400rhqav.asp>.

conceptions about human rights and with a degree of superiority over other States and social forms. Sontag indicated that “the torture of prisoners is not an aberration. It is a direct consequence of the with-us-or-against-us doctrines of world struggle with which the Bush administration has sought to change, radically change, the international stance of the United States, and to recast many domestic institutions and prerogatives”<sup>69</sup>.

Angela Davis, civil rights movement activist and professor at the University of California, considers that Abu Ghraib reveals the racist dimension of the Bush Government’s war on terror. For Davis, racism is a constituent element in the formation of American society – the need of some communities to define their identity over others – and there are precedents in the exploitation of the black community, the genocide of Native Americans and now the radicalisation of Islamists. “The varieties of racism that define our present are so deeply embedded in institutional structures and so complexly mediated that they now appear to be detached from the person they harm with their violence”<sup>70</sup>.

Fourth, the use of torture and offensive and indiscriminate forms of combat, such as those being used by the American army in Iraq and Afghanistan, also respond to the US Government’s frustration at not being able to hail the wars in Iraq and Afghanistan as the successes they were supposed to be according to their initial estimates. For the troops, in particular, fighting a war without a clear strategy, and in an unknown and hostile environment, gives rise to huge frustration, and when combined with lack of information about legal instruments and forms of conduct in combat, this frustration can lead to the use of torture and other brutal methods.

## 8. Dirty work

The controversy surrounding how much freedom we can afford to lose in defending democracy has been described in many texts. A significant case in point is that of the liberal conservative thinker Michael Ignatieff who opens the door to flexibility and repressive policies<sup>71</sup>. His case, furthermore, is especially relevant as he is ex-Director of the Carr

<sup>69</sup> SONTAG, S.: *op. cit.*, 2004, p. 42.

<sup>70</sup> DAVIS, A.: *Abolition Democracy. Beyond Empire, Prisons and Torture*, New York, Seven Stories Press, 2005, p. 57.

<sup>71</sup> IGNATIEFF, M.: *El mal menor*, Madrid, Taurus, 2005.

Center for Human Rights at the Harvard University, and a well-known figure for his work in human rights.

Ignatieff, who is now candidate for Prime Minister of Canada (his nationality of origin), defends a State that can respond with extraordinary measures in the face of terrorist attacks by an enemy who he considers nihilist and with no values/amoral. In his writings he raises four issues. First, that there is an absolute position that condemns the use of torture in all cases. Second, that it is necessary to define what torture is and what coercive forms of interrogation are. Third, that on certain occasions the use of this type of interrogation can help to save lives. Fourth, that practising this type of interrogation entails risks and those who do it and those who order it will "get their hands dirty", but this may be the price to pay for safeguarding the democratic system.

His reasoning follows the same lines as the lawyer Alan Dershowitz who proposes that torture should be banned from a legal viewpoint, but given that it is practised in the United States and other countries, and insofar as it is useful or could be useful "to prevent terrorist acts", it would be better to regularise its use in some circumstances through specific legal authorisations. In addition, he considers that it is hypocritical to condemn torture knowing that it is used. On this basis, he argues that it is preferable to legalise it under certain conditions.

Dershowitz and Ignatieff use the argument of the ticking bomb and the terrorist who has possible information. The first is situated in the position of being a *conditional norm*, and he argues that he is not in favour of torture but rather "against all forms of unaccountable torture". Given that torture is practised, it is better to regularize it<sup>72</sup>.

Ignatieff believes that liberal democracy needs to confront the problem and redefine exactly what torture is and what legitimate coercion is. Furthermore, he considers that on "urgent" occasions liberal democracy can use pre-emptive strike and the selective assassination of terrorists. His argument is also based on the fact that torture is not the same as coercive interrogation. Sleep deprivation belongs to the second category. Ignatieff quotes Dershowitz to support his arguments and he does not criticise the latter's stance. He reaches the same conclusions as Alberto Gonzales Jr. and the Legal Department that advised Rumsfeld and Bush: the State must be more flexible on torture and other methods of "lesser evil" in order to protect freedom. Given that the West is faced with enemies that could use nuclear weapons for terrorist

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<sup>72</sup> DERSHOWITZ, A.: *Why terrorism works: understanding the threat, responding to challenge*, Yale University Press, Yale, 2002. See also his essay and replies in the collective work LEVINSON, S. (Ed.): *Torture. A collection*, Oxford University Press, Oxford, 2004.

attacks, the State must “dirty its hands” with terrible things that must be done, although within legal limits. Ignatieff admits that once the way has been cleared for the Executive to exercise repression without legal limits, the risks involved are great. However, he considers that in a constitutional democracy the judicial system, parliament and the press would rise up to defend the system of freedoms if the executive got carried away by authoritarian urgings.

Unfortunately, the reality has been rather different and bleaker. The climate created after September 2001 enabled President Bush and his team to adopt a number of measures almost completely unopposed. As opposition increased, the White House closed ranks. Even when in 2004 the Supreme Court ruled that the President could not order the indefinite detention of prisoners without charges, ill treatment continued. Although the Judiciary and the press reacted to the lies about the alleged weapons of mass destruction in Iraq, and the network of bases used for torture - albeit four years later - the Bush government continued with its policies, creating legal confusion and contradictory jurisprudence. At the same time, hundreds of people have suffered and are still suffering torture and illegal detentions.

The press also took a long time to focus on the accusations of human rights organisations. The *Washington Post*, for example, and later other media, only dealt with torture when digital photos flooded their editorial departments and after the magazine *The New Yorker* published articles by Hersch that encouraged debate<sup>73</sup>. On the other hand, accusations by human rights NGOs were not reported during the first three years after 2001.

For Ignatieff there is a “a price to pay” for the absolute position against torture maintained by libertarians and human rights defenders. Given a case where the security forces have an alleged terrorist in their hands, who has information about a nuclear weapon that is going to explode in Europe or the US, what happens if the legal system prohibits them from stepping over the bounds of an interrogation without coercion or torture? The price to pay could be the explosion of the nuclear device. But another price could be that the police or army officer, having tortured the terrorist and obtained the information, could then be tried for his actions<sup>74</sup>.

The Bush Administration has used the same arguments as Ignatieff and Dershowitz about the serious dilemma for governments who

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<sup>73</sup> HERSH, S.: *Chain of command*, *op cit.*

<sup>74</sup> IGNATIEFF, M.: “Moral Prohibition”, in *Torture. A Human Rights Perspective*, *op cit.*, p. 27.

try to respect the law but need to obtain information to prevent terrorist attacks that could save lives. This argument, however, is misleading because in fact American intelligence did have information indicating that Al Qaeda and Osama Bin Laden were thinking of carrying out an attack on US territory and that they were thinking of using planes. Nevertheless, the Bush government paid no attention to the matter.

Without a doubt there is significant resistance to violating the system of constitutional safeguards (see the last section of this essay.) However, as the lawyer Ronald Dworkin has said, Human Rights violations continue and Supreme Court decisions are side-stepped<sup>75</sup>. At the same time, the US has not ratified international treaties on Human Rights and boycotts the International Criminal Court. Ignatieff says in the *The Lesser Evil* that the problem of protecting detainees starts when "reasonable people may disagree as to what constitutes torture, what detentions are illegal, which killings depart from lawful norms, or which preemptive actions constitute aggression"<sup>76</sup>.

With historical experience of torture ranging from the Inquisition to Pinochet, and with the Universal Declaration of Human Rights and the Geneva Conventions as reference points, "reasonable people" usually recognise what torture is and what an illegal arrest is. But Ignatieff and other authors speculate about the legal procedures which the forces of law and order would use once the State could establish the limits of the type and duration of suffering permitted. In this way, Ignatieff and Dershowitz end up arguing about what separates an official or a soldier, under orders from his superiors, from being a torturer or only a "coercive interrogator". As the lawyer Ronald Steel wrote, "Ignatieff is playing with fire"<sup>77</sup>.

The torture issue has led to many political and intellectual essays and debates<sup>78</sup>. One of the responses that Dershowitz has received, and Ignatieff indirectly, is from the Professor of Aesthetics Elaine Scarry. Her argument, shared by many critics, is that the hypothesis of the ticking bomb is an exceptional case and incomplete. First, because it does not happen often. Second, because it fallaciously takes for granted that

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<sup>75</sup> DWORKIN, R.: "What the Court Really Said", *The New York Review of Books*, 12 August 2004, <http://www.nybooks.com/articles/17293>.

<sup>76</sup> IGNATIEFF, M.: *The Lesser Evil*, Princeton, Princeton University Press, 2004, p. viii.

<sup>77</sup> STEEL, R.: "The Lesser Evil: Fight Fire with Fire", *The New York Times Book Review*, 24 July 2004.

<sup>78</sup> See the debate from multiple points of view and authors in GREENBERG, K.: *The Torture Debate in America*, New York, Cambridge University Press, 2006.

the arrested person has information that will prevent the bomb from exploding. Third, because it does not present the full dilemma (What happens if I torture an innocent person?). Fourth, that the supposed torturer might be afraid of being tried.

Scarry points out also that thinking that one might have to do something prohibited does not mean that what is incorrect or susceptible to being penalised should then be legalised. On the other hand, she points to the fact that before an attack there might be a certain level of information, as happened in the months before and in the hours and minutes before the planes crashed in New York and Washington. Instead of considering torture, why not consider making better use of intelligence<sup>79</sup>. Professor Henry Shue also refutes the idea that the regularisation of torture should be considered: he states that if an exceptional situation obliges a jury to question whether it should sentence a torturer or not, that is not reason enough to legalise a criminal act<sup>80</sup>.

## 9. Critical reaction

In May 2005 Amnesty International (AI) criticised the Government of the United States, along with the Government of the United Kingdom, for subverting human rights, sanctioning the use of torture and “usurping the language of justice and freedom”<sup>81</sup>. Irene Khan, AI Director, said the detention of over 500 men without trial in “Guantanamo has become the *gulag* of our times, entrenching the notion that people can be detained without any recourse to the law”. She added that “Guantanamo evokes images of Soviet repression”. The report pointed out, moreover, that the Pentagon transferred prisoners to countries with authoritarian regimes, such as Uzbekistan and Egypt, to be tortured, and that this practice recalls those who disappeared in Latin America.

AI’s accusations were followed by Human Rights Watch who then asked for a special prosecutor to be named to investigate the roles of Rumsfeld, former CIA Director George Tenet and high-ranking military officers in Guantanamo and Abu Ghraib. These actions came on top of Supreme Court rulings and sentences by judges aimed at pro-

<sup>79</sup> SCARRY, E.: “Five Errors in the Reasoning of Alan Dershowitz”, in LEVINSON, S. (Ed.): *Torture. A Collection, op. cit.*, pp. 281-290.

<sup>80</sup> SHUE, H.: “Torture”, in LEVINSON, S.: *Ibidem*, p. 58.

<sup>81</sup> [www.amnesty.org/report2005](http://www.amnesty.org/report2005).



protecting the rights of prisoners who have not been charged or tried. The Government's response was to prosecute sub-officials and soldiers without investigating or demanding the resignation of senior military or civilian officials. Bush, Cheney, Rumsfeld, Gonzales and others have ensured that legislation will favour them. Rumsfeld's resignation after the legislative elections in November 2006, in which the Democrats won, could be considered a political payment but under no circumstances was it an assuming of responsibilities. In 2006, the Supreme Court declared that the military tribunals set up by the White House were illegal. The President's response was to interfere and make the Military Commissions Act even more restrictive regarding prisoner's rights.

In June 2006 the Supreme Court ruled that the military tribunals created by the Government to charge terrorism suspects violated United States Law and the Geneva Conventions. Likewise, the Court declared that prisoners in Guantanamo have the right to *habeas corpus*. Anthony Romero, director of American Civil Liberties Union, reported that the Court told the President that "he did not have *carte blanche* in the war on terror". President Bush's response was that he is not going to endanger the security of the American people. A number of legal experts considered that the Supreme Court sentence did not mean that the Government could not keep the 450 prisoners in Guantanamo, but rather it referred to the legal conditions that should be applied to them. In July, the Government ordered the cases of prisoners in Guantanamo and other detention facilities to be reviewed so that they complied with the principles established in common Article 3 of the Geneva Conventions.

In February 2007, the U.S. Court of Appeals for the District of Columbia Circuit ruled in favour of the Government's thesis that detainees in Guantanamo prisoner camp do not have the right to be judged in normal US courts and by implication do not have the right to *habeas corpus*. The main argument was that the prisoners were outside American territory. Judge Judith Rogers did not agree with the sentence and pointed out that the Constitution establishes that *habeas corpus* can only be restricted in the event of rebellion or invasion<sup>82</sup>. Human rights groups declared that the MCA was illegal precisely because it strips prisoners and suspect foreigners who live in the United States of the right to *habeas corpus*. In addition, the conditions of their detention

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<sup>82</sup> Editorial: "American Liberty at the Precipice", *The New York Times*, 22 February 2007.

are illegal<sup>83</sup>. Furthermore, since 2001 dozens of cases of errors have been detected that have led to the detention and torture of innocent people<sup>84</sup>. There are also denounces that some prisoners were captured in Afghanistan by bounty hunters. Despite this, the President of the Federal Court considered that in exceptional circumstances *habeas corpus* could be limited.

The media have increasingly published reports and eye witness accounts of torture and some of them have begun to demand accountability from the Government. The *Washington Post* called Richard Cheney "Vice President for Torture" owing to his determination to block a Bill in Congress in 2005 that would have banned any type of abusive treatment by the American security forces<sup>85</sup>. As analyst Anthony Lewis said, the US needs leaders who are committed to constitutional rights but "the country is governed now by men who have shown no interest in this commitment"<sup>86</sup>.

Donald Rumsfeld has been called a war criminal by the Centre for Constitutional Rights, the National Lawyers Guild and other American organisations and they have asked German justice to initiate a criminal investigation against him and other members of the Bush Government. In 2004, a group of military lawyers belonging to the Judge Advocate General's Corps visited the New York City Bar Association's Committee on International Human Rights to express their concern over the practice of torture in military prisons<sup>87</sup>.

The lawyer Marjorie Cohn, of the Thomas Jefferson School of Law and President of the National Lawyer's Guild, considers that this accusation is just given that the Secretary of Defense sanctioned the use of torture and cruel and inhuman treatment. Under the doctrine of command responsibility, "a commander can be liable for war crimes committed by his inferiors if he knew or should have known they would be committed and did nothing to stop or prevent them"<sup>88</sup>. Also the Féder-

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<sup>83</sup> Statements in SEVASTOPULO, D.: "Court Blow for Guantanamo Prisoners", *Financial Times*, 21 February 2007.

<sup>84</sup> ACKERMAN, B.: *Before the Next Attack. Preserving Civil Liberties in An Age of Terrorism*, Yale, Yale University Press, 2006.

<sup>85</sup> "Vice President for Torture", *The Washington post*, 26 October 2005. See also CALVO, J.M.: "El Lado Oscuro de EEUU", *EL PAIS*, 17 November 2005, and BORGER, J.: "Cheney May Be Guilty of War Crime", *The Guardian*, 29 November 2005.

<sup>86</sup> LEWIS, A.: "The Road to Abu Ghraib", *The American Prospect*, Special number on Bringing Human Rights Home, October 2004, [www.prospect.org](http://www.prospect.org).

<sup>87</sup> HERSH, S.: *op. cit.*, p. 42.

<sup>88</sup> COHN, M.: "Donald Rumsfeld: the War Crimes Case", 2006, <http://jurist.law.pitt.edu/forumy/2006/11/donald-rumsfeld-war-crimes-case.php>.

ation Internationale des Ligues des Droits de l'Homme and three other organizations filed a criminal complaint against Rumsfeld before French Justice for his authorization of the torture memorandums and the abuse of prisoners in Guantanamo and Abu Ghraib<sup>89</sup>.

Two lawyers from the Center for Constitutional Rights declared: "United States officials have committed crime and there is a conspiracy within the Bush government to ensure that none of the commanding officers are brought to Justice. Whether it takes a few years or thirty, which is what it took to bring Pinochet to trial, the officers accused of war crimes will appear before the Law"<sup>90</sup>. In April 2005 Human Rights Watch published a report demanding that a Special Prosecutor should be named to investigate the conduct of the then Secretary of Defense Donald Rumsfeld and former CIA Director George J. Tenet. They were accused of liability in war crimes and torture by some of the US troops in Afghanistan, Iraq and Guantanamo under the doctrine of "Command Responsibility". According to HRW, three years of denouncing the detainees' situation had only met with stonewalling from Rumsfeld.

HRW also accused Tenet of having authorised the CIA to transport detainees to third countries where they were tortured. Lieutenant General Ricardo Sánchez, former commander of the US forces in Iraq, and General Geoffrey Miller, former commander of the prison camp at Guantanamo, were accused of being responsible for torture and war crimes. Reed Brophy, HRW special counsel, stated that these abuses "did not result from the acts of individual soldiers" but rather "resulted from decisions made by senior US officials", and that the Government had created "a wall of immunity that surrounds the architects of the policy that led to all these crimes"<sup>91</sup>.

Another important initiative proposed by the Center for Constitutional Rights was to set up a campaign in 2006 to impeach Bush (an indictment mechanism enshrined in the Constitution of the United States that can be used in special circumstances). The CCR considers that the President is dismantling the Constitution through the use of illegal arrests, torture, illegal wiretapping of citizens<sup>92</sup> and suppressing

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<sup>89</sup> *Le Monde*, 27 October 2007.

<sup>90</sup> RANNER, M. and WEISS, P.: "Litigating Against Torture: the German Criminal Prosecution", in GREENBERG, K.: *The Torture Debate in America*, *op.cit.*, p. 266.

<sup>91</sup> Human Rights Watch: "U.S.: Investigate Rumsfeld, Tenet for Torture", 2005, <http://hrw.org/english/docs/2005/04/24/usint10511.htm>.

<sup>92</sup> Center for Constitutional Rights: *Articles of Impeachment Against George W. Bush*, New Jersey, Melville House Publishing, 2006.

the freedom of expression. Other organisations, such as Human Rights First and American Civil Liberties Union (ACLU), are also preparing reports about the CIA's secret places of detention, while giving legal assistance to detainees and cooperating with Democrat members of Congress and some Republican who want to revoke the Government's Laws.

## 10. The State against itself?

The *New York Times* epitomises the climate of opposition to the Government's repressive policies; in one of its editorials in March it asked Congress to "end the assault on liberties" by the Government that has been taking place over the last five years. Among the measures it asked Congress to take were:

- a) Restore *habeas corpus*.
- b) Stop illegal spying on American citizens.
- c) Close CIA prisons, starting with Guantanamo.
- d) Ban extraordinary rendition and the transfer of prisoners to other countries.
- e) Give a precise definition of what "a combatant" is so that this concept cannot be used arbitrarily.
- f) Screen prisoners fairly in Afghanistan and other countries. Abandon the irregular "combatant status review tribunals".
- g) Put pressure on the Executive to halt classifying official documents to avoid public scrutiny (the Government has classified 15.6 million documents in 2005, double the number in 2006)<sup>93</sup>.

A characteristic of the Rule of Law is that its sustainability and legitimacy depend on not violating its rules and preserving the process that protects the very existence of the Rule of Law. As soon as a group of people are detained without accusation and tortured, the State concedes legitimacy to ideologies that do not respect human values or human rights. As Dworkin states, "we should be willing, out of respect for our own traditions and values, to accept whatever unknown loss of efficiency this deference to morality will entail. Our Constitution demands that we run that risk in our ordinary criminal process: no doubt our police would be more efficient in preventing

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<sup>93</sup> Editorial: "How to End the Assault on Liberties", *The New York Times*, reproduced in the *International Herald Tribune*, 4 March 2007.

crime, and we would all be safer, if we ignored the rights of due process at home"<sup>94</sup>.

Torture is not an action that can be regulated because its practise is absolute: once an official (military, police, bureaucrat, member of a private security company) is permitted to torture, no limit can be placed on his acts. The experience and practice of torture shows, furthermore, that once the lid has been taken off torture by the State, or by a middle-ranking official, what starts with a "not severe" blow, can end with death and even the torture of relatives. When, moreover, the use of torture is framed within a totalising and quasi-mystical vision of saving a given society from a subversive or terrorist danger, the conditions are set for it to be used with an assumed legitimisation that exonerates whoever gives the order or permits torture and those who practise it.

On the other hand, if a legal system regularises torture, this produces a perversion of democratic values and of the guarantees and protection of human rights. The fact that torture is conducted or that a commander or official decides to use it at any given moment does not legitimise its legalisation. The recurrence of a crime does not mean that we should normalise and accept its existence. Let us remember that torture should not exist, and the fact that it is practised does not make this statement hypocritical, but rather it means that we should fight for democratic values and practices. Lastly, even if torture is used in an extreme situation with the reasoning that it has been used for the common good, this should not lead us to consider its legalisation but instead the case should be reviewed to determine the specific circumstances. Proposing legalisation is a demonstration of the anti-democratic authoritarianism of its proponents. Neither is acceptable the argument that torture can be used in the tic-tac scenario but that then its perpetrator should be prosecuted.

The Conservative Catholic political commentator Andrew Sullivan considers that a democratic Republican should not cross the line of authorising torture. He admits that in an extreme case a State authority could use it, sincerely believing that the Law will be violated to do good (for example, to prevent a "ticking bomb" from exploding). But in that case, the authority that executes the illegal act, (for example, authorising torture) should answer to the Law that forbids it.

Sullivan indicates that this would be "a compromise" between the act of breaking the law and protecting its existence. However, he criticises Krauthammer (and those who argue along the same lines) be-

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<sup>94</sup> DWORKIN, R.: "What the Court Really Said", *The New York Review of Books*, *op.cit.*

cause his proposal “does not retain our soul as a free republic while at the same time protecting ourselves from a catastrophe in some extremely exceptional cases. What Krauthammer proposes is something very different – that our “dirty hands” should be legally washed before and after that illegal act. This is the Rubicon we should not cross, because it marks the frontier between a free country and one that is not”<sup>95</sup>. The idea that the State may legitimise a crime in a given moment and that afterwards will prosecute and punish the same act is a double breach of Law and open the door for a continuous process of negotiations over crimes.

On the other hand, a language or a norm that would allow just “a little” torture does not exist as the lawyer Dinah Pokempner explains:

“the norm against torture cannot be read as merely “negative”, requiring the State to refrain from certain acts. Rather, it is an inaction to a great many positive acts, specially in situations such as war. Just as we know the many facilitating conditions, the elements that inhibit torture and related abuse are also known” (...)“that torture occurs regularly is not an argument for exceptions to the norm, any more than the ubiquity of rape is an argument to craft limited circumstances where rape may be authorized or immunized. Understanding the nature of torture, however, illuminates why its prohibition is absolute”<sup>96</sup>.

If terrorists are going to be tortured in the name of defending our freedom, then the world will be divided between those who have the right to legal protection and those who do not have this right.

## 11. The future

The debate over torture has continued between the Supreme Court, human rights organizations and academics, journalists and lawyers on the one hand, and an anxious Bush Administration on the other. Although in the Summer of 2007 President Bush issued an executive order to comply with the restrictions imposed by the Supreme Court in 2006 and by Congress in March 2008, but the Justice Department insisted in the justification of the use of torture under some circumstances and told Congress that US intelligence officials can legally use inter-

<sup>95</sup> SULLIVAN, A.: “Winning the War on Terrorism Without Sacrificing Freedom”, *The New Republic*, 19 December 2005, [www.tnr.com](http://www.tnr.com).

<sup>96</sup> POKEMPNER, D.: “Command and Responsibility for Torture”, in *Torture. A Human Rights Perspective*, *op. cit.*, pp. 166-167.

rogations methods in their work to prevent terrorist attacks. These methods might be prohibited under the Geneva Conventions<sup>97</sup>. The Justice Department also denied the legal documents (memorandums and drafts) that the Government asked for and produced to claim that the President could ignore US Law and the Geneva Conventions.

On June 2008 the US Supreme Court rejected for the third time the Government's argument that prisoners in Guantanamo are not entitled to challenge their detention in federal courts because the Caribbean facility is not part of sovereign US territory. The Supreme considered that the 270 prisoners at Guantanamo have a constitutional right to challenge their detention using US civilian courts. The Court declared unconstitutional a provision of the Military Commissions Act (2006) that stripped the federal court of jurisdiction to hear *habeas corpus*. There are around 200 *habeas corpus* petitions awaiting judicial action.

The Court said that "laws and the Constitution are designed to survive, and remain in force, in extraordinary times", and that the powers of the President, even outside US territory, were not "absolute and unlimited". This ruling has serious implications for the military trials that the Bush Administration had already initiated against 20 detainees and another 60 that the Pentagon wants to try. President Bush responded saying that he would abide by the decision of the Court but that "doesn't mean I have to agree with it" and he ordered his Government to block the Court's decision<sup>98</sup>.

The first critical responses to the Supreme Court's decision came from the presidential candidate and Senator John McCain who said that the "Supreme Court's decision granting suspected terrorists the right to challenge their detention in federal courts (...) is one of the worst in history". McCain was one of architects in the Senate of the Military Commissions Act in 2006 which stripped the federal courts of the right to hear detainees' *habeas corpus* petitions. This provision has now been declared unconstitutional by the Supreme Court<sup>99</sup>. Chief Justice Antonio Scalia dissented and indicated that the decision will provoke "devastating and disastrous consequences"<sup>100</sup>.

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<sup>97</sup> MAZZETI, M.: "Letter Give CIA Tactics a Legal Rationale", *The New York Times*, 2008.

<sup>98</sup> *Financial Times*, 13 June 2008.

<sup>99</sup> Quoted in *The New York Times Politics Blog*, The Caucus, 17 June 2008. <http://thecaucus.blogs.nytimes.com/2008/06/13/mccain-guantanamo-decision-one-of-worst-ever/?scp=3-b&sq=Guant%20namo+&st=nyt>.

<sup>100</sup> GREENHOUSE, L.: "Back Detainee Appeals for Guantanamo", *The New York Times*, 2008.

On May 2008 the mainstream organization funded by US federal funds Freedom House expressed its “grave concern” for the impact that the US “war on terror” has for the United States both internally and externally. The organization mentioned extraordinary renditions, the “mistreatment of those in US custody”, the control of US citizens and the restrictions of individuals freedoms. FH also questioned the rise in the incarceration rate and the serious problems faced by the US criminal justice system<sup>101</sup>.

From 2009 onwards the main challenge will be for the new President. McCain intends to follow Bush’s policy with some reforms. Barack Obama has repeatedly mentioned the need to close Guantanamo and to respect the Geneva Conventions. If he wins he will have a tough job dismantling the hidden and overt system that was set up to legitimize torture in the US and abroad.

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<sup>101</sup> Freedom House: “Today’s America—How Free?”, Washington DC, 2008. <http://www.freedomhouse.org/template.cfm?page=406>.



## Part III

# United Nations and Universal Human Rights

Conventional protection of  
human rights

Extra-conventional protection  
of human rights



# The Universal Declaration of Human Rights

Jaime Oraá Oraá

**Summary:** 1. Writing the Universal Declaration. 2. The Content of the Universal Declaration. 2.1. The Preamble and Articles 1 and 2: the Ideological Basis of the Declaration. 2.2. Analysis of the main body of the Universal Declaration. 3. The Universality of the Universal Declaration of Human Rights. 4. The Legal Value of the Universal Declaration. 4.1. The Current Legal Value of the Universal Declaration. 4.2. Theories Explaining its Current Legal Value. 4.3. Analysis of the provisions which have acquired the status of peremptory norms of International Law. 5. Conclusions.

Before beginning a detailed analysis of the Universal Declaration of 1948, it should be made clear that the Declaration, together with other human rights instruments, forms part of what is known as the *International Bill of Human Rights*. By using the expression “International Bill of Human Rights”, which is not a technical name from an international law point of view, we are recognising three international documents of particular importance: the Universal Declaration of 1948, and the two International Covenants on human rights of 1966, which completed the regulations of the Declaration, making up the basic international code of human rights.

We have already seen<sup>1</sup> how, at the San Francisco Conference, there were more daring proposals regarding human rights than those which were eventually included in the United Nations Charter. However, reference has also been made to the particular importance of Article 68 of the Charter, where the Economic and Social Council of the United Nations was ordered to create a commission for human rights. This commission for human rights was created immediately, in February 1946, and was entrusted with the task of preparing a project of “an international bill of human rights”. The Commission very soon recognised that it would be relatively easy to come to an agreement on a declarative and programmatic text but that acceptance of a legally binding inter-

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<sup>1</sup> See the introductory paper by Felipe Gómez in this same book.

national treaty, which would define in detail the obligations of States with regards to each of the rights, would be a much longer process and one which would be much harder to accomplish. Problems regarding the sovereignty of States would again condition the whole process of the internationalisation of human rights which had begun with the United Nations Charter. The Commission therefore very astutely decided to first of all work on a Declaration so that immediately following its approval they could move on to the preparation of a treaty. This decision shaped the work of the Commission in the following years and led to the Universal Declaration in 1948 and, 18 years later, to the International Covenants of human rights of 1966, which were to come into force ten years later, in 1976.

The Universal Declaration of Human Rights is the first general legal and international instrument of human rights proclaimed by an international organisation with a universal character<sup>2</sup>. As Thomas Buergenthal, former President of the Inter-American Court of Human Rights states, "because of its moral status and the legal and political importance it has acquired over the years, the Declaration ranks with the *Magna Carta*, the French Declaration of the Rights of Man and the Citizen (1789), and the American Declaration of Independence (1776), as a milestone in mankind's struggle for freedom and human dignity"<sup>3</sup>.

## 1. Writing the Universal Declaration

Right from the beginning of the United Nations, the production of a human rights instrument that could concrete and define the regulations of the Charter was one of its fundamental aims. The most important part of this task was taken on by the Commission on Human Rights, created in 1946 as a subsidiary body to the Economic and Social Council (ECOSOC). However from the beginning the Commission on Human Rights was aware of the problems involved in this venture, given the fact that the positions were, as we shall see below, very opposed.

Initially, the Commission on Human Rights set itself three targets. These were first of all to approve a declaration so as to provide ade-

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<sup>2</sup> We should take into account the fact that, a few months prior to the Universal Declaration, the *American Declaration of the Rights and Duties of Man* (2 May 1948) had been approved at the Ninth International Conference of American States, a Declaration which had a certain amount of influence on the Universal Declaration.

<sup>3</sup> BUERGENTHAL, T.: *International Human Rights in a Nutshell*, West Publishing Co., Minnesota, 1988, pp. 25 and 26.

quate international protection for human rights, secondly a human rights covenant and finally a series of measures for putting into practice the rights recognised in the two aforementioned instruments. These three documents were to form what René Cassin called the "Human Rights Charter"<sup>4</sup>. However, it very soon became clear that these aims were too ambitious; States were not prepared to make commitments of this nature and eventually a much more modest aim was decided on, which was to produce a single document to enshrine the most relevant human rights. However there was still a problem, namely to clarify whether what was going to be produced would be a mere Declaration of the General Assembly of the United Nations, without full legally binding value for States or, conversely, an international human rights covenant which would be a truly international treaty of an obligatory nature<sup>5</sup>. The less stringent option, which was less binding for States, again came to the forefront and it was decided that a human rights declaration would be written; a type of manifesto which was political and programmatic in character, leaving until later, the writing of an instrument which bound States to a greater extent, along with the adoption of concrete measures for putting into practice recognised human rights.

In any case drafting a human rights declaration would not be simple either, but rather the opposite; it was to be a process plagued with obstacles and difficulties<sup>6</sup>. The main problem which faced the Commission on Human Rights in carrying out this task was the huge ideological-political conflict present at that time in international society and, of course, within the United Nations. We are here referring to the East-West conflict and the ideological, political, and economic battles between the United States and its Western allies, on the one hand, and, on the other hand, the Socialist bloc led by the Soviet Union. For the

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<sup>4</sup> CASSIN, R.: «La Déclaration Universelle et la mise en oeuvre des droits de l'homme», *op. cit.*, p. 270.

<sup>5</sup> While the United States was in favour of producing a Declaration, other countries, such as Great Britain and Australia, were in favour of approving a document which was binding to a much stronger degree. See VERDOOT, A.: *Naissance et Signification de la Déclaration Universelle des Droits de L'Homme*, Société d'Etudes Morales, Sociales et Juridiques, Louvain, Editions Nauwelaerts, Louvain-Paris, 1964, pp. 54 ff.

<sup>6</sup> The difficulties which had to be overcome before the eventual approval of the Universal Declaration are related in an autobiographical tone by John P. Humphrey who, being as he was at that moment Director of the Division of Human Rights at the United Nations, is able to relay the information first-hand. See HUMPHREY, J.P.: «The Universal Declaration of Human Rights: its History, Impact and Juridical Character», in RAMCHARAN, B.G. (Ed.): *Human Rights. Thirty Years after the Universal Declaration*, Martinus Nijhoff Publishers, Dordrecht, 1979, pp. 21-37.

Soviet Union and the Socialist bloc countries, the Universal Declaration of Human Rights was not a fundamental objective; rather, they expressed an “uncompromising hostility”<sup>7</sup>. In their opinion, a person is above all a social being and as such the rights which must be guaranteed are those which are economic, social, and cultural in nature, not awarding such importance to those of a civil and political nature. The socialist countries however, gave huge importance to the principle of State sovereignty and as such human rights could not pass over the sovereignty of States; in other words, questions relating to human rights were considered issues that essentially fell under the domestic jurisdiction of States and, as a result, the international community could not intervene and criticise the human rights situation in a given country. Conversely, the stance defended by Western countries, especially France, the United States, and Great Britain was distinguished by its decided defence of rights of a civil and political nature, the classic freedoms of Western democracies. As such, these countries were in favour of human rights becoming issues which went beyond the internal jurisdiction of States; in other words, involving the international community.

As can be seen, the controversy had begun and human rights became yet another tool for the battles between the greater powers which were already very involved in the Cold War, which was to last from the end of the Second World War until the beginning of the 1990s. As John Foster Dulles, former U.S. Secretary of State, stated on this issue (in a speech at the American Bar Association in 1949), “the Universal Declaration, like the French Declaration of the Rights of Man and the Citizen, is an important element in the great ideological fight which is currently being fought in the world, and, in this sense, Mrs. Roosevelt has made a significant contribution to the defence of North American ideals”<sup>8</sup>. As we can see, Mr. Dulles saw the Universal Declaration as yet another element in the ideological battle against the USSR, making a special mention of the work of the United States representative on the committee for the writing of the Declaration, Mrs. Eleanor Roosevelt, which had consisted in a tooth-and-nail defence of American ideals and principles<sup>9</sup>.

<sup>7</sup> CASSIN, R.: «La Déclaration Universelle...», *op. cit.*, p. 267.

<sup>8</sup> Quoted in CASSESE, A.: *Los derechos humanos en el mundo contemporáneo*, Ariel, Barcelona, p. 42.

<sup>9</sup> In any case, it appears that there exists clear evidence that Eleanor Roosevelt’s personal opinions were more open than is suggested by the speeches in which she defends the position of the U.S. government. Mrs. Roosevelt expressed herself as hugely critical

Despite these extreme opinions, it should be said that in the end the Universal Declaration was a balance, a type of consensus, as we shall see when we analyse its content, between the different positions among the international community on the controversial topic of human rights. As Professor Antonio Cassese has correctly stated, the Universal Declaration was, more than a triumph for one side or the other, "a victory (not complete, though) for all of humanity"<sup>10</sup>.

As has already been stated, it was to be the Commission on Human Rights of the United Nations that was to take on the complicated task of the project to draw up the Universal Declaration of Human Rights<sup>11</sup>. However, before the Commission on Human Rights could begin its work, the first measure taken by ECOSOC as regards the Universal Declaration was to appoint those on the initial committee (also known as the *nuclear committee*), made up of nine people<sup>12</sup> who would perform their tasks in their personal capacity. Following the first work of this nuclear committee, a drafting committee was named, made up of delegates from eight countries, from which we can begin to form an idea as regards those who were the principal influences on the Universal Declaration. The eight countries involved in this drafting committee were Australia, Chile, China, United States, France, Lebanon, Great Britain, and the Soviet Union. This drafting committee, after its first

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of the racial discrimination of her country which, in her opinion, made her feel ashamed at international conferences she attended. On the enormous influence of Mrs Roosevelt on the Universal Declaration, see JOHNSON, M.G.: «The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection for Human Rights», *Human Rights Quarterly*, Vol. 9, 1987, pp. 27 ff. Also see MOWER, A.G.: *The United States, the United Nations and Human Rights: the Eleanor Roosevelt and Jimmy Carter Eras*, Westport, Greenwood Press, 1979.

<sup>10</sup> CASSESE, A.: *Los derechos humanos...*, *op. cit.*, p. 53.

<sup>11</sup> On the different stages through which the production of the Universal Declaration of Human Rights passed, see the summary produced by MOLLER, J.T.: «The Universal Declaration of Human Rights: How the Process Started», in EIDE, A.; ALFREDSSON, G.; MELANDER, G.; REHOF, L.A. and ROSAS, A. (Eds.): *The Universal Declaration of Human Rights: A Commentary*, Scandinavian University Press, Oslo, 1992, pp. 1-3.

<sup>12</sup> The nine people who were to perform their work were as follows: Paul Berg (Norway); René Cassin (France); Fernand Dehousse (Belgium); Víctor Haya de la Torre (Peru); K.C. Neogy (India); Eleanor Roosevelt (United States); John C.H. Wu (China), later replaced by C.L. Hsia; Jerko Radmilovic (Yugoslavia), replaced by Dusan Brkish; and Nicolai Krioukov (USSR), replaced by Mr. Borisov. It should be noted as regards these nine members of the nuclear commission that René Cassin and Eleanor Roosevelt, two of the main driving forces and significant influences for the Universal Declaration, were already involved. On Cassin's and Roosevelt's roles see EIDE, A. and ALFREDSSON, G.: «Introduction», in EIDE, A.; ALFREDSSON, G.; MELANDER, G.; REHOF, L.A. and ROSAS, A. (Eds.): *The Universal Declaration of Human Rights: A Commentary*, *op. cit.*, p. 11.

meetings and discussions, entrusted Professor René Cassin with the task of preparing a declaration project. After the drafting committee had approved this project written by René Cassin, it was presented at the second session of the Commission on Human Rights, which took place between November and December of 1947. However the project was still not sufficiently developed and as such had to be discussed again at the third session of the Commission on Human Rights, which took place in May and June of 1948. In the expert opinion of Albert Verdoot, this third session of the Commission was the most decisive for the final project of the Declaration, dealing with very important debates at the very heart of the issue, such as, for example, regarding the inclusion of economic, social, and cultural rights<sup>13</sup>.

Once the Universal Declaration project had been approved by the Commission on Human Rights, this same body passed it on to ECOSOC so that ECOSOC could present it to the General Assembly of the United Nations, the body which had to finally approve the project. In September 1948, the General Assembly sent the Declaration project to its Third Committee, the Committee for Social, Humanitarian, and Cultural Affairs for examination. Following 24 work sessions, said Committee completed the Declaration project, recommending its approval by the General Assembly with 29 votes in favour and none against, but with seven abstentions. The countries which abstained in the vote at the Third Committee of the General Assembly were the six countries of socialist Europe and Canada, although, as we shall see, this last country voted in favour at the General Assembly. What is undoubtedly true is that the majority of opposition came from the socialist bloc countries.

Finally, on 10 December 1948 in the Chaillot Palace in Paris the Universal Declaration of Human Rights was approved by the General Assembly of the United Nations<sup>14</sup>. The final voting which took place at the General Assembly gives an interesting insight into where the main problems had been regarding the approval of the Universal Declaration. With this in mind, it should be noted that the Declaration obtained 48 votes in favour, eight abstentions, and not a single vote against<sup>15</sup>, which can only be seen as a triumph. However, the definitive text had

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<sup>13</sup> VERDOOT, A.: *Naissance et Signification de la Déclaration Universelle des Droits de L'Homme...*, *op. cit.*, pp. 67 ff.

<sup>14</sup> It should be noted that, from then on, 10 December has become the *International Human Rights Day*.

<sup>15</sup> Honduras and Yemen were not present at the final vote, and as such their votes were not counted.



eight abstentions. These abstentions came from the following countries: the Soviet Socialist Republic of Belarus; Czechoslovakia; Poland; Yugoslavia; the Soviet Socialist Republic of the Ukraine; the Union of Soviet Socialist Republics; South Africa, and Saudi Arabia. As can be seen, the socialist bloc countries abstained *en masse*, due to the fact that they did not agree with certain parts of the Declaration. For its part, as we shall see below, Saudi Arabia expressed certain doubts based on its religious and family traditions, and South Africa was completely against the inclusion of economic, social, and cultural rights in the Declaration. However, what is far more important from our point of view is the fact that there was not even one vote against the Universal Declaration of Human Rights, and because of this it has become a vital reference point for the human race as regards human rights.

The fact is that the Universal Declaration of Human Rights was written and approved relatively quickly if we compare it with other subsequent human rights instruments. It took advantage of the favourable momentum which could be felt in international society just after the end of the Second World War. Had it not been approved on December 1948, the problems which were beginning to appear on an international scale would have made it very difficult to reach a consensus on an issue as controversial as that of a Human Rights Declaration. Many of the delegations which took part in the preparatory debates for the Universal Declaration were of the opinion that if it was not approved at that precise moment, it would never be approved. Many factors contributed to this, including the following: Firstly, the horrors of war were beginning to be less prominent in people's minds, and no longer had the influence that they had had at the first sessions of the Commission on Human Rights; secondly, the effects of the Cold War were beginning to be felt, intensifying as of 1948, meaning that human rights were beginning to be at the mercy of the great ideological battle; third, the question of self-determination began to rear its head as regards human rights, with its accompanying wildly opposing views; and, finally, the United States was beginning to lose the favourable position it had towards human rights under President Roosevelt<sup>16</sup>. It is as a result of all of these factors that it was so important to approve the Universal Declaration. As Ashild Samnøy has said, "the drafting of the Universal

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<sup>16</sup> The radical changes which took place regarding human rights from 1950 with the Eisenhower Administration are significant, with a return to the cyclic "isolation" which the United States falls into on this and other topics. On this, see JOHNSON, M.G.: «The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection of Human Rights»..., *op. cit.*, p. 46.

Declaration of Human Rights was a struggle against time and the erosion of memory<sup>17</sup>, becoming a more important achievement than anyone had imagined in 1948<sup>18</sup>.

## 2. The Content of the Universal Declaration

As regards the content of the Universal Declaration of Human Rights, it is a faithful reflection of the challenges and ideological battles which essentially took place between the Socialist bloc, led by the Soviet Union, and the Western bloc, led by the United States. As Antonio Cassese, the great expert on human rights, has said, "the discussion at the United Nations concerning the Universal Declaration was wholly a fragment of the Cold War"<sup>19</sup>, with each side trying to express its own conception of human rights and of the political, social and economic order in the Declaration. We were, at the time of modelling the content of the Universal Declaration, faced with "the confrontation between two human rights messianisms"<sup>20</sup>, the capitalist and the socialist. While one of them, the capitalist, placed the emphasis on the 'classic' individual freedoms, or the civil and political rights that came about as a result of the eighteenth century bourgeois revolutions, the other put the emphasis on the economic and social circumstances in which individuals and social groups must exercise their rights, affording greater importance to the economic, social, and cultural rights which were born at the end of the nineteenth century and in the first third of the twentieth. It must not be forgotten that, at this time, the United Nations Organisation was still only made up of a reduced number of States due to the fact that vast colonial empires were still in existence<sup>21</sup>. It was for this reason that most of the group of countries we now know as the *The South* was absent from the debate concerning the Universal Declaration of Human Rights, and the most serious conflict took place between the Western countries and those belonging to the

<sup>17</sup> SAMNOY, A.: *Human Rights as International Consensus...*, op. cit., p. 108.

<sup>18</sup> HUMPHREY, J.: *Human Rights & United Nations...*, op. cit., p. 74.

<sup>19</sup> CASSESE, A.: *Los derechos humanos en el mundo contemporáneo...*, op. cit., p. 42.

<sup>20</sup> VERDOOT, A.: *Naissance et Signification de la Déclaration Universelle...*, op. cit., p. 13.

<sup>21</sup> An interesting approach to the historical circumstances in which the United Nations and, consequently, International Law, have evolved can be found in CARRILLO SALCEDO, J.A.: *El Derecho Internacional en perspectiva histórica*, Tecnos, Madrid, 1991.

Socialist bloc; there were also significant contributions from Latin American countries<sup>22</sup>.

In spite of everything already mentioned, and against all expectations, the final content of the Declaration constitutes a delicate and healthy equilibrium between the different ideologies and conceptions of human rights and society which were in existence at the time of its writing. Although we are obliged to recognise the fact that in certain passages of the Declaration the influence of predominantly Western theories can undoubtedly be felt, it cannot be said that the final result was an imposition of one ideology over another. In the insightful words of the eminent Latin American jurist Héctor Gros Espiell:

“The Universal Declaration aimed to present a universal conception, an ideal common to the whole of humanity, of human rights, rising, in a divided world, above the different ideologies and opposed opinions on their origin and nature...”<sup>23</sup>.

Below, we will proceed to a deeper study of the main elements of the content of the Universal Declaration of 1948. For this, we will first of all analyse the preamble and Articles 1 and 2 of the aforementioned text, which is where the underlying ideology is enshrined, so as to later go on to study the different rights proclaimed in the Declaration, both civil and political rights, and economic, social and cultural rights, with this latter group being the main novel element of the Declaration.

### 2.1. *The Preamble and Articles 1 and 2: the ideological basis of the Declaration*

The preamble of the text under analysis is exceptionally important given that it is where the main themes and guidelines regarding the conception of human rights that the Universal Declaration hopes to express are contained. In other words, it contains the ideological framework of the Declaration. According to the wise words of René Cassin, the French representative in the working group which drew up the Declaration, and one of the principal sources of its ideology:

“The Universal Declaration has been compared to the vast portico of a temple, where the pediment is built of the preamble which

<sup>22</sup> For a good summary of the different positions maintained as regards the content of the Universal Declaration by the different groups of countries present, see CASSESE, A.: *Los derechos humanos...*, *op. cit.*, pp. 40 ff.

<sup>23</sup> GROS ESPIELL, H.: *Estudios sobre Derechos Humanos II*, Instituto Interamericano de Derechos Humanos-Civitas, Madrid, 1988, p. 30.

affirms the unity of the human family, and where the columns are made up of the general principles of freedom, equality, non-discrimination, and fraternity proclaimed in Articles 1 and 2"<sup>24</sup>.

It should also be noted that the preamble was written at the end of the drafting process and as such it reinforces the theory that it is a summary of the ideology of the Universal Declaration of Human Rights. According to Jan Marteson, the preamble "states unequivocally that the foundation of freedom, justice, and peace in the world is the recognition of the inherent dignity and the equal and inalienable rights of all members of the human family"<sup>25</sup>. As we shall see later, the basis for the human rights enshrined in the Declaration is none other than the *dignity of the human being*. In the words of Niceto Blázquez, who has analysed the exact significance of the reference to dignity in the text of the Universal Declaration, "the whole Declaration is based on the philosophical-legal principle of the dignity of the human being. From this come the postulates of liberty, equality, and fraternity"<sup>26</sup>. Such is the sense of the statement which opens the text of the preamble. In it, the General Assembly of the United Nations considers that:

"... recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".

Another important pronouncement regarding placing dignity as the basis for recognised human rights in the Declaration can be found in Article 1 of the same document. According to this provision, which goes into detail about what has just been established in the preamble, "all human beings are born free and equal in dignity and rights. They

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<sup>24</sup> CASSIN, R.: «La Déclaration Universelle et la mise en oeuvre des droits de l'homme», *op. cit.*, pp. 277 and 278. René Cassin, winner of the Nobel Prize for Peace in 1968, has undoubtedly been one of the great sources of inspiration for the Universal Declaration of Human Rights, and of later United Nations work on the matter. For a personal and academic profile of this great French thinker, see GROS ESPIELL, H.: "René Cassin, los derechos del hombre y la América Latina", in GROS ESPIELL, H.: *Estudios sobre Derechos Humanos I*, Instituto Interamericano de Derechos Humanos-Editorial Jurídica Venezolana, Caracas, 1985, pp. 95-104.

<sup>25</sup> MARTESON, J.: «The Preamble of the Universal Declaration of Human Rights and the United Nations Human Rights Programme», in EIDE, A.; ALFREDSSON, G.; MELANDER, G.; REHOF, L.A. and ROSAS, A. (Eds.): *The Universal Declaration of Human Rights...*, *op. cit.*, p. 19.

<sup>26</sup> BLÁZQUEZ, N.: «El recurso a la *dignidad humana* en la Declaración Universal de Derechos Humanos de las Naciones Unidas», in *Dignidad de la Persona y Derechos Humanos*, Instituto Pontificio de Filosofía, Madrid, 1982, p. 110.

are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.

Finally, we find a reference to dignity in Article 22 of the Universal Declaration of Human Rights, a provision where the right to social security is recognised, and which serves as a framework for the recognition of economic, social, and cultural rights. The mention of dignity in Article 22 is very important given that it is saying that without the satisfaction of rights which are economical, social, and cultural in nature, then life cannot be dignified<sup>27</sup>. Paraphrasing Article 22, every human being has the right to social security and the satisfaction of the economic, social, and cultural rights, “*indispensable for his dignity* and the free development of his personality”<sup>28</sup> (emphasis added). As we can see, the dignity of the human being depends as much on civil and political rights as it does on economic, social, and cultural rights. We find ourselves, as we will see again in other passages of the Declaration, facing a crystal clear affirmation of the *indivisibility and interdependence* of all human rights.

However, the Declaration offers us no definition of what it means by dignity, expressly rejecting any allusion of a metaphysical character as a foundation for dignity<sup>29</sup>. According to some, “it is implied that dignity is the quality of being recognised as a person”<sup>30</sup>, from which the notions of freedom and equality necessarily derive.

These difficulties regarding the definition of the term ‘dignity’, used in the Universal Declaration as the basis of human rights, lead us to a problem of much greater magnitude which consists in trying to find the inspiring philosophy, if such a thing could be said to exist, of the Declaration. Right from the start of the process of the writing of the Universal Declaration it was clear that an attempt to base human

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<sup>27</sup> OLINGA, A.D.: «Le droit à des conditions matérielles d’existence minimales en tant qu’élément de la dignité humaine (Articles 2 et 3 de la CEDH)», in MORIN, J-Y. (sous la direction de): *Les Droits Fondamentaux*, Bruylant, Bruxelles, 1997, pp. 91-104.

<sup>28</sup> Equally, in Article 23 of the Declaration, which is dedicated to the right to work, a reference to dignity also appears. According to what is set out in Article 23.3, “everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of *human dignity*...”.

<sup>29</sup> An attempt at defining the concept of dignity can be found in MAURER, B.: «Essai de définition théologique et philosophique de la dignité humaine», in MORIN, J-Y. (sous la direction de): *Les Droits Fondamentaux*, *op. cit.*, pp. 223-252. See also ZAJADLO, J.: «Human Dignity and Human Rights», in HANSKI, R. and SUKSI, M. (Eds.): *An Introduction to the International Protection of Human Rights...*, *op. cit.*, pp. 15-24; DONNELLY, J.: “Human Rights and Human Dignity: An Analytic Critique of Non Western Conceptions of Human Rights”, *The American Political Science Review*, Vol. 76, 1982, pp. 303-316.

<sup>30</sup> BLÁZQUEZ, N.: «El recurso a la *dignidad humana* en la Declaración...», *op. cit.*, p. 111.

rights on a single philosophical foundation was to be an incredibly arduous task. At this time there were many different, and on occasion irreconcilable, cultural, religious, and philosophical traditions represented at the United Nations. It is certain that “the unilateral philosophical or political impositions would, without doubt, have generated irresolvable discussions within the pluralist framework of the United Nations”<sup>31</sup>. The Declaration is, in many regards, the result of a compromise, and the question of its philosophical basis was one of the aspects where agreements had to be reached between those holding differing points of view; points of view which fundamentally were either in favour of a naturalist view regarding human rights, or in favour of a purely positivist way of looking at them. As Joaquín Ruiz-Giménez, a respected expert on human rights, stated, the drafters of the Declaration “came to be convinced that it was useless to continue arguing all the way to the final foundation of human rights, and that what was important was realising the need for a consensus on a number of basic rights”<sup>32</sup>. It is for this reason that any overly explicit reference to the foundation of the Declaration was omitted from it. It is certainly true, however, that the philosophy of the Universal Declaration is basically inspired by the philosophy of human rights in the eighteenth century, but with some very important qualifications<sup>33</sup>, as we shall see below.

To begin with, there is no explicit mention in the Declaration of “nature” as the ultimate basis for human rights, a difference compared with the Declarations of Rights of the eighteenth century<sup>34</sup> or the American Declaration of the Rights and Duties of Man<sup>35</sup>. Following an

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<sup>31</sup> RABOSSO, E.: *La Carta Internacional de Derechos Humanos*, op. cit., p. 14.

<sup>32</sup> RUIZ-GIMÉNEZ, J.: «Intervención de D. Joaquín Ruiz-Giménez», in *Alocuciones sobre Derechos Humanos. Cuarenta Aniversario de la Declaración Universal de Derechos Humanos*, Ministerio de Asuntos Exteriores, Madrid, 1989, p. 177.

<sup>33</sup> MORSINK, J.: «The Philosophy of the Universal Declaration», *Human Rights Quarterly*, Vol. 6, 1984, p. 333.

<sup>34</sup> With this in mind it is important to discuss Article 2 of the *French Declaration of the Rights of Man and the Citizen* (26 August 1789). According to this provision, “the aim of all political association is the preservation of the *natural* and imprescriptible *rights* of man...” (emphasis added). In the same vein is Article 1 of the *Declaration of Rights of the Good People of Virginia* (12 June 1776), where it is set out that “all men are by *nature* equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity...”.

<sup>35</sup> As is shown in the first paragraph of its preamble, “all men are born free and equal, in dignity and in rights, and, being endowed by *nature* with reason and conscience, they should conduct themselves as brothers one to another” (emphasis add-

intense debate and seeing that it was very difficult to reach a consensus on this point, the idea in favour of leaving a reference to nature out of the Declaration prevailed. In the words of the Chinese delegation, "this measure would obviate any theological question, which could not and should not be raised in a declaration designed to be universally applicable"<sup>36</sup>.

Secondly, this same statement from the Chinese government was applied to the attempt by some delegations to include a reference to the divine origin of human rights, such as appears in the eighteenth century Declarations<sup>37</sup>. The most insistent proposal for this came from Brazil with strong support on the matter coming from Argentina and from Charles Malik, the Lebanese representative. The Brazilian government proposed in Article 1 of the Declaration the expression "created in the image and likeness of God". Eventually, faced with the certainty that the proposal had little chance of prospering, Brazil chose to withdraw it<sup>38</sup>. The Soviet Union, justifying its negative stance against the inclusion of any mention of divinity in the Declaration, stated that it was a fact that "many people do not believe in God, and the Declaration should be aimed at humankind as a whole"<sup>39</sup>. Many delegations criticised this secularisation of the Universal Declaration, but it must be admitted, as René Cassin has done, that "the Declaration could not have been universal if there had been a desire to impose a single official doctrine"<sup>40</sup>.

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ed). This statement is practically identical to Article 1 of the Universal Declaration of Human Rights, except that in the American Declaration there is an explicit mention of nature, and aspect which is lacking in the Universal Declaration. As Gros Espiell has said on the matter, "the American Declaration of the Rights and Duties of Man is in keeping with an American historical process in which the human being is the holder of rights which are essential as to his nature, inalienable and imprescriptible...", in GROS ESPIELL, H.: "La Declaración Americana: raíces conceptuales y políticas en la Historia, la Filosofía y el Derecho Americano", *Revista del Instituto Interamericano de Derechos Humanos*, N.º Especial, 1989, p. 42.

<sup>36</sup> Quoted in SAMNOY, A.: *Human Rights as International Consensus...*, *op. cit.*, p. 100.

<sup>37</sup> In the *French Declaration of the Rights of Man and the Citizen* the National Assembly recognises and proclaims human rights "in the presence and under the auspices of the Supreme Being". In turn, the *Declaration of Rights of the Good People of Virginia* in its sixteenth Article refers to "the duty which we owe to our Creator".

<sup>38</sup> The details of these discussions, with different opinions, can be found in DE LA CHAPELLE, P.: *La Déclaration Universelle des Droits de l'Homme et le Catholicisme*, Librairie Générale de Droit et de Jurisprudence, Paris, 1967, p. 88.

<sup>39</sup> For the opinions of the USSR on this topic, see VERDOOT, A.: *Naissance et Signification de la Déclaration Universelle des Droits de l'Homme...*, *op. cit.*, p. 276.

<sup>40</sup> CASSIN, R.: «La Déclaration Universelle...», *op. cit.*, p. 284.

We must therefore conclude that there is no single philosophical foundation to the Universal Declaration, with the horrors which took place during the Second World War being used as “the epistemic foundation of the Declaration”<sup>41</sup>. And so, as Sonia Picado has rightly said, “the text of the Declaration reveals a resurgence of the theory that there are fundamental principles, higher than ideological discrepancies, which the positive legal developments of each State should look to”<sup>42</sup>.

Another significant aspect of the Preamble is the clear and undeniable support for *all members of the human family*, a unit which has as its base the fundamental rights of the human being; it could not be any other way. With this in mind, it is the first paragraph of the preamble which considers that “recognition of the inherent dignity and of the equal and inalienable rights of *all members of the human family* is the foundation of freedom, justice and peace in the world,” (emphasis added). In this provision the desire for universality is clear. The Declaration attempts to recognise the human rights of “all members of the human family”, regardless of their race, religion, gender, nationality etc. This desire for universality which can be found in the Declaration, which calls itself “Universal”, is confirmed in Articles 1 and 2 of the Declaration itself. Article 1 states that “all human beings are born free and equal in dignity and rights”, and Article 2.1 tells us that “everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

This same second Article extends the enjoyment of the rights proclaimed in the Declaration to all countries, whether these be independent States or those under colonial rule, thus contributing to the clear support for universality which the Declaration provides. This section is very important given that at the time when the Declaration was first proclaimed vast colonial empires were still in existence, which has been referred to as an enormous “contradiction in terms”<sup>43</sup> because on the one hand universal human rights were being proclaimed, and on the

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<sup>41</sup> MORSINK, J.: «World War Two and the Universal Declaration», *Human Rights Quarterly*, Vol. 15, 1993, p. 358.

<sup>42</sup> PICADO SOTELO DE OREAMUNO, S.: «Artículo 2», in ASOCIACIÓN COSTARRICENSE PRO-NACIONES UNIDAS: *La Declaración Universal...*, *op. cit.*, p. 27.

<sup>43</sup> CLAVERO, B.: «De los ecos a las voces, de las leyes indigenistas a los derechos indígenas», in *Derechos de los Pueblos Indígenas*, Servicio Central de Publicaciones del Gobierno Vasco, Vitoria-Gasteiz, 1998, p. 37.



other, some States continued to maintain colonial empires<sup>44</sup>. It is the second paragraph of Article 2 which states that “no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty”.

In relation to the *principle of non-discrimination* which is proclaimed both in the preamble and in Articles 1 and 2 of the Universal Declaration, the role played by the Commission on the Status of Women should be made clear; it was, like the Commission on Human Rights, created in 1946<sup>45</sup>, and defended the inclusion of the particular and specific perspectives of women in the text of the Declaration. On this matter, Mrs. Begtrup, the President of this Commission, played an undeniably praiseworthy role, achieving significant improvements in the final text of the Declaration, as we shall see below.

An important achievement was that the Preamble of the Universal Declaration of Human Rights reaffirmed its faith in “the equal rights of men and women”, exactly as had been set out in the Preamble of the United Nations Charter. Article 1 of the Declaration, for its part, was exceptionally important from the point of view of women’s rights, as it states that:

*“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”* (emphasis added).

The expression “all human beings” is highlighted in italics because it was an expression which caused great controversy in the negotiations which led to the approval of the Universal Declaration. One of the initial proposals for this Article 1 used the expression “all men”, which would have been disastrous from a women’s point of view, and a very bad start for the Universal Declaration of Human Rights, enshrining sexist language in the very provision which was to head the Universal

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<sup>44</sup> This contradiction was solved, in part, in 1960, with the General Assembly of the United Nations’ approval of the Declaration on the Granting of Independence to Colonial Countries and Peoples, resolution 1514 (XV), of 14 December 1960. In this Declaration, as well as for the first time proclaiming the right of self-determination for all peoples, the General Assembly states that “the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights...”.

<sup>45</sup> John P. Humphrey has discussed the lobbying in favour of the rights of women performed by this Commission. In his opinion, “there was no more independent body in the United Nations” in HUMPHREY, J.P.: *Human Rights & United Nations: A Great Adventure*, *op. cit.*, p. 30.

Declaration. Finally, faced with pressure from the Commission on the Status of Women and from some of the States more supportive to women's demands, such as some of the socialist countries, the expression was achieved<sup>46</sup>.

For its part, Article 2 of the Universal Declaration is dedicated to enshrining the principle of non-discrimination. This second Article in its first paragraph states that:

"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

As we can see, it contains an extension of the circumstances in which discrimination is prohibited in relation to Article 1.3 of the United Nations Charter, which referred to non-discrimination "as to race, sex, language or religion".

Another triumph for the women's movement was the inclusion in all the provisions of the Universal Declaration of expressions such as "everyone" and "no one", thus expressing that the principle of non-discrimination should play a role in all the human rights recognised in the Universal Declaration.

There are, however, some references in the Universal Declaration that are fairly negative as regards the rights of women. Article 23.3, which recognises the right to work, states that "everyone who works has the right to just and favourable remuneration ensuring for himself *and his family* an existence worthy of human dignity..." (emphasis added). This sentence supposes that there exists only one working income in the family and that this income is, obviously, earned by the man<sup>47</sup>.

Despite these points in the Declaration that are negative for women, Johannes Morsink has come to the conclusion that "the internal history of the drafting process and the struggles involved in reaching the final product, show that from the point of view of the rights of women the Declaration is a remarkably progressive document"<sup>48</sup>. This optimistic view of the document is not, however, shared by others. In

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<sup>46</sup> The details of all these discussions and negotiations can be consulted in MORSINK, J.: «Women's Rights in the Universal Declaration», *Human Rights Quarterly*, Vol. 13, 1991, pp. 233 ff.

<sup>47</sup> This same logic is present in Article 25 of the Declaration, which proclaims the right to an adequate standard of living.

<sup>48</sup> MORSINK, J.: «Women's Rights...», *op. cit.*, p. 255.

the opinions of certain feminist writers, the evolution of human rights, both on an internal and on an international level, has been presided over by a *male-dominated* view of human rights, a view based on the experiences and the needs of men, which has marginalised the female view of the world. In the words of Carmen Magallón, "male-dominance is a defining characteristic of the tradition of Western thought and of human rights"<sup>49</sup>. In addition, the very structure of human rights, as it has been designed historically, is a structure which does not take into account the needs of women as regards human rights. International Human Rights Law itself "has developed to reflect the experiences of men and largely to exclude those of women"<sup>50</sup>. One of the reasons for this marginalisation of the expectations of women is that in the environments in which international norms are created, in States and international organisations, "the invisibility of women is striking..., very few States have women in significant positions of power"<sup>51</sup>, which contributes to the fact that it is the masculine perspective that ends up in the dominant position<sup>52</sup>. In the process of drafting the Universal Declaration for Human Rights the absence of women in the governmental delegations is enormously significant, despite the role played by Eleanor Roosevelt.

Similarly, in the preamble of the Universal Declaration there is a special mention drawing attention to the terrible crimes against human rights committed throughout the Second World War, which are some of the most important factors which led the winners of the war to take on a serious and decided commitment to human rights<sup>53</sup>. This commitment was such that, as we have already seen previously, several statements appear in the Charter of the United Nations Organisation which reaffirm the faith of the peoples of the United Nations in fundamental

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<sup>49</sup> MAGALLÓN, C.: «Los derechos humanos desde el género», in CENTRO PIGNATELLI (Ed.): *Los derechos humanos, camino hacia la paz*, Diputación General de Aragón-Seminario de Investigación para la Paz, Zaragoza, 1997, p. 259.

<sup>50</sup> CHARLESWORTH, H.: «Human Rights, Men's Rights», in PETERS, J. and WOLPER, A. (Eds.): *Women's Rights, Human Rights: International Feminist Perspectives*, Routledge, New York, 1995, p. 103.

<sup>51</sup> CHARLESWORTH, H.: «Human Rights as Men's Rights»..., *op. cit.*, p. 104. This female author offers figures which detail female representation in different human rights bodies, figures which are quite revealing as regards the discrimination which takes place.

<sup>52</sup> FREEMAN, M.A. and FRASER, A.S.: «Women's Human Rights: Making the Theory a Reality», in HENKIN, L. and HARGROVE, J.L. (Eds.): *Human Rights: An Agenda for the Next Century*, The American Society of International Law, Washington, D.C., 1994, p. 104.

<sup>53</sup> On how the events of the Second World War influenced the development of a clear conscience regarding the respect of human rights, see BUERGENTHAL, T.: *International Human Rights in a Nutshell*, West Publishing Co., Minnesota, 1988, pp. 17 ff.

rights. It is the second paragraph of the preamble of the Declaration that tells us that “disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of humankind”. It is certainly true that from then on the international community has been fully conscious of the fact that if it wants to avoid such events from reoccurring then it should immerse itself in the promotion, encouragement, and effective protection of the human rights of all people<sup>54</sup>. On the other hand, it should be mentioned that, in this second paragraph of the preamble, can be found, in one form or another, the four freedoms proclaimed by Franklin D. Roosevelt in his famous speech to the U.S. Congress in January of 1941. For the President of the New Deal, the fundamental freedoms which all human beings should enjoy are four: freedom of speech and thought; freedom of religion; freedom from want<sup>55</sup>, and freedom from fear. And so the philosophy behind Roosevelt’s thoughts is now expressed in the Universal Declaration of Human Rights<sup>56</sup>, when it states that what it means by the international recognition of human rights is “the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want”. As we can see, at the beginning of the Declaration we find a faithful representation of the four freedoms proposed by the U.S. President.

Another of the aspects present in the preamble is the connection between *the rule of law* and the effective protection of human rights. In other words, the Declaration considers “essential... that human rights should be protected by the rule of law”<sup>57</sup>. At no point in the preamble is what they consider the rule of law defined, but if we carefully read the different provisions of the Universal Declaration we can come to some conclusions as to what the drafters of the Declaration meant by this. Many of the human rights recognised by the Universal

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<sup>54</sup> Sadly, the events which have taken place in the former Yugoslavia, in Rwanda, in Liberia, and in Kosovo, have again brought to our eyes images which we had considered consigned to the history books.

<sup>55</sup> In saying “freedom from want”, Roosevelt was referring to what we know as economic, social, and cultural rights, of which he was a significant instigator, thus contributing to the widening of the traditional concept of human rights in the United States. On this topic, see JOHNSON, M.G.: «The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection for Human Rights», *op. cit.*, pp. 20 ff.

<sup>56</sup> On this subject, see EIDE, A.: «The Universal Declaration in Space and Time», in *Human Rights in a Pluralist World. Individuals and Collectivities*, UNESCO-Roosevelt Study Center, Meckler, Westport, 1990, p. 16.

<sup>57</sup> Paragraph three of the preamble of the Universal Declaration of Human Rights.

Declaration help to configure this “rule of law”, among which can be highlighted equality before the law (Article 7), the right to an effective remedy by national tribunals (Article 8), the right to be presumed innocent until proven guilty (Article 11), the right to freedom of thought, conscience and religion (Article 18), the right to freedom of opinion and expression (Article 19) etc. All of these are at the foundation of what is now known as the rule of law, an indispensable requirement for the effective protection of human rights. This is such that, as paragraph three of the preamble recognises, the protection of human rights within a rule of law is necessary “if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression”. As we can see the preamble is, due to the influence of the socialist countries, suggesting the right to rebellion against regimes which do not respect human rights. Nevertheless, in the substantive part of the Declaration we do not find any other reference to this controversial right; as such this right is to some extent minimised just as the Western countries wanted it to be<sup>58</sup>. This is another of the contrasts between the Universal Declaration and the classic Declarations of rights which included important pronouncements in favour of the right to resistance<sup>59</sup>. Despite these undeniable recognitions of the right to resistance in the first human rights Declarations, the fact is that this right has lost importance and has become diluted as the theory of human rights has evolved. Proof of this is the debate that arose regarding this right at the time when the Universal Declaration of Human Rights was being discussed in 1948. Many delegations, the most significant being those from Cuba, Chile, and France, proposed the inclusion of the right to resist oppression as a separate right in the main body of the Universal Declaration; in other words, they wanted a specific provision in favour of this right. This view met with strong support from the Soviet Union for whom it was essential to recognise a right which was already a part of the Declaration of the Rights of the People of the Soviet Union and which would be able to prevent regimes totally against human rights, such as the Nazi regime in Germany or Franco’s regime in Spain (the USSR delegate, Mr. Demchenko, referred

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<sup>58</sup> On the details and different points of view and discussions regarding this right to rebellion, see CASSESE, A.: *Los derechos humanos...*, *op. cit.*, pp. 44 ff.

<sup>59</sup> One example among many, the *French Declaration of the Rights of Man and the Citizen*, on listing the basic rights, expressly mentions “resistance to oppression”. It is the Article 2 the one which states that “the aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are: liberty, property, security, and resistance to oppression.”

expressly to Franco's regime as one of the examples where the right to resistance could be legitimately invoked). The opposite view as regards this controversial right was defended by countries like Great Britain, the United States, Belgium, and Australia, all of whom were very critical of an eventual inclusion of the right to resistance as an autonomous right in the Universal Declaration of Human Rights. For Great Britain the existence of this right in the Universal Declaration was a step that would be "inopportune and dangerous" and could entail "the risk of inciting anarchy" when, in its opinion, "non-revolutionary democratic methods should be sufficient to do away with tyranny and oppression". A similar view was held by Eleanor Roosevelt, the U.S. delegate, for whom "it would not be clever to legalise the right to rebellion given that it could be invoked by subversive groups who wanted to attack or undermine genuinely democratic governments" (the recognition in the Declaration of human rights of the right to resist acts of tyranny and oppression would be tantamount to encouraging sedition, for such a provision could be interpreted as conferring a legal character to uprisings against a government which was in no way tyrannical). However, for the American delegation, "an honest rebellion against a tyranny should be permitted by the Universal Declaration". We can see therefore that the United States and Great Britain objected to the inclusion of the right to resistance as an autonomous right, but did come to admit it as a general principle. For Ernest Davies, the British representative at the Commission negotiating the text for the Universal Declaration of Human Rights, resistance when faced with oppression could not be considered to be an authentic right, but it could be seen as a "last resort" when faced with a tyrannical or oppressive government. Eventually, given the evident lack of consensus concerning a problematic issue which had inevitable political ramifications, it was decided that this right would be included in the preamble of the Declaration, and not in the main body of it, which meant a clear diminishment of the legal and programmatic content of the right to resistance. In addition, a direct recognition of the right to resistance does not appear in paragraph three of the preamble; rather, this recognition is indirect. The preamble considers it "essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law". As we can see, the right to resistance is not shown as an authentic human right which all human beings enjoy, but rather it expresses it, just as the British delegation wanted, as a type of "last resort" when faced with a tyrannical and oppressive regime. What is made quite clear is that the majority of States present at the discus-

sions regarding the Universal Declaration in 1948 were not particularly in favour of a clear recognition of the right to resistance, and it is for this reason that those who wanted to see this right diminished triumphed in the end.

A crucial section of the preamble is its fifth paragraph which underlines the fact that "... the peoples of the United Nations... have determined to promote social progress and better standards of life in larger freedom"<sup>60</sup>. As we can see, social progress was undeniably linked with human rights. In other words, for people to truly and effectively be able to enjoy human rights, progress and development are absolutely necessary. It is for this reason that the preamble argues for a *larger concept of freedom*, that is to say that freedom is not to be understood in its simplest sense of formal freedom, but that it should include improvement in people's quality of life. In order to defend human dignity it will be vital to defend both civil and political rights, as well as those which are economic, social and cultural; these latter rights were recognised in the international sphere for the first time by the Universal Declaration of Human Rights. It is this fact that led Philip Alston to refer to the "revolutionary content"<sup>61</sup> of the Universal Declaration. And the fact is that we cannot forget that "all reflection on the success of a legal system for the promotion and protection of human rights should start with the idea that the reality of these rights is determined by economic, social and cultural conditions. In a world characterised by misery, illness, exploitation, and injustice, human rights will not be a reality without the existence of specific economic and social conditions"<sup>62</sup>. So, right from the start of the preamble, the innovative concept of the *indivisibility and interdependence* of the two categories of human rights, civil and political, and economic, social and cultural, is advancing; this is a concept that will be discussed further below.

Finally, the preamble of the Universal Declaration of Human Rights states in its final section that "a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge" (it is referring to the commitment, taken on in the sixth paragraph of the preamble, to "pledge... to achieve, in co-operation with the United Nations, the promotion of universal respect for and ob-

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<sup>60</sup> As we have seen, an identical pronouncement appears in the preamble to the United Nations Charter.

<sup>61</sup> ALSTON, P.: «The Fortieth Anniversary of the Universal Declaration of Human Rights: A Time More for Reflection than for Celebration», in *Human Rights in a Pluralist World. Individuals and Collectivities...*, *op. cit.*, p. 1.

<sup>62</sup> GROS ESPIELL, H.: *Estudios sobre Derechos Humanos II...*, *op. cit.*, p. 254.

servance of human rights and fundamental freedoms”, which clearly reminds us of Articles 55 and 56 of the United Nations Charter). This final paragraph reiterates yet again the call for the universality of human rights, namely the vital importance of achieving a concept of human rights and freedoms that can be shared by all the different peoples and cultures that inhabit the planet. Regarding this, the General Assembly of the United Nations, on proclaiming the Universal Declaration of Human Rights, defines it as “a common standard of achievement for all peoples and all nations”, thus signalling the importance of “teaching and education” for the promotion and stimulation of a true culture of human rights. With this final statement, attention is being drawn to the huge relevance of *Human Rights Education* to the achievement of this “common standard of achievement” which the General Assembly speaks of<sup>63</sup>. It is the responsibility of all, public and private institutions, universities, human rights institutes, the media, individuals, etc. that this culture of human rights should definitively be installed among us.

## 2.2. *Analysis of the main body of the Universal Declaration*

Now that we have analysed the preamble and the first two provisions of the Declaration, we will spend some time studying the different rights which have been recognised and enshrined in the Universal Declaration, which will give us a better idea of the exact concept of human rights that this text of capital importance for the history of human rights is fighting for. To this end we are going to consider the analysis carried out by one of the main inspiring figures behind the Declaration, the aforementioned René Cassin. For him, four columns of equal importance support the portico of the Universal Declaration of Human Rights: the first column is made up of personal rights and freedoms (Articles 3 to 11 of the Declaration); the second comprises the rights of the individual in relation to the groups of which he or she is a part (Articles 12 to 17); the third is made up of political rights (Articles 18 to 21), while the final column consists of economic, social and cultural rights (Articles 22 to 27). Above these four columns, says Professor

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<sup>63</sup> VERDOOT, A.: «Genèse et Expansion de la Déclaration Universelle des Droits de l’Homme. Role de René Cassin», in *Recueil des Cours*, Institut International des Droits de l’Homme, Strasbourg, 1998, p. 95. As the General Assembly stated when it proclaimed the *United Nations Decade for Human Rights Education*, this education “should constitute a comprehensive life-long process by which people at all levels in development and in all strata of society learn respect for the dignity of others and the means and methods of ensuring that respect in all societies”, Resolution 49/184, 23 December 1994.



Cassin, is placed the frontispiece, Articles 28 to 30 of the Declaration, the final provisions which establish the links between the individual and the society of which he or she is a part<sup>64</sup>. Below we will proceed to look more closely at the different divisions made by Professor Cassin.

### 2.2.1. PERSONAL RIGHTS AND FREEDOMS (ARTICLES 3 TO 11)

The rights which refer to the most intimate and personal environment of the human being are found in this first part of the human rights contained in the Universal Declaration. When discussing this part, it is essential to highlight the *right to life* recognised in Article 3 of the Declaration; this is one of the most important rights in the current list of human rights. As this third Article states, “everyone has the right to life, liberty and security of person”.

However, the recognition of a right as important as the right to life inevitably brought about significant discussions concerning its extent and scope. In the end a fairly restrictive recognition of the right to life prevailed, with the emphasis placed on its merely formal aspects. This deals with a right to the integrity of the individual when faced with any kind of interference on the part of the State. There were three more aspects which were discussed in relation to the right to life: the death penalty, abortion, and the inclusion of material elements in the definition of the right to life.

As regards the death penalty, the Soviet Union put forward a proposal for the prohibition of capital punishment in times of peace as a logical extension of the recognition of the right to life<sup>65</sup>. However, this

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<sup>64</sup> CASSIN, R.: «La Déclaration Universelle et la mise en oeuvre des droits de l’homme»..., *op. cit.*, pp. 278 ff. This is not the only way the Declaration can be divided. For example, in Spain, the respected expert on human rights, Professor Carillo Salcedo, former magistrate at the European Court of Human Rights, has distinguished five groups of the human rights recognised by the Universal Declaration: 1) inherent personal rights (Articles 3, 4, 5, 6, and 7); 2) rights guaranteeing personal security (Articles 8, 9, 10, 11, 12, and 14); 3) rights relating to the political life of the individual (Articles 18, 19, 20, and 21); 4) economic and social rights (Articles 17, 22, 23, 24, 25, 26, and 27) and 5) rights concerning to the social and juridical life of individuals (Articles 13, 15, and 26), CARRILLO SALCEDO, J.A.: «Human Rights, Universal Declaration», in *Encyclopedia of Public International Law*, Max Planck Institute, vol. 8, 1985, pp. 305 and 306.

<sup>65</sup> This proposal, in the opinion of Lars Adam Rehof, was partly as a result of “tactical reasons” derived from the Cold War, given that the USSR widely used the death penalty during that time, and continued to do so in later years; see REHOF, L.A.: «Article 3», in EIDE, A.; ALFREDSSON, G.; MELANDER, G.; REHOF, L.A. and ROSAS, A. (Eds.): *The Universal Declaration of Human Rights: A Commentary*, *op. cit.*, p. 77.

proposal was rejected, and it remained the exclusive responsibility of national legislations whether to have the death penalty<sup>66</sup>. According to some<sup>67</sup>, this was one of the principal gaps in the Universal Declaration, a gap which there have been attempts to fill with the passing of years<sup>68</sup>, but which today is still one of the principal obstacles to achieving an authentic human rights culture.

Regarding the thorny issue of abortion, which mixes ethical, religious, and legal aspects, the Universal Declaration decided in the end to again remain completely silent. Once more, due to the lack of consensus, the delegations in favour of the inclusion of an explicit prohibition on abortion in the third Article of the Declaration had to back down. The most serious proposals came from the representatives of Chile and Lebanon, defending the view that the right to life should be guaranteed "from the moment of conception"<sup>69</sup>. However, delegations as important as those from Great Britain, the Soviet Union, the United States, China, Australia, and France were opposed to an express mention of the prohibition on abortion given that this could not be reconciled with some provisions of their internal legislation, which foresaw the possibility of abortion<sup>70</sup>.

Finally, the last issue which was debated during the discussion on the right to life was the extent to which this right should be awarded, or whether the right to life should exclusively deal with formal aspects, or whether it should be complemented by elements of a material character. Following this debate, there was a proposal from Uruguay, Cuba,

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<sup>66</sup> LLANO, A.E.: *La protección de la persona humana en el Derecho Internacional...*, *op. cit.*, p. 51.

<sup>67</sup> TOMUSCHAT, C.: «The Universal Declaration of Human Rights of 1948: Does It Need any Updating?», in *The Universal Declaration of Human Rights: Its Significance in 1988*, *op. cit.*, p. 78.

<sup>68</sup> The International Covenant on Civil and Political Rights, approved in 1966, establishes certain limitations to the imposition of the death penalty in its Article 6, which is the one devoted to recognition of the right to life. It states that it can only be imposed "for the most serious of crimes"...; "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women". An analysis of this Article appears in RAMCHARAN, B.G.: "The Drafting History of Article 6 of the International Covenant on Civil and Political Rights", in RAMCHARAN, B.G. (Ed.): *The Right to Life in International Law*, Martinus Nijhoff Publishers, Dordrecht, 1985, pp. 42-56.

<sup>69</sup> On the different elements of this proposal, see BLÁZQUEZ, N.: «El recurso a la *dignidad humana* en la Declaración Universal...», *op. cit.*, p. 124.

<sup>70</sup> SAMNOY, A.: *Human Rights as International Consensus...*, *op. cit.*, p. 90. The opposition to any reference to abortion which came from Mrs. Begtrup, the President of the Commission on the Status of Women, is also significant; see VERDOOT, A.: *Naissance et Signification de la Déclaration Universelle...*, *op. cit.*, p. 98.

Lebanon, and Mexico to include a reference to economic, social and cultural rights within the right to life; in other words, that the right to life should be complemented by all the conditions which make it possible for this life to be dignified. The amendment proposed by these four States said that “everyone has the right to life, honour, liberty, physical integrity, and to the legal, economic, and social security which is necessary for the full development of human personality”<sup>71</sup>. As we can see, there is a clear link between the right to life and those economic and social conditions which are needed for the full development of the personality of individuals.

This proposal to link the right to life with economic and social rights did not enjoy the support of the majority and was not therefore in the end included in Article 3 of the Universal Declaration. This is an aspect which has also been criticised from some doctrinal standpoints. An example of such criticism comes from Cecilia Medina, for whom Article 3 of the Declaration must necessarily be linked with Articles 25 and 28 of the same document<sup>72</sup>. In other words the right to life cannot be seen as a merely formal right, but must be complemented with “the right to a standard of living adequate” for himself and his family (Article 25), and with the right “to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized” (Article 28). In the same vein are the views of Rubén Hernández Valle, for whom the right to life should include, in addition to the basic right of all human beings that nobody should attack their lives or their integrity, “the right of all human beings that social solidarity, whose maximum expression can at present be found in the State, although not exclusively, should provide them with the means necessary for subsistence...”<sup>73</sup>. And the fact is that, as René Cassin has stated, “there exists an indivisibility, in the right to life, between formal elements on the one hand, and material and economic elements, on the other”<sup>74</sup>.

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<sup>71</sup> This quotation, as well as a full analysis of the circumstances surrounding this proposal, can be found in MORSINK, J.: «The Philosophy of the Universal Declaration», *op. cit.*, pp. 327 ff.

<sup>72</sup> MEDINA, C.: «A 1988 Universal Declaration of Human Rights», in *The Universal Declaration of Human Rights...*, *op. cit.*, pp. 64 ff.

<sup>73</sup> HERNÁNDEZ VALLE, R.: «Artículo 3», in ASOCIACIÓN COSTARRICENSE PRO-NACIONES UNIDAS: *La Declaración Universal de Derechos Humanos...*, *op. cit.*, p. 32.

<sup>74</sup> In the same vein, René Cassin asks himself the following question: “Is it not well founded to say that the right to life is made up not only of the right not to be murdered or not to be arbitrarily condemned to death, but also the right to, through work, contribute to production, and receive food, accommodation, clothes etc. which correlate?” in CASSIN, R.: «La Déclaration Universelle...», *op. cit.*, pp. 285 and 286.

Advancing with this wide concept of the right to life<sup>75</sup>, we have come to the point where third generation human rights (that is, the right to development, to peace, to the environment, or to humanitarian aid) are the corollary of the right to life and to security<sup>76</sup>. The right to life would therefore become a true *synthesis-right*, a right which is situated at the foundation of all human rights, reinforcing their indivisibility and interdependence.

Article 4, for its part, prohibits slavery and the slave trade in all its forms thus culminating a process which had been initiated with the General Act of the Brussels Conference in 1890, the Convention of Saint-Germain-en-Laye of 1919, and the Geneva Convention of 1926. This was a provision which did not pose many problems as regards its drafting and inclusion in the Universal Declaration of Human Rights given that there existed a fairly generalised consensus as regards slavery *in all its forms* as an attack on basic human rights<sup>77</sup>. Nevertheless, despite the fact that many notable advances have been made in the field,

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<sup>75</sup> On this topic, see B.G. Ramcharan's interesting comments concerning the different dimensions which should be applied to the right to life, in RAMCHARAN, B.G.: «The Concept and Dimensions of the Right to Life», in RAMCHARAN, B.G. (Ed.): *The Right to Life...*, *op. cit.*, pp. 1-32. In the same vein, the Uruguayan Gross Espiell has defended the value of making the distinction between the "right to life" and the "right to live", in GROS ESPIELL, H.: "The Right to Life and the Right to Live", in *Essais sur le concept de "droit de vivre". En mémoire de Yougindra Khushalani*, Bruylant, Bruxelles, 1988, pp. 43-53.

<sup>76</sup> As Gros Espiell has stated regarding respect of the right to development, this right "results from or is a consequence of the recognition... of economic, social, and cultural rights, and in particular the right to life, which necessarily implies the right to live in a full and integrated manner"; see GROS ESPIELL, H.: «El derecho al desarrollo como un derecho de la persona humana», in *Seminario sobre protección y promoción internacional de los derechos humanos. Universalismo y Regionalismo*, Caracas, 31 de July a 4 de August de 1978, p. 11; TIKHONOV, A.A.: "The Inter-Relationship Between the Right to Life and the Right to Peace", in RAMCHARAN, B.G. (Ed.): *The Right to Life...*, *op. cit.*, pp. 97-113; BETTATI, M.: "L'accès aux victimes: droit d'ingérence ou droit d'assistance?", in *Law in Humanitarian Crises. Access to Victims: Right to intervene or Right to receive humanitarian assistance?*, Vol. II, Office for Official Publications of the European Communities, Luxembourg, 1995, p. 14.

<sup>77</sup> Concerning this issue, we cannot forget that the International Court of Justice, in referring in its pronouncement on the *Barcelona Traction* incident of 5 February 1970 to the "obligations of States towards the international community as a whole", or obligations *erga omnes*, mentioned as an example of these obligations "the principles and rules concerning the basic rights of the human person, including protection from slavery", CIJ, *Recueil*, 1970, p. 31. As we can see, the practice of slavery would have acquired the status of a *ius cogens* norm, as a result there could have been no agreement in opposition on the part of States, according to Articles 53 and 54 of the Vienna Convention on the Law of Treaties.

“many parts of the world are still experiencing diverse forms of slavery or servility, and a trade in human beings continues to exist not only in Africa, but also in Asia and some parts of Latin America”<sup>78</sup>. Therefore slavery and practices analogous to it, remain problems which both States and the international community have to face up to. This meant that, in the sphere of the United Nations, the Commission on Human Rights created the *Working Group on Contemporary Forms of Slavery* in the mid-1980s. This group has analysed different situations, which are still widespread, and which can be classed as new forms of slavery. Among them, the working group has highlighted the sale of children, child prostitution, the use of minors in pornographic publications, the exploitation of child labour etc.<sup>79</sup>, which are all situations which demand urgent attention.

Article 5 is dedicated to establishing that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. Clear proof of the fact that the international community considers the right not to have to experience any kind of torture or cruel, inhuman, or degrading treatment to be one of the fundamental rights comes from the huge legal development which Article 5 of the Universal Declaration has undergone both on regional and international levels<sup>80</sup>. However, despite legal and institutional developments, we should underline the fact that unfortunately torture continues to be a widespread practice used in many parts of the world<sup>81</sup>.

The right of all human beings “to recognition everywhere as a person before the law” is consecrated in Article 6 of the Declaration, thus prohibiting the formerly common practice of the *civil death* of a per-

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<sup>78</sup> MORA ROJAS, F.: «Artículo 4», in ASOCIACIÓN COSTARRICENSE PRO-NACIONES UNIDAS: *La Declaración Universal de Derechos Humanos...*, *op. cit.*, p. 42.

<sup>79</sup> On the work done by this work group, see ASSEN, N.M.: «Article 4», in EIDE, A.; ALFREDSSON, G.; MELANDER, G.; REHOF, L.A. and ROSAS, A. (Eds.): *The Universal Declaration of Human Rights: A Commentary*, *op. cit.*, pp. 98 ff.

<sup>80</sup> Within the universal sphere we have the Declaration of the General Assembly of the United Nations of 9 December 1975, concerning the protection of all persons from being subjected to torture and other cruel, inhuman, or degrading treatment or punishment; the International Convention of 10 December 1984 against torture and other cruel, inhuman, or degrading treatment or punishment. Additionally, on a regional level we have the European Convention of 26 November 1987 for the prevention of torture and of inhuman or degrading treatment or punishment, as well as the Inter-American Convention of 9 December 1985 to prevent and punish torture.

<sup>81</sup> Given the seriousness of the situation as regards torture, in 1985 the Commission on Human Rights of the United Nations, by virtue of its resolution 1985/33, appointed a *Special Rapporteur on Torture*.

son, or the degradation of a person to a mere object, by depriving them of their status as a person before the law<sup>82</sup>.

Article 7, for its part, is the one dedicated to establishing the principle of equality before the law and of non-discrimination<sup>83</sup>. Under this provision:

“all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination”.

Article 8 of the Declaration recognises that “everyone has the right to an effective remedy by the competent national tribunals...” for the defence of their fundamental rights, recognised “by the constitution or by law.” Another significant provision is Article 9, which states that “no one shall be subjected to arbitrary arrest, detention or exile”<sup>84</sup>. In relation to the two previous provisions is Article 10, which states that “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal...”; in other words, this provision recognises the famous *right to due process*. Obviously, the independence and impartiality of the judiciary is a fundamental element concerning the effective enjoyment of the fundamental rights and freedoms enshrined in the provisions under discussion. On this subject it has been said that these Articles “could never have full significance and validity without a truly independent and impartial judiciary”<sup>85</sup>. Finally, and along exactly the same lines as Articles 8, 9, and 10, Article 11 enshrines the

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<sup>82</sup> On this issue, see BOGDAN, M.: «Article 6», in EIDE, A.; ALFREDSSON, G.; MELANDER, G.; REHOF, L.A. and ROSAS, A. (Eds.): *The Universal Declaration...*, *op. cit.*, pp. 112 ff.

<sup>83</sup> This general principle of non discrimination has been extensively developed and made more specific by the normative work undertaken under the auspices of the United Nations. Among the most significant achievements the following can be highlighted: the Convention of 14 December 1960 regarding the fight against discrimination in education; the International Convention of 21 December 1965 concerning the elimination of all forms of racial discrimination; and the Convention of 18 December 1979 concerning the elimination of all forms of discrimination against women.

<sup>84</sup> Nevertheless, arbitrary detention continues to be a fairly widespread practice throughout the international community, as can be seen from the fact that through the 1991/42 Resolution of 5 March 1991, the Commission on Human Rights proceeded to create a *Working Group on Arbitrary Detention*. According to its mandate, this group can “investigate cases of detention imposed arbitrarily or otherwise inconsistently with relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments...”.

<sup>85</sup> MONTERO CASTRO, J.A.: «Artículos 9, 10 y 11», in ASOCIACIÓN COSTARRICENSE PRO-NAACIONES UNIDAS: *La Declaración Universal...*, *op. cit.*, p. 75.

*principle of presumption of innocence*<sup>86</sup>, as well as the principle of *non-retroactivity of criminal law*<sup>87</sup>.

As can be seen, all of these provisions which deal with rights directly related to the personal and civil sphere of the individual seek to establish and perpetuate the “rule of law” which is mentioned in the Preamble to the Universal Declaration. To conclude, democracy and respect for the basic rules of the rule of law are indispensable for the construction of an environment of rights and freedoms<sup>88</sup>.

### 2.2.2. RIGHTS OF THE INDIVIDUAL IN RELATION TO THE GROUPS OF WHICH HE OR SHE IS A PART (ARTICLES 12 TO 17)

This second of the columns which form the principal foundations of the Universal Declaration of Human Rights is made up of those rights and freedoms which refer to the relationships of the individual with the different social groups of which he or she is necessarily a member. Hence Article 12 protects people’s private and family life, stating that “no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation...”. In order to protect this right, Article 12 states that “everyone has the right to the protection of the law against such interference or attacks”.

Article 13 sets out the right to freedom of movement and that of residence as well as the right to freely leave the country one is in. According to the first section of this provision, “everyone has the right to freedom of movement and residence within the borders of each State”, and the second states that “everyone has the right to leave any country, including his own, and to return to his country”. As we can see, this provision sets out the right of all people to move and freely set up residence within a State, regardless of whether they are a national of that State. In other words, once a person has legally entered a State, that person has the same rights as a national as regards residence and free movement. Similarly, the same Article recognises the right of all people to leave the

<sup>86</sup> In its first paragraph, Article 11 states that “everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”

<sup>87</sup> For its part, Article 11.2 states that “no one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal 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 the penal offence was committed”.

<sup>88</sup> On the interaction between democracy and human rights, see ROLDÁN BARBERO, J.: *Democracia y Derecho Internacional*, Civitas, Madrid, 1994, in particular pp. 119 ff.

country in which they find themselves, even if this happens to be their own country. As Alejandro Etienne Llano has said, "this right to emigration can only be effective as far as facilities for immigration and free movement exist, both within and through other States<sup>89</sup>. But this last right is not mentioned in Article 13 of the Universal Declaration. Therefore, the right to leave one's country exists, but there is not a corresponding obligation on other States to welcome that person.

This provision, as was to be expected, brought about significant discussions between States given that they found themselves facing a delicate problem which affects one of the main issues of sovereignty, namely how to establish rules which permit a person to freely leave a State, and as regards whether a State is under the obligation to accept his or her entry. On this matter the representative of the Soviet Union, supported by the delegates from the Ukraine, Belarus, and Saudi Arabia<sup>90</sup>, stated that the adoption of Article 13 put Article 2.7 of the United Nations Charter in danger; this is a provision which establishes the principle of non-intervention in affairs which fall essentially under the domestic jurisdiction of States. In addition, this provision in accordance with the opinions of Mr. Paulov (USSR), deliberately ignored the right of every State to freely regulate the movement of people both within its territory, and at exit points on borders. The huge restrictions which former socialist bloc countries used to place both on free movement within the country and, more significantly, on exiting the country, are well known<sup>91</sup>.

Along the same lines, Article 14 is devoted to the recognition of the right to asylum, stating that "everyone has the right to seek and to enjoy in other countries asylum from persecution". As we can see, this Article 14 establishes the right of all people who find themselves facing persecution to seek asylum. What it does not establish, unfortunately for those who are asylum seekers, is the obligation on countries to receive those seeking asylum; this, according to some, deprives this right of any real effectiveness<sup>92</sup>. The provision of asylum, therefore, is defined as an "optional act, not a duty whose fulfilment is obligatory for States"<sup>93</sup>. Additionally, this right to asylum has appropriate limitations,

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<sup>89</sup> LLANO, A.E.: *La protección de la persona humana en el Derecho Internacional...*, *op. cit.*, p. 73.

<sup>90</sup> These and other opinions can be found in VERDOOT, A.: *Naissance et Signification de la Déclaration...*, *op. cit.*, pp. 147 ff.

<sup>91</sup> GRAHL-MADSEN, A.: «Article 13», in EIDE, A...: *op. cit.*, p. 210.

<sup>92</sup> LLANO, A.E.: *La protección de la persona humana...*, *op. cit.*, p. 75.

<sup>93</sup> TINOCO CASADO, L.D.: «Artículo 14», in ASOCIACIÓN COSTARRICENSE PRO-NACIONES UNIDAS: *op. cit.*, p. 97.



as is established in Article 14.2. According to this provision, "this right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations".

Article 15 recognises the right of all people to have a nationality of which they cannot be arbitrarily deprived, and also the right to change nationality<sup>94</sup>. This is an important right given that nationality is, in many cases, the condition for the enjoyment of some of the rights recognised in the Universal Declaration of Human Rights. Above all, the objective of this Article 15 is to avoid *statelessness*, or the legal situation in which a person holds no nationality<sup>95</sup>.

The following Article, the sixteenth, is a little more controversial, proclaiming as it does the right to marriage without restriction<sup>96</sup>, and to found a family, classing this as "the natural and fundamental group unit of society". The Article also states the equality of men and women as regards marriage<sup>97</sup>. This is a controversial provision because some of the delegations from Muslim countries present at the discussions leading to the approval of the Universal Declaration of Human Rights expressed a certain amount of reserve concerning the topic, mainly motivated by cultural and religious factors. This led to the abstention of Saudi Arabia at the final vote on the Universal Declaration because it was not totally satisfied with the final text of Articles 16 and 18, which will be commented on below. This reserve on the part of the Muslim world was basically due to their particular way of seeing the roles of men and of women in society, and because of the role played by religion in their so-

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<sup>94</sup> Article 15: 1. Everyone has the right to a nationality.

2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

<sup>95</sup> A United Nations development of this Article 15 was made through the Convention on the Reduction of Statelessness, 30 August 1961.

<sup>96</sup> It may seem strange that the right to marriage is recognised in the Declaration; nevertheless, this can be understood through an analysis of its historical significance: the Second World War had demonstrated the risks of State planning of family life, with discriminatory criteria on the basis of race, nationality, or religion (a ban on marriages between Germans and those who had ancestry which was a quarter or more Jewish...), in PÉREZ VARGAS, V.: «Artículo 16», in ASOCIACIÓN COSTARRICENSE...: *op. cit.*, p. 108.

<sup>97</sup> Article 16: 1. "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State".

cities. As an Islamic commentator on the Universal Declaration has stated, Article 16 contains many parts "which directly contradict Islamic teaching and which, therefore, are totally unacceptable for Muslims"<sup>98</sup>. The fact is that Islam forbids marriage between a Muslim and someone of another religion, which contradicts the first paragraph of Article 16, which states that men and women have the right to marry "without any limitation due to race, nationality or religion". Similarly, natural equality between men and women does not exist in Islam which believes that nature made them differently and therefore their roles in society will also be different. Finally, Islam only accepts divorce when it is requested by the man, and not by the woman, and so it cannot accept that, as Article 16.1 states, men and women should have the same rights "at [the] dissolution [of the marriage]"<sup>99</sup>. As we can see, Islam questions one of the basic foundations of the Universal Declaration, namely the principle of non-discrimination.

Following on from this analysis, we should remember that some of the provisions of the Declaration, especially Article 16 which is discussed above, can pose certain problems as regards their universal acceptance. On this subject, Philip Alston has mentioned "the importance of being culturally sensitive in our interpretation and application of some of the norms [contained in the Declaration]", particularly referring to Article 16 and its statement that the family is "the natural and fundamental group unit of society"<sup>100</sup>. It is possible that this is true in the Western world, but, as we leave behind this world, both culturally and anthropologically, it is very possible that the truth of this statement diffuses, and begins bit by bit to lose its clarity. For example, the way of understanding the family in certain parts of Africa is nothing like the Western concept of the family, which is based on the nuclear family<sup>101</sup>.

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<sup>98</sup> TABANDEH, S.: *A Muslim Commentary of the Universal Declaration of Human Rights*, F.T. Goulding & Company Limited, London, 1970, p. 35.

<sup>99</sup> A detailed analysis of Islamic reservations as regards Article 16 of the Universal Declaration can be found in TABANDEH, S.: *A Muslim Commentary...*, *op. cit.*, pp. 36 ff.

<sup>100</sup> ALSTON, P.: «The Fortieth Anniversary of the Universal Declaration of Human Rights: A Time More for Reflection than for Celebration», in *Human Rights in a Pluralist World...*, *op. cit.*, pp. 7 and 8. Similarly, there have been feminist opinions expressed against this strong declaration in favour of the family. Such declarations in favour of the family tend to go against the rights of women, given that through them they are not accorded rights as individuals, but only as mothers or housewives; on this issue, see MORSINK, J.: "Women's Rights in the Universal Declaration", *op. cit.*, pp. 239 ff.

<sup>101</sup> Regarding conceptions of human rights in Africa concerning cultural, ideological, and legal issues, see. MOTALA, Z.: "Human Rights in Africa: A Cultural, Ideological and Legal Examination", *Hastings International and Comparative Review*, Vol. 12, no. 2, winter 1989, pp. 373-410.

We must conclude that this issue is one which brings up the controversial and thorny issue of the universality of the human rights enshrined in the Declaration.

Another incredibly conflictive issue regarding Article 16 of the Universal Declaration was the question of divorce, given that some delegations from Catholic countries could not accept an express mention of the possibility of divorce<sup>102</sup>. In the end, due to pressure from those countries which included divorce in their legislation, the Catholic countries had to accept an indirect mention of divorce in Article 16 which establishes that “men and women... are entitled to equal rights as to marriage, during marriage and *at its dissolution*” (emphasis added).

Completing this section, Article 17 is devoted to recognition of the right to property. Following bitter arguments and intense discussion between the many delegations from the socialist bloc and from the capitalist nations, a form of consensus was reached regarding the formulation of this right. The right to property was established as follows: the first paragraph of Article 17 states that “everyone has the right to own property alone as well as in association with others”, with the second paragraph stating that “no one shall be arbitrarily deprived of his property”; in other words, the right to property is not seen as an absolute right –under certain circumstances it is possible to legitimately deprive a person of his or her property<sup>103</sup>. As we can see, the consensus was that *individual and collective* property are recognised, which was an attempt to include both Western and Eastern views on the matter. However, true consensus was still far from being reached as can be seen from the fact that, when the two International Covenants on human rights were approved in 1966, the right to property was not explicitly mentioned in either of them.

### 2.2.3. POLITICAL RIGHTS AND FREEDOMS (ARTICLES 18 TO 21)

The first section, as we have seen, was made up of civil rights and freedoms, indispensable for the “rule of law”; this concept should also, undoubtedly, be able to count on rights and freedoms of a political nature. Along these lines, Article 18 enshrines the recognition of the

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<sup>102</sup> Mr. Vanistendael's opinions on the matter are significant; he stated that “if the Declaration proclaimed the right to dissolve marriage, it would be unacceptable for hundreds of millions of Christians in countries that were members of the United Nations”, quoted in MORSINK, J.: “Women's Rights...”, *op. cit.*, p. 246.

<sup>103</sup> ALFREDSSON, G.: “Article 17”, in EIDE, A...: *op. cit.*, p. 256.

“right to freedom of thought, conscience and religion”<sup>104</sup>. As before, there were problems for some of the delegations from Islamic countries, this time regarding recognition of freedom of religion and freedom to change religion. This reservation from Islamic countries led to Saudi Arabia’s abstention<sup>105</sup>. As René Cassin has stated regarding the position of the Islamic countries, especially that of Saudi Arabia, “it is difficult to demand that theocratic regimes based on a particular religion proclaim the possibility of the individual to elude it”<sup>106</sup>.

Another basic right needed for the establishment of a democratic regime of law is the “right to freedom of opinion and expression” mentioned in Article 19 of the Declaration<sup>107</sup>. And for its part, Article 20 recognises the right of all people “to freedom of peaceful assembly and association”, continuing in its second paragraph by stating that “no one may be compelled to belong to an organisation”.

The last of the provisions in this section is the one aimed at establishing the right to participation in politics. Due to its importance for the establishment of a democratic society, Article 21 of the Universal Declaration is reproduced in full below:

1. “Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right of equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”

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<sup>104</sup> As Article 18 of the Declaration states, “everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance”.

<sup>105</sup> Similarly, Egypt demanded that its reservations figure as a *sine qua non* condition for its affirmative vote concerning the whole of the Universal Declaration, for the same reasons. On the reservations of certain Islamic countries regarding Articles 16 and 18, see VERDOOT, A.: *Naissance et Signification de la Déclaration Universelle des Droits de l’Homme...*, *op. cit.*, p. 77. The theological theories underlying this refusal of the possibility to change religion can be found in TABANDEH, S.: *A Muslim Commentary of the Universal Declaration...*, *op. cit.*, pp. 70 ff.

<sup>106</sup> CASSIN, R.: “La Déclaration Universelle et la mise en oeuvre des droits de l’homme”..., *op. cit.*, p. 287.

<sup>107</sup> This Article states that “everyone has the right to freedom of opinion and expression; this *right* includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”.

As we can see, this provision clearly expresses the liberal and democratic credo favoured by Western countries which is based on the principles of popular sovereignty and political participation<sup>108</sup>. However, this democratic credo posed problems regarding the acceptance of all its consequences for delegations from the Socialist bloc, and for certain Third World countries. Again, this right must be flexibly interpreted in order for it to be able to contain concepts of democracy present in cultural environments different to that of the West<sup>109</sup>.

#### 2.2.4. ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ARTICLES 22 TO 27)

We will now deal with the group of rights that was a true innovation as regards the international protection of human rights. Until the time of the drafting of the Declaration, no international text had collected together what we call *second generation* human rights. As the Belgian representative at the discussions leading to the approval of the Universal Declaration said, "... it is only after Article 22 that we really made innovations concerning human rights"<sup>110</sup>. The Universal Declaration of Human Rights thus became "the first international legal text to create a fully comprehensive catalogue of human rights"<sup>111</sup>. However, this should be looked at in conjunction with the American Declaration of the Rights and Duties of Man, approved a few months before the Universal Declaration in May 1948; this was a document which took in economic, social, and cultural rights. Also, this recognition of second generation rights was a more vigorous recognition than the one which appears in the Universal Declaration; this has been highlighted as one of the principal differences between the two texts<sup>112</sup>.

<sup>108</sup> VOLIO JIMÉNEZ, F.: "Artículo 21", in ASOCIACIÓN COSTARRICENSE...: *op. cit.*, p. 149.

<sup>109</sup> An interesting analysis of the concept of political power in African societies can be found in MATALA KABANGU, T.: *El poder por el poder en Africa*, Servicio Central de Publicaciones del Gobierno Vasco, Vitoria-Gasteiz, 1996. See also KUMADO, K.: "Africa and the Universal Declaration of Human Rights", in *The Universal Declaration of Human Rights: Its Significance in 1988*, Report of the Maastricht/Utrecht Workshop..., *op. cit.*, pp. 55-60.

<sup>110</sup> See the text reproduced in GONZÁLEZ, N.: "¿Hacia una nueva Declaración de Derechos Humanos?", in *El derecho al desarrollo o el desarrollo de los derechos*, Editorial Complutense, Madrid, 1991, p. 378.

<sup>111</sup> SOMMERMANN, K-P.: "El desarrollo de los derechos humanos desde la Declaración Universal de 1948", in PÉREZ LUÑO, A-E. (Coord.): *Derechos Humanos y Constitucionalismo ante el Tercer Milenio*, Marcial Pons, Madrid, 1996, p. 98.

<sup>112</sup> For Gros Espiell, the American Declaration "enumerates with more precision the economic, social and cultural rights, which the Universal Declaration summarizes" (Arts. 22 to 27)», in GROS ESPIELL, H.: "La Declaración Americana...", *op. cit.*, p. 51.

However, the inclusion of these economic, social, and cultural rights in the text of the Universal Declaration of Human Rights was far from peaceful. As we have already shown, these rights were mainly supported by Latin American and Socialist countries, while Western countries were less enthusiastic about their inclusion. In the end, after some significant hurdles, equilibrium was reached in the Universal Declaration between civil and political rights, and economic, social and cultural rights, which could be said to be one of the greatest achievements of the Declaration. René Cassin's input was fundamental to this process; it can be stated without doubt that it was thanks to his intellectual talents and negotiation skills that the huge problems and reservations on the topic were overcome. As Albert Verdoot has said with regards to Professor Cassin's significant input,

"this latter person is taking advantage of his past as an eminent jurist, and of his special abilities to conciliate the liberal tendencies of the French Declaration of 1789 and the socialist tendencies of modern constitutions, especially those of the USSR. He managed to keep both traditional rights and the new economic and social rights in the Universal Declaration"<sup>113</sup>.

Even so, and despite all the efforts carried out to strike a balance between the two categories of human rights satisfactory for all, the delegation from South Africa abstained in the final vote on the Universal Declaration of Human Rights due to the inclusion of economic and social rights. For them, economic, social and cultural rights, which cannot (in their opinion) be seen as fundamental rights, should never have appeared in the text of the Declaration.

The most important provision in the list of economic, social and cultural rights is, without doubt, Article 22, a type of *chapeau*<sup>114</sup> article, to use René Cassin's term; in other words, it is a provision which serves as a basis and a framework which marks out the guidelines for all the articles discussed in this chapter. This Article is the one that recognises the right of all people to social security. As it states,

"everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and internation-

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<sup>113</sup> VERDOOT, A.: *Naissance et Signification de la Déclaration Universelle...*, *op. cit.*, p. 49. Along the same lines, Eide and Alfredsson called René Cassin "an eminent draftsman with a deep social commitment..." in EIDE, A. and ALFREDSSON, G.: "Introduction", in EIDE, A.; ALFREDSSON, G.; MELANDER, G.; REHOF, L.A. and ROSAS, A. (Eds.): *The Universal Declaration of Human Rights...*, *op. cit.*, p. 11.

<sup>114</sup> On this topic, see René Cassin's preface to VERDOOT, A.: *op. cit.*, p. IX.

al co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”

Firstly, it is important to recognise the fact that this Article acknowledges the right that every person has to social security. However, it is equally significant that it considers economic, social, and cultural rights to be “indispensable” for the dignity of the human being and for the “free development of his personality”. These statements are of crucial importance, and serve, once and for all, to support the “larger freedom” of the preamble that was discussed above<sup>115</sup>. Article 22 clearly and unequivocally sets out the *indivisibility and interdependence* of the two categories of human rights, namely those which are civil and political, and those which are economic, social and cultural<sup>116</sup>. Both categories of human rights must be adequately treated if there is truly a desire to guarantee the full dignity of the human being. However in practice the divergences between the different conceptions of human rights have continued, thus making a fully comprehensive definition of them very difficult. As Professor Cassese has, somewhat sceptically, stated,

“the divergences are significant, and the diplomatic formulae with which, as documentation shows, attempts have been made at overcoming the differences between the opposing sides, have little value. One of these formulae speaks of *indivisibility and interdependence*. This is a comfortable phrase which serves to calm the discussion, leaving things exactly as they were. In reality, the problems continue, and the political and ideological confrontations are only postponed, to reappear more fiercely at the first available opportunity”<sup>117</sup>.

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<sup>115</sup> On this topic we have already discussed the enormous contribution of President Roosevelt and his *Speech on the Four Freedoms*, in which he stated the need for economic and social rights for an adequate concept of freedom. See JOHNSON, M.G.: “The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection for Human Rights”, *op. cit.*, pp. 20 ff.

<sup>116</sup> The indivisibility and interdependence of human rights as a whole has been strongly reaffirmed by many resolutions made by the General Assembly of the United Nations; both the International Conference on Human Rights which was held in Teheran in 1968, and that which took place in Vienna in 1993 have proclaimed this indivisibility and interdependence, with the Vienna Declaration stating that all human rights “are indivisible and interdependent and interrelated”, *Vienna Declaration and Programme of Action*, World Conference on Human Rights, Vienna, 14 to 25 June 1993, A/CONF.157/23, of 12 of July 1993, paragraph 5.

<sup>117</sup> CASSESE, A.: *Los derechos humanos en el mundo contemporáneo...*, *op. cit.*, p. 72.

An example of these deep divisions, and of how difficult it is to successfully overcome them in practice, comes from the negotiations in the lead-up to the approval of an International Covenant on Human Rights to complement the regulations of the Universal Declaration of Human Rights. These discussions were begun as soon as the Universal Declaration was adopted in 1948. However, the job could not be completed until 1966, eighteen years later, and the Covenants could not come into force until 1976, a further ten years later. In addition, the approval of one single Covenant which brought together all fundamental human rights was not possible. However now that the Cold War has ended it is to be hoped that conflicts regarding the concept of human rights will begin to dissipate<sup>118</sup>. Nevertheless, Philip Alston has warned against “the clear endeavour to exclude economic and social rights” from a clearer definition of human rights, a project which is mainly being undertaken by the United States<sup>119</sup>. As Martha H. Good has said, in reference to President Roosevelt’s Four Freedoms and his vigorous defence of economic and social rights, “more than forty years later, however, there is not freedom from want throughout the world or in the United States”<sup>120</sup>.

Another element of Article 22 that it is important to highlight, and which contributes to the general characterisation of economic, social and cultural rights, is that these rights are dependent on “national effort” and “international co-operation”. If however State resources are not sufficient, reinforcement through international co-operation should be provided. When we are faced with second generation rights we realise that they are rights which depend on all the resources which States have, both economic and otherwise. These rights are not

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<sup>118</sup> The situation is such that many countries from the former socialist bloc are joining the Council of Europe, and are ratifying the European Convention of Human Rights (1950). On the subject, see SAENZ DE SANTA MARIA, M.P.: “Consejo de Europa y derechos humanos: desarrollos recientes”, in *Andorra en el ámbito jurídico europeo*, XVI Jornadas de la Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales, Principado de Andorra, 21-23 September 1995, Marcial Pons, Madrid, 1996, especially pp. 215 ff.

<sup>119</sup> ALSTON, P.: «The Fortieth Anniversary of the Universal Declaration of Human Rights...», *op. cit.*, p. 6. Proof of this intent of exclusion can be found in the fact that the United States has still not ratified the International Covenant on economic, social, and cultural rights, and, even more worryingly, there do not appear to be any reliable sources that indicate that it will do so at any point in the near future.

<sup>120</sup> As the same author says, “American courts have never recognized any governmental duty to provide welfare or subsistence benefits to citizens”, GOOD, M.H.: «Freedom from Want: the Failure of United States Courts to Protect Subsistence Rights», *Human Rights Quarterly*, Vol. 6, 1984, p. 335.



absolute but rather are characterised by *progressivism*; they depend on available resources. Article 22 itself recognises that these rights depend on "the organization and resources of each state". The conclusion we can reach is that, for enjoyment of economic, social and cultural rights, there must be complementary national effort and international co-operation, especially if we take into account the difficulties faced by many Third World countries. In many of these, given the scarcity of resources, the fulfilment of second generation rights requires closer co-operation from industrialised countries. With this in mind, we are currently witnessing the 'divorce' of developed countries from under-developed countries as regards the concept of human rights and the emphasis which should be placed on different rights. In the wise words of Eide and Alfredsson, "there are indications that previous tensions between East and West are being replaced by increasing differences between North and South"<sup>121</sup>. The debate concerning the so-called *third generation rights*, or *solidarity rights*, which first appeared in the 1970s, is proof of this growing tension<sup>122</sup>.

The next provision in this section devoted to second generation human rights is Article 23, which enshrines the right to work, to equal pay and to just remuneration, as well as the right to freely join a trade union. This right to work is complemented by Article 24, which deals with the right to rest, leisure, a reasonable limitation of working hours, and periodic holidays with pay. However, it should be taken into account that Articles 23 and 24 of the Universal Declaration "do nothing more than enshrine, at the highest international level, principles which were already being incorporated into the Conventions and Recommendations of the ILO"<sup>123</sup>.

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<sup>121</sup> EIDE, A. and ALFREDSSON, G.: «Introduction», in EIDE, A.; ALFREDSSON, G.; MELANDER, G.; REHOF, L.A. and ROSAS, A. (Eds.): *The Universal Declaration of Human Rights...*, *op. cit.*, p. 12.

<sup>122</sup> Third generation rights are a new variety of rights which have come about at the hands of developing countries, and which emphasise their principle demands and needs. As was foreseeable, these new rights have met fierce opposition from developed countries. Among these new rights, we can mention the right to development, the right to environment, the right to humanitarian aid, the right to peace etc. There exists extensive literature on the issue of third generation rights. Among others, see URIBE VARGAS, D.: *La tercera generación de derechos humanos y la paz*, Plaza&Janes, Bogotá, 1986; ALSTON, P.: "Conjuring up new human rights: a proposal for quality control", *American Journal of International Law*, Vol. 78, 1984, pp. 607-621; MARKS, S.: "Emerging Human Rights: a new generation for the 1980s?", *Rutgers Law Review*, Vol. 33, 1981, pp. 435-452.

<sup>123</sup> ARAUZ AGUILAR, A.: «Artículos 23 y 24», in ASOCIACIÓN COSTARRICENSE...: *op. cit.*, p. 174.

Another important provision is Article 25 which is devoted to the recognition of an adequate standard of living for all human beings. As we have seen previously, this provision should be examined in the light of Article 3 of the Declaration. The fact is that, as Gonzalo J. Facio rightly says, “in poor countries, the right to life is linked above all with the possibility of attaining the necessary minimum for subsistence, such as food, accommodation, health, education etc...”<sup>124</sup>. As Article 25.1 tells us:

“everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control”<sup>125</sup>.

Article 26 is devoted to recognition of the *right to education*, and sets out some of the principles applicable to this right. First, states the Declaration, education should be free “at least in the elementary and fundamental stages”. Secondly, this elementary education will be compulsory. Finally, as regards higher education, access to it “shall be equally accessible to all on the basis of merit”.

The second paragraph of Article 26 is of transcendental importance, given that it is where the objectives of education are established. According to this provision:

“education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace”.

As we can see, education, according to the view expressed in the Universal Declaration, must clearly be aimed at the respect and the promotion of human rights, tolerance, and peace<sup>126</sup>. It is here that the rel-

<sup>124</sup> FACIO, G.J.: “Artículo 22”, in ASOCIACIÓN COSTARRICENSE...: *op. cit.*, p. 166.

<sup>125</sup> In addition, and thanks to the influence of the Commission on the Status of Women, presided over by Mrs. Begtrup, a second section was included in Article 25, which is dedicated to special protection for motherhood and childhood, as well as social protection for children whether they are born in or out of wedlock.

<sup>126</sup> FLINTERMAN, C.: “The Universal Declaration of Human Rights and the need for Human Rights Education”, in *The Universal Declaration of Human Rights: its Significance in 1988*, *op. cit.*, pp. 41-44.

evance of *Human Rights Education*<sup>127</sup> comes to the fore, as a fundamental means for the conversion of education systems into instruments for the enjoyment and promotion of human rights, democracy, peace, and development. This is exactly the view expressed in the 1993 Vienna Declaration, which says that

“the World Conference on Human Rights reiterates that States are duty-bound... to ensure that education is aimed at strengthening the respect of human rights and fundamental freedoms. The World Conference on Human Rights emphasizes the importance of incorporating the subject of human rights education programmes and calls upon States to do so. Education should promote understanding, tolerance, peace and friendly relations between the nations and all racial or religious groups... Therefore, education on human rights and the dissemination of proper information... play an important role in the promotion and respect of human rights...”<sup>128</sup>.

With regards to this huge importance afforded to human rights education, it has been argued that this education has become a true human right in itself, namely the right to human rights education<sup>129</sup>.

Finally, the last element of the right to education appears in paragraph three of Article 26 of the Universal Declaration, establishing the “prior right” of parents “to choose the kind of education that shall be given to their children”; it proclaims the principle of parental freedom to choose the education system they want their children to be part of<sup>130</sup>.

The next provision, Article 27, establishes the right of all people to participate in the cultural life of the community, as well as the right to take advantage of it, while also protecting the copyright. The first paragraph of this Article states that “everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share

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<sup>127</sup> As regards Education in Human Rights, many materials have appeared in recent years, and they aim to promote and extend this education. Among others ANDREOPOULOS, G.J. and CLAUDE, R.P. (Eds.): *Human Rights Education for the Twenty-First Century*, University of Pennsylvania Press, Philadelphia, 1997; INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS: *Educación en Derechos Humanos. Texto Autoformativo*, IIDH, San José, 1994; AMNISTÍA INTERNACIONAL: *Educación en Derechos Humanos. Propuestas Didácticas*, Los Libros de la Catarata, Madrid, 1995.

<sup>128</sup> *Vienna Declaration and Programme of Action*, World Conference on Human Rights, Vienna, 14 to 25 June 1993, para. 33.

<sup>129</sup> ALFREDSSON, G.: “The Right to Human Rights Education”, en EIDE, A.; KRAUSE, C. and ROSAS, A. (Eds.): *Economic, Social and Cultural Rights*, Martinus Nijhoff Publishers, Dordrecht, 1995, pp. 213-227.

<sup>130</sup> ARAJARVI, P.: “Article 26”, en EIDE, A...: *op. cit.*, p. 411.

in scientific advancement and its benefits". As we can see, this section attempts to introduce cultural rights as a separate and quite different category. However it should be made clear that, as the majority of authors agree, little attention is given to cultural rights in the Universal Declaration, despite the fact that there were serious attempts for them to play a more significant role<sup>131</sup>. One of the more important reasons for this lack of interest in cultural rights seems to have been the choice to reject the inclusion of minority rights in the Declaration<sup>132</sup>, in significant contrast to the attention paid to minority rights at the time of the League of Nations. The fact is that whether to include minority rights in the Universal Declaration was one of the most controversial issues discussed during the drafting of the document<sup>133</sup>. The strongest opposition came from the Western countries and particularly Latin America; this latter opposition was due to the fact that the Latin Americans considered that they did not have any minorities, either indigenous or national. This has been criticised by many<sup>134</sup>, as it attempted to deny the reality of the existence of minorities and indigenous peoples, the true *absent humanity*<sup>135</sup> in the process of drafting the Universal Declaration of Human Rights; this, in turn, posed problems regarding the supposed universality of the document<sup>136</sup>. The States present assumed "the right to decide not only concerning themselves, but also concerning the totality of peoples in the world... For the time being, they assumed the majority of humanity to be incapable of taking immediate control of their own rights"<sup>137</sup>. In the end, as we know, the absence of minority

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<sup>131</sup> Regarding this issue, it is interesting to highlight the contribution of the *American Anthropological Association*, whose Executive Committee made a presentation in 1947 to the Commission in charge of producing the Universal Declaration, using a text which argued for recognition of the importance of the rights of cultural groups. See the text in "Statement on Human Rights submitted to the Commission on Human Rights", *American Anthropologist*, Vol. 49, no. 4, October-December 1947. However, it would appear that this input was not particularly successful, given that it was not reflected in the final text of the Declaration.

<sup>132</sup> MELANDER, G.: "Article 27", in EIDE, A...: *op. cit.*, p. 429.

<sup>133</sup> SAMNOY, A.: *Human Rights as International Consensus. The Making of the Universal Declaration...*, *op. cit.*, p. 91.

<sup>134</sup> VAN BOVEN, T.: "40 Years of the Universal Declaration of Human Rights", in *The Universal Declaration of Human Rights: Its Significance...*, *op. cit.*, p. 17.

<sup>135</sup> This expression was coined by Bartolomé Clavero from Seville University, an expert on the rights of indigenous peoples; see CLAVERO, B.: "De los ecos a las voces, de las leyes indigenistas a los derechos indígenas", in *Derechos de los Pueblos Indígenas*, *op. cit.*, p. 37.

<sup>136</sup> STAVENHAGEN, R.: "The Universal Declaration: Cultural and Structural Constraints", in *The Universal Declaration...*, *op. cit.*, pp. 71 ff.

<sup>137</sup> CLAVERO, B.: «De los ecos...», *op. cit.*, p. 37.

rights is one of the principal *lacunae* of the Universal Declaration, a gap which there have been attempts to fill as time has passed<sup>138</sup>.

For its part, the second paragraph of Article 27 enshrines recognition of copyright, stating that “everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”.

So, as we have seen, the Universal Declaration of Human Rights very significantly recognises the most important economic, social and cultural rights, thus contributing to, or to least attempting to, the indivisibility and interdependence of the two generations of human rights.

#### 2.2.5. RIGHTS THAT ESTABLISH THE LINKS BETWEEN THE INDIVIDUAL AND SOCIETY (ARTICLES 28 TO 30)

René Cassin has called these provisions “the frontispiece of the Universal Declaration”<sup>139</sup>, noting their tremendous importance. This section sets out that “the full and free development of any person’s personality is possible only when he or she forms part of a community and observes his or her duties to it”<sup>140</sup>. However, despite Professor Cassin’s special emphasis on these articles, the truth is that they have been given very little attention during the subsequent development of the provisions of the Declaration; to some extent, these sections have been the victims of “forgetfulness”; the fact that they have been forgotten is a fully conscious decision given that people are not willing to accept all the consequences which would come from a full and effective acceptance of these articles<sup>141</sup>.

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<sup>138</sup> Regarding the rights of minorities, in 1966 the International Covenant on Civil and Political Rights in its Article 27 established that “in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”. As regards the rights of indigenous peoples, the most important work has been done by ILO, with many different Conventions on the subject. The most significant and recent are the Convention concerning Indigenous and Tribal Peoples in Independent Countries, ILO Convention No. 169, adopted on 27 June 1989, and the UN Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly of the UN on 13 September 2007, Resolution 61/295.

<sup>139</sup> CASSIN, R.: “La Déclaration Universelle et la mise en oeuvre...”, *op. cit.*, p. 278.

<sup>140</sup> EIDE, A.: “The Universal Declaration in Space and Time”, in *Human Rights in a Pluralist World...*, *op. cit.*, p. 19.

<sup>141</sup> It is very significant that, in the International Covenants of 1966, there is no mention either to the rights of duties of the individual towards the community, nor to Article 28, the Article which relates the enjoyment of human rights to the establishment of a particular social and international order.

The first of these provisions is Article 28, a human right which has been described as “exceptional”<sup>142</sup>, and which sets out that:

“everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized”.

As we can see this Article proclaims the importance of the social and international order for the satisfaction of human rights. In other words, human rights will, on many occasions, depend on the prevailing social order of a particular State as well as on the structure of the international order. For many Article 28 is the germ of what in the 1970s was called the *Structural Approach to Human Rights*<sup>143</sup>. This Structural Approach puts emphasis on the importance of both internal and international structures for the adequate enjoyment of human rights. It is frequently political, social, economic or cultural structures, both internal and international, which hide behind the most serious violations of human rights. And, as Mary Robinson, former United Nations High Commissioner for Human Rights, has recalled:

“what is unacceptable... is the lack of equality in the world, the evident and unacceptable inequalities which deny people a reasonable level of human rights, and which very often become violations of their rights”<sup>144</sup>.

Finally, Article 28 aims, in the opinion of Cassese, to highlight the fact that the human rights recognised in the Universal Declaration “will only be able to come into practice if a social structure that permits the development of countries is set up, and if the international environment as a whole facilitates the economic take-off of the poor countries, and a major redistribution of wealth in developed countries”<sup>145</sup>.

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<sup>142</sup> ABELLÁN HONRUBIA, V.: “Internacionalización del concepto y de los contenidos de los derechos humanos”, in CENTRO PIGNATELLI (Ed.): *Los Derechos Humanos, camino hacia la Paz*, Seminario de Investigación para la Paz-Diputación General de Aragón, Zaragoza, p. 19.

<sup>143</sup> Concerning the *Structural Approach to Human Rights* and the importance of internal and international order for human rights, see VAN BOVEN, T.: “Human Rights and Development. Rhetorics and Realities”, in *Festschrift für Felix Ermacora*, E. Verlag, Strasbourg, 1988, pp. 575-587.

<sup>144</sup> Interview with *EL PAIS*, 16 February 1998, p. 3.

<sup>145</sup> CASSESE, A.: *Los derechos humanos en el mundo contemporáneo...*, *op. cit.*, p. 47. Not in vain, this Article 28 of the Universal Declaration of Human Rights is the basis for the emergence of third generation human rights, particularly the right to development, given that this right argues for the legitimacy of individuals and peoples demanding a certain amount of economic, social, and cultural development.

This right to a particular social order has been criticised by many writers who have classed it as a utopian provision lacking in realism<sup>146</sup>. In response to these criticisms, Professor Gros Espiell has stated that

“utopian or not, this way of considering the issue is of profound importance, not only theoretically, but also from a practical point of view, because utopia has been, and is, in certain historical conditions, an irreplaceable catalyst for the political, ideological, economic, social, and legal progress and evolution of humanity”<sup>147</sup>.

The fact is that the serious problems of under-development, misery, illness, environmental destruction, etc. which three quarters of the human race are suffering, constitute some of the most dangerous and flagrant attacks on fundamental human rights. It is for this reason that, based on Article 28 of the Universal Declaration<sup>148</sup>, the General Assembly of the United Nations proclaimed the *right to development* in 1986, declaring that it is “an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized”<sup>149</sup>.

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<sup>146</sup> Professor Christian Tomuschat has even reached the point of doubting whether, “from a realistic point of view, Article 28 should be kept... Rights of a purely utopian nature probably contribute to discredit human rights; it is as if they are stories which have nothing to do with reality”. See TOMUSCHAT, C.: “The Universal Declaration of Human Rights: Does it Need any Updating?”, *op. cit.*, p. 79.

<sup>147</sup> GROS ESPIELL, H.: *Estudios sobre Derechos Humanos II...*, *op. cit.*, pp. 349 y 350.

<sup>148</sup> As Clarence J. Dias has said on the topic, “the Universal Declaration of Human Rights provides both the logic and the inspiration for the right to development... The Declaration on the right to development, and subsequent efforts to realise the right to development would be a glorious way of affirming the true universal values of the Universal Declaration”, DIAS, C.J.: “From Self-Perpetuation of the Few to Survival with Dignity of the Many: the crucial importance of an Effective Right to Development”, in *The Universal Declaration of Human Rights: Its Significance in 1988*, Report of the Maas-tricht/Utrecht Workshop..., *op. cit.*, p. 24.

<sup>149</sup> *Declaration on the Right to Development*, resolution 41/128, 4 December 1986. We should take into account the fact that in the third paragraph of the Preamble of this Declaration on the Right to Development, there is an express mention of Article 28 of the Universal Declaration. In it, the General Assembly of the United Nations states that it considers that “under the provisions of the Universal Declaration of Human Rights, everybody is entitled to a social and international order in which the rights and freedoms set forth in that Declaration can be fully realized”. A detailed study regarding the right to development and its link to Article 28 can be found in GÓMEZ ISA, F.: *El derecho al desarrollo como derecho humano en el ámbito jurídico internacional*, Universidad de Deusto, Bilbao, 1999.

The first subsection of Article 29 is also important, fundamentally because it gives us a different way of looking at human rights. This new point of view makes reference to the duties that all people have towards the community of which they are a part. According to this paragraph:

“everyone has duties to the community in which alone the free and full development of his personality is possible”.

This paragraph must be analysed in conjunction with Article 1 of the Declaration which, as has been shown above, sets out that all human beings “should act towards one another in a spirit of brotherhood”. As we can see, this means that the individual is not only faced with rights regarding others, but also with certain obligations to the rest of the community<sup>150</sup>. It has been said that there is a complementary relationship between rights and duties; they represent the two sides of the same coin<sup>151</sup>. And the fact is that “it is evident that a legal order which recognises and guarantees the rights of the human being can only exist if those rights are integrated within a system that assures the harmonisation of everyone’s rights. Each person’s rights cannot be unlimited, given that they can only be rights if they co-exist with and respect the rights of others”<sup>152</sup>. In this regard, it is curious to see how, in the West, the emphasis has been placed on people’s individual rights, practically forgetting the existence of correlating duties, while in other cultural environments, such as that of Africa or Latin America, these duties are relatively important. This explains why the Universal Declaration recognises duties fairly discreetly, which is an “almost protocolary”<sup>153</sup> acknowledgment; thus, they only have a very modest role in the text. In order to see what the opinions of the delegations from Western nations were, it is useful to look at what the U.S. delegate, Eleanor Roosevelt, said at one of the first sessions of the working group of the drafting committee. In

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<sup>150</sup> The most rigorous study on people’s duties towards the community is perhaps the one written by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Erica-Irene A. Daes: *The individual’s duties to the community and the limitations on human rights and freedoms under Article 29 of the Universal Declaration of Human Rights*, E/CN.4/Sub.2/432/Rev.2.

<sup>151</sup> OPSHAL, T.: “Articles 29 and 30. The Other Side of the Coin”, in EIDE, A.; ALFREDSSON, G.; MELANDER, G.; REHOF, L.A. and ROSAS, A. (Eds.): *The Universal Declaration of Human Rights: A Commentary*, Scandinavian University Press, Oslo, 1992, pp. 449-470.

<sup>152</sup> GROS ESPIELL, H.: *Estudios sobre Derechos Humanos II...*, op. cit., p. 321.

<sup>153</sup> BLÁZQUEZ, N.: “El recurso a la dignidad humana en la Declaración Universal de Derechos Humanos de las Naciones Unidas”, in *Dignidad de la Persona y Derechos Humanos*, op. cit., p. 111.



her qualified opinion, "the task which has been given to us is that of proclaiming the fundamental rights and freedoms of the human being... not that of listing his duties"<sup>154</sup>.

Explanations for the fact that the duties of the human being figure so modestly in the Universal Declaration of Human Rights are, firstly, the liberal individualism from which it takes its inspiration, an individualism which fundamentally places the emphasis on the rights of the individual, to the detriment of any consideration of duties; and secondly, the context in which the Declaration came about, one which was marked by the horrors of the human rights violations that took place during the Second World War. These meant that when it came to drafting the Declaration, the main objective was to produce the widest possible catalogue of human rights. Another final reason was the motivation that came about as a result of the excesses committed by fascist States which had placed particular emphasis on the duties of the individual towards the community. These were some of the many reasons why the role of duties was hugely minimised in the text of the Declaration; it was as an antidote to future tyranny and excesses of power<sup>155</sup>.

In the end duties were permitted to be included within the Universal Declaration although in a much reduced form, as shown above. This inclusion of the duties people have towards their communities meant a "rejection of eighteenth century individualism, because it asserts the organic connection between the individual and either the State or society", in other words "it constitutes a refinement of the classical natural rights philosophy"<sup>156</sup>. In short, the enshrinement of duties in the Universal Declaration of Human Rights was one of the elements which contributed to the transformation of the "liberal heart of the Declaration"<sup>157</sup>. As we can see, the Declaration was inaugurating a new concept of human rights in which, unlike the classic doctrine of human rights, the human being is not completely isolated, but instead is seen as a member of society. In other words, "in these new concepts man was not an isolated and

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<sup>154</sup> These words, due to the fact that there are not official minutes of the first work group meetings, were recorded by René Cassin in CASSIN, R.: "De la place faite aux devoirs de l'individu dans la Déclaration Universelle des Droits de l'Homme", in *Problèmes des Droits de l'Homme et de l'unification européenne. Mélanges offerts à Polys Modinos*, Pedone, Paris, 1968, p. 481.

<sup>155</sup> A thought-provoking consideration of all these explanations for the small role of duties in the Declaration can be found in MADIOT, Y.: *Considérations sur les droits et les devoirs de l'Homme*, Bruylant, Bruxelles, 1998, pp. 111 ff.

<sup>156</sup> MORSINK, J.: "The Philosophy of the Universal Declaration", *op. cit.*, p. 319.

<sup>157</sup> ARGUEDAS, C.M.: "Artículo 30", in ASOCIACIÓN COSTARRICENSE PRO-NACIONES UNIDAS: *La Declaración Universal de Derechos Humanos. Comentarios y Texto*, *op. cit.*, p. 202.

individualist monad, but rather a member of a collective towards which he has a concrete obligation to maintain and improve it"<sup>158</sup>.

Finally, in the spring of 1948, and due to pressure from the Socialist and Latin American countries, an agreement that duties would be included just as they appear in Article 29.1 was reached. However it is interesting to note how in the Preamble of the Universal Declaration, in the ideological portico of this instrument, there is not a single reference to the duties of the human being, either to society or to their peers. In this regard, the contrast with the Preamble of the American Declaration of the Rights and Duties of Man, approved a few months earlier on 2 May 1948, is enormous. The very title of this Declaration is already indicative of the role it wants duties to play, as it is known as the *American Declaration of the Rights and Duties of Man*. From the start, the Preamble of the American Declaration provides a very wide recognition of the duties of the human being, devoting the majority of its paragraphs to it. Due to the huge importance attributed to duties in this Declaration, we shall reproduce here some of the sections of the Preamble which are most explicit in this regard. The first paragraph states that "all men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another" (it should be noted that, apart from the reference to nature, this subsection is identical to Article 1 of the Universal Declaration of Human Rights). The second paragraph, for its part, states that "the fulfilment of duties by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man...". Further on, the following duties are proclaimed: to "serve the spirit" (paragraph four); "to preserve, practice and foster culture" (paragraph five); and, finally, "always to hold it [moral conduct] in high respect" (paragraph 6). As we can see, duties play a primordial role in the Preamble of the American Declaration of Human Rights, completely unlike what can be seen in the Universal Declaration of Human Rights. This has been highlighted as one of the main differences between the Universal Declaration and the American Declaration, as well as the fact that the Universal Declaration does not include a clear list of human duties, whereas there is one in the American Declaration<sup>159</sup>.

<sup>158</sup> HERNÁNDEZ VALLE, R.: "Artículo 29", in ASOCIACIÓN COSTARRICENSE PRO-NACIONES UNIDAS: *La Declaración Universal...*, op. cit., p. 197.

<sup>159</sup> GROS ESPIELL, H.: "La Declaración Americana: raíces conceptuales y políticas en la Historia, la Filosofía y el Derecho Americano", op. cit., pp. 42 ff.

It is significant that this residual role played by duties in the Universal Declaration is not repeated in other international human rights instruments. We have already mentioned the American Declaration of the Rights and Duties of Man, with its Preamble entirely devoted to recognition of the link between rights and duties, and its second chapter containing a list of all the different duties which bind the human being, highlighting among these duties to society, duties between parents and children, the duty to instruct, the duty of suffrage, the duty to serve the community and the nation, the duty to pay taxes etc<sup>160</sup>. Also in America, the American Convention on Human Rights (1969) in its fifth chapter devotes Article 32.1 to stating that "every person has responsibilities to his family, his community, and mankind". But, without doubt, the text which most significantly recognises the duties of the individual is the African Charter on Human and Peoples' Rights (1981). According to Etienne R-Mbaya "the emphasis placed on duties is probably explainable by the very concept of the individual in Africa, as well as by the fact that there is now awareness of the state of under-development in which African countries find themselves"<sup>161</sup>. Faithful to this concept, its Preamble considers that "the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone". Similarly, the entire second chapter is devoted to recognition of duties. Article 27 in its first subsection states that "every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community". However, the most important provision as regards this is Article 29, a provision which produces a true catalogue of human duties<sup>162</sup>.

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<sup>160</sup> The duties explicitly recognised in the American Declaration run from Article 29 to Article 38.

<sup>161</sup> MBAYA, E.R.: "Symétrie entre droits et devoirs dans la Charte Africaine des Droits de l'Homme", in MEYER-BISCH, P. (Dir.): *Les devoirs de l'Homme. De la réciprocité dans les droits de l'homme*, Editions Universitaires, Fribourg Suisse-Editions du CERF, Paris, 1989, p. 49.

<sup>162</sup> As shown in Article 29, the individual has the duty to:

Preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need;

Serve his national community by placing his physical and intellectual abilities at its service;

Not to compromise the security of the State whose national or resident he is;

Preserve and strengthen social and national solidarity, particularly when the latter is threatened;

Preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law;

In addition to duties, this Article 29 in its second paragraph also deals with the limitations which should be established on fundamental rights and freedoms. In other words rights should not be considered as absolute but rather, according to circumstances, they will be susceptible to some sort of limitation. When it came to setting some kind of limit to those rights set out in the Universal Declaration, it was decided to choose a *general limiting clause*, given that all rights, as long as they meet the established requirements, can be limited. This option is different to that used by the European Convention on Human Rights in 1950, the International Covenant on Civil and Political Rights in 1966, or the American Convention of Human Rights in 1969. In these treaties the technique used was *specific limiting clauses* which means that only articles mentioned as such will be able to be the object of any limitation.

Once the possibility to limit rights had been set out in the Declaration, the problem was to decide what circumstances would allow these limitations to come into force. As regards this, the Universal Declaration set out two general principles in Article 29.2:

- 1) The *principle of legality*, which holds that all limitations which are to be placed on a right must be set up through law. As Article 29.2 states, "in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law...".
- 2) The *principle of a legitimate end*, which sets out that all limitations on a right recognised in the Declaration must have a legitimate end. As legitimate ends, the Universal Declaration accepts only the following: "securing due recognition and respect for the rights and freedoms of others", and "meeting the just requirements of morality, public order and the general welfare in a democratic society". This setting out of legitimate ends which might allow for limitations on rights is exhaustive, there is no other reason, however appropriate it may seem, for any kind of limitation of rights.

As regards the possibility of the derogation of human rights in exceptional or emergency situations, the Universal Declaration is com-

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Work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;

Preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society;

Contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

pletely silent and is an aspect which has been criticised by jurists of considerable prestige, such as Cecilia Medina<sup>163</sup>. This silence has received many different doctrinal interpretations. At one extreme we find Albert Verdoot, for whom the silence of the Declaration means that none of the rights contained within it can ever be subject to derogation<sup>164</sup>. On the other hand, the majority are inclined to think that this means that there exists the possibility that at least some of the rights set out in the Declaration can be restricted in emergency situations<sup>165</sup>. However, as Alejandro Etienne Llano states, "some absolute rights, such as the right to life or freedom of conscience cannot ever be legitimately overcome or restricted"<sup>166</sup>.

Finally, as Article 29.3 sets out, rights and freedoms can never be exercised "contrary to the purposes and principles of the United Nations"; in other words, human rights can never be used as justification for any attempt to diminish the fundamental principles which underpin the work of the United Nations Organisation.

To conclude this commentary, the last provision of the Universal Declaration of Human Rights, Article 30, sets out a clause whose objective is to protect the rights and freedoms enshrined in the Declaration in the case of foreseeable attacks from a State, an individual, or from groups of people. As this subsection sets out, "nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of the rights and freedoms set forth herein". In other words, nobody can seek protection in the rights recognised in the Declaration for any attempt against the Universal Declaration itself.

### 3. The Universality of the Universal Declaration of Human Rights

In the initial stages of the drafting process, the Declaration we are analysing was known as the "International Declaration of Human Rights".

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<sup>163</sup> MEDINA, C.: "A 1988 Universal Declaration of Human Rights", in *The Universal Declaration of Human Rights: Its Significance in 1988*, Report of the Maastricht/Utrecht Workshop..., *op. cit.*, p. 66.

<sup>164</sup> VERDOOT, A.: *Naissance et Signification de la Déclaration Universelle...*, *op. cit.*, p. 271.

<sup>165</sup> See ORAA, J.: *Human Rights in States of Emergency in International Law*, Clarendon Press, Oxford, 1996 (2nd. Edition).

<sup>166</sup> ETIENNE LLANO, A.: *La protección de la persona humana en el Derecho Internacional. Los Derechos Humanos*, Trillas, México, p. 104.

Only later, and as a result of a French proposal<sup>167</sup>, was its title changed, becoming the *Universal Declaration of Human Rights*. René Cassin has explained this change by saying that the Declaration “comes from the legally organised community of all the peoples of the world and expresses the common aspirations of all men”<sup>168</sup>. It is certainly true that the Declaration has a clear vocation for universality; in other words, it aims to award human rights to everybody, without distinction of any kind. On this subject it is worthwhile to remember Article 1. This provision states that “all human beings are born free and equal in... rights”. As we can see the Declaration is aimed at the human being, at all human beings, not to any particular type of person. Similarly, the Declaration should be applicable in all territories regardless of whether they have achieved independence or not. As Article 2.2 states on this issue in relation to the enjoyment of human rights:

“everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty”.

In other words, the human rights mentioned in the Declaration should be in force in those countries which are still under colonial domination; colonial powers could not treat these nations as they had been doing until the time of the drafting of the Declaration. As of this time there were clear and precise standards which were also applicable in these territories.

We have seen how the Declaration is universal due to its content. And the fact is that, in the wise words of Albert Verdoot, “thanks to [the Declaration], universal society sees its rights and freedoms protected which until this point were only set out in national constitutions. The Universal Declaration was innovative in that, on a universal plane, it formulated the rights which no national declaration or law has been able to formulate except with reference to a specific country”<sup>169</sup>.

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<sup>167</sup> On this issue it is necessary to return to René Cassin, who was, as we already know, one of the most influential persons concerning the final draft and ideological profile of the Declaration; see CASSIN, R.: “La Déclaration Universelle...”, *op. cit.*, pp. 279 ff.

<sup>168</sup> CASSIN, R.: *op. cit.*, p. 279.

<sup>169</sup> VERDOOT, A.: *Naissance et Signification de la Déclaration Universelle...*, *op. cit.*, p. 318.

Nevertheless, we should also be conscious of the fact that, although the Declaration undoubtedly does have some aims towards universality, not all of its provisions achieve this to the same extent<sup>170</sup>. As Alston has asserted, "any suggestion that all of the provisions of the Universal Declaration are universally accepted, either in philosophical or anthropological terms, is simply untenable"<sup>171</sup>. Some more sceptical authors have even said that "universality is, for the time being, a myth. That the observance of human rights is very different in different countries is a fact that nobody can deny... They are understood in a different way..."<sup>172</sup>. The fact is that, at the moment, "the universal character of the idea of human rights... is beginning to show symptoms of crisis"<sup>173</sup>. These criticisms come mainly from the Islamic world and from Third World countries, who consider human rights to be a predominantly Western idea which do not correspond to their current demands and needs. Swords are still drawn as was made clear at the last big international meeting on human rights. This was the World Conference of Human Rights which took place in Vienna in June 1993. At this Conference one of the principal objects under discussion was that of the universality of human rights<sup>174</sup>. The Final Declaration of the Conference came to a conclusion which, in

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<sup>170</sup> Reference has already been made in other parts of this study to the problems which Islamic states had with certain rights such as religious freedom or the consideration that "the family is the natural and fundamental group unit of society" (Article 16.3 of the Declaration).

<sup>171</sup> ALSTON, P.: "The Fortieth Anniversary of the Universal Declaration...", *op. cit.*, p. 7.

<sup>172</sup> CASSESE, A.: *Los derechos humanos...*, *op. cit.*, p. 61.

<sup>173</sup> On the issue of the universality of human rights and its opposing theory of cultural relativism, see the interesting essay by DUNDES RENTELN, A.: *International Human Rights. Universalism Versus Relativism*, Sage Publications, London, 1990.

<sup>174</sup> Good proof that the positions were far from one another can be found through comparison of the final documents of the Regional Meetings, which were produced in preparation for the Vienna World Conference. The first was the African Regional Meeting, which took place in Tunisia from 2 to 6 November 1992, *Report of the Regional Meeting for Africa of the World Conference on Human Rights*, A/CONF.157/AFRM/14, of 24 November 1992. The second was the Latin American and Caribbean Regional Meeting, *Report of the Regional Meeting for Latin America and the Caribbean of the World Conference on Human Rights*, A/CONF.157/LACRM/15, 22 January 1993. The third was the Asian Regional Meeting, *Report of the Regional Meeting for Asia of the World Conference on Human Rights*, A/CONF.157/ASRM/8, 7 April 1993. The European Union also held a preparatory meeting for the Conference, *Note verbale dated 23 April 1993 from the Permanent Mission of Denmark to the United Nations Office at Geneva, transmitting a position paper by the European Community and its member States*, A/CONF.157/PC/87, 23 April 1993.

my opinion, still leaves this thorny issue unresolved. As the Vienna Declaration states:

“all human rights are universal, indivisible and interdependent, and are interrelated (...). While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic or cultural systems, to promote and protect all human rights and fundamental freedoms”<sup>175</sup>.

It can clearly be seen how this ambiguous paragraph does not openly show support either for the universality of human rights, or for the theory of cultural relativism; it aims, as far as is possible, to please the holders of both opinions. And the fact is that, as we have seen, it was clearly demonstrated in the sessions of the World Conference on Human Rights that some views were strongly opposed and that consensus was still very far from being reached<sup>176</sup>.

And so, although we are conscious of the problems that come about when creating a universally applicable concept of human rights, we are also equally aware of the fact that, progressively, a restricted core of almost universally accepted rights is being created. Rights such as the right to life, to security, the prohibition of torture etc are the rights that enjoy very wide acceptance across the majority of the international community. In the coming years the issue of the universality of human rights will be the biggest battle we will face. In this battle it is of paramount importance to be open to other cultures and to other world-views on human rights, especially if we are to come closer to the suggestions of the Third World and Islamic countries. As Xabier Etxeberria has said, “there is a dimension of the universality of human rights which is only coming about through intercultural dialogue, in a never-ending process”<sup>177</sup>. This process has begun, and important steps are being taken, while always avoiding any kind of imposition. As regards this, it is interesting to recall the words of Antonio Cassese:

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<sup>175</sup> *Viena Declaration and Programme of Action*, A/CONF.157/DC/1/Add.1, 24 June 1993, para. 5.

<sup>176</sup> On the issue of the universality of human rights at the Vienna Conference, and in its Final Declaration, see VILLÁN DURÁN, C.: «Significado y alcance de la universalidad de los derechos humanos en la Declaración de Viena», *Revista Española de Derecho Internacional*, Vol. XLVI, no. 2, 1994, pp. 505-532.

<sup>177</sup> ETXEBERRIA, X.: “Derechos Humanos: ¿Universales u Occidentales?”, *Gaceta Municipal de Vitoria-Gasteiz*, no. 79, 7 December 1996, p. 4.



“fortunately, States and other organisms are making use of the paths towards universality, not to reach an absurd and undesirable uniformity, but to reach a minimum of common rules as a result of which we will be able to ensure respect of at least the essential foundations of human dignity in any place in the world”<sup>178</sup>.

#### 4. The Legal Value of the Universal Declaration

The problem of the legal nature of the Universal Declaration is a complex issue, and one which has provoked, and continues to provoke controversy among the international community<sup>179</sup>. It is clear that the Universal Declaration is not a treaty, and as such is not, *per se*, a legally binding instrument for those States which are parties to it. These States did not want to give it this format nor take on such international obligations in 1948 although, during the process of the drafting of the Declaration, there were many suggestions that this should be the case.

The Declaration was adopted by the General Assembly of the United Nations as a resolution and therefore in accordance with the UN Charter, it is a “recommendation” which does not *prima facie* have any legal force. In any event, as is well known, ‘Declarations’ are not simple General Assembly resolutions, but have a special degree of importance. As has been rightly stated, in the general practice of the United Nations system, “in view of the greater solemnity and significance of a “Declaration,” it may be considered to impart, on behalf of the organ adopting it, a strong expectation that Members of the international community will abide by it”<sup>180</sup>. The truth is that, in direct reference to the Universal Declaration, the Memorandum of the UN Office of Legal Affairs stated that “a “Declaration” is a formal and solemn instrument, suitable for rare occasions when principles of great and lasting significance are being enunciated, *as is the case for the Human Rights Declaration*. A recommendation is less formal” (emphasis added).

Given this solemn character of a ‘Declaration’, it can be assumed that the body adopting it is manifesting its strong hope that all members of the international community will respect it. As this hope is

<sup>178</sup> CASSESE, A.: *Los derechos humanos...*, *op. cit.*, p. 80.

<sup>179</sup> See, for example, the work of Professor Díez de Velasco, who speaks of its “controversial obligatory value”, Díez de VELASCO, M.: *Instituciones de Derecho Internacional Público*, Madrid, 1994, vol. 1, p. 648.

<sup>180</sup> *Memorandum of the United Nations Office of Legal Affairs, United Nations Secretariat*, Doc. E/CN.4/L.610.

gradually justified by the practice of States, a Declaration can be considered, due to its customary value, to herald obligatory norms for States. The variables which condition the legal value of a Declaration are, fundamentally, these four:

1. The intention to put forward legal principles;
2. The majority by which it was approved;
3. Its content; and
4. the later practice of States<sup>181</sup>.

The aim of the Declaration was, as stated in the Preamble, to establish "a common standard of achievement for all peoples and all nations" and its content is considered to be "a common understanding of [the] rights and freedoms" to which the Charter refers. It is thus clear that from the start the huge moral and political value was underlined. As Antonio Cassese has said, in 1948 the Declaration was a "simple and solemn reciprocal promise, only regarding ethical and political commitments, but not constituting legal obligations on States"; this decision of the States (that of 'lowering' its level of obligation) was made so as to safeguard State sovereignty to the maximum<sup>182</sup>, an essential fact and basic constitutional principle of the international community. However, the different delegations involved in the production of the Declaration had many different views on the subject when it came to defining its legal status; the positions of two of the principal people involved in writing the Declaration, Eleanor Roosevelt and René Cassin, are very illustrative on this point.

On the same day as the Declaration was adopted, Eleanor Roosevelt, the President of the Commission on Human Rights, and US representative at the General Assembly, stated that:

"In giving our approval to the Declaration today it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a Declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by formal vote of its members, and to serve as a common standard of achievement for all peoples of all nations"<sup>183</sup>.

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<sup>181</sup> GARZÓN, C., "El Valor Jurídico de las Declaraciones de la Asamblea General", *Revista Jurídica de Cataluña*, 1973, pp. 581-616.

<sup>182</sup> CASSESE, A.: *op. cit.*, p. 51.

<sup>183</sup> Quoted in WHITEMAN, *5th Digest of International Law 243*, Washington DC: Dpt of State Publications 7873, 1965.

Faced with this stance which minimised the legal value of the Declaration, one of the 'fathers' of the text, René Cassin, upheld the notion that, at the time of its adoption, the Declaration constituted "an authorised interpretation of the United Nations Charter", although it did not have "coercive legal power" and was not "a direct source of legal obligations". This position strengthened the legal character of the Declaration; Cassin therefore maintained that the Declaration constituted the point of reference for appreciating the extent to which States fulfilled their obligations to co-operate with the United Nations as regards human rights, set out in Article 56 of the Charter, to which the Preamble of the Charter alludes directly. Although this obligation is written in general terms, and needs to be further concreted, for example with the addition of a system of sanctions, this does not to any extent affect its direct legal value. Additionally, the Declaration was called to integrate itself into the "general principles of law", using the definition appearing in Article 38 of the Statute of the International Court of Justice, and, through this, to form a part of a "universal public order"<sup>184</sup>.

This firm stance of Cassin's in the light of differing opinions is indicative of the fact that the issue of the legal value of the Declaration was not a peaceful one, and that the views of those most active in its writing were very different. This was such that the Belgian delegate, M. Dehousse, put forward the proposal that the opinion of the United Nations Legal Service be sought on the issue; this was, however, a proposal which was unable to gain a sufficient majority at the Third Commission<sup>185</sup>. On the same topic, it is worthy of note that one of the main reasons for South Africa's abstention in the final vote was due to its conviction that the Declaration was of an obligatory nature.

#### 4.1. *The Current Legal Value of the Universal Declaration*

Whatever the opinions regarding the character of the Declaration when it was approved, it can safely be said that in the decades follow-

<sup>184</sup> UN GAOR 3d Comm., 3d Sess, 1948, p. 61. CASSIN, R., *La Commission des Droits de l'Homme de l'ONU, Miscelanea W.F. Ganshof Van der Meersch, LGDJ*, Paris 1972, t. 1, p. 405. CASSIN, R.: "La Déclaration Universelle et la mise en oeuvre des droits de l'homme", *RCADI*, 1951-II, pp. 293 ff.

<sup>185</sup> On this topic, it is interesting to note the distinction made by the Belgian delegate before the Third Commission on 20 October 1948 which, apparently, "as a result of its great authority... very much impressed the commission"; this distinction was made between the "legal value" of the Declaration, and its "obligatory character". This is a distinction whose reach and transcendence is still being seen today. TCHIRKOVITCH, S., "La Déclaration Universelle des Droits de l'Homme et sa portée internationale", *Revue Generale de Droit International Public*, vol. 53, 1949, p. 378.

ing 1948 the document has undergone a significant transformation as regards its legal value. There are now few international lawyers who deny the fact that the Declaration has become a normative instrument which creates legal obligations for member States of the United Nations. The controversy nowadays, however, concerns two issues: firstly, the interpretation of the process by which the Declaration has become legally binding; and secondly, a discussion as to whether all the rights proclaimed in the Declaration are equally binding for all States.

Although this is the majority opinion, there are still many for whom the current value of the Declaration continues to be as it was when it was adopted; in this regard nothing has changed. Due to the importance of this issue, it is relevant to focus for a while on the position which is held by the United Nations and by the Inter-American Court of Human Rights.

In 1989, the Inter-American Court had to produce an Advisory Opinion on the Interpretation of the American Declaration of the Rights and Duties of Man within the framework of Article 64 of the American Convention. This Declaration, which came a few months before the Universal Declaration, has a very similar position within the Organisation of American States to that which the Universal Declaration has in the United Nations. This has the result that the observations of the Court regarding the legal value of the American Declaration are very relevant to the issue under discussion, and can be 'imported' *mutatis mutandi* to the Universal Declaration.

In its section of written observations sent by States which are members of the OAS system, the United States clearly stated its position:

"The American Declaration of the Rights and Duties of Man represents a noble statement of the human rights aspirations of the American States".

Unlike the American Convention, however, it was not drafted as a legal instrument and lacks the precision necessary to resolve complex legal questions. Its normative value lies as a declaration of basic moral principles and broad political commitments and as a basis to review the general human rights performance of member States, but not as a binding set of obligations.

The United States recognizes the good intentions of those who would transform the American Declaration from a statement of principles into a binding legal instrument. But good intentions do not make law. It would seriously undermine the process of international lawmaking - by which sovereign States voluntarily commit to specific legal obli-

gations - to impose legal obligations on States through a process of "reinterpretation" or "inference" from a non-binding statement of principles<sup>186</sup>.

And in order to still further strengthen their point, the United States made a statement to the tune that "the Declaration remains for all member States of the OAS what it was when it was adopted: an agreed statement of non-binding general human rights principles". The United States must state, "with all due respect, that it would seriously undermine the established international law of treaties to say that the Declaration is legally binding"<sup>187</sup>.

This United States interpretation was not accepted by the Inter-American Court which, in accordance with the International Court of Justice, considers that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation"<sup>188</sup>. Continuing along this line of reasoning, the Inter-American Court states that:

"to determine the legal status of the American Declaration it is appropriate to look to the inter-American system of today in the light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948"<sup>189</sup>.

There is no doubt as to the fact that the evolution of American law is a regional expression of the situation experienced by universal and international human rights law, and it is because of this that the advisory opinion is so important. In addition, as was stated above, the position of the American Declaration within the OAS system is very similar to that of the Universal Declaration within the United Nations Organisation. The Charter of the OAS includes some provisions which refer to human rights, but does not contain a list of what exactly they are; this is very similar to the situation as regards the San Francisco Charter. This is such that, as the OAS General Assembly has repeatedly stated, the American Declaration is an "authorised interpretation" of the Charter as regards human rights for OAS member States, and, as such, is a true source of international legal obligations. As the Inter-American Court has said:

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<sup>186</sup> Inter-American Court of Human Rights, Series A, No. 10, Advisory Opinion OC-10/89, 14 July 1989, para. 12.

<sup>187</sup> *Op. cit.*, para. 17.

<sup>188</sup> *ICJ Reports*, 1971, p. 31.

<sup>189</sup> *Op. cit.*, para. 37.

“the member States of the Organization have signalled their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter. Thus the Charter of the Organization cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration”<sup>190</sup>.

The practice repeated at the heart of the OAS has been that for member States which are not a part of the American Convention, the essential legal instrument as regards human rights for the determination of their obligations and the evaluation of their fulfilment is, without doubt, the American Declaration; this is how it has consistently been applied by the Inter-American Commission throughout its significant advisory capacity since 1960. But even for States that were part of the Convention in 1969, although there is no doubt as to the fact that the fundamental basis for their obligations as regards this lies in the same Convention (given the superior precision of its provisions), it is not for this reason that they are freed from the environs of the Declaration through being OAS members and, as such, also bound by the Charter of the Organisation. This position leads the Court to the conclusion that the Declaration undoubtedly has “legal value”<sup>191</sup>.

#### 4.2. *Theories Explaining its Current Legal Value*

The process through which the Universal Declaration has become a normative instrument is due in part to the fact that the writing, approval and coming into force of the 1966 Covenants took a significant amount of time, and the international community needed a legal document which defined the legal obligations of States as regards human rights. Once the United Nations Commission on Human Rights completed the draft of the UDHR in 1948, it began the huge task of attempting to write an international treaty which would much more specifically set out the international obligations of States on the issue, considering that the UDHR was a Declaration containing only very general principles. Naturally, achieving agreements from States regarding the specific obligations coming from each of the rights was a much harder task. Firstly, the Commission had to separate what was united in

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<sup>190</sup> *Op. cit.*, para. 43.

<sup>191</sup> *Op. cit.*, para. 47.

the UDHR: civil and political rights, and those which are economic, social and cultural. The main reason for this was that States considered the obligations they took on as regards each of these groups of rights to be essentially different. Although the Covenant project was very advanced and almost completed in 1955, it was necessary to wait until 16 December 1966 for the Covenants to be adopted by the General Assembly and opened up for signature and ratification. It should also be noted that they did not come into force until the first few months of 1976 when State number 35 deposited the instrument of ratification for each of the Covenants.

The prolonged absence (at least from 1948 until 1976, and from this latter year only for those States which had ratified it) of a specific treaty on the subject meant that the Declaration was used with great frequency. When governments, the United Nations and other international organisations wanted to invoke human rights obligations, or wanted to condemn violations of them by a State, they referred to the Universal Declaration as the basic norm. In this way, the Declaration came to symbolise what the international community understood as “human rights”, reinforcing the conviction that governments had the obligation of assuring fulfilment of the rights of the Declaration for all those individuals under their jurisdiction.

It is undeniable that for the whole United Nations system, especially those bodies relating to human rights (Commission, Sub-Commission, special rapporteurs, working groups etc), the UDHR has been the fundamental point of reference, and therefore taking on an almost ‘constitutional’ role inside the organisation. The importance of this ‘obligatory’ value of the Declaration for all UN bodies should be highlighted.

There currently exist three fundamental theories, which do not for any reason have to be incompatible or exclusive, which attempt to explain the current legal value of the UDHR. The first of these holds that the UDHR is an “authentic or authorised interpretation” of the obligations contained within the UN Charter as regards human rights. A second theory states that the UDHR has become “customary international law”; finally, another theory prefers to base its normativity on the category of “general principles of law”. These theories will be looked at in detail below.

#### 4.2.1. THE UDHR AS AN “AUTHENTIC INTERPRETATION” OF THE CHARTER

Some scholars and governments hold that the fact that UN bodies make constant reference to the Declaration when applying clauses of the Charter implies that the Declaration is accepted as an “authorised

and authentic interpretation” of these clauses. Many United Nations bodies have made frequent references to the Declaration: the General Assembly in innumerable resolutions; the Commission on Human Rights and its Sub-Commission; the country and thematic special rapporteurs, etc. The references of the International Court of Justice, the highest jurisdictional body in the international community, when it has had to provide an advisory opinion of some kind, or judge some case regarding human rights, are of particular importance. Some examples follow:

In the well-known case of the *Barcelona Traction*, the Court, in referring to obligations *erga omnes* (those obligations which States have as regards the international community as a whole), states that one of the sources of these obligations is “the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law; others are conferred by international instruments of a universal or quasi-universal character”<sup>192</sup>.

In the case regarding the *Presence of South Africa in Namibia*, the ICJ concluded that racial discrimination, which constitutes a denial of fundamental human rights, is a flagrant violation of the purposes and principles of the United Nations Charter<sup>193</sup>. The prohibition of racial discrimination is to be found not only in the Charter, but also in the UDHR (Articles 2, 7, and 16).

As regards the case concerning *United States diplomatic and consular Staff in Tehran*, kidnapped by fundamentalist Islamic students, the Court held that the act of abusively denying human beings freedom, and of forcing them into physical suffering in pitiful circumstances, is manifestly incompatible with the United Nations Charter, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights<sup>194</sup>. We can see especially clear with this case how the ICJ considers the violation of one of the basic human rights protected by the UDHR not only as a violation of this document, but also as a violation of the obligations derived from the United Nations Charter; this is an unequivocal sign that the Court considers the UDHR to be a legal text which specifies the obligations of the Charter as regards human rights.

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<sup>192</sup> *CJ Recueil*, 1970, p. 32.

<sup>193</sup> *CJ Recueil*, 1971, p. 57.

<sup>194</sup> *CJ Recueil*, 1980, p. 42.



As a famous internationalist has stated on examination of the Court's case-law, "apparently the unanimous opinion of the Court is that the Universal Declaration is a document with sufficient legal status that its invocation is justifiable as regards the obligations of States in accordance with general international law... the Declaration as a whole sets out fundamental principles recognised by general international law"<sup>195</sup>.

#### 4.2.2. THE UDHR AS "CUSTOMARY INTERNATIONAL LAW"

Other scholars are of the opinion that the fact that governments continuously (at international conferences, in presidential declarations, in ministers' statements etc) cite the Universal Declaration, and that States have even incorporated many of its clauses in their legislation, means that this practice has brought about a norm of customary international law, if not as regards all articles in the Declaration, then certainly as regards a considerable part of them.

The famous theory regarding the relationship between 'Declarations' of the UN General Assembly and customary law, formulated by Jiménez de Aréchaga<sup>196</sup>, holds that a 'Declaration' can have three effects:

1. a 'codifying' effect: the Declaration is no more than a formal and written expression of pre-existing customary norms;
2. a 'crystallising' effect: the Declaration is the first written formulation of norms in the process of being set up, and, because of the discussion of the Declaration, consensus among States will lead to its 'crystallisation' as a legal rule which is customary in character;
3. a 'generative' effect: the Declaration, at the time of its approval, is a new norm, and has the status of *lege ferenda*, but it constitutes the starting point for the later practice of States, a practice which is 'repeated and uniform', so that the Declaration becomes a legal rule because of its customary character.

<sup>195</sup> RODLEY, N., "Human Rights and Humanitarian Intervention: The Case-Law of the World Court", 38 ICLQ (1989), pp. 321-326.

<sup>196</sup> As is well-known, this main theory refers to the relationship between treaty and custom, with the application of the Declarations of the General Assembly of the United Nations being a perfect adaptation of the same, JIMÉNEZ DE ARÉCHAGA, E., *El Derecho Internacional Contemporáneo*, Madrid, 1980, pp. 19-42.

The first question which should be asked is which of these three categories the UDHR should be placed in. It is very interesting, and at the same time surprising, that Professor Jiménez de Aréchaga, in his many classifications of 'Declarations' regarding these three categories, makes no reference to the UDHR, although this is evidently one of the most important Declarations in the history of the General Assembly. We believe the best position is the one that holds that the UDHR should be placed in the third category, that of being 'generative', although there are also many arguments for putting it into one of the other two categories.

This position leads us to the fact that the UDHR, at the time of its adoption, became the first universal and general international document concerning human rights; its novelty here cannot be disputed. The UN Charter, and the inclusion of clauses on human rights, with the consequent 'internationalisation' of a subject which until that time had come under the exclusive domestic jurisdiction of States, meant that there was a revolution, and undeniable novelty, in contemporary international law; but the Charter does not contain any list of rights, as it was decided not to draft it at the San Francisco conference, but to later entrust the task to the Commission on Human Rights created as a result of Article 68 of the UN Charter. Therefore, when, on 10 December 1948, the General Assembly of the United Nations approved the UDHR, it was giving life to a document that was profoundly innovative in the international field (but not in domestic law, given that much national legislation already recognised some of these rights), hence the difficulty to prove that the UDHR in 1948 was a "codification of pre-existing customary laws", or a "crystallisation" of laws which were *in statu nascendi*. As a result, it seems that the idea that the rules in the UDHR are customary laws can only be based on subsequent practice by States, as long as this practice has proven that it involves two essential requirements: the material or objective element (recurring practice, constant and uniform), and the formal or subjective element, the *opinio iuris*.

Evidence of subsequent practice regarding the UDHR by States and bodies of the international community is abundant, and confirms its character as a customary law. As has been said in the *US Restatement*, the following types of practices are relevant to the consolidation of the customary law of human rights:

"quasi-universal adhesion to the UN Charter and to its human rights clauses, quasi-universal and frequently reiterated acceptance of the Universal Declaration, even if only in principle; quasi-universal partici-

pation in all stages of the preparation and adoption of international agreements recognising principles of human rights in general, or concrete rights; the adoption of human rights principles by States in regional organisations in Europe, Latin America, Africa etc; general support from States for UN resolutions declaring, recognising, invoking, and applying international principles of human rights as international law; actions of States aimed at harmonising their national law and practices to the standards or principles set out by international bodies, and the incorporation of human rights clauses, either directly or through references to national constitutions and other laws; invocation of human rights principles in national policy, diplomatic practice, international organisations, diplomatic communications and actions expressing the point of view that certain practices violate international human rights law, including condemnation and other adverse reactions from the State to violations by other States<sup>197</sup>.

It is clear that all this evidence regarding the value of the UDHR cannot be exhaustively analysed, although it is true that there is an enormous amount of material on the subject. Nevertheless, we shall highlight a few points of interest.

Firstly, the UDHR has been correctly classed as “a legal milestone in the process of progressive codification of international law”; references to the UDHR in all subsequent international instruments which have specified the international obligations of States are an example of the importance given to the document.

As regards allusions made by governments in final documents of particularly important international conferences, we have to mention the Proclamation of Tehran at the First World Conference on Human Rights in 1968, held in the year of the 20<sup>th</sup> anniversary of the Declaration; the Helsinki Final Act 1975, and the Vienna Declaration and Programme of Action of 1993.

In the *Tehran Proclamation* (13 May 1968), States asserted that the Declaration constitutes an *obligation* for the international community, and that they considered serious violations of human rights to be violations of the Charter<sup>198</sup>.

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<sup>197</sup> *US Restatement: US Rest, 3rd; Restatement of the Foreign Relations Law of the USA*, American Law Institute (Washington 1987). Vol. II ii & 702, p. 154, n. 2.

<sup>198</sup> “The Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and *constitutes an obligation for the members of the international community*” (emphasis added). The importance of this declaration of obligation for all the international community as regards the UDHR cannot be ignored, bearing in mind the seriousness of the context and the unanimous States’ support achieved”.

In the *Helsinki Final Act* (1975) both Eastern and Western States set out the principles which were to guide their relations, and in doing this specifically devoted chapter VII to the issue of respect for fundamental rights and freedoms; in that respect, they declared that, in the field of human rights, "States will act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights".

Finally, in the *Vienna Declaration* (1993), the States taking part reaffirmed again "their commitment to the purposes and principles contained in the Charter of the United Nations and the Universal Declaration of Human Rights"<sup>199</sup>.

All these manifestations of States in particularly serious contexts, which give the same importance to the Charter and to the Declaration, are evidence of a particular *opinio iuris*; in other words, of a decision of States concerning the legally binding character of the Declaration.

Other important evidence of the normative and customary character which the Declaration has acquired can be found in the very widespread practice across States consisting of its incorporation into constitutions and domestic legal orders. As the International Law Association has correctly stated, "the Universal Declaration has, directly or indirectly, served as a model for many constitutions, laws, rulings and policies which protect human rights. These internal manifestations include direct constitutional references to the Declaration or incorporation of its clauses; fundamental provisions of the Declaration which have been reflected in national legislations; and judicial interpretation of national laws with reference to the Declaration"<sup>200</sup>.

No fewer than 90 constitutions written after 1948 contain rules concerning human rights which faithfully reproduce UDHR articles, or

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<sup>199</sup> Regarding the language used by the Vienna Conference in discussing the value of the UDHR, some authors have detected a certain "step backwards" as regards the Tehran Proclamation, given that at no point is the "obligatory nature" of the Declaration mentioned. The UDHR is rather considered "a common standard of achievement for all peoples and all nations, is the source of inspiration and has been the basis for the United Nations in making advances in standard setting as contained in the existing international human rights instruments", particularly in the Covenants of 1966 (paragraph eight of the preamble).

<sup>200</sup> INTERNATIONAL LAW ASSOCIATION, "Final Report on the Status of the Universal Declaration of Human Rights in National and International Law", *ILA Report of the Sixty-Sixth Conference*, Buenos Aires (Argentina), London 1994, pp. 527 ff. In this final report there is a fairly complete study of the incorporation of the UDHR into national laws and constitutions, as well as jurisprudential references to it.

are inspired by the document. Many of the constitutions of countries which gained independence after 1950 make direct reference to the Universal Declaration. To mention only one example, the Spanish Constitution of 1978 establishes in its Article 10.2 that “provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights...”. The importance of this reference lies in the call for tribunals to interpret the human rights contained within Title I (whose writing was also influenced by the Declaration), in accordance with the UDHR. Legal references to the Declaration are useless if judges and tribunals are not legitimised to apply them.

Regarding the use of the UDHR by domestic courts, it must first be highlighted that these are generally reluctant to decide a case against a national law by directly applying international law and, in that respect, the UDHR. There are few precedents for such a situation; one of the few is the decision of the High Court of the United Republic of Tanzania which declared a rule of customary Tanzanian law, which permitted discrimination against women, unconstitutional due to the fact that it was in contravention of Article 7 of the UDHR (equality before the law and prohibition of all discrimination) which, according to the Court, “is part of our Constitution”<sup>201</sup>. Secondly, it should be noted that the normal situation is for domestic courts to refer to the UDHR when they seek support for any right already recognised by their constitutions or national laws, or help in interpreting them. That is the case, for example, in the practice of Spanish courts; more specifically, the Supreme Court refers to the UDHR to materially reinforce the right under discussion.

#### 4.2.3. THE UDHR AS AN EXPRESSION OF GENERAL PRINCIPLES OF LAW

A third way in which a part of the doctrine has formed a basis for the legal status of the UDHR is that “general principles of law” have been found in it and, as such, because it is one of the sources of international law in accordance with Article 38 of the ICJ Statute, its legal value is without doubt. We have already seen above how one of the fathers of the Declaration, the great jurist from Bayonne, René Cassin, put forward this theory at its adoption. There have later been many authors who have also shared this opinion; an illustrious representative of

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<sup>201</sup> Ephrahim v Pastory & Kaizilige, High Court, 22 Feb 1990, Civil App No. 70 of 1989, reprinted in 87 *International Legal Reports* 106, p. 110.

this school of thought would be J.A. Carrillo Salcedo. For this international lawyer from Seville, “the theory of the general principles contained in the United Nations Charter and developed by the Universal Declaration”, and which are generally accepted, is the most appropriate, and can find its basis in ICJ jurisprudence<sup>202</sup>. An Italian Court appears to uphold this same theory of general principles in its statement in the sense that the Universal Declaration reflects “general principles of international law” which are part of Italian law according to Article 10 of the Italian Constitution<sup>203</sup>.

Many years ago, Theodor Meron was surprised by the little attention that the category of “general principles of law recognized by civilized nations” had received as a method for obtaining greater legal recognition for the principles of the Universal Declaration and other human rights instruments. He also added that, as regards the extent to which the norms of human rights contained within international instruments are reflected in national laws, Article 38 of the ICJ Statute becomes one of the principal methods for the maturation of such standards in the field of international law<sup>204</sup>. Through this it becomes clear that the barrier between the two sources, international customs and general principles, becomes blurred if not erased.

Whatever the interpretation might be concerning the foundation of the current legal character of the Declaration, and therefore the extent to which it is obligatory (“authorised interpretation of the Charter”, “international customary law”, or even “expression of general principles of law which are generally accepted”), what really matters is the general consensus of States concerning the obligatory character, more than the way in which this consensus has been expressed.

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<sup>202</sup> CARRILLO SALCEDO, J.A., «Algunas Reflexiones sobre el Valor Jurídico de la Declaración Universal de los Derechos Humanos», in *Hacia un Nuevo Orden Internacional y Europeo. Homenaje al Profesor Manuel Díez de Velasco*, Madrid 1993, pp. 22-3. Professor Carrillo specifically refers to the cases of the *Corfu Channel* (1949), *the Genocide Convention* (1951), *the case concerning United States diplomatic personnel in Tehran* (1980), and of *Nicaragua v. United States* (1986).

<sup>203</sup> Fallimento Ditta Magiv Ministry of Finance, Tribunal de Roma, 27 July 1959, Foro It LXXXV (1960), I col. 505.

<sup>204</sup> MERON, T., *Human Rights and Humanitarian Norms as Customary Law*, Oxford 1989, pp. 88-89. The US Restatement also considers another of the major sources of obligations regarding human rights to be “the general principles of law common to main legal systems of the world”, *op. cit.*, p. 152. Similarly, the great American jurist Oscar Schachter also holds that the principles of internal laws are often adequate for international application regarding human rights. SCHACHTER, O., “General Course in Public International Law: International Law in Theory and Practice”, *Recueil*, 178.5, 1982, p. 79.

As Professor Carrillo has rightly said, “in the development of international law, the essential part is that it crystallises a consensus between States, as the rules of international law are created, modified, and progressively developed through general consensus between States. The formation, development and modification of this consensus is always a dynamic process: the will of States... is essential in the initial phase...; but... what, above all, is important, is a general acceptance of the fact that these guidelines of behaviour are legally binding.”<sup>205</sup>. Therefore, continues J.A. Carrillo, what is vital is the consent and willingness of States to determine legal obligations, whatever the way or technical method through which this consent might be manifested and expressed: multi-lateral treaties, customs, United Nations General Assembly resolutions and Declarations.

#### 4.3. *Analysis of the provisions which have acquired the status of peremptory norms of International Law*

General State consensus concerning affirmations of the legal value of the UDHR, manifested, as discussed above, through multiple “forms” evidenced in the three theories discussed, is indubitable. However, the main problem lies in deciding exactly which provisions in the Declaration are now obligatory for all States of the international community as a result of their general acceptance<sup>206</sup>. It is clear that the right to life (Article 3) or the prohibition of torture (Article 5) cannot be afforded the same importance as the right to periodic paid holiday (Article 24). Because of this, the investigation concerning which provisions in the Declaration have been generally accepted and which ones have

<sup>205</sup> CARRILLO SALCEDO, J.A.: *op. cit.*, para. 4.

<sup>206</sup> Scholars who believe that all articles of the UDHR are equally obligatory for all States in the international community are in the minority; among them, however, is one of the people most involved in the process of drafting that the Declaration, John Humphrey, who says that “the UDHR has been quoted so many times both within and outside the UN that jurists now say that, whatever the intention of the authors might have been, the Declaration is now a part of customary international law and, therefore, is obligatory for all States. The Declaration has become what some nations wanted in 1948: a universally accepted interpretation and definition of human rights, which were left undefined in the Charter”. HUMPHREY, J.: “The International Bill of Rights: Scope and Implementation”, *17 WM & Mary Law Review* 527, 529, 1976. The following are some other authors who agree: Alston, Bilder, Kartashkin, Lallah, Sohn, Thornberry, Waldock, Robertson and Merrills. There are still fewer who would defend the view that all the Declaration is *ius cogens* (imperative rules of general international law, according to Article 53 of the Vienna Convention on the Law of Treaties); see Haleem, Mc Dougal, Humphrey, Markovit.

not is a task of undeniable transcendence, and is necessary in order to specifically define the legal status of the Declaration. The human rights Committee of the *International Law Association*, one of the most prestigious international organisations of experts in international law, dedicated itself to performing this task between 1988 and 1994. The results of the Final Report were presented at the 1994 Buenos Aires Conference and are somewhat unsatisfactory if one is looking for an exhaustive analysis and clear conclusions on international practice concerning each article of the UDHR.

This committee recognised that “it would be presumptuous to attempt (in the report) to comprehensively analyse every one of the rights contained within the Declaration”<sup>207</sup>. However in the light of State practice, some tentative conclusions can be drawn and are reproduced below.

The committee sees the following as legally binding, as rules of customary law, for all States in the international community:

1. Those contained in Articles 1, 2, and 7, which express the fundamental right to freedom and non-discrimination in the enjoyment of rights. It would be difficult to deny the general acceptance of this right, although in States’ practice there exists a less-than-satisfactory fulfilment of this principle of equality. Thus, women are frequently prevented from exercising their rights in a manner fully equal to men; distinctions based on political and religious beliefs are found in many constitutions; and an effective guarantee of the equal rights of the rich and the poor is often lacking. Discrimination on the grounds of race is accepted by the doctrine as prohibited by general international law, and has even been declared as a *ius cogens* norm.
2. The guarantees of Article 3 (the right to life, freedom, and security) are formulated in such a general manner that they hardly constitute a useful and operative standard; nevertheless, protection of the right to life has always been considered as one of the rules of customary international law, in such a way that practices such as assassinations, disappearances, and arbitrary deprivation of life have been universally condemned as violations of the right to life.
3. The prohibition of slavery (Article 4), the prohibition of torture (Article 5), the prohibition of prolonged arbitrary detention (Article 9), the right of every human being to recognition of legal

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<sup>207</sup> *ILA, op. cit.*, p. 545.



personality (Article 6), the right to a fair trial (Articles 10 and 11), and the right to marry (Article 16) would also be classed as customary rules<sup>208</sup>.

However, due to different reasons, the following have not been awarded the status of customary law: the right to an effective remedy for violations of human rights (Article 8), the prohibition of arbitrary interferences into private life (Article 12), the right to freedom of movement and residence within a territory, as well the freedom to enter and leave a country (Article 13), the right to a nationality (Article 15), the right to property (Article 17), the right to freedom of thought, conscience, and religion (Article 18), the right to freedom of expression and opinion (Article 19), the right to freedom of assembly and association (Article 20), and the right to seek asylum (Article 14). Regarding this last right, it should be said that the returning of a person to a country where there are well-founded fears that he or she might be subjected to torture and persecution would be contrary to a practically crystallised customary rule that is the principle of *non-refoulement*.

Although some argue that a “right to democracy” is emerging as a customary norm, it is clear that many States have not accepted the right, recognised in Article 21, of everyone to take part in the government of the country.

Similarly, the committee states that economic, social and cultural rights, set out in Articles 22 to 27 (the rights to work, to social security, to rest, to an adequate standard of living, to education, and to take part in the cultural life of the community), are rarely qualified by the doctrine or tribunals as customary norms. Among them, perhaps the strongest candidates for soon becoming international customs would be the following: the right to free choice of employment, the right to form and join trade unions, and the right to free and accessible primary education, according to States’ available resources.

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<sup>208</sup> The aforementioned *US Restatement (Third) of the Foreign Relations Law*, whose significant authority on the current status of international law is disputed by few, includes a list of rules of international customary law concerning human rights, which includes the prohibition of genocide, slavery and the slave trade, murder and disappearance, torture and cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, and practices which constitute serious violations of internationally recognised human rights (*US Restatement, op. cit.*, & 702, vol. II). A discussion of this list can be found in ORAA, J.: *Human Rights in States of Emergency in International Law*, Oxford 1994 (2nd), pp. 214 ff.

The provisional conclusion of the ILA study is that even if a large proportion of the civil and political rights in the UDHR have now become customary rules, this is not the case for economic, social and cultural rights, and this poses the difficult problem of defining the legal value of these latter rights. It would appear that the position of the ILA is that more value should be afforded to the first group (which are obligatory customary norms), lessening the value of the second group (only very few of these are candidates for soon becoming customary norms).

This position would appear to be in contrast to the current doctrine on human rights which insists that all human rights are "universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis"<sup>209</sup>.

Although the provisional conclusions of the International Law Association are of much interest, it would be necessary to conduct a more detailed and exhaustive analysis of State practice as regards every one of the other rights protected in the Declaration before coming to definitive conclusions regarding the character of customary norms, and therefore binding for all States of the international community.

## 5. Conclusions

Following this detailed study of the birth and the main elements of the content and legal value of the Universal Declaration of Human Rights, one of the main conclusions which we have reached is that we are faced with a document which is a child of its time; in other words, it is indissolubly linked to the vicissitudes which occurred during the Second World War; a fact which is reflected in many of its passages both in the preamble and in the main text. The Universal Declaration was only the first step and starting point in a long process of internationalisation of human rights, a process in which the United Nations has played a fundamental role with its approval of a huge variety of instruments aimed at developing the sometimes vague and generic provisions contained in the Declaration. With this in mind, the different provisions of the Declaration must be interpreted in a dynamic manner in light of the international treaties and other instruments which the international community has developed.

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<sup>209</sup> *Vienna Declaration...*, para 5.

On the other hand, the Declaration was the fruit of consensus; it could not have been otherwise. The final content of its text reflects compromise and a delicate balance between the different ideologies and world-views existing in the United Nations at its time of writing. In this regard, it must be noted that the Universal Declaration became a revolutionary instrument, as it was the first international text which achieved the inclusion of both civil and political rights as well as economic, social and cultural rights, thereby advancing the concept of the indivisibility and interdependence of the whole gamut of human rights.

Finally, we would like to state how, sixty years on, the Declaration continues to be a document that is alive and full of inspirational strength for the fight against new threats to human dignity and the very survival of humankind. The seeds of all the human rights developments which have taken place after the writing of the Declaration are found in the document. It is necessary that, at its sixtieth anniversary, we should continue to reflect on this document which is still vital for every reference to human rights and fundamental freedoms. To use the words of Federico Mayor Zaragoza, the former Director General of UNESCO, the Universal Declaration of Human Rights has become a true "ethic heritage of humankind"<sup>210</sup>.

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<sup>210</sup> MAYOR ZARAGOZA, F.: «Consolidación de una Cultura de Paz», *XVI Curso Interdisciplinario en Derechos Humanos*, Instituto Interamericano de Derechos Humanos, 15 to 26 June 1998, San José, Costa Rica.



# From the Commission on Human Rights to the Human Rights Council

Carmen Márquez Carrasco and Ingrid Nifosi Sutton

**Summary:** 1. Introduction. 2. The Commission on Human Rights: 2.1. Reform Movements. 2.2 Beyond Reform: Replacement of the Commission by the Human Rights Council. 3. The Human Rights Council: 3.1. Establishment of the Human Rights Council. 3.2. Mandate. 3.3. Working Methods. 4. The Council at Work: Achievements and Trends: 4.1. Institution-building and Working Methods. 4.2. Standard-Setting. 4.3. Special Procedures. 4.4. Universal Periodic Review. 4.5. Country Situations. 5. Concluding remarks.

## 1. Introduction

The creation of the Human Rights Council (HRC) on 15 March 2006 is the most recent turning point in the history of UN intergovernmental discussion of human rights that dates back to 1946, when the United Nations Economic and Social Council (ECOSOC) created the Commission on Human Rights (CHR). The Commission made a very important contribution to the promotion of human rights within the UN system and to significant improvements in the human rights protection at the national level. However, regardless of all its positive features, the CHR became the target of widespread criticism. Importantly, the view was voiced that the Commission had failed to protect human rights.

This study aims at examining the reasons for the transformation of the Commission on Human Rights to the Human Rights Council; the difference in the structure of the new HRC as compared to that of the CHR; whether it will be able to rectify the shortcomings of its predecessor; and if it can prove to be an effective and credible body in the promotion of human rights.

## 2. The Commission on Human Rights

As a subsidiary body set up by ECOSOC under article 68 of the UN Charter, the Commission on Human Rights was part of the so-called

'Charter-based' institutions in contradistinction to the 'treaty-based' organs. The former organs derive their legitimacy and their mandate from the human rights provisions in the UN Charter<sup>1</sup>, and they are basically political organs. The Commission was last composed of 53 members<sup>2</sup>, elected for 3-year terms by ECOSOC, taking into account an equitable geographical distribution among the five regional groups (15 seats for Africa, 12 for Asia, 5 for Eastern Europe, 11 for Latin America, 10 for Western European and others).

Every year, the Commission held its regular six-week meetings from mid-March to the end of April in Geneva. As the human rights forum of the UN, it formed the biggest gathering of government delegates and NGO-representatives discussing a variety of human rights issues. It could therefore truly be described as 'the nerve center of the UN human rights apparatus'<sup>3</sup>.

In the first twenty years of its existence, the Commission devoted its time almost exclusively to standard setting, such as drafting the Universal Declaration of Human Rights, and promotional activities. From the very start of the UN, however, many people all over the world sent letters to the Secretary-General to complain about human rights violations. But the prevailing doctrine of State sovereignty led to the conclusion that no action could be taken by the UN with regard to the received communications. A much-criticized statement of the Commission, adopted in 1947, claimed that it had 'no power to take any action in regard to any complaints concerning human rights'.

This point of view was overturned in 1967, when the Commission slowly began responding to certain grave violations under the pressure of public opinion. Initially only problems associated with racism and colonialism in Southern Africa were addressed. Soon, the Palestinian territories occupied by Israel (1967) and Chile (1975) were under investigation as well. Gradually, an ever-widening range of countries and violations were tackled on the basis of a new general agenda item dealing with gross and systematic violations 'anywhere in the world'<sup>4</sup>.

The de-colonization process that led to a number of newly created independent States initiated this evolution. These Third World countries

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<sup>1</sup> Preamble, Article 1, paragraph 3, Articles 55 c, Article 56 and Articles 62 and 68.

<sup>2</sup> Initially, the Commission counted 18 members. Successive enlargements led to the latest number of 53 (1946: 18; 1962: 21; 1967: 32; 1980: 43; 1992: 53).

<sup>3</sup> BUERGENTHAL, T.: *International Human Rights in a Nutshell*, 2nd ed., St. Paul, West Publishing Co., 1995, p. 81.

<sup>4</sup> The adoption of ECOSOC resolution 8 added the subject of "human rights violations anywhere in the world" to the Commission's agenda.

were pressing for a general, non-treaty-based, communication-type procedure, in which they saw an additional means to pursue the struggle against racist and colonial policies. Eventually, negotiations created two separate procedures, laid down in two different ECOSOC resolutions: Resolution 1235 (1967) and Resolution 1503 (1970).

Under the 1235-procedure, two types of instruments have been set up<sup>5</sup>:

- a) The Country specific procedure, which usually -but not necessarily -involved the appointment of a Special Rapporteur and which can lead to the adoption of a resolution by the Commission.
- b) The thematic procedure was a mechanism devoted to a theme with a world-wide mandate rather than a State or region. The first thematic mechanism was the 1980 Working Group on Disappearances.

Resolution 1503 (1970) established a confidential complaint procedure referring to situations<sup>6</sup>.

Together the two procedures are known as 'the special procedures' or extra-conventional mechanisms of the United Nations' Commission on Human Rights. In the Post Cold War period, the Commission saw an enormous increase in the number of Special Procedures (hereinafter SPs)<sup>7</sup>.

The end of the Cold War marked a new era for the United Nations. On the one hand, there was great optimism about the progress that could be achieved in the field of human rights because the United Nations were no longer paralyzed by the classical cold war confrontations. On the other hand, criticism on the functioning of the United Nations' human rights institutions was rising. Suggestions were made to reform or at least change the working methods of the treaty bodies as well as

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<sup>5</sup> Resolution 1235 (1967) set up the procedure on the basis of which the Commission held an annual public debate focusing on gross violations in a number of States. Thus, the resolution permitted the Commission to examine certain gross violations of human rights that come to its attention. The mandate of the Commission in this respect has evolved in the course of time, to reach its full potential in the late 70's with a growing number of countries coming under scrutiny.

<sup>6</sup> A limited petition system gives authorization to establish a procedure for the examination of communications (complaints) pertaining to "situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the Commission". Besides the aspect of confidentiality, a main feature of this procedure is the exclusion of individual cases, which is implied in the use of the terminology "situations".

<sup>7</sup> At the time of the Commission's last meeting, there were 41 special procedure mechanisms in force, covering 13 country mandates and 28 thematic mandates.

the Charter-based organs. A flow of studies, reports, resolutions and recommendations followed. Certain changes were indeed introduced, but an in-depth reform did not take place until the replacement of the Commission by the Human Rights Council.

### 2.1. *Reform Movements*

Four major reform movements have been identified prior to the final effort that culminated in the abolition of the Commission and its replacement by the Council in March 2006<sup>8</sup>. The reform movements began in the 1950s with the introduction of the Advisory Service Program apparently intended as a move to steer the Commission's work away from the field of standard setting, which the United States wanted to stop or to down play<sup>9</sup>. The next phase occurred between 1967-1968 and increased the size of the CHR's membership. It also resulted in the creation of the 1235 and 1503 procedures. The subsequent phase of reform took place between the late 1970s and mid-1980s, and entailed another increase in the Commission's membership (bringing it to 43) and the lengthening of its annual session to six weeks (previously four). It also saw an attempt by Third World countries to instigate a substantive shift in the Commission's work focus, with the idea of making the Commission more attuned to the structural and economic factors underlying human rights violations<sup>10</sup>.

The fourth phase occurred in 1989. Here there were competing proposals from the Western bloc and the Non-Aligned Group which were fundamentally incompatible as each sought to 'enhance' the work of the Commission according to their own political ideologies and national interests – in many cases this involved limiting the Commission's powers as much as possible<sup>11</sup>.

<sup>8</sup> ALMEIDA, A. J.: "Backgrounder on the Reform of the United Nations Commission on Human Rights", *Rights and Democracy*, 2005, p. 17.

<sup>9</sup> *Ibidem*. On this see also TAYLOR, R.: "The Ghost of Things to Come. Prospects of Success of the UN Human Rights Council" (LLM theses on file at the EIUC, Venice), 2006, pp. ii-v.

<sup>10</sup> ALSTON, P.: "The Commission on Human Rights", in Alston, P. (ed): *The United Nations and Human Rights: A Critical Appraisal*, Oxford University Press, Oxford, 1992, p. 197.

<sup>11</sup> *Ibidem*, p. 178. Some of the proposals of the Non-Aligned Group included that: "the Commission's approach should be 'constructive and remedial' and that 'judgmental, selective or inquisitorial approaches' should be eschewed; any reform should involve no additional financial or personnel costs; the time for debate allocated to each item should reflect the importance accorded to it by the international community; all thematic procedures should be undertaken by five-member Working Groups,



The end result of these competing proposals was a very limited (but still significant) reform package which included the final enlargement of the Commission to 53 members and authorization for it to meet for emergency special sessions when the majority of members considered it necessary.

These four phases of reform highlight only the successful attempts to re-organize the workings and mandate of the Commission. In contrast, the majority of such initiatives failed to bear fruit, leading to a perpetuation of the *status quo*. Some of the strongest arguments against proposals for reform came, surprisingly, from those more progressive States and even NGOs who would have liked the Commission to be as effective as possible. This was due to a fear that providing opportunities to assess the Commission's working methods and make changes to it would in fact have led to its powers being weakened and its mandate restricted<sup>12</sup>.

The origins of the last process of reform of the CHR are to be found in its 1998 session. The Bureau of the 54<sup>th</sup> (1998) session presented a report<sup>13</sup> the following year with recommendations for various changes to the work of the Commission. The different regional groups were unable to agree on the proposals<sup>14</sup>. As a result, only a few of the less substantive recommendations were adopted, but a Working Group was established to consider the report further. The Working Group presented its findings to the Commission in 2000 and its report<sup>15</sup> was adopted in its entirety, with significant consequences for the system of Special Procedures, the 1503 procedure and the Sub-Commission.

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consisting in part of Geneva-based diplomats, rather than by individual Special Rapporteurs; Country Rapporteurs be chosen "from amongst individuals commanding a thorough knowledge and familiarity of [sic] the specificities and complexities of the country in question"; the Sub-Commission should no longer adopt any resolution and should not concern itself with violations; all communications should be dealt with solely under the 1503 procedure and not by the thematic Rapporteurs; and the role of NGOs should be restricted".

<sup>12</sup> As a result of these factors Alston has noted that "major innovations have usually been achieved as a result of equally major political confrontations", *supra* note 10, at p. 199.

<sup>13</sup> E/CN.4/1999/104, Report of the Bureau of the fifty-fourth session of the Commission on Human Rights submitted pursuant to Commission decision 1998/112, (December 23, 1999).

<sup>14</sup> The Western Group being predominantly in favour and the Asian and Like-Minded Groups opposed.

<sup>15</sup> E/CN.4/2000/112, Report of the Inter-session Open-ended Working Group on Enhancing the Effectiveness of the Mechanisms of the Commission on Human Rights, (February 16, 2000).

Among these alterations, the Sub-Commission was prohibited from adopting country-specific resolutions or thematic resolutions making references to specific countries. The majority of the recommendations of the original report of the 1998 Bureau were not implemented.

In 2003 the Commission began a thorough review of its working methods<sup>16</sup> which continued throughout 2004 and 2005<sup>17</sup>. Two of the more significant proposals, put into practice for the first time at the 2003 session, were the High-Level Segment and Interactive Dialogues with the Special Procedures. The outcome of these reviews did not include any major substantive changes to the Commission's structure or mandate. Moreover, on the 1998-2000 process of reform, one of the members of the Sub-Commission has noted that 'he almost had the impression that the UN was suffering from an acute attack of "reformitis", and that in view of the results of that reform, 'reform did not necessarily amount to progress'<sup>18</sup>.

## 2.2. *Beyond Reform: Replacement of the Commission by the Human Rights Council*

In the context of the reform process of the United Nations, the first report of real significance regarding the Commission is the High-Level Panel's 2004 Report entitled *A More Secure World: Our Shared Responsibility*<sup>19</sup>.

<sup>16</sup> On the basis of CHR Resolution 2002/91, with input from the Expanded Bureau of the 58<sup>th</sup> session.

<sup>17</sup> The topics addressed pertained predominantly to issues of time management, documentation issues, duration of the session and format of resolutions.

<sup>18</sup> Statement by Mr. Marc Bossuyt, member of the Sub-Commission for the Promotion and Protection of Human Rights during its last session held in 2005. UN Doc.E/CN.4/Sub.2/2005/SR.5, paragraph 47, Summary Records of the Fifth Meeting, 28 July 2005, Fifty-Seventh Session of the Sub-Commission of the Promotion and Protection of Minorities. In this line, Elvira Domínguez Redondo has pointed out that subjecting the same procedures and mechanisms to reform every now and then has great potential to undermine their credibility and has a big impact on their efficiency. Statement made during her presentation entitled "The European Union and the HRC's Expert Body: Can the Sub-Commission and Special Procedures Be Replaced by a More Effective Mechanism?", in *EIUC Diplomatic Conference: the Role of the European Union in the Newly Established UN Human Rights Council*, Venice, Monastery of San Nicolò, 7-8 July 2006.

<sup>19</sup> UN Doc. A/59/565 (December 2, 2004). The Panel's mandate was confined "to the field of peace and security, broadly interpreted" and its role was to:

(a) Examine today's global threats and provide an analysis of future challenges to international peace and security...

(b) Identify clearly the contribution that collective action can make in addressing these challenges;

The Panel did accurately identify some of the problems preventing the Commission from functioning. The Panel concludes that 'the Commission's capacity to perform [its] tasks has been undermined by eroding credibility and professionalism'. It expresses concern that 'in recent years States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others. The Commission cannot be credible if it is seen to be maintaining double standards in addressing human rights concerns'. The Panel identifies the question of membership in many ways as 'the most difficult and sensitive issue relating to the Commission on Human Rights'. As 'proposals for membership criteria have little chance of changing these dynamics and indeed risk further politicizing the issue', the Panel rather recommends as a short-term solution 'that the membership of the Commission on Human Rights be expanded to universal membership'. 'In the longer term, Member States should consider upgrading the Commission to become a "Human Rights Council" that is no longer subsidiary to the Economic and Social Council but a Charter body standing alongside it and the Security Council'<sup>20</sup>.

In its own report entitled *In Larger Freedom: Towards Development, Security and Human Rights for All*, the Secretary-General Kofi Annan agrees that with respect to the Commission on Human Rights 'a credibility deficit has developed, which casts a shadow on the reputation of the United Nations system as a whole'. He also points out that certain 'States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others'<sup>8</sup>. However, he proposes to 'replace the Commission on Human Rights with a smaller standing Human Rights Council, as a principal organ of the United Nations or subsidiary body of the GA, whose members would be elected directly by the GA by a two-thirds majority of members present and

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(c) Recommend the changes necessary to ensure effective collection action, including but not limited to a review of the principal organs of the United Nations.

See A/59/565, *A More Secure World: Our Shared Responsibility*, Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change, Annex II, 2004, p. 119.

<sup>20</sup> The Panel further proposes that all members of the Commission on Human Rights designate prominent and experienced human rights figures as the heads of their delegations, as was the practice in the first half of the Commission's history. A last suggestion from the Panel is that the High Commissioner be called upon to prepare an annual report on the situation of human rights worldwide. Such a report could serve as a basis for a comprehensive discussion with the Commission. It is worth noticing that the report of the High-Level Panel did not mention the Sub-Commission but did propose the creation of an advisory council or panel to support the work of the CHR.

voting'<sup>21</sup>. The composition of the Council and term of office of the members is left to be decided by States and no membership criteria proposed other than that members of the Council 'should undertake to abide by the highest human rights standards'<sup>22</sup>.

The Secretary-General further developed his thinking about a new Human Rights Council in a statement that he made to the Commission on 7 April 2005 in which he introduced the concept of 'universal peer review' that was to become a central element in the development of the new Council<sup>23</sup>. His thinking was yet further developed in an Explanatory note first transmitted to the President of the General Assembly on 14 April 2005 and later published as an addendum to 'In larger freedom'<sup>24</sup>.

It was from here that negotiations began with States aimed at reaching the momentum at the World Summit in New York in September 2005<sup>25</sup>.

### 3. The Human Rights Council

#### 3.1. *Establishment of the Human Rights Council*

The Heads of State and Government gathered in New York for the 2005 World Summit merely decided to create a Human Rights Council without giving any more details<sup>26</sup>. All further modalities were left to the General Assembly with the request to its President 'to conduct open, transparent and inclusive negotiations, to be completed as soon as possible during the sixtieth session, with the aim of establishing the mandate, modalities, functions, size, composition, membership, working methods and procedures of the Council'<sup>27</sup>. After intense and lengthy negotiations, on 15 March 2006, it was adopted Resolution 60/251 establishing the Human Rights Council as a subsid-

<sup>21</sup> *Ibidem*.

<sup>22</sup> *Ibidem*, paragraph 183.

<sup>23</sup> Secretary-General, Address to the Commission on Human Rights, 7 April 2005, available at: [www.ohchr.org/english/bodies/chr/docs/61chr/sgchr.doc](http://www.ohchr.org/english/bodies/chr/docs/61chr/sgchr.doc).

<sup>24</sup> Addendum to In larger freedom, Human Rights Council: Explanatory note by the Secretary-General, 23 May 2005, A/59/2005/Add.1 at para.6.

<sup>25</sup> High Level Plenary Meeting of the 60<sup>th</sup> Session of the UN General Assembly held in New York, September 14-16, 2005.

<sup>26</sup> That decision is enshrined in the Outcome document of the World Summit, GA Res. 60/1, paragraphs 157-160.

<sup>27</sup> GA Res. /60/1, paragraphs 159-160.

ary organ of the General Assembly, which shall review the Council's status within five years<sup>28</sup>.

### 3.2. *Mandate*

GA Resolution 60/251 has entrusted the HRC with the following powers and tasks<sup>29</sup>:

(a) Promote human rights education and learning as well as advisory services, technical assistance and capacity-building, to be provided in consultation with and with the consent of Member States concerned;

(b) Serve as a forum for dialogue on thematic issues on all human rights;

(c) Make recommendations to the General Assembly for the further development of international law in the field of human rights;

(d) Promote the full implementation of human rights obligations undertaken by States and follow-up to the goals and commitments related to the promotion and protection of human rights emanating from United Nations conferences and summits;

(e) Undertake a universal periodic review, based on objective and reliable information, of the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; [...];

(f) Contribute, through dialogue and cooperation, towards the prevention of human rights violations and response promptly to human rights emergencies;

(g) Assume the role of and responsibilities of the Commission on Human Rights relating to the work of the Office of the United Nations High Commissioner for Human Rights, as decided by the General Assembly in its resolution 48/141 of 20 December 1993;

(h) Work in close cooperation in the field of human rights with Governments, regional organizations, national human rights institutions and civil society;

(i) Make recommendations with regard to the promotion and protection of human rights;

(j) Submit an annual report to the General Assembly;'

GA Resolution 60/251 also refers explicitly to the Council's powers to address specific situations of gross human rights violations – a function which was hard-won within the Commission only after a consider-

<sup>28</sup> Resolution 60/251 was adopted by an overwhelming majority of 170 States in favour out of 177. Belarus, Iran and Venezuela abstained, while the US, Israel, Marshall Islands and Palau voted against.

<sup>29</sup> GA Resolution 60/251, Operative Paragraph 5.

able period of time. In contrast, the wording of the Council's mandate states unequivocally:

'3. The Council should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon...'<sup>30</sup>.

Since gross and systematic human rights violations as such constitute a threat to international peace and security, the GA Resolution can be interpreted as authorizing the HRC to explicitly refer particular serious Country situations to the Security Council.

One of the most innovative features of the Council is the Universal Periodic Review procedure (hereinafter, UPR)<sup>31</sup> that was initially proposed by the Secretary General as 'peer review'<sup>32</sup>. The provisions of the GA Resolution referring to the UPR are somewhat ambiguous about the scope and outcome of that review<sup>33</sup>. On the first hand, the working methods of the UPR are expressed in GA Resolution 60/251 only in very general terms, to include universal coverage based on a cooperative interactive dialogue which should 'not duplicate' the work of the Treaty-Bodies. As we will see below, the details have been subject to

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<sup>30</sup> *Supra* note 29, Operative Paragraph 3. In the same paragraph the Council is also entrusted to "promote the effective coordination and the mainstreaming of human rights within the United Nations system". That task is closely related to that of responding promptly to human rights emergencies, see in operative Paragraph 5 (f).

<sup>31</sup> In fact, the UPR is not an entirely innovative proposal. In 1956 ECOSOC initiated a voluntary reporting system of periodic reports on the implementation of human rights (ESC Resolution 624B (XXII) 1956). Between 1956 and 1965, these reports were not given any serious attention by any UN body. Finally, in 1965, the Sub-Commission began undertaking initial studies of the reports, which were then submitted to the CHR for consideration. These reports included comments from NGOs and government responses. Despite the whole process being voluntary it led to such great controversy that in 1967 the CHR passed a resolution asking ECOSOC to request the Sub-Commission to cease its consideration of the reports and the whole practice effectively died. See EIDE, A.: "The Sub-Commission on Prevention of Discrimination and Protection of Minorities", in ALSTON, P. (ed.): *The United Nations and Human Rights: A Critical Appraisal*, 1992, *supra* note 12, pp. 211-264, at p. 223.

<sup>32</sup> On the concepts of "peer review" and "periodic review" see GAER, F.D.: "A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System", *Human Rights Law Review*, vol. 7, no. 1, 2007, pp. 109-139.

<sup>33</sup> For further references see the roundtable expert meeting entitled *El Consejo de Derechos Humanos* organized by the Fundación para las Relaciones Internacionales y el Diálogo Exterior (FRIDE) and the Institute of Human Rights Pedro Arrupe of the University of Deusto in [www.fride.org](http://www.fride.org) (visited on July 14, 2006) and ALMQVIST, J. and GÓMEZ ISA, F.: *El Consejo de Derechos Humanos: Oportunidades y Desafíos/The Human Rights Council: An Expert Meeting on Challenges Ahead*, Universidad de Deusto, Bilbao, 2006.

determination by the Council in its first year of practice<sup>34</sup>. Hampton has referred to some crucial issues that need to be addressed for the UPR to efficiently work. Who will determine who gets reviewed when? How will the process succeed in being both objective and non-political, engendering a sense of responsibility on the part of members of the Council to protect human rights without fear or favor? How will the very real possibility of undermining the work of the treaty monitoring bodies be avoided?<sup>35</sup> One may add to this list the issue related to the information upon which the review will be based upon.

In this connection, a very clear distinction between the political bodies (the new Council) and the technical expert bodies from where the Council can get the information about the situation of human rights (Treaty-Bodies, SPs) when it conducts the UPR should be made since the lesson learned from experience at the UN and regional organizations shows that '... an objective, reliable and professional assessment and monitoring of human rights can only be achieved by truly independent expert bodies'<sup>36</sup>. The HRC should, as a political body, establish a follow-up mechanism to monitor the implementation of the recommendations made up by the Treaty-Bodies and the SPs regarding specific situations since one of the failures of the Commission was the lack of monitoring the implementation of its own recommendations. The Council must work on the 'objective and reliable information' coming from these sources to carry out its review of the fulfillment by each State of its human rights obligations<sup>37</sup>. The main aim of this distinction between the political and the technical functions is to decrease the level of politicization of the HRC.

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<sup>34</sup> As one NGO has highlighted, "Universal periodic review could be an excellent means to ensure the equality of States in international accountability. It could also be a way to waste time and resources on essentially fruitless discussions". See ΣΙΔΩΤΙ, C.: "Now the Real Work Begins", *International Service for Human Rights*, 2006 available at [www.ishr.ch](http://www.ishr.ch) (visited on April 28, 2006).

<sup>35</sup> HAMPTON, F.: "The Reform of the UN Human Rights Machinery", *Human Rights Law Review*, vol. 7, no. 1, 2007, pp. 7-27, at p. 16.

<sup>36</sup> This has been highlighted by NOWAK, M. "The EU Input to the Universal Periodic Review Mechanism: how to Deal with Country Situations?", *EIUC Diplomatic Conference: The Role of the European Union in the Newly Established UN Human Rights Council*, Venice, Monastery of San Nicolò, July 7-8, 2006, pp. 4-5 (On file with the authors).

<sup>37</sup> *Supra* note 29, paragraph 5. Nowak proposes that the UPR serves only the purpose of "... supervising the domestic implementation of the respective decisions, conclusions and recommendations of independent expert bodies...", and that it would be the role of the OHCHR to collect all available objective and reliable information on the States to be reviewed and the role of the Council would be merely to supervise whether or not the respective Government has taken adequate measures to implement the decisions and recommendations outlined above, *Ibidem*, p. 6 (emphasis in the original).

On the second hand, the GA Resolution also poses the question about how to reconcile the mandate to 'undertake a universal periodic review (...) of the fulfillment by each State' (OP.5 (e)) with the provision requiring that the Council 'decides also that members elected to the Council (...) shall fully cooperate with the Council and be reviewed under the universal periodic review mechanism during their term of membership' (OP.9). The logical interpretation seems to be that the UPR will entail the assessment by the Council of all States, starting with its own member States, in a non-selective manner<sup>38</sup>.

The GA Resolution does not make any reference to the outcome of the UPR. The rationale behind the mechanism is that the Council can make recommendations to States for the improvement of the human rights situations.

On the other hand, some wording of the operative paragraph 5 (e) of the GA Resolution forces us to question what is the main purpose of the UPR: 'the review shall be a cooperative mechanism, based on interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs...'. The UPR not only has to meet the capacity-building needs of countries in the area of human rights, but also to address the importance of the situations regarding human rights violations which prevail in specific countries.

A further pivotal component of the HRC's mandate concerns the review of functions and responsibilities of the CHR as well as its overall human rights machinery. The operative paragraph is clear in this regard and reads as follows:

'6. ... the Council will assume, review and, where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain a system of special procedures, expert advice and complaint procedure...'

The above wording offers a great opportunity for reforming and boosting the effectiveness of the human rights apparatus of the old UN Commission. The analysis of the practice of the Council will show whether the shortcomings of the confidential procedure under ECOSOC Resolution 1503 have been truly reviewed, often condemned as useless or even harmful to the protection of human rights<sup>39</sup>.

<sup>38</sup> NOWAK, M.: *supra* note 36, p. 3.

<sup>39</sup> On the proposal of reviewing the 1503 procedure see NOWAK, M.: *supra* note 36, pp. 7-8.



Arguably, the most sensitive aspect of the overall review process has to do with the SPs, the most vital tools the CHR created to monitor and protect human rights. The future existence of the SPs has been put into question since the GA Resolution refers to 'a system of special procedures' due to the pressure of the so-called like-minded group of States. Their so-called 'rationalization' has also attracted very different views (note Hampton). One may recognize that reshaping the mandate of the Procedures as to exclude for instance consideration of individual cases or the urgent messages procedures, or the termination of crucial mandates such as that on torture, arbitrary detention, disappearances, or those on economic social and cultural rights, would mean to completely distort the Procedures.

A serious review of the SPs shall, first of all, envisage the inclusion of all the members of the HRC, the SPs' mandate holders, and civil society representatives<sup>40</sup>. Secondly, the review should begin with a conceptualization of the role the Procedures should play as independent experts advising and supporting the Human Rights Council, above all, in the UPR. This should be then followed by an analysis of issues such as selection process; complementarity and gaps; enhancement of follow-up; emerging human rights issues; improvements of guidelines to ensure a consistently high standard of work; harmonization of work between mandates where appropriate and within the OHCHR to ensure maximum effectiveness and efficient use of resources; and enhancing links with relevant partners such as the UN agencies, the Security Council, national human rights institutions, Treaty-Bodies, etc<sup>41</sup>. Thirdly, a very significant improvement to the work of the SPs would also include enhancing cooperation with the mandates by governments, yet this is perhaps the most difficult reform to implement in practice<sup>42</sup>. However, the requirement that Council members 'fully cooperate with the Council'<sup>43</sup> may be interpreted as including full cooperation with the Council's mechanisms. The pledges made as part of the election procedure may also create further psychological pressure on States to take such a measure. In any event, the Council should closely monitor those kinds of offers to ensure cooperation.

The review and rationalization process of the SPs that has taken place in the first year of the Council's mandate will be examined below.

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<sup>40</sup> See the report of the 13<sup>th</sup> annual meeting of the SPs and specifically Annex II, A/HRC/4/43.

<sup>41</sup> *Ibidem*.

<sup>42</sup> *Ibidem*.

<sup>43</sup> *Supra* note 29, paragraph 9.

### 3.3. Working Methods

The quality of membership is one of the main challenges underlying the establishment of the Council<sup>44</sup>. According to GA Resolution 60/251<sup>45</sup> the Council is composed of forty-seven members elected directly and individually by the majority of the GA members (or ninety-six countries). The HRC's membership is smaller than that of its predecessor, a feature that it was hoped to allow for a more efficient and improved decision-making process. The Council's election by the GA rather than regional groups, as in the case of the CHR, was thought to guarantee, at least in principle, that 'countries with a greater commitment to human rights' would sit in the Council.

Membership of the Council is based on the principle of equitable geographic representation according to the following distribution of seats: thirteen seats to the Group of African States; thirteen seats to the Group of Asian States; six seats to the Group of Eastern European States; eight seats to the Group of Latin American and Caribbean States and seven seats to the group Western European and other States. Each member State will serve for a period of three years and 'shall not be eligible for immediate re-election after two consecutive terms'<sup>46</sup>.

The process for electing members to the Council differs in small but significant ways to that of the Commission since members are elected by the GA rather than by the ECOSOC (which previously was accused of 'rubber-stamping' candidates proposed by regional groups with little real competition). This change was intended to make 'members more accountable and the body more representative'<sup>47</sup>. The reform proposal originally required a two-thirds GA majority for election but this was later reduced to a simple majority (96 votes of a possible 191). Although this would have made it harder for States with poor human rights records to be elected, in reality it may have represented an unrealistically high standard for many States<sup>48</sup>.

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<sup>44</sup> *Supra* note 6, p. 3.

<sup>45</sup> *Supra* note 29, operative paragraph 7.

<sup>46</sup> *Ibidem*.

<sup>47</sup> A/59/2005/Add.1, Explanatory Note by the Secretary-General, *In Larger Freedom*, paragraph 4, *supra* note 24.

<sup>48</sup> Noting the results of the elections on 9 May 2006, it was only the African Group in which all members were elected with a comfortable two-thirds majority. This would appear to indicate regional solidarity rather than universal approval as in contrast the highest-scoring member from the WEOG Group (Germany) won just 154 votes – 14 less than the lowest ranked African member (Algeria).

Operative paragraph 8 of GA Resolution 60/251 then sets the criteria for membership. It requires States 'to take into account' when electing members of the HRC 'the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto'. As it has been pointed out, this 'neither formally binds a candidate State to submit voluntary pledges nor precludes any State from voting a candidate that has neither made nor met its pledges. In this respect, the provision falls short of conditionality attached to membership, an element which many States had advocated [...]'<sup>49</sup>. Besides these criteria, HRC's members are expected to uphold the highest human rights standards, fully cooperate with the Council and will be subjected to the UPR during their terms of membership<sup>50</sup>.

The above criteria for membership are too generic: it would have been desirable that the GA identified what kind of State activity and behaviour falls within the category of 'contribution to human rights'. In addition, the degree of fulfillment of human rights obligations should have been included as a key requirement for membership<sup>51</sup>. Specifications of the criteria for membership have emerged from State delegations' statements after the vote on GA Resolution 60/251<sup>52</sup> and from candidate countries through the pledges presented<sup>53</sup>.

Importantly and dramatically differently from the CHR, operative paragraph 8 provides for the suspension of the HRC's membership by the GA if member States commit gross and systematic violations of human rights. Exactly what would be included in this definition - and who would decide - is not specified but one possibility would be for the UPR to have the power to recommend a State for suspension. Until now, suspension from a UN body could only take place with Security Council authorization (as was the case when South Africa was suspended from the Organization). Although suspension would re-

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<sup>49</sup> UPTON, H.: "The Human Rights Council: First Impressions and Future Challenges", *Human Rights Law Review*, vol. 7, no. 1, 2007, pp. 29-39, at p. 32.

<sup>50</sup> *Supra* note 29, paragraph 9.

<sup>51</sup> Some commentators have regarded the criteria for membership as a further guarantee that the HRC will be less politicized and more professional than the HRC. In this respect see the Nobel Prize Laureates' remarks, *supra* note 41.

<sup>52</sup> In particular, the EU, Liechtenstein, Japan, Canada and Australia have pointed out that when electing a member to the HRC they will consider whether the candidate Country is under enforcement measure decided by the Security Council under Chapter VII of the UN Charter.

<sup>53</sup> On this see TAYLOR, R.: *supra* note 9, pp. 53 ff. All candidates in the first election of the HRC made voluntary pledges and commitments during the election process.

quire a higher voting standard than initial election to the Council (two-thirds of GA members present and voting), abstentions are discounted so in practice a member could be suspended with fewer than 96 votes.

Considering the results of the 9 May 2006 and the 17 May 2007 elections, an overview of the current Council membership in comparison with recent years of the Commission shows that over half of the Council's initial members were also members of the Commission in 2005, and two-thirds were Commission members in either 2003 or 2004. Most notably among these returning States are China, Cuba, the Russian Federation, and Saudi Arabia – all of which have been cited for grave and massive human rights violations<sup>54</sup>. The USA is conspicuous by its absence, made somewhat ironic by its public opposition to the establishment of the Council on the ground.

Regarding sessions, the Council will meet regularly scheduling no fewer than three sessions per year, including a main meeting, and hold special sessions at the request of one of its members and the support of one third of the member States<sup>55</sup>.

Notably, participation in the HRC's session by NGOs is also envisaged: it will have to be based on agreements, ECOSOC resolution 1996/31 and practices observed by the Commission. Indeed, NGOs

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<sup>54</sup> The current composition of the Council, including the newly elected members and the previously elected members whose terms have not yet expired, is shown in the following table:

African Group		Asia Group		Eastern European Group		Latin and Caribbean Group		Western European and Other Groups	
<b>13</b>		<b>13</b>		<b>6</b>		<b>8</b>		<b>7</b>	
Angola	2010	Bangladesh	2009	Azerbaijan	2009	Bolivia	2010	Canada	2009
Cameroon	2009	China	2009	Bosnia and Herzegovina	2010	Brazil	2008	France	2008
Djibouti	2009	India	2010	Romania	2008	Cuba	2009	Germany	2009
Egypt	2010	Indonesia	2010	Russian Federation	2009	Guatemala	2008	Italy	2010
Gabon	2008	Japan	2008	Slovenia	2010	Mexico	2009	Netherlands	2010
Ghana	2008	Jordan	2009	Ukraine	2008	Nicaragua	2010	Switzerland	2009
Madagascar	2010	Malaysia	2009			Peru	2008	United Kingdom	2008
Mali	2008	Pakistan	2008			Uruguay	2009		
Mauritius	2009	Philippines	2010						
Nigeria	2009	Qatar	2010						
Senegal	2009	Rep. of Korea	2008						
South Africa	2010	S. Arabia	2009						
Zambia	2008	Sri Lanka	2008						

<sup>55</sup> *Supra* note 29, operative paragraph 10.

participation together with the preservation of the system of the SPs constitute the most significant legacies of the CHR's practice<sup>56</sup>.

As far as the methods of work are concerned the HRC shall apply the GA rules of procedure and fulfills its mandate in a transparent, fair and impartial way<sup>57</sup>. This means that its session should bring about genuine dialogue, be result-oriented and allow for follow-up to recommendations and substantive interaction with the SPs<sup>58</sup>. These very provisions could be a way to potentially tackle most of the Commission's shortcomings. The analysis of the practice of the Council will show if those provisions have been put in practice.

The frequency and length of Council sessions present both advantages and disadvantages in comparison to those of the Commission. The Commission's highly compressed 6-week annual sessions hampered its ability 'to tackle crisis situations or to take timely action to prevent them,' and '[did] not allow for sustained attention to human rights,'<sup>59</sup>. It also presented serious logistical difficulties for smaller missions and NGOs attempting to cover all meetings and resolution negotiations.

GA Resolution 60/251 states only the minimum requirements: that the Council should meet for at least three sessions per year, for a minimum of ten weeks in total, and should include a 'main session'. There is also provision for holding 'special sessions' as required. These extended sessions should help to reduce politicization by allowing 'more time for a wider range of issues to be addressed more comprehensively'<sup>60</sup> and allow more concerted follow-up of, for example, States' implementation of SPs and Treaty-Bodies' recommendations. The need for such follow-up to maintain pressure on target situations and produce concrete results has been highlighted as a key requirement for effective reform. However, additional time alone will not automatically entail successful follow-up since this must be consciously scheduled into the agenda and given the

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<sup>56</sup> *Ibidem*, paragraph 11. As result of NGOs activism and lobby the draft resolution presented by Eliasson on February 23, 2006, clearly stated, in paragraph 11, that 'the participation of and consultation with observers, including (...) NGOs shall be based on arrangements , including ECOSOC Resolution 1996/31, and practices observed by the Commission, while ensuring the most effective contribution of these entities'. NGOs have lobbied hard and managed to have a solid legal basis for participation in the HRC.

<sup>57</sup> *Supra* note 29, paragraphs 11 and 12.

<sup>58</sup> *Ibidem*, paragraph 12.

<sup>59</sup> Amnesty International: *Meeting the Challenge: Transforming the Commission on Human Rights into a Human Rights Council*, IOR 40/008/2005, available at [www.amnesty.org](http://www.amnesty.org) (visited on June 28, 2006).

<sup>60</sup> PROVE, P.: "Re-Commissioning the Commission on Human Rights: UN Reform and the UN Human Rights Architecture", available at [www.lutheranworld.org/What\\_We\\_Do/OIAHR/Issues\\_Events/UN\\_Reform-Human\\_Rights.pdf](http://www.lutheranworld.org/What_We_Do/OIAHR/Issues_Events/UN_Reform-Human_Rights.pdf), p.12.

attention it merits. Even with the additional sitting time, it will still be necessary to manage the Council's agenda responsibly to ensure that all pertinent issues are addressed within the time available.

The new format offers a workable model for addressing emergency situations promptly. In light of the GA's recent endorsement of the concept of the 'Responsibility to Protect'<sup>61</sup>, it will be interesting to note what (if any) use the Council makes of its enhanced powers to respond to human rights crises in a timely manner. However, it could be argued that the scarcity of special sessions of the Commission was the result of lack of political will rather than functional complexity and as such the Council is perhaps no more likely to address emergency situations effectively than its predecessor. For the victims, all human rights violations are a crisis requiring urgent response. As the Council cannot permanently sit in special session, deciding which situations require emergency sessions will also require political choices to be made. It is also worth noting that there is no mandate for a special session to be called on the initiative of the High Commissioner for Human Rights, which would have been an advantage.

It is therefore extremely important that the Council's main session be of sufficient length and meaningful content to attract participation by the actors identified above so as to address these concerns.

#### 4. The Council at Work: Achievements and Trends

We will now look at how the Council has worked in its first year and half of practice. At the time of writing, the Council has met in seven regular sessions and eight special sessions<sup>62</sup>.

##### 4.1. *Institution-building and Working Methods*

The HRC has focused on institution-building in its first year and has established three inter-governmental working groups representing six processes: (a) UPR facilitated by Morocco; (b) review of mandates and

<sup>61</sup> *Supra* note 26, operative paragraphs 138-139.

<sup>62</sup> The seventh regular session and the special sessions are beyond the scope of this article. Information on these sessions is available at <http://www2.ohchr.org/english/bodies/hrcouncil/>, (visited on May 20, 2008). For an in depth study of the Council's first year and half of practice see MARQUEZ CARRASCO, C. and NIFOSI SUTTON, I.: "The UN Human Rights Council: Reviewing its First Year", *Yearbook on Humanitarian Action and Human Rights*, 2008, pp. 101-124.

mechanisms assumed from the former Commission on Human Rights facilitated by the Czech Republic; (c) expert advice facilitated by Jordan; (d) complaint procedure facilitated by Switzerland; (e) agenda and programme of work facilitated by Guatemala; and (f) rules of procedure and working methods facilitated by the Philippines.

In accordance with the deadline set in GA resolution 60/251, the HRC concluded its institution-building processes during the fifth ordinary session, held 11-18 June 2007. That session was largely devoted to the negotiation and drafting of Resolution 5/1 of the Council, laying down the fundamental rules and procedures that will inform the body's future practice. Resolution 5/1 enshrines the modalities of the UPR and the review of the SPs, establishes the Council's Advisory Committee and a new complaint procedure, and sets the Council's agenda and program of work.

These other components of the Council's institution-building (the Advisory Committee, the new complaint procedure, and the Council's agenda and methods of work<sup>63</sup>) should also be highlighted. The establishment of the Advisory Committee and the new complaint procedure may be regarded as positive developments but their importance should not be overstated. It is unlikely that the Committee will play the same propulsive role as the Sub-Commission on the Promotion and Protection of Human Rights, whereas the new complaint procedure is just a photocopy of the old and highly unsatisfactory 1503 procedure it was meant to replace.

The Council's new agenda raises questions about the seriousness of the body's future work. The main problem is item N° 7, dealing with the human rights situation in Palestine and other Occupied Arab territories. This reference to a specific country situation contradicts the principles of impartiality, non-selectiveness and universality which should inform examination of country situations. Other country situations will be dealt with under item N° 4 on 'human rights situations that require the Council's attention'.

Finally, the methods of work of the Council present a further contentious issue pertaining to the analysis of country situations. That is, the introduction of a sort of 'conditional clause' for the adoption of a country resolution whereby States proposing the texts shall have to 'se-

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<sup>63</sup> Resolution 5/1 paragraphs 65-84, 85-109 and Section V. Amnesty International has noted that "the agenda and program of work [... provide] a good base from which to make the Council's work sufficiently predictable to enable effective participation by States and relevant stakeholders and sufficiently flexible to allow the Council to address human rights situations in an effective and timely manner", *supra* note 59.

cure the broadest possible support for their initiatives (preferably 15 members) before action is taken'<sup>64</sup>. While it is not possible to predict how this new stipulation will affect the consideration of country situations and the appointment of country experts, it is not difficult to imagine that the Organization of the Islamic Conference (OIC) and States like China and Cuba will be very active in using the 'broadest possible support/15 members' requirement to sabotage negotiations for the adoption of country resolutions. The very unknown in this regards is how successfully pro-human rights States will be in framing diplomatic strategies capable of triggering the necessary political support for the resolutions at stake.

#### 4.2. *Standard-Setting*

The HRC followed the distinguished standard-setting tradition of the CHR by adopting two important instruments at its first session. The first is the International Convention for the Protection of All Persons from Enforced Disappearance, enshrined in the very first resolution adopted by Council<sup>65</sup>. The second is the long-awaited UN Declaration on the Rights of Indigenous Peoples<sup>66</sup>, adopted by majority vote. The Council referred both instruments for adoption by the General Assembly at its 61st session later in 2006<sup>67</sup>. The new Convention will fill a major gap in existing human rights standards, and the Declaration will set human rights standards crucial for the dignity and well-being of all indigenous peoples.

In an unprecedented move, the Council authorized the open-ended intergovernmental Working Group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights, inherited from the Commission, to elaborate an optional protocol to the Covenant<sup>68</sup>. NGOs and academics have campaigned long and hard for this mandate which heralds a fundamental break-through in the judicial protection of second generation rights.

In addition, the Council asked the High Commissioner for Human Rights to select five highly qualified experts to study the content and scope of the substantive gaps in existing international instruments to combat

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<sup>64</sup> Resolution 5/1, paragraph 117 (d).

<sup>65</sup> A/HRC/RES/1/1 June 23, 2006. The Resolution was adopted by consensus.

<sup>66</sup> A/HRC/RES/1/2, June 23, 2006.

<sup>67</sup> Resolution 1/3.

<sup>68</sup> Further details on the Optional Protocol are available at <http://www2.ohchr.org/english/issues/escr/intro.htm> (accessed on May 21, 2008).



racism, racial discrimination, xenophobia and related intolerance and produce a document with concrete recommendations on the means to bridge those gaps<sup>69</sup>. The recommendations are to include, but not be limited to, the drafting of an optional protocol to the International Convention on the Elimination of All Forms of Racial Discrimination or the adoption of other standard-setting instruments<sup>70</sup>.

#### 4.3. *Special Procedures*

In its first ordinary session, held on 19-30 June 2006, the Council decided to extend the mandates of all SPs for one year and created an open-ended intergovernmental working group charged with the task of formulating recommendations on their review and rationalization<sup>71</sup>. During the second session, convened on 6-18 October 2006, the Council heard and considered all Thematic and Country SPs's reports and remarked on the report on the joint mission to Lebanon and Israel of the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on the right to health, the Special Rapporteur on adequate housing, and the Special Representative of the Secretary General for internally-displaced persons<sup>72</sup>.

The review of the SPs, arguably the most sensitive issue at stake in the Council's institution building, is enshrined in Resolution 5/1 HRC (Part II). The Resolution sets out criteria for the nomination and selection of the UN experts<sup>73</sup> and changes, to a certain extent, the modalities of their appointment. In other words, the selection of the UN SPs will be based on a public list of eligible candidates, to be prepared and

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<sup>69</sup> In its Annual Report to the GA, racism in all its contemporary manifestations is put across as one of the top priorities of the future work of the Council. A/HRC/RES/3/L.11. In Resolution 3/2 the Council had decided to act as the Preparatory Committee for the 2009 Durban Review Conference. The Third Committee of the General Assembly had recommended the convening of the Durban Review Conference and requested the HRC to undertake preparation for the event and formulate by 2007 a concrete plan.

<sup>70</sup> A/HRC/AC.1/1/2.

<sup>71</sup> A/HRC/DEC/102, June 30, 2006.

<sup>72</sup> A/HRC/2/7. The main objective of the joint visit was to assess the impact on the civilian populations of the armed conflict that affected southern Lebanon and northern Israel between July 12 and August 14, 2006.

<sup>73</sup> The criteria are: expertise, experience in the field of the mandate, independence, impartiality, personal integrity and objectivity. Resolution 5/1 paragraph 39. The Resolution does not detail the technical and objective requirements for candidates for mandate-holders deferring their definition to the sixth session of the Council (first session of the second cycle), *Ibidem*, paragraph 41.

regularly updated by the Office of the High Commissioner for Human Rights, which shall include personal data, information on expertise and professional experience<sup>74</sup>.

Importantly, Resolution 5/1 makes clear that the review, rationalization and improvements of the SPs will take place in the context of negotiations of the relevant resolutions<sup>75</sup>. The process shall be guided by the principles of universality, objectivity, non-selectivity, constructive dialogue and cooperation and aimed to enhance promotion of all human rights<sup>76</sup>.

The most controversial aspect of the review of the SPs concerned the fate of the country procedures, an issue that became explosive as a consequence of the presentation of the experts on Cuba and Belarus very critical reports at the fifth session<sup>77</sup>. Cuba and Belarus, together with Pakistan (on behalf of the OIC), the Russian Federation and China, among others, used the reports as a pretext for advocating the termination of all country mandates. Western States and NGOs, who were in favor of the preservation of the country mandates, engaged in lengthy negotiations and diplomatic efforts to retain the country procedures. At the end they succeeded, although their victory was not without costs: the mandates on Cuba and Belarus were discontinued<sup>78</sup>. Thus, the traditional structure of the system of SPs will be maintained. Thematic Rapporteurs will be appointed for a period of three years while country mandates will be established for one year<sup>79</sup>. A UN expert's tenure in his/her function as SPs will not be longer than six years<sup>80</sup>.

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<sup>74</sup> Resolution 5/1 paragraph 43. A Consultative Group will be set up with the task to recommend to the President of the Council the best candidates to be appointed as SPs on the basis of the above public list and taking into account, as appropriate, the view of stake holders, including current or former SPs. The recommendations of the Consultative Group will have to be "public and substantiated". The Group will consist of five members appointed by the Regional Groups and acting in their personal capacity. The President of the Council, on the basis of the Group's recommendations and broad consultations with the regional coordinators, will identify the candidates for each vacancy and prepare a list of nominees to be submitted to the Council for approval, Resolution 5/1, paragraphs 47, 49, 50, 52-53.

<sup>75</sup> *Ibidem* paragraph 55.

<sup>76</sup> *Ibidem* paragraph 54.

<sup>77</sup> For more information see the report of the Representative of the United Nations High Commissioner for Human Rights on the situation of human rights in Cuba A/HRC/4/12, and the report of the Special Rapporteur on the situation of human rights in Belarus A/HRC/4/16.

<sup>78</sup> VON KEYSERLING, G.: "Fifth Session of the UN Human Rights Council", FES GENEVA, June 2007/N. 6, available at <http://library.fes.de/pdf-files/bueros/genf/04615.pdf>.

<sup>79</sup> Resolution 5/1, paragraphs 60-61.

<sup>80</sup> *Ibidem* paragraph 62.

The review and rationalization of the SPs has not been as catastrophic as many predicted. The SPs will be retained and will continue carrying out their mandate under the auspices of the Council. There are at least two features of the review and rationalization of the SPs that are encouraging. The first feature is the introduction of a more structured selection of candidates as SPs. While in the past, the UN experts were designated by the chairperson of the CHR after the conclusion of consultations with the Regional Groups, from now on obtaining the appointment as a Special Procedure will be similar to applying for a job. The selection of the mandate-holders will be based on the list the Office of the High Commissioner has been requested to prepare which will not only contain the names of the potential nominees but also their resumes. Hence, Resolution 5/1 has heeded the pressing need for transparency in the appointment of SPs. While still being inherently and unavoidably political, the selection process of the SPs is now more open and public than before.

Second, the reform of the SPs guarantees the independence and impartiality of the nominees by requiring that individuals serving as governmental officials for their countries cannot be appointed as UN experts. The 'independence requirement' already informed the selection of SPs by the CHR<sup>81</sup> and, consequently, Resolution 5/1 merely formalizes an important legacy of the relatively recent practice of the Council's predecessor.

More troublingly, reforming the SPs has shown the hostile attitude of some States towards country experts and rendered the system of SPs more vulnerable to governments' whims. The termination of the mandates on Cuba and Belarus is very illustrative in this regard. The blatancy with which the Council challenged the experts and got rid of them creates two very dangerous precedents that States may follow again in the future to put an end to Country Procedures inconvenient for them. The lesson States learn from the case of Cuba and Belarus is that if they can muster the 'right' alliances within the Council they can overtly refuse to collaborate with country experts and show respect for their work, and even obtain the abolition of the country procedure.

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<sup>81</sup> As a matter of fact, since the nineties the CHR changed its approach to the selection of SPs, which in the past privileged the appointment of individuals working for their government, and began to appoint true human rights experts. They were professors of international law or international human rights law and members of human rights NGOs. See NIFOSI, I.: *The UN Special Procedures in the Field of Human Rights*, Intersentia, Antwerp, 2005, pp. 46-48.

Finally, the SPs have now a code of conduct, which was very difficult to negotiate at the working group<sup>82</sup>. Considered the best of the worst options, it has the potential to be intrusive to their work and to be misused by States. Algeria (on behalf of the African Group) tabled a resolution at the resumed second session of the Council which directed the working group to review the manual of special procedures and to draft a code of conduct. The resolution was supported by all members of the Council belonging to the African Group, almost all Asian States, and also by Brazil and Ecuador. A number of States, in the minority amongst the HRC members, opposed the code on the grounds that it was not necessary and would restrict the independence of special procedures.

#### 4.4. *Universal Periodic Review*

The most impressive feature of the Council's institution building is the breadth of the UPR encompassing international scrutiny of virtually all States in the world. Resolution 5/1 is unequivocally clear in this regard as it stipulates that each UN member State will be reviewed in cycles of four years<sup>83</sup>. The resolution further specifies that member States of the Council shall be reviewed during their term of membership<sup>84</sup> and that the review will also affect observer States of the Council<sup>85</sup>. Overall the procedure will allow consideration of 48 States per year<sup>86</sup>.

The review will be carried out by a working group chaired by the President of the Council and composed of all member States of the Council. Its main task is to undertake an interactive dialogue with the State under scrutiny<sup>87</sup>. Observer States and other relevant stake holders, such as NGOs, will participate in the review<sup>88</sup>.

Resolution 5/1 also details the information that will be used to assess States' fulfillment of their human rights obligations and commitments<sup>89</sup>.

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<sup>82</sup> MEGHNA, A.: "Building the New Human Rights Council", Dialogue on Globalisation, Occasional Papers, no. 33, 2007 (available at [http://www.upr-info.org/IMG/pdf/FES\\_Dialogue\\_N\\_33.pdf](http://www.upr-info.org/IMG/pdf/FES_Dialogue_N_33.pdf)).

<sup>83</sup> Resolution 5/1, June 18, 2007, paragraph 14.

<sup>84</sup> *Ibidem*, paragraph 8.

<sup>85</sup> *Ibidem*, paragraph 10.

<sup>86</sup> *Ibidem*, paragraph 14.

<sup>87</sup> *Ibidem*, paragraphs 18 (a) and 21. Three Rapporteurs will be appointed with the task of preparing the report of the working group and smoothing all the proceedings within the review, Resolution 5/1 paragraph 18 (d).

<sup>88</sup> *Ibidem*, paragraph 18 (b) and (c).

<sup>89</sup> *Ibidem*, paragraph 15 (a), (b), (c).

Accordingly, three kinds of documentation will be considered: information by the State concerned, which could be submitted in the form of a national report compiled on the basis of the general guidelines adopted by the Council at its sixth session<sup>90</sup>; a compilation of relevant information enclosed in the reports of Treaty-Bodies, SPs and other relevant UN documents prepared by the Office of the High Commissioner for Human Rights; and any other reliable information provided by the relevant stake holders of the UPR<sup>91</sup>.

The outcome of the UPR will consist of a report presenting a summary of the proceedings, and detailing conclusions, recommendations and voluntary commitments of the State concerned<sup>92</sup>. The report will also include recommendations approved with and without the consent of the state scrutinized<sup>93</sup>. The outcome will be adopted by the Council convened in plenary session during which the State concerned, member States of the Council and observer States will have the opportunity to take the floor and express their views and comments<sup>94</sup>. The implementation of the outcome will be assessed during the subsequent review of the State<sup>95</sup>.

The definition of the procedure for the UPR is the first fundamental step in the process of consolidation of the prospective practice of the Council. One of its more relevant aspects is the information that will be used to study country situations. According to the wording of Resolution 5/1, such documentation will be varied and comprehensive. The information provided by States will not only have to comply with the Council's guidelines, but will also be examined in light of compilations of reports of UN human rights bodies and civil society actors. This should ensure a transparent, unbiased and serious examination of country situations.

Arguably, an addition could have been made to the information for the UPR. The Council should have requested Country SPs dealing with the same human rights situations examined under the UPR to submit their reports separately instead of having them enclosed in a compilation of other UN documents. As many of these reports are written after visits to the countries concerned, they offer a unique perspective on the human rights violations occurring on the spot and should, therefore, be used extensively.

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<sup>90</sup> *Supra* note 82.

<sup>91</sup> *Ibidem*.

<sup>92</sup> *Ibidem*, paragraph 26.

<sup>93</sup> *Ibidem*, paragraph 32.

<sup>94</sup> *Ibidem*, paragraph 30.

<sup>95</sup> *Ibidem*, paragraph 34.

The review will conclude with a report on the outcome achieved through the interactive dialogue with the State concerned<sup>96</sup>. In this last regard, the modality of the Council's follow-up to the implementation of the outcome, the tools it will identify to react to States' inertia and the periodicity of the evaluation of what States do after the review will be crucial. Resolution 5/1 is vague on these issues but it is compelling for the Council to clarify them as there is no doubt that they will be determinative of the success and effectiveness of the review.

Importantly, the UPR should not exclude further consideration of country situations and that States may be examined outside its framework. As mentioned, the General Assembly has made clear that examining country situations is one of the key components of the Council's terms of reference by mandating it to 'address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon'<sup>97</sup>. The Agenda item N° 4 opens the door for such a scrutiny.

The UPR will fundamentally be a *collaborative* 'device' to inspect human rights situations occurring within the boundaries of UN member States. Such a result of the Council's institution building is not surprising given the political nature of the body and the desire to overcome the too confrontational atmosphere pervading the CHR meetings. Cooperation is not a bad thing in itself: it may actually be conducive to a constructive working environment and induce States to comply with the human rights related requests the international community will put forward in the outcome of the UPR. Nevertheless, it is of paramount importance that focus on cooperation will not be an excuse for not being firm and clear about the human rights issues that warrant State action, how these issues shall be addressed and within which time frame. It is for the Council to avoid that the UPR will develop as a mere technical assistance exercise.

During the first part of its sixth session, 10-28 September 2007, the Council work was focused on the adoption of the general guidelines for the preparation of the information under the UPR and the technical and objective requirements for electing the experts who will serve as SPs<sup>98</sup>.

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<sup>96</sup> As Amnesty International has pointed out, "the ultimate effectiveness of the UPR will lie in its ability to focus on key human rights issues in the country under review and the quality and timeliness of its recommendations", Amnesty International: *Conclusion of the United Nations Human Rights Council's Institution Building: Has the Spirit of General Assembly Resolution 60/251 Been Honoured?* AI Index: IOR 41/015/2007.

<sup>97</sup> GA Resolution 60/251.

<sup>98</sup> Decision 6/102, September 2, 2007. The Council also defined the requirements for the candidatures of its Advisory Committee.

The Council then chose the countries to be scrutinized under the UPR from 2008 to 2011. As a provisional assessment of the results of the first<sup>99</sup> and second session of this mechanism<sup>100</sup> it should be highlighted that recommendations of the UPR are usually very general and are not endorsed by the Working Group as such but reflect individual State's concerns. Aside from that, a country is only reviewed for three hours every four years under the UPR cycle, unlike the country mandates of the Human Rights Council, which provide ongoing and systematic scrutiny. Attempts to replace such a system by deferring to the UPR would therefore constitute a serious setback to the relevance of the work of the Council.

#### 4.5. *Country Situations*

As noted, GA Resolution 60/251 gives the Council the mandate to consider country situations. How and when the Council should examine the human rights situation in particular countries has become a 'hot potato' in the deliberations of the Council to date.

This has been evidenced in the practice of the Council in many different ways, such as in "the identification of 'issues' for discussion at the first session; the arrangements for the special procedures with country-specific mandates to report to the Council; discussion of the arrangements for NGOs to address the Council (including in the interactive dialogue with the country-specific special procedures); the review of the mandates and mechanisms inherited from the Commission; and the establishment of the universal periodic review"<sup>101</sup>.

Many instances have been arisen during the sessions of the Council's first year of practice that illustrate this. For instance, in its first ordinary session, the Council dealt with the situation in Palestine and other Occupied Arab Territories<sup>102</sup>. Significantly, the Council further dealt with

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<sup>99</sup> States submitted to the review process at the first session of the UPR Working Group in 2008 are Bahrain, Ecuador, Tunisia, Morocco, Indonesia, Finland, the United Kingdom, India, Brazil, Philippines, Algeria, Poland, Netherlands, South Africa, the Czech Republic, and Argentina

<sup>100</sup> States that have been examined during the second session (5-16 May 2008) are Gabon, Ghana, Peru, Guatemala, Benin, South Korea, Switzerland, Pakistan, Zambia, Japan, Ukraine, Sri Lanka, France, Tonga, Romania and Mali.

<sup>101</sup> SCANELLA, P. and SPLINTER, P.: "The United Nations Human Rights Council: A Promise to be Fulfilled", *Human Rights Law Review*, 7 (1), 2007, pp. 41-72, at 60.

<sup>102</sup> Decision 1/106, June 30, 2006. As a result the Council requested the relevant Special Rapporteurs to report at its next session and decided to substantially examine human rights violations and implications of Israeli occupation of Palestine and other Arab Territories at its next and following sessions.

the above human rights situation on the last day of its session, when it decided, at the request of 21 of its 47 members, to hold its first special session (5-6 July) on the escalation in the occupied Palestinian territories following the kidnapping of an Israeli soldier by Palestinian militants in Gaza<sup>103</sup>.

The principles of universality, impartiality, objectivity and non-selectivity have been regularly invoked in the discussions on how the Council should address country situations. However, the discussion has in large part been unprincipled<sup>104</sup>. This has been most evident in the Council's handling of situations involving Israel, which have been discussed every time the Council has met and have been the subject of several decisions and resolutions.

Undoubtedly, the serious human rights situations in Gaza, Lebanon and the Occupied Territories demand the attention of the Council, although one can question whether the way that attention has been imposed through voted decision after voted decision will lead to any real improvement in the situation. However, many of the main proponents of the Council's action in respect of situations involving Israel have also argued against, if not actively sought to block, the Council's consideration of the human rights situations in other acute situations<sup>105</sup>.

It should be asserted that the examination of the situations of human rights in Sudan, Lebanon and the Occupied Palestinian Territories showed the 'old fashioned political maneuvering reminiscent of the [old] Commission'<sup>106</sup> and resulted in the impossibility to give the country situations at stake meaningful consideration<sup>107</sup>. In this regard, the

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<sup>103</sup> The Permanent Representative of Tunisia to the United Nations office in Geneva, on behalf of the Group of Arab States, requested the President of the Council to convene the special session. The letter from the Permanent Representative of Tunisia is available at <http://www.ohchr.org/english/bodies/hrcouncil/specialsession/index.htm>, (visited on 5 February 2007). See also, 'Israeli troops roll into Gaza', June 29, 2006 available at <http://www.cnn.com/2006/WORLD/meast/06/27/israel.soldier/index.html> (visited on September 4, 2006).

<sup>104</sup> SCANELLA, P. and SPLINTER, P.: "The Human Rights Council..." , *op. cit.*, *supra* note 101, at 61

<sup>105</sup> The resolutions adopted at the Council's emergency meeting were Resolution S-1/1 and Resolution S-3/1/. The first resolution requested the Special Rapporteur on the situation of human rights in the Occupied Palestinian territories to lead a urgent fact-finding mission in the Territories, while the second , adopted following Israel military operation in Beit Hanoun, established a high-level fact-finding mission, to be appointed by the President of the Human Rights Council, to travel to Beit Hanoun.

<sup>106</sup> Amnesty international, *supra* note 67.

<sup>107</sup> Human Rights Watch: *UN: Rights Council, Disappoints Again*, available at <http://hrw.org/english/docs/2006/10/06/global14354.htm>, (accessed on October 19, 2006).



role played by the Organization of the Islamic Conference (OIC) is especially emblematic. As it has been noticed, member States of the Council that belong to the OIC, such as Pakistan, have fought resolutely to shield States from criticism and 'have acted in virtual unison to undermine the Council'<sup>108</sup>.

In the same line, politicization reminiscent of the Commission at its worst prevented the Council from addressing the gross and systematic violations taking place in Sudan's Darfur region until its fourth special session<sup>109</sup>. The omission, in the resolution on Darfur, of the Sudanese government's responsibility in the planning and perpetration of the gross violations of human rights occurring in Darfur are particularly illustrative in this regard.

Another illustration of the same dynamics is the Council's meeting behind closed doors to consider gross violations of human rights under the 1503 procedure. The most striking result of this monitoring exercise was the decision to discontinue consideration of the human rights situations in Iran and Uzbekistan despite their deterioration<sup>110</sup>. Similarly, the HRC has failed to consider very urgent situations such as those in Myanmar and Sri Lanka<sup>111</sup>, and has not been able to follow-up on the recommendations of thematic Special Rapporteurs, which draw atten-

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<sup>108</sup> Hicks, P.: "How to Put U.N. Rights Council Back on Track", available at <http://www.forward.com/articles/how-to-put-un-rights-council-back-on-track/>, (visited on February 8, 2007). Hicks notices that when the Council considered the report and findings of the four independent experts' joint visit to Lebanon and Israel, "State after State from the OIC took the floor to denounce the experts for daring to look beyond Israeli violations to discuss Hezbollah's as well. Strikingly, States that support human rights, meanwhile, were silent.... Yet, only Chile spoke in defense of the experts and their report", *Ibidem*.

<sup>109</sup> S-4/101, December 13, 2006. In the next regular session, the HRC adopted a resolution in which it regretted that the high-level mission established during the emergency session could not visit the Darfur region and established a group of experts, to be presided over by the Special Rapporteur on Sudan, charged with the task of ensuring compliance with all the relevant resolutions and recommendations formulated by UN human rights bodies and mechanisms. See Resolution 4/8 paragraphs 6-7, March 30, 2007. The designated experts were: Radhika Coomaraswamy, Special Representative of the Secretary General for children in armed conflict; Philip Alston, Special Rapporteur on extrajudicial, summary or arbitrary executions; Hina Jilani, Special Representative of the Secretary General concerning the situation of human rights defenders; Walter Kälin, Representative of the Secretary General for internally displaced persons; Manfred Nowak, Special Rapporteur on torture and Yakin Erturk, Special Rapporteur on violence against women.

<sup>110</sup> Human Rights Watch: UN: Rights Council Remains Timid in Face of Abuses, available at <http://hrw.org/english/docs/2007/03/30/global15608.htm> (last visited December 7, 2007).

<sup>111</sup> *Ibidem*.

tion to violations of human rights occurring in many Countries and address 'the endemic failure of many States to cooperate fully with the experts'<sup>112</sup>.

The practice is indicating that the manner in which the Council is going about country situations is biased, obliging and ineffective. It seems like the Council wants to 'play it safe' by avoiding condemnation and serious investigation of certain States that violate human rights. All this runs contrary to the mandate of the Council explicitly referring to the examination of country situations, constitutes a backward step in the UN human rights practice which since the end of the sixties has focused on country situations, and is very likely to impair the future credibility of the Council. In the same breath, the Council's monitoring of the implementation of unbalanced and politically motivated resolutions adopted against Israel at its special sessions conveys a highly negative message about the objectivity of its work.

The outcomes of the first three emergency sessions of the HRC highlight the recurring problem of politicization and double standards, and are more discouraging than those of the regular sessions<sup>113</sup>. The results of the special sessions are very troubling<sup>114</sup> since they give the impression that the Council is using the emergency sessions as a political

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<sup>112</sup> *Ibidem*.

<sup>113</sup> Human Rights Watch has stated the same concerns especially with regard to the second special session of the Council. See Human Rights Watch: "Lebanon/Israel: U.N. Rights Body Squanders Chance to Help Civilians" available at [http://hrw.org/doc/?t=united\\_nations\\_hrc&document\\_limit=0,20](http://hrw.org/doc/?t=united_nations_hrc&document_limit=0,20) (visited on 12 September 2006).

<sup>114</sup> The first special session, convened on 5-6 July 2006 to address the deterioration of the situation in the occupied Palestinian territories following the kidnapping of an Israeli soldier by Palestinian militants in Gaza, concluded with the adoption of an unbalanced resolution condemning Israel for violations of human rights law and humanitarian law but neglecting to mention the kidnapping of the Israeli soldier and Hamas government's responsibilities. The same holds true for the second emergency meeting of the HRC, held in the wake of the war in Lebanon on 11 August 2006. The Council strongly condemned Israel's military operations in Lebanon, including the indiscriminate air strike in Qana on 30 July 2006, and called for respect of human rights law and humanitarian law. Strikingly, no mention is made in the final resolution of Hezbollah responsibility in starting the conflict, kidnapping two Israeli soldiers and killing Israeli civilians. Such an unbalanced approach is again evident in the fact-finding measures endorsed by the Council aimed at investigating only Israel violations of international law.

The situation of human rights in the occupied Palestinian territories has been addressed again during the third special session of the HRC convened on 15 November 2006. The emergency meeting dealt with Israel military incursion in Beit Hanoun, which killed nineteen Palestinians, including eight children and seven women, and wounded more than forty. The Council condemned Israel targeting of Palestinian civilians and established a high level fact finding mission to investigate into the human rights violations occurred in Beit Hanoun.

tool and turning them into a forum of confrontation among its regional groups<sup>115</sup>. This sensation is, only in part, eased by the fourth special session, finally convened to discuss on the situation of human rights in Sudan and during which the Council resolved to dispatch a high-level Mission to assess the human rights situation in Darfur<sup>116</sup>.

Besides, OIC attitude towards the report of the four UN experts on their joint mission to Israel and Lebanon illustrates another serious problem. That is, the absence of leadership on the part of EU member States and Latin American countries, i.e. those States that supported the creation of a stronger, more effective Council, and 'the willingness of moderate [Asian and African] States to side with regimes that have notoriously bad human rights records and nefarious agendas'<sup>117</sup>.

The manner in which the Council deals with individual country situations will continue to be a major challenge for the Council and its members and observers. It is indisputable that the Council must address individual human rights situations because GA Resolution 60/251 stipulates so. However, like the Commission, the Council is made up of governments, and therefore its working environment will be inherently political. In looking at how else the Council might address country situations, it is essential to bear in mind that the distribution of seats in the Council means that the African and Asian members hold a comfortable majority in the Council, and many countries in those regions are among the most reluctant to address country situations.

The ability of the Council to adopt effective measures to address human rights violations in country-specific situations will, therefore, depend on coalitions of members including at least some from Africa and Asia. This will require that methods and means are devised to ensure that country situations can be addressed in ways that do not easily lend themselves to credible allegations of selectivity and political instrumentation by the countries concerned.

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Once again, the third special session suggests a partial approach to the Israeli-Palestinian conflict. There are no doubts that Israel incursion in Beit Hanoun constitutes a flagrant violation of human rights and humanitarian law and the Council was right in tackling it. However, the activity of Palestinian militants firing rockets in Israel residential areas, in Israel's view the trigger of the incursion, should also have been considered.

<sup>115</sup> It is significant that France, in its explanation of vote after the vote of Resolution S-3/1, said that it was concerned about the way special sessions were taking place and the impossibility for the Council to adopt resolutions by consensus.

<sup>116</sup> Decision S-4/101, 13 December 2006. The Session was convened upon request of the Permanent Representative of Finland to the United Nations Office at Geneva, on 30 November 2006. See the report on the special session, A/HRC/S-4/5 p. 3.

<sup>117</sup> Hicks, P.: *supra* note 108.

## 5. Concluding remarks

In spite of the new prospects, dark shades hang over the future of the HRC. Overall, its responsiveness to human rights violations occurring worldwide in its first year and half of life has been very poor, tainted with selectivity, lack of objectivity and politicization.

Clear and tangible indications of modalities of implementation of the Council's mandate have emerged from its early practice. So far, the discussion in the HRC was dedicated more to the debate on how to deal with human rights than to human rights performance, which is not very much understandable under the present circumstances; altogether six special sessions have been convened during the first eighteen months since the establishment of the HRC to address grave human rights situations; and concerns has been voiced that time effectively allocated to the human rights debate, to the dialogue with special procedures, and to the participation of NGOs has been actually shortened.

Institution-building is by far the more important achievement in the first year of practice of the Council, particularly concerning the universal periodic review mechanism. Nevertheless, the first two sessions of the operation of the UPR raise many more areas of concern than positive elements. It remains to be seen whether the UPR turns out to be a successful mechanism.

While the adoption of new international human rights instruments and the promotion of the inter-active dialogue with the Special Procedures are very positive achievements of the body, difficulty in dealing with the issues at stake timely and incapability of taking measures to address them indicate that the shortcomings of the old Commission are still there.

The most disconcerting aspects of the Council's institution building concerns consideration of country situations. Some member States have made very clear their aversion toward this working practice that has characterized the practice of the CHR since the end of the sixties. The Council's methods of work and the review of the SPs do not set forth rules and principles preventing States from jeopardizing serious scrutiny of country situations. On the contrary they seem to confirm a very frail and politicized approach to these issues that will inexorably be reflected in the practice of the Council and compromise its credibility.

# CONVENTIONAL PROTECTION OF HUMAN RIGHTS



# The International Covenant on Civil and Political Rights\*

Manfred Nowak

**Summary:** 1. Introduction. 2. Substantive provisions: an overview. 3. Obligations of State Parties. 4. Derogation and limitation clauses. 5. Human Rights Committee. 6. Reporting procedure. 7. Inter-State complaints procedure. 8. Individual complaints procedure. 9. Conclusions.

## 1. Introduction

In 1986 the Human Rights Committee decided that the 'breadwinner' requirement in the Dutch Unemployment Benefits Act (married women received support only when they could prove that they were 'breadwinners', whereas this proof was not required of married men) constituted *gender-specific discrimination* in violation of Article 26 of the International Covenant on Civil and Political Rights (CCPR)<sup>1</sup>. As a consequence, the *Netherlands* and other States Parties to the Covenant had to amend a substantial number of social security laws in order to achieve equality for women.

During the time of the former military regime in *Uruguay* the Committee examined a large number of individual complaints it had received on behalf of political prisoners from their relatives living abroad. In most of these cases it established serious violations of the rights to *life, liberty and security of the person*, of the *prohibition of torture* and inhuman prison conditions, of *freedom of expression* and other *political rights and freedoms*. Taken together this case law revealed a consistent pattern of gross and reliably attested violations of human rights

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<sup>1</sup> Communication No. 172/1984, *S. W. M. Broeks v. the Netherlands*, and Communication No. 182/1984, *F. H. Zwaan-de Vries v. the Netherlands*. Report of the Human Rights Committee, UN General Assembly, Official Records, Forty-second Session, Supplement No. 40 (A/42/40), pp. 139-150 and 160-169.

and as such contributed more than any other international procedure to the overthrow of the military government in 1985. Moreover, in a decision of July 1994, the Committee held that victims of gross human rights violations such as torture are entitled under Article 2(3)(a) of the Covenant to an *effective remedy* which entails the obligation of the present democratic government to carry out official investigations, to identify the individual perpetrators and to grant compensation to the victims. As a consequence, the Amnesty Law of December 1986 was found to be incompatible with the legal obligations of Uruguay since it 'has contributed to an atmosphere of impunity which may undermine the democratic order and give rise to further grave human rights violations'<sup>2</sup>. This decision has had a major impact on the policy of reconciliation and *impunity* not only in Uruguay but also in many other, notably Latin American, African and Eastern European States in transition to democracy.

*Compensation for human rights violations by a former regime* was also at issue in a case against the *Czech Republic* decided in July 1995. The case was based on a complaint by a number of persons who had left the former CSSR for political reasons between 1968 and 1987 and whose property had, therefore, been confiscated by the then Communist government. The Restitution Act of 1991 is not applicable to the applicants, who presently live in Canada and Switzerland, on the ground that the right to restitution and compensation is only granted to Czech citizens who permanently reside in the country. Although the right to *property* is not protected by the Covenant (as opposed, e.g. to the European Convention for the Protection of Human Rights and Fundamental Freedoms; henceforth European Convention on Human Rights or ECHR), the Committee found that the cumulative conditions of citizenship and permanent residence were unreasonable and, therefore, violated the *equal protection of the law* under Article 26 of the CCPR<sup>3</sup>.

With respect to a growing number of complaints submitted by prisoners on death row in *Jamaica* and *Trinidad and Tobago*, the Committee established a consistent line of legal reasoning that, in *capital*

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<sup>2</sup> Communication No. 322/1988, *Hugo Rodríguez v. Uruguay*. Report of the Human Rights Committee, Vol. II, UN General Assembly, Official Records, Forty-ninth Session, Supplement No. 40 (A/49/40), pp. 5-11. See also NOWAK, M.: "The Activities of the UN Human Rights Committee: Developments from 1 August 1992 to 31 July 1995", *Human Rights Law Journal*, Vol. 16, no. 10-12, 1995, pp. 395-396.

<sup>3</sup> Communication No. 516/1992, *Alina Simunek et al. v. the Czech Republic*. See Human Rights Committee, Final Decisions, UN Doc. CCPR/C/57/1, pp. 99-108; and NOWAK, *op. cit.*, p. 391.



*punishment* cases, States Parties must observe rigorously all the guarantees for a fair trial and that the imposition of a death sentence upon conclusion of an unfair trial constitutes a violation of the *right to life* pursuant to Article 6 of the CCPR<sup>4</sup>. As a consequence, quite a few death sentences were commuted to prison sentences, and some prisoners were released. Moreover, in November 1993 the Committee arrived at the conclusion that execution by gas asphyxiation, as practised, for example, in California, constitutes cruel and inhuman treatment. Consequently, by exposing somebody to the real risk of being executed in such a manner by means of *extradition* to the United States, *Canada*, a State Party which had abolished the death penalty, violated Article 7 of the Covenant<sup>5</sup>. Since the *United States* has not ratified the First Optional Protocol to the Covenant, no individual complaints can be lodged directly against the US Government. With respect to the US practice of imposing death sentences even on minors, the Committee, however, considered the US *reservation* to Article 6(5) of the CCPR to be incompatible with the object and purpose of the Covenant and explicitly requested the US Government to withdraw this reservation as well as the reservation concerning the prohibition of torture<sup>6</sup>.

A number of leading members of the former opposition party *Union pour la Démocratie et le Progrès Social* (U.D.P.S.) including the later Prime Minister Etienne Tshisekedi had submitted complaints against the former regime of President Mobutu in *Zaire*. In most cases the Committee found serious violations of the rights to *personal liberty*, *physical integrity*, *privacy* and *movement* and, in its finding, thus contributed to the international pressure on the Mobutu regime to improve its human rights situation. Similar human rights violations of opposition members have been established with respect to various other African and Latin American countries such as Zambia, Equatorial Guinea, Cameroon, Madagascar, Libya, Surinam, the Dominican Republic, Nicaragua, Ecuador and Colombia.

In a growing number of *disappearance cases in Latin America*, the Committee in principle follows the jurisprudence of the Inter-American

<sup>4</sup> See, e.g. NOWAK, M.: "The Activities of the UN Committee: Developments from 1 August 1989 to 31 July 1992", *Human Rights Law Journal*, Vol. 14, 1993, pp. 13-14 y NOWAK, M.: *op. cit.*, 1995, pp. 384-385 y 389. See also Communications Nos. 575 and 576/1994, *Lincoln Guerra and Brian Wallen v. Trinidad and Tobago*, Human Rights Committee, Final Decisions, UN Doc. CCPR/C/57/1, pp. 195-202; and *Human Rights Law Journal*, Vol. 16, No. 10-12 (1995), pp. 400-403.

<sup>5</sup> Communication No. 469/1991, *Charles Chitat Ng v. Canada*. Report of the Human Rights Committee, UN General Assembly, Official Records, Forty-ninth Session, Supplement No. 40 (A/49/40), pp. 189-220. See also NOWAK, M.: *op. cit.*, 1995, pp. 385-387.

<sup>6</sup> UN Doc. CCPR/C/79/Add.50.

Commission and Court of Human Rights by establishing violations of the rights to personal liberty, security and physical integrity as well as of the right to life. In addition, it urged the respective States parties to open proper investigations of disappearance cases, to provide for appropriate compensation, and to bring to justice those responsible<sup>7</sup>.

In March 1994 the general prohibition of male homosexuality in the Australian State of *Tasmania* was found to be in violation of the right to *privacy* in Article 17 of the Covenant<sup>8</sup>. With the active support of the Federal Government of *Australia*, which in fact disapproved of the Tasmanian practice, the laws in question have now been repealed<sup>9</sup>.

In the controversial case of *Faurisson v. France* the Committee ruled that criminal sanctions imposed by French courts on a well-known French professor of literature for his denial of the existence of Nazi gas chambers for the extermination of Jews did not violate his freedom of expression under Article 19 of the Covenant. The Committee raised, however, certain doubts as to the compatibility of the French 'Gaysot Act' of 1990 which makes it a criminal offence to contest the existence of the category of crimes against humanity as defined in the Charter of the International Military Tribunal at Nuremberg, on the basis of which Nazi leaders were convicted after the Second World War<sup>10</sup>.

In the famous case of the *Lubicon Lake Band v. Canada*, although the Committee dismissed the allegations of a violation of the *right to self-determination* on procedural grounds, it ruled that historical inequities as well as large-scale expropriation of the lands of this Cree Indian band for commercial interests (oil and gas exploration) threatened the way of life and culture of this *indigenous minority* and thereby constituted a violation of Article 27 of the Covenant<sup>11</sup>. The

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<sup>7</sup> See, e.g. Communications No. 540 and 563/1993, *Ana Rosario Celis Laureano v. Peru* and *Nydia Erika Bautista de Arellana v. Colombia*. Report of the Human Rights Committee, Vol. II, UN General Assembly, Official Records, Fifty-first Session, Supplement No. 40 (A/51/40), pp. 108-115, 132-143.

<sup>8</sup> Communication No. 488/1992, *Nicholas Toonen v. Australia*. Report of the Human Rights Committee, UN General Assembly, Official Records, Forty-ninth Session, Supplement No. 40 (A/49/40), pp. 226-237. See also NOWAK, M.: *op. cit.*, 1995, pp. 390-391.

<sup>9</sup> Report of the Human Rights Committee, Vol. I, UN General Assembly, Official Records, Fifty-second Session, Supplement No. 40 (A/52/40), pp. 88-89.

<sup>10</sup> Communication No. 550/1993, *Robert Faurisson v. France*. Report of the Human Rights Committee, Vol. II, UN General Assembly, Official Records, Fifty-second Session, Supplement No. 40 (A/52/40).

<sup>11</sup> Communication No. 1671/1984, *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*. Report of the Human Rights Committee, Vol. II, General Assembly, Official Records, Forty-fifth Session, Supplement No. 40 (A/45/40), pp. 1-30.

Canadian Government offered to set aside 95 square miles of land for a reserve and to pay Can \$ 45 million as compensation for historical inequities. This was considered by the Committee to be an appropriate remedy within the meaning of Article 2 of the CCPR.

These few cases were selected to illustrate the *variety of issues arising under the Covenant* and the impact of the case law of the Human Rights Committee on domestic human rights problems. On the other hand, this impact must, of course, not be exaggerated. Many States in which gross and systematic human rights violations occur are not (yet) parties to the Covenant or the First Optional Protocol, and only a minority of States Parties actually make convincing efforts to comply with their obligations under the Covenant and with the legally non-binding decisions of the Committee. In order to assess the actual significance of the Covenant and the achievements of the Committee in a fair, balanced and realistic manner, one has to see it in the overall context of the progress and the difficulties of the international protection of human rights during the 60 years since the adoption of the Universal Declaration of Human Rights.

Together with the Universal Declaration of Human Rights of 10 December 1948 and the International Covenant on Economic, Social and Cultural Rights (CESCR), the International Covenant on Civil and Political Rights and its two Optional Protocols constitute the core of United Nations human rights law commonly referred to as the *International Bill of Human Rights*. This core is supplemented and defined in more detail by a considerable number of special human rights conventions, declarations, bodies of principles, minimum rules, etc. Some provisions of the International Bill of Human Rights, such as the prohibition of slavery and torture, acquired in the meantime the status of customary international law, others are legally binding only on States Parties to the respective treaties.

Originally, the United Nations envisaged only one general human rights treaty to give binding force to the provisions of the Universal Declaration<sup>12</sup>. During the early years of the Cold War, the Western

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<sup>12</sup> General Assembly Resolution 421 (V) of 4 December 1950. For the historical background, see UN Doc. A/2929; BOSSUYT, M.J.: *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights*, Martinus Nijhoff Publishers, Dordrecht, 1987; MCGOLDRICK, D.: *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, Clarendon Press, Oxford, 1991; NOWAK, M.: "The Effectiveness of the International Covenant on Civil and Political Rights: Stocktaking after the First Eleven Sessions of the UN Human Rights Committee", *Human Rights Law Journal*, Vol. 1, 1980, pp. 136-170; PECHOTA, V.: "The Development of the Covenant on Civil and Political Rights", en HENKIN, L. (Ed.): *The In-*

States succeeded, however, in their demand for *two separate Covenants* with different State obligations and different monitoring bodies and procedures<sup>13</sup>. In their view only the civil and political rights of the so-called 'first generation' were genuine human rights that could be guaranteed immediately and implemented by judicial procedures, whereas the economic, social and cultural rights of the so-called 'second generation' were only considered as 'programme rights'. The Socialist States, on the other hand, stressed the interdependence and indivisibility of all human rights and objected strongly to any judicial or quasi-judicial monitoring system. These were only some of the ideological conflicts which delayed the adoption of the Covenants for almost 20 years. After the Commission on Human Rights submitted its drafts in 1954<sup>14</sup>, the Third Committee of the General Assembly still needed 12 years to finalize these drafts. On 16 December 1966, both Covenants were adopted unanimously by 106 States and the First Optional Protocol to the CCPR, which provides for the possibility of individual complaints, by 66 to 2 votes, with 38 abstentions<sup>15</sup>. On 15 December 1989, a second Optional Protocol aimed at the abolition of the death penalty was adopted by 59 to 26 votes, with 48 abstentions<sup>16</sup>. Both Covenants and the First Optional Protocol entered into force in 1976, the inter-State complaints procedure under Article 41 of the CCPR in 1979, and the Second Optional Protocol in 1991. As at September 2008, the CCPR had been ratified by 162 States and the CESCR by 153 States from all regions of the world. Forty-seven States accepted the inter-State complaints system under Article 41 of the CCPR, 111 States the individual complaints system of the First Optional Protocol, and 68 States were bound by the Second Optional Protocol not to re-introduce the death penalty<sup>17</sup>.

In October 1997, the Human Rights Committee adopted a general comment on issues relating to the continuity of obligations of States Parties to the Covenant. Referring to the fact that the Covenant does not include a provision on *denunciation* or withdrawal and

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*tional Bill of Rights: The Covenant on Civil and Political Rights*, Columbia University Press, New York, 1981, pp. 32-71.

<sup>13</sup> General Assembly Resolution 543 (VI) of 5 February 1952.

<sup>14</sup> UN Doc. E/2573, p. 62.

<sup>15</sup> General Assembly Resolution 2200/A (XXI).

<sup>16</sup> General Assembly Resolution 44/128.

<sup>17</sup> Information received from the UN Treaty Collection database (<http://www.un.org/Depts/Treaty>).

to the nature of the Covenant constituting, together with the CESCRC and the Universal Declaration of Human Rights, the International Bill of Human Rights, the Committee concluded that international law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce or withdraw from it<sup>18</sup>. In fact, the Government of the Netherlands, which in a first reaction to the Committee's jurisprudence on the Dutch social security cases mentioned at the beginning of this chapter had considered to denounce the Covenant, soon realized that this was impossible. By way of comparison, it is to be noted that Article 12 of the First Optional Protocol to the Covenant explicitly allows for denunciation but includes special arrangements for a transition period. As an expression of dissatisfaction with the Committee's case law on capital punishment cases, *Jamaica and Trinidad and Tobago recently denounced the First Optional Protocol*. Trinidad and Tobago acceded again with a reservation excluding the competence of the Committee to consider communications relating to the imposition of the death penalty but this reservation appears to be clearly incompatible with the object and purpose of the Covenant.

## 2. Substantive provisions: an overview

The Covenant is divided into a Preamble and six parts. Parts I to III (Articles 1 to 27) contain all substantive rights as well as some general provisions such as the prohibition of discrimination and misuse, gender equality, a derogations and a savings clause. Parts IV to VI (Articles 28 to 53) contain the international monitoring provisions, some principles of interpretation and final clauses. The First Optional Protocol contains 14 articles relating to the individual complaints procedure, whereas the 11 articles of the Second Optional Protocol in fact constitute an amendment to the right to life in Article 6 of the CCPR<sup>19</sup>.

With the exception of the collective right of peoples to self-determination (Article 1), which is listed in a separate Part I and which according to the case law of the Human Rights Committee is not subject

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<sup>18</sup> General Comment 26(61) of 29 October 1997, UN Doc. CCPR/C/21/Rev.1/Add.8.

<sup>19</sup> For an article by article commentary of all substantive and procedural provisions of the Covenant and its Optional Protocols, see NOWAK, M.: *UN Covenant on Civil and Political Rights. CCPR Commentary*, NP. Engel, Kehl, 2005. See also HENKIN, L. (Ed.): *op. cit.* y McGOLDRICK, D.: *op. cit.*

to monitoring by means of individual complaints<sup>20</sup>, the Covenant only guarantees individual rights enumerated in Part III: the right to life (Article 6), the prohibition of torture and inhuman prison conditions (Articles 7 and 10), the prohibition of slavery (Article 8), the right to personal liberty and security, including prohibition of detention for debt (Articles 9 and 11), freedom of movement and protection of aliens against arbitrary expulsion (Articles 12 and 13), procedural guarantees in civil and criminal trials including prohibition of retroactive criminal laws (Articles 14 and 15), recognition of legal personality (Article 16), privacy (Article 17), freedom of thought, conscience, religion and belief (Article 18), freedom of opinion, expression and information, including the prohibition of propaganda for war and advocacy of hatred (Articles 19 and 20), freedom of assembly, association and trade unions (Articles 21 and 22), rights of marriage, the family and the child (Articles 23 and 24), political rights (Article 25), equality (Article 26) and rights of persons belonging to minorities (Article 27).

Part III constitutes a fairly comprehensive catalogue of civil and political rights comparable to those in regional treaties such as the European and American Conventions on Human Rights or the African Charter on Human and Peoples' Rights. Compared to the civil and political rights enlisted in the Universal Declaration, the Covenant does not contain the rights to property, nationality and asylum. The European Convention on Human Rights also protects the right to education (which forms, however, part of the CESCR) and prohibits the collective expulsion of aliens. The American Convention on Human Rights also contains a right of reply and correction and a general right to a name.

With the exception of the detailed minimum rights of the accused in a criminal trial in Article 14, the rights of persons deprived of liberty in Articles 9 and 10, as well as the restrictions on the death penalty in Article 6, most rights are formulated in rather general terms. More detailed provisions can, however, be found in special human rights treaties and declarations such as, for example, the UN Conventions against Genocide, Torture, Racial Discrimination, Discrimination against Women, the Convention on the Rights of the Child and the Declarations on Religious Intolerance, on Enforced Disappearances or on the Rights of Disabled Persons. In addition, the Human Rights Committee, in applying the Covenant provisions in the complaints and reporting procedures, as well as by adopting general comments in accordance with Ar-

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<sup>20</sup> *Lubicon Lake Band v. Canada*, *supra*, note 11.

title 40(4) of the CCPR, sheds further light on the content and meaning of these rights.

In accordance with the nature of the Covenant as a general and universal human rights treaty most of its rights apply to every human being, and Article 2(1) explicitly prohibits any discrimination in the enjoyment of these rights. Nevertheless, some rights apply only to certain categories of human beings. The rights listed in Article 27, for example, only apply to persons belonging to ethnic, religious or linguistic minorities, the political rights in Article 25 only to citizens, freedom of movement in Article 12 only to persons lawfully within the territory of a State Party, the guarantee of Article 13 only to aliens, the rights to a name and nationality only to children (Article 24), the rights to marry and found a family in Article 23 only to adults ('men and women of marriageable age'), the minimum guarantees of Article 14(2) and (3) only to persons charged with a criminal offence, the minimum guarantees of Articles 9(2) to (5) and 10 only to persons deprived of their liberty, certain restrictions on the death penalty in Article 6(5) only to pregnant women and to persons below 18 years of age, and the right of self-determination in Article 1 only to peoples.

### 3. Obligations of States Parties

According to Article 2(1) of the CCPR each State Party undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, without discrimination of any kind. This obligation to respect immediately, *i.e.* from the date of entry into force of the Covenant for the State Party, and ensure all Covenant rights, differs significantly from the corresponding provision of the CESC. Each State Party to this Covenant, pursuant to Article 2(1), only undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the economic, social and cultural rights recognized in the Covenant, including particularly the adoption of legislative measures. This difference reflects the widely-held belief, at least in the time of the Cold War when both Covenants were drafted, that there exists a fundamental difference between human rights of the first and second generation, and that economic, social and cultural rights only imply an obligation to take steps toward their progressive realization. Modern human rights theory and the practice of the Committee on Economic, Social and Cultural Rights

prove, however, that this difference is only of a relative nature, and that the CESCR contains various obligations of both conduct and result which clearly may be violated by States Parties<sup>21</sup>. In accordance with this change of attitude the 1993 Vienna World Conference on Human Rights recommended the adoption of an Optional Protocol to the CESCR providing for an individual complaints system<sup>22</sup>.

The *obligation to respect* in Article 2(1) of the CCPR indicates the negative character of civil and political rights<sup>23</sup>. It means that States Parties must refrain from restricting the exercise of these rights where such is not expressly allowed. The concrete substance of this duty of forbearance depends on the formulation of the given right. Some rights, such as the prohibition of torture in Article 7, are absolute, *i.e.* States must refrain from practising torture under all circumstances, even in the event of a national emergency. Other provisions, such as the right to life in Article 6(1) or the protection of privacy in Article 17, only prohibit arbitrary interference. Still other provisions, in particular, the political freedoms in Articles 18, 19, 21 and 22, expressly empower the States Parties to impose certain restrictions<sup>24</sup>.

The *obligation to ensure* in Article 2(1) of the CCPR indicates the positive character of civil and political rights. It means, as in the case of economic, social and cultural rights, that States Parties must take positive steps to give effect to the Covenant rights and to enable individuals to enjoy their rights<sup>25</sup>. This duty of performance implies the obligation to adopt the necessary legislative and other measures under Article 2(2), to provide an effective remedy to victims of human rights violations pursuant to Article 2(3), and to safeguard certain rights institutionally by way of *procedural guarantees* or the establishment of relevant *legal institutions*. For instance, the right to a fair trial in criminal cases or suits at law ensured by Article 14 requires States Parties to

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<sup>21</sup> See DRZEWICKI, K.; KRAUSE, C. and ROSAS, A. (Eds.): *Social Rights as Human Rights: A European Challenge*, Abo Akademi University, Turku, 1994; EIDE, A.; KRAUSE, C. and ROSAS, A. (Eds.): *Economic, Social and Cultural Rights. A Textbook*, Martinus Nijhoff Publishers, Dordrecht, 1995; CRAVEN, M.: "The International Covenant on Economic, Social and Cultural Rights", in HANSKI, R. and SUKSI, M. (Eds.): *An Introduction to the International Protection of Human Rights. A Textbook*, Abo Akademi University, Turku, 1999, pp. 101-124.

<sup>22</sup> For the progress on such an Optional Protocol, see the contribution by Fons Coomans in this book.

<sup>23</sup> For the following, see NOWAK, M.: *UN Covenant...*, *op. cit.*

<sup>24</sup> See below, section 4 of this Article.

<sup>25</sup> See General Comment 3(13), para. 1. UN Doc. CCPR/C/21/Rev.1, p. 3; UN Doc. HRI/GEN/1/Rev.3, pp. 4-5.



establish a sufficient number of courts and tribunals and to regulate their procedure in a manner that at least fulfils the minimum guarantees set forth therein. Similar procedural and institutional obligations might be derived, for example, from Articles 1, 9, 10, 13, 15, 16, 20, 23, 24, 25, 26 and 27. The wording of Article 2(1) indicates, however, that the obligation to ensure the rights by means of positive State action applies to all rights listed in the Covenant. Even a so-called classic negative right as the prohibition of torture contains the positive obligation to take effective steps for the prevention of torture (by means of education, procedural guarantees, etc.) and for the investigation of alleged acts of torture. As has been shown in a case against Uruguay in the introduction, this positive obligation may still apply even to a new government more than ten years after the actual act of torture.

The obligation to ensure also implies a basic *obligation to protect* individuals against certain interferences with their civil and political rights by other private individuals, groups or entities. As in the case of other State obligations, these 'horizontal effects' depend, of course, on the precise wording of the given right. Some provisions, such as the prohibition of slavery in Article 8 or the prohibition of advocacy of racial hatred in Article 20, apply primarily on the horizontal level. In other provisions, the formulation 'right to the protection of the law' (e.g. Articles 6, 17, 23, 24 and 26) indicates a special requirement to take positive measures for the protection of children, the family or the rights to life, privacy and equality. For instance, Uruguay, Colombia and the Dominican Republic have been held responsible for cases of *disappearances* with respect to the right to life without any proof of the involvement of governmental agents<sup>26</sup>. In *Delgado Paéz v. Colombia*, a case concerning a teacher who fled the country because of death threats, the Human Rights Committee found a violation of Arti-

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<sup>26</sup> Communication No. R.7/30 (1978), *Irene Bleier Lewenhoff and Rosa Valiño de Bleier v. Uruguay*, Report of the Human Rights Committee, UN General Assembly, Official Records, Thirty-seventh Session, Supplement No. 40 (A/37/40), pp. 130-136; Communication No. 107/1981, *Elena Quinteros and M. C. Almeida de Quinteros v. Uruguay*, Report of the Human Rights Committee, UN General Assembly, Official Records, Thirty-eighth Session, Supplement No. 40 (A/38/40), pp. 216-224; Communication No. 161/1983, *Herrera Rubio v. Colombia*, Report of the Human Rights Committee, UN General Assembly, Official Records, Forty-third Session, Supplement No. 40 (A/43/40), pp. 190-198; Communication No. 181/1984, *A. and H. Sanjuan Arévalo v. Colombia*, Report of the Human Rights Committee, UN General Assembly, Official Records, Forty-fifth Session, Supplement No. 40 (A/45/40), pp. 31-37; and Communication No. 449/1991, *Barbarin Mojica v. the Dominican Republic*, Report of the Human Rights Committee, Vol. II, UN General Assembly, Official Records, Forty-ninth Session, Supplement No. 40 (A/49/40), pp. 142-145. See also *supra*, note 7.

cle 9(1) on the ground that the Colombian Government had not taken appropriate measures to protect him and thereby ensure his right to *personal security*<sup>27</sup>.

#### 4. Derogation and limitation clauses

As noted above, only very few human rights, such as the prohibition of torture, slavery and retroactive criminal laws, can be considered as absolute. But even in this case, the definition of which acts actually constitute torture or slavery is controversial and might, therefore, leave a certain discretion to States Parties. For example, the European Court of Human Rights considered even comparably mild forms of corporal punishment on the Isle of Man as degrading punishment in violation of Article 3 of the ECHR<sup>28</sup>, but it is arguable whether other regional or universal treaty monitoring bodies would apply an equally strict standard in a similar case in, for example, an Islamic or African State<sup>29</sup>.

Most of the Covenant rights may be subject to reservations, derogations, restrictions and limitations in conformity with the relevant provisions<sup>30</sup>. These measures were designed to leave States Parties a fairly broad 'margin of appreciation' in order to adapt universal human rights standards to their respective political, economic, social and cultural circumstances. In other words, these limitation clauses provide a fair balance between the allegedly contradictory aims of universalism and cultural relativism.

In accordance with Article 19(c) of the Vienna Convention on the Law of Treaties, *reservations* made by States at the time of ratification

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<sup>27</sup> Communication No. 195/1985, *W. Delgado Paez v. Colombia*, Report of the Human Rights Committee, Vol. II, UN General Assembly, Official Records, Forty-fifth Session, Supplement No. 40 (A/45/40), pp. 43-49. See also, Communication No. 314/1988, *Peter Chiiko Bwalya v. Zambia*, Report of the Human Rights Committee, UN General Assembly, Official Records, Forty-eighth Session, Supplement No. 40 (A/48/40), pp. 52-56; and Communications No. 449/1991, *Barbarín Mojica v. the Dominican Republic*, and No. 468/1991, *Angel N. Oló Bahamonde v. Equatorial Guinea*, Report of the Human Rights Committee, Vol. II, UN General Assembly, Official Records, Forty-ninth Session, Supplement No. 40 (A/49/40), pp. 142-145 and 183-188.

<sup>28</sup> *Tyrer* case, judgment of 25 April 1978, Publications of the European Court of Human Rights, Series A, No. 26.

<sup>29</sup> See also the 'lawful sanctions' clause in Article 1 of the UN Convention against Torture.

<sup>30</sup> Kiss, A.C.: "Permissible Limitations on Rights", en HENKIN, L. (Ed.): *op. cit.*, pp. 290-310.

or accession are permissible to the extent that they are compatible with the object and purpose of the Covenant. In practice, roughly half of the States Parties submitted a total of more than 150 reservations and declarations of interpretation on many substantive and procedural provisions in the Covenant and the First Optional Protocol<sup>31</sup>. No reservation has so far been submitted to the Second Optional Protocol<sup>32</sup>.

In November 1994, the Human Rights Committee adopted a highly controversial *general comment* on issues relating to reservations<sup>33</sup>. According to this opinion, provisions that represent customary international law and various other provisions of the Covenant may not be the subject of reservations. Furthermore, the Committee expressed its belief that the respective provisions of the Vienna Convention on the Law of Treaties are inappropriate to address the problem of reservations to human rights treaties on the ground that the principle of inter-State reciprocity has no place. Consequently, the Committee considers itself as the only body entrusted by the Covenant to determine whether a specific reservation is compatible with the object and purpose of the Covenant. If a reservation is considered incompatible, the Committee applies the respective provision to the State Party without the benefit of the reservation. It is not surprising that some States strongly objected to this legal opinion of the Committee<sup>34</sup>.

In time of *public emergency* which threatens the life of the nation (e.g. international armed conflict, civil war, other serious cases of violent internal unrest, natural or human-made disasters), Article 4 of the CCPR authorizes States Parties to take measures derogating from their obligations under the Covenant<sup>35</sup>. In order to prevent the misuse of this *derogation clause*, Article 4 imposes a number of conditions and restrictions: the state of emergency must be officially proclaimed, the government shall immediately inform the Secretary-General of the United Nations of the provisions derogated and its reasons for doing so; derogation measures are only permitted to the extent strictly re-

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<sup>31</sup> UN Doc. CCPR/C/2/Rev.4.

<sup>32</sup> See the explicit restriction in Article 2(1) of the Second Optional Protocol.

<sup>33</sup> General Comment 24(52) of 2 November 1994, UN Doc. CCPR/C/21/Rev.1/Add.6; UN Doc. HRI/GEN/1/Rev.3, pp. 42-49. See also NOWAK, M.: *op. cit.*, 1995, pp. 379-382.

<sup>34</sup> See the observations of the United Kingdom and the United States in Report of the Human Rights Committee, Vol. I, UN General Assembly, Official Records, Fiftieth Session, Supplement No. 40 (A/50/40), pp. 126-134.

<sup>35</sup> NOWAK, M.: *UN Covenant...*, *op. cit.*

quired by the exigencies of the situation, and shall be consistent with other obligations under international law and must not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin. Finally, Article 4(2) prohibits any derogations from the rights to life, prohibition of torture, slavery, servitude, detention for debt and retroactive criminal laws, as well as the rights to recognition of legal personality and freedom of thought, conscience, religion and belief.

In practice, more than 20 States Parties have notified of various derogation measures and justified them with internal difficulties, such as ethnic conflicts, terrorism, guerrilla war or social unrest<sup>36</sup>. In cases of obvious misuse of the derogation clause, such as in Colombia and by the military dictatorships in Chile and Uruguay, the Committee considered the respective derogation measures as violations of the Covenant<sup>37</sup>.

In addition to the possibility of reservations and derogation measures, most Covenant provisions explicitly authorize *restrictions* and *limitations* by States Parties. One technique is the use of the word '*arbitrary*' as, for example, in Articles 6(1), 9(1) and 17(1) of the CCPR. Other provisions, such as Articles 12(3), 13, 18(3), 19(3), 21 and 22(3), contain so-called *limitation clauses* which authorize restrictions on the condition that they are provided by law, consistent with other Covenant rights, that they serve one of the purposes of interference listed in the respective provision and are necessary for achieving this purpose<sup>38</sup>. The decisive criterion for the permissibility of limitations is, therefore, the principle of *proportionality*. As in the case of discrimination, *i.e.* a distinction which is not based on reasonable and objective grounds, the finding of a violation by the Committee thus necessarily implies certain value judgments and often depends on the ability or readiness of the government concerned to submit convincing legal arguments.

## 5. Human Rights Committee

Much has been said about the Human Rights Committee without explaining what it is. Similar to the Racial Discrimination Committee and the Committee on the Rights of the Child, it is not a UN organ in

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<sup>36</sup> See UN Doc. CCPR/C/2/Rev.4, pp. 58-112.

<sup>37</sup> NOWAK, M.: *UN Covenant...*, *op. cit.*

<sup>38</sup> See, *e.g.* with respect to Article 12(3), NOWAK, 1993, p. 206.

the strict sense but a *treaty monitoring body*, *i.e.* it is established by a treaty (Article 28 of the CCPR) with the task of monitoring the compliance of States Parties with their obligations under this treaty<sup>39</sup>. It consists of 18 *independent experts* who are elected for a period of four years at biannual meetings of States Parties. Although they are nominated and elected by governments for a relatively short period, most members in fact enjoy a surprisingly high independence from 'their' governments as compared, for example, to the Sub-Commission on Prevention of Discrimination and Protection of Minorities. They are usually professors of law or judges in their home countries and represent all geopolitical regions and the major legal systems. In 1997, the Committee adopted a set of 'Guidelines' on the independence of its members<sup>40</sup>.

The first elections were held shortly after the entry into force of the Covenant in 1976, and the Committee started its activities in 1977. It usually holds three sessions of three weeks per year, the spring session in New York, the summer and fall sessions at Geneva. Together with preparatory work and meetings of working groups, every Committee member spends roughly one-quarter of his or her time for the Committee, *i.e.* less than members of the European Court of Human Rights but considerably more than members of other UN treaty monitoring bodies.

The Committee adopts its own *rules of procedure* in accordance with Article 39(2) of the CCPR. Although this provision envisages decisions by majority vote, the Committee in practice usually reaches decisions by *consensus*. Only individual cases are sometimes decided by majority with dissenting and concurring opinions appended. With the exception of the consideration of complaints, the meetings of the Committee are usually open to the public and the media. After initial problems caused by members from Socialist States, the Committee has developed a very fruitful cooperation with non-governmental organizations (NGOs). In contrast to the practice of the Committee on Economic, Social and Cultural Rights (which was established by ECOSOC) and the Committee on the Rights of the Child, NGOs are, however, not permitted to officially participate in the Committee's procedures.

The two main tasks of the Committee are the examination of State reports and individual complaints since until now no inter-State complaint has been submitted.

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<sup>39</sup> MCGOLDRICK, D.: *op. cit.*;

<sup>40</sup> UN Doc. CCPR/C/61/GUI.

## 6. Reporting procedure

The submission and examination of State reports in accordance with Article 40 is the only *mandatory* monitoring procedure established by the Covenant. All 162 States Parties are under an obligation to submit an initial report within one year of the entry into force of the Covenant and 'thereafter whenever the Committee so requests'. In practice, the Committee established a five years periodic reporting cycle and, in exceptional circumstances, requests supplementary or emergency reports. Recently, the Committee abandoned the mechanical five-year reporting interval in favour of a new arrangement under which it decides, as part of its concluding observations on each State report, the deadline for the submission of the next report.

The reporting procedure is the major UN treaty monitoring procedure which, in spite of being criticized as inefficient, serves a number of *useful purposes*. First of all, it forces governments to reflect thoroughly on whether and how the Covenant's rights and obligations are actually implemented in their domestic legal systems. After all, the implementation of international human rights treaties is and remains a task of national governments, whereas international monitoring procedures can only fulfil limited functions of assistance and control. The way in which governments in fact carry out their reporting duties varies, of course, considerably. There are still governments who deem it sufficient to submit reports of a few pages which do not go beyond the citation of their respective constitutional provisions. A growing number of governments, however, take their reporting obligations more seriously and submit comprehensive reports covering both the legal and *de facto* situation including also certain problems and difficulties of implementation, as requested by Article 40(2) of the CCPR. Some governments even involve NGOs and independent research institutes in the drafting of their reports in order to enhance their accuracy and objectivity. To make the reporting duty easier for States, and to ensure a certain uniform standard, the Committee adopted guidelines regarding the form and contents of initial and periodic reports<sup>41</sup>. In addition, the United Nations, under its programme of advisory services and technical cooperation, as well as independent human rights institutes, such as the Raoul Wallenberg Institute in

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<sup>41</sup> See NOWAK, M.: *UN Covenant on Civil and Political Rights: CCPR Commentary*, Engel Publishers, Kehl, 1993, pp. 558 and 876.

Sweden, organize seminars to train government officials in the preparation of reports.

All reports are examined by the Committee in public session, usually in the presence of State representatives. The procedure, although still based on the principle of *constructive dialogue* with governments, has over the years gradually developed into one of critical examination and assessment. Originally, members from Socialist States did not only object to any involvement of NGOs, but also to any evaluation by the Committee or its individual members of the respective State's performance. Legally speaking, this conflict centred on the interpretation of the words 'its reports' in Article 40(4) of the CCPR<sup>42</sup>. Today, international and local NGOs openly provide the Committee members with their critical comments on State reports and assessments of the human rights situation in the respective countries; working groups and individual rapporteurs of the Committee thoroughly prepare every examination of State reports, and State representatives often face serious difficulties in answering critical questions referring to failures and shortcomings in the domestic implementation of civil and political rights. Since the mid-eighties it has become common practice for Committee members to submit quasi-concluding personal statements on the human rights situation in the State concerned. As from April 1992, the Committee as a whole adopts by consensus concluding comments on every State report pointing at positive aspects, as well as factors and difficulties impeding the application of the Covenant. Since then these *country-specific comments* were formulated in an increasingly comprehensive and critical manner including principal subjects of concern, as well as detailed suggestions and recommendations. In April 1994, the Committee finally decided to discontinue its practice of including in its annual reports summaries of its consideration of State reports and now only includes in chapters on each individual country a short introduction and its concluding comments<sup>43</sup>.

In addition to these country-specific comments, the Committee from the very beginning issued *general comments* in accordance with Article 40(4) of the CCPR. They are directed at States Parties in their entirety and reflect the views of the Committee on various substantive and procedural provisions of the Covenant. Since these general comments are adopted by consensus, often after extensive discussions within the Committee, they constitute an important and authoritative

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<sup>42</sup> *Ibid.*, p. 568.

<sup>43</sup> NOWAK, M.: *op. cit.*, 1995, pp. 378-379.

source of interpretation. Between July 1981 and November 2008, the Committee published a total of 33 general comments on the reporting procedure itself and on most of the rights contained in the Covenant<sup>44</sup>. Most controversial were General Comment 14(23) of November 1984, in which the Committee expressed its opinion that ‘the production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity’, and the General Comment 24(52) on issues relating to reservations discussed above<sup>45</sup>.

## 7. Inter-State complaints procedure

The inter-State complaints procedure in Articles 41 and 42 of the CCPR is modelled on similar procedures of the International Labour Organisation (ILO) and under Article 33 of the European Convention on Human Rights, as amended by Protocol N° 11. It was adopted by the General Assembly only after long and highly controversial discussions and was finally watered down to the extent that the procedure hardly deserves to be called a complaints procedure<sup>46</sup>. In contrast to other, more effective, inter-State complaints procedures the one before the Human Rights Committee is *optional*, the role of the Committee is reduced to seeking a friendly solution, and if its good offices fail, an *ad hoc Conciliation Commission* may be appointed only with the prior consent of the States Parties concerned, and this Commission again is only empowered to express its views on the possibilities of an amicable solution which may even be legally rejected by the States Parties. In other words, the whole procedure is nothing more than a *pure mediation or conciliation procedure* without any possibility of a final decision on the relevant human rights issues in the event that the efforts to reach conciliation fail. It is, therefore, not surprising that only 47 of the 162 States Parties have made the optional declaration required by Article 41 and that none of these States has actually resorted to this procedure.

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<sup>44</sup> For the texts of the General Comments, see UN Doc. HRI/GEN/1/Rev.3, pp. 2-54; and CCPR/C/21/Rev.1/Add.8/Rev.1.

<sup>45</sup> See *supra*, section 4.

<sup>46</sup> In fact, the Covenant uses the term ‘communication’ rather than ‘complaint’. For a detailed description of the procedure in comparison to other inter-State complaints procedures in the light of the *travaux préparatoires*, see NOWAK, M.: *UN Covenant...*, 1993, p. 538.



## 8. Individual complaints procedure

Although the individual complaints procedure was even more controversial during the drafting of the Covenant than the inter-State complaints procedure and resulted in the compromise to refer it to a separate Optional Protocol, this procedure, thanks to the quasi-judicial practice of the Human Rights Committee, emerged as the *most effective human rights complaints system at the universal level*<sup>47</sup>. As of September 2008, 111 of the 162 States Parties to the Covenant, including most of the former Communist States of Europe as well as an increasing number of Latin American and African States, were Parties to the First Optional Protocol and thereby submit themselves to the jurisdiction of the Human Rights Committee in cases of alleged individual human rights violations.

The procedure is modelled on the one applied under the European Convention on Human Rights. It is also divided into an admissibility stage and a stage in which an examination on the merits of the case occurs. Since the Committee is the only body involved the duration of the average procedure is, however, considerably shorter than that before the European Commission and Court of Human Rights prior the merger of these two organs.

In contrast to Article 34 of the European Convention on Human Rights as amended by Protocol N° 11, only individuals, *i.e.* not groups, NGOs or other legal entities, may submit a communication to the Committee under Articles 1 and 2 of the Optional Protocol. As a consequence, the collective right of peoples to self-determination cannot be subject to this procedure<sup>48</sup>. The *admissibility requirements* in Articles 2, 3 and 5 of the Optional Protocol are less strict than those under the European Convention on Human Rights which means in practice that the chances of applicants to pass the admissibility stage are significantly higher before the Committee. Communications must not be anonymous, abusive or incompatible with the provisions of the Covenant *ratione temporis, personae, loci* or *materiae*. There is no time limit but the applicant must first exhaust all available domestic remedies. The simultaneous submission to different complaints procedures is excluded by Article 5(2) of the Optional Protocol, but in

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<sup>47</sup> Although the First Optional Protocol uses the term 'communication' it is justified to speak of a quasi-judicial complaints system. See MCGOLDRICK, D.: *op. cit.*, p. 120; and the different contributions by Nowak mentioned in this article.

<sup>48</sup> Communication No. 167/1984, *Lubicon Lake Band v. Canada*, *supra*, note 11.

contrast to Article 35(2)(b) of the ECHR, an applicant may first go to Strasbourg and afterwards to Geneva (not vice versa). However, many Member States of the Council of Europe followed a recommendation of the Committee of Ministers by submitting a reservation which excludes the possibility of two consecutive international complaints procedures<sup>49</sup>. Although the First Optional Protocol does not contain an explicit authorization similar to Article 35(3) of the ECHR to declare 'manifestly illfounded' communications inadmissible, the Committee developed the requirement that allegations must be sufficiently substantiated to be admissible<sup>50</sup>.

Under Article 4 of the Optional Protocol communications which have been declared admissible are brought to the attention of the government concerned for its observations on the merits. The entire procedure is *confidential* and based only on *written information* made available by both parties. This explicit restriction in Article 5(1) of the Optional Protocol excludes, for example, oral hearings, the examination of witnesses, or fact-finding on the spot, and often leads to serious problems in establishing the facts. In the absence of adequate replies by the respective government, the Committee often found a violation by basing its decision exclusively on the well-founded allegations of the applicant<sup>51</sup>.

Although not legally binding, the Committee's decisions on the merits of the case ('*final views*' in accordance with Article 5(4) of the Optional Protocol) are structured like court judgments, usually well-reasoned and published in full in the Committee's annual reports. Individual members may add their dissenting or concurring opinions to the final views. If the Committee finds one or more violations of the Covenant, it requests the government concerned to provide the victim with an appropriate remedy such as release from detention, adequate compensation and/or the necessary measures to prevent similar violations in the future. In view of the fact that many governments did not comply with these requests and recommendations, the Committee, in July 1990, appointed a *Special Rapporteur for the Follow-Up of Views* with the task of monitoring States' compliance with its views. Nevertheless, the lack of legally binding effects and of any sanctions against non-cooperative governments remain the most serious shortcomings of the individual complaints procedure.

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<sup>49</sup> See NOWAK, M.: *UN Covenant...*, 1993, p. 700.

<sup>50</sup> *Ibid.*, p. 666.

<sup>51</sup> *Ibid.*, p. 691.

## 9. Conclusions

In 2006 we celebrated the fortieth birthday of the Covenant on Civil and Political Rights and the thirtieth anniversary of its coming into force. Although it constitutes a compromise between the then prevailing Western and Socialist concepts of human rights, it is still a surprisingly *modern document*. Apart from the rights to property and asylum, no important contemporary civil and political right is missing. Most provisions including the derogation and limitation clauses are formulated in a way that strikes a fair balance between the aims of universal application on the one hand, and cultural relativism on the other. More than two-thirds of the present 191 Member States of the United Nations are already Parties to the Covenant which proves that, notwithstanding major differences among contemporary legal, political, economic and cultural systems, the Covenant provides *an excellent framework for a truly universal acceptance* of the human rights of the so-called first generation.

*Less satisfactory is the monitoring system* established by the Covenant and its First Optional Protocol. Thanks to its independent, active and innovative membership, the Human Rights Committee developed the reporting and individual complaints procedures far beyond the narrow limits of their legal framework. Nevertheless, the shortcomings of these procedures are obvious. Apart from its moral and political authority, the Committee lacks any power to force or only induce governments to submit their reports on time, to cooperate in a proper manner and to comply with its recommendations resulting from the examination of State reports or with its final views relating to individual communications. These decisions are neither legally binding nor politically enforceable. The inter-State complaints procedure, which is primarily designed to respond to gross and systematic human rights violations, provides even fewer possibilities for effective action.

Under the European Convention on Human Rights the *judicial functions* of establishing the facts and handing down legally binding decisions and judgments are strictly *separated* from the *political supervision of their execution* which is entrusted the major political body, the Committee of Ministers<sup>52</sup>. Although not perfect, this division of labour has in principle functioned fairly well and was, therefore, upheld and strengthened with the establishment, on 1 November 1998, of a single European Court of Human Rights in accordance with Protocol N° 11.

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<sup>52</sup> Article 46 of the ECHR, as amended by Protocol N° 11.

Article 45 of the CCPR and Article 6 of the Optional Protocol which oblige the Human Rights Committee to submit annual reports on its activities through the Economic and Social Council to the General Assembly of the United Nations, are based on a similar philosophy. In practice, both political bodies failed, however, to give force to the country-specific recommendations and views of the Committee.

Much has been said, in the context of the new international order following the Cold War, about the decisive move from the mere protection to an effective enforcement of human rights and a comprehensive policy to prevent violations of human rights. Like country-specific and thematic rapporteurs and working groups of the Human Rights Council, the Committee as the most important treaty monitoring body made a significant contribution to the development of universal human rights standards and their supervision by international experts. Now it is up to the competent political bodies to ensure that governments in fact comply with the decisions and recommendations of the relevant expert bodies and adopt appropriate measures for the domestic implementation of their obligations under the Covenant and other international human rights treaties.

# The International Covenant on Economic, Social and Cultural Rights

From Stepchild to Full Member of the Human Rights Family

Fons Coomans

**Summary :** 1. Introduction. 2. Background to the Development of the ICESCR. 3. Structure and Content of the Covenant. 4. The Supervisory System of the Covenant: 4.1. The Mandate and Composition of the Supervisory Body. 4.2. The Committee's Working Methods. 4.3. Role of Specialized Agencies in the Work of the Committee. 5. Developing the Normative Content of ESC-rights: 5.1. Clarifying States' Parties Obligations. 5.2. A 'Violations' Approach to ESC-Rights. 6. The Justiciability of Economic, Social and Cultural Rights. 7. Towards a Right to Complain. 8. Challenges.

## 1. Introduction

The International Covenant on Economic, Social and Cultural Rights (hereafter: ICESCR or Covenant)<sup>1</sup> is the sibling of the International Covenant on Civil and Political Rights (ICCPR). They were adopted by the General Assembly of the United Nations (UN) in 1966 and came into force in 1976. For a long time the ICESCR was treated as a poor relation of the human rights family. This was said to be due to the weak legal nature of economic, social and cultural rights (hereafter *esc*-rights) compared to civil and political rights, and the characteristics of its supervisory procedure. However, over the years the Covenant has developed from a stepchild to a full member of the human rights family. This gradual process was initiated and fostered by the UN Committee on Economic, Social and Cultural Rights (hereafter: the Committee), the body in charge of monitoring the implementation of treaty obligations by States. The aim of the present chapter is to give an overview of the main features of the Covenant and provide insight in the development of this treaty through the activities of its supervisory

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<sup>1</sup> International Covenant on Economic, Social and Cultural Rights; Concluded 16 December 1966; Entered into force: 3 January 1976; 993 *UNTS* 3. By 1 July 2008 157 States had ratified or acceded to the Covenant.

body. The chapter will conclude that the ICESCR has gained importance over the years and that the Committee has contributed substantively to strengthening the place of esc-rights at the international level. However, there is also a need for a stronger commitment by States parties to the Covenant norms that they have accepted voluntarily. The present chapter will be structured according to the following lines. After presenting some background information on the development of the Covenant, its structure and content will be discussed. Next, the supervisory system of the ICESCR will be dealt with by paying attention to, *inter alia*, the working methods of the Committee. The chapter will then turn to a discussion of a number of substantive issues, namely the normative content of esc-rights, their justiciable nature, and the development of an international complaints procedure under the Covenant. The chapter will conclude by presenting a number of challenges that have to be faced by the supervisory Committee and the States parties in order to maintain and strengthen its position as a key human rights instrument.

## 2. Background to the Development of the ICESCR

After the adoption of the Universal Declaration of Human Rights in 1948, the UN started to draft legally binding standards on civil and political rights and esc-rights. In the early 1950s a quite complex debate took place in the UN Commission on Human Rights, the Economic and Social Council and the General Assembly about the question whether both sets of rights should be included in one treaty, or whether two separate treaties were the most appropriate approach. This discussion related to the nature of civil and political rights on the one hand and esc-rights on the other. The former were said to be capable of immediate implementation, cost-free and only entailing negative obligations (obligations not to interfere) for States. The latter, however, were seen to be subject to progressive realization, requiring financial resources and positive obligations for States (obligations to actively take measures). These differences also meant that civil and political rights could be enforced against the State before the courts, while esc-rights were seen to be non-justiciable, that is not suitable for review by the courts<sup>2</sup>. In 1952 the General Assembly took the decision

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<sup>2</sup> For a comprehensive overview of the traditional approach towards the legal differences between civil and political rights and esc-rights, see BOSSUYT, M.: "La distinction juridique entre les droits civils et politiques et les droits économiques, sociaux et cul-

to draft two separate treaties (Covenants) in stead of one single comprehensive treaty. The main reason for this was the problem of including in one Covenant two different kinds of rights and obligations which would consequently require two different methods of implementation. Two separate treaties would therefore be a better way of solving this problem<sup>3</sup>. If we study both treaties the differences that the drafters had in mind are clearly visible from the texts. The key to understanding the traditional thinking about the differences between both sets of rights is an analysis of the central provisions of the Covenants that stipulate the nature of State obligations. The relevant provision is Article 2(1) of each Covenant. These read as follows:

Article 2(1) ICCPR:

'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

Article 2(1) ICESCR:

'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'.

It has been argued that the former provides for immediate and enforceable rights for individuals and that States should not interfere

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turels", *Revue des Droits de l'Homme/Human Rights Journal*, Vol. 8, 1975, pp. 783-813; VIERDAG, E.W.: "The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights", *Netherlands Yearbook of International Law*, Vol. 9, 1978, pp. 69-105. For critical comments on Bossuyt and Vierdag, see VAN HOOF, G.J.H.: "The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views", in ALSTON, PH. & TOMASEVSKI, K. (eds.), *The Right to Food*, Martinus Nijhoff Publishers, The Hague, 1984, pp. 97-111.

<sup>3</sup> General Assembly Res. 543 (VI), 'Preparation of two Draft International Covenants on Human Rights'. For an overview of the discussions in the relevant UN bodies, see CRAVEN, M.C.R.: *The International Covenant on Economic, Social and Cultural Rights – A Perspective on its Development*, Clarendon Press, Oxford, 1995, pp. 16-22; JHABVALA, F.: "On Human Rights and the Socio-Economic Context", *Netherlands International Law Review*, Vol. 31, 1984, pp. 149-182, at 153-159.

in the enjoyment of those rights. The latter provision, however, would only contain general and rather permissive obligations for States to progressively realize the rights which therefore cannot be enforced from the State. In other words, the legal status of civil and political rights was believed to be stronger than the one of esc-rights. This difference in legal nature had also consequences for the way in which non-observance of the rights could be challenged. The ICCPR provides for an obligation to make effective remedies available at the domestic level for persons who claim that their rights have been violated<sup>4</sup>. In addition, an Optional Protocol to the ICCPR was adopted in 1966, laying down a right of complaint for individuals in case of an alleged violation. The ICESCR lacks a reference to domestic remedies in case of alleged violations and also no complaints procedure at the international level was added to this treaty when it was drafted. What is more, the ICCPR uses the term 'violation', while this word is lacking in the ICESCR<sup>5</sup>. The rationale for this was that only civil and political rights can be violated, thus underpinning the need for legal remedies, while it would not be possible to define a lack of realization of esc-rights as a violation. This explains the fact that the ICESCR only has a State reporting procedure to assess progressive realization. Another noticeable difference between the ICCPR and ICESCR is that the substantive rights listed in the former start with the clause: 'Everyone has', or 'No one shall', thus granting rights directly to the individual. The ICESCR, on the other hand, uses language, such as: 'The States Parties to the present Covenant recognize the right of everyone...'. It has been argued therefore that this treaty is directed primarily towards governments to take measures, and only indirectly to individuals. The latter can only derive and invoke their esc-rights rights when they have been implemented in law and practice at the domestic level.

This traditional view which puts emphasis on the inherent differences between civil and political rights and esc-rights has dominated the thinking about the latter until the late 1980s. Gradually this approach has given way to more modern views that stress the unity, equality and interdependence of all human rights. These will be discussed further on in this chapter when the normative content of rights as explained by the UN Committee on Economic, Social and Cultural Rights will be dealt with.

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<sup>4</sup> Compare Article 2(3)(a) ICCPR.

<sup>5</sup> See Article 2(3)(a) ICCPR and Article 1 Optional Protocol to the ICCPR.



### 3. Structure and Content of the Covenant

The Covenant is divided into five parts. Part I only contains one provision. This Article 1 deals with the right to self-determination; it is identical to its counterpart in the ICCPR. Part II comprises a number of articles on general provisions, such as on State obligations (Art. 2(1)), non-discrimination (Articles 2(2 and 3), 3) and on limitations (Art. 4 and 5). The main body of the Covenant is included in Part III (Articles 6-15) which contains a number of provisions on substantive rights (work, labour conditions, social security, food, health, housing, education and culture). Part IV (Articles 16-25) deals with the State reporting procedure and international supervision. Part V (Articles 26-31) contains final clauses on ratification, accession, amendments and entry into force. In this section we will focus on the types of substantive rights included and discuss some of their features<sup>6</sup>.

One can roughly distinguish between economic rights, social rights and cultural rights, but this classification is not very rigid. One should keep in mind that all human rights are interdependent and interrelated<sup>7</sup>. Generally speaking, esc-rights deal with entitlements and freedoms related to an adequate standard of living. They stress self-development, the quality of life from the perspective of protecting human dignity. Economic rights relate to claims to participation in economic life, professional activities in order to make a living. They include, for example, the right to work, the right to an adequate standard of living and the right to property<sup>8</sup>. Social rights relate to the legal protection of workers and the conditions under which people live and work (just and favourable working conditions, social security, food, housing, health). Cultural rights are more difficult to define. They relate to the protection of dimensions of culture in a broad sense, such as the individual and collective aspects of cultural identity (minorities; indigenous groups). Examples are the right to education, the right to take part in cultural life and linguistic rights of minorities.

If we closely read and analyse the provisions on substantive rights of the Covenant, it becomes clear that Part III is a combination of a listing

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<sup>6</sup> A more detailed analysis of Article 2(1) on the nature of State obligations will be given in section 5 below. For a detailed discussion of substantive esc-rights, see EIDE, A., KRAUSE, C. & ROSAS, A. (Eds.), *Economic, Social and Cultural Rights – A Textbook*, 2<sup>nd</sup> revised ed., Martinus Nijhoff Publishers, Dordrecht-London-Boston, 2001.

<sup>7</sup> As confirmed in the Vienna Declaration and Programme of Action adopted at the Second World Conference on Human Rights in 1993, UN Doc. A/CONF.157/23, 12 July 1993, para. I(5).

<sup>8</sup> The right to property is not included in the Covenant, but in Article 17 of the Universal Declaration of Human Rights.

of rights and freedoms and measures or steps to be taken by States. Some provisions are quite lengthy and contain a rather detailed list of steps to be taken to achieve the full realization of a right. An example is Article 7 on just and favourable working conditions and Article 13 on the right to education. Other provisions are succinct and only contain quite general and broad formulations, such as in Article 11 on the right to an adequate standard of living, including adequate food, clothing and housing and the continuous improvement of living conditions. Another example is Article 9 on social security which is very brief (only one sentence) and consequently quite exceptional compared to the other provisions. The Covenant contains rights and freedoms, that is entitlements of individuals to the State to take measures, and claims to the State not to interfere in the free exercise of a freedom. An example of such a right is the entitlement of mothers, children and the family to special protection (Article 10); an example of a freedom is the free choice of work (Article 6(1)). Freedoms give rise to negative State obligations to abstain from interference in the enjoyment of a right. Entitlements or claims entail positive State obligations to allocate resources for the realization of these rights. In some cases rights and freedoms are part of the same Article and therefore have to be distinguished carefully. An example is Article 13 which entails a claim to have access to an education (section 1 and 2) and the liberty of parents to choose schools for their children, as well as the freedom to establish their own schools (section 3 and 4).

Another feature is that some provisions indicate in a quite detailed way what type of conduct is required to realize a right. For example, Article 14 refers to the obligation to realize compulsory primary education by mentioning the adoption of a detailed plan of action for the progressive implementation of this right, within two years after the Covenant got into force for a particular State. This is an obligation that stipulates a particular type of action to be taken. It is therefore called an obligation of conduct. However, the majority of provisions of the Covenant refer to obligations of result. These are obligations indicating the final result to be achieved, but leave it open to the State to select the most appropriate measures for that end. An example is the right to take part in cultural life, which should include measures for the conservation, development and diffusion of culture (Article 15). States are thus granted a considerable discretion for measures tailored to the specific national or local context<sup>9</sup>.

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<sup>9</sup> See further GOODWIN-GILL, G.S.: "Obligations of Conduct and Result", in ALSTON, PH. & TOMASEVSKI, K. (eds.), *The Right to Food*, Martinus Nijhoff Publishers, The Hague, 1984, pp. 111-119.

## 4. The Supervisory System of the Covenant

### 4.1. *The Mandate and Composition of the Supervisory Body*

As a result of the decision to draft two separate Covenants because of the inherent differences between civil and political rights and economic, social and cultural rights, the ICESCR only has a State reporting system as a way of supervising States' compliance with their obligations. According to Article 16 ICESCR, States Parties undertake to submit reports on the measures taken and the progress made in achieving the observance of the Covenant rights. Such reports may indicate factors and difficulties affecting the degree of fulfillment of obligations (Art. 17(2)). Reports should be submitted to the UN; one of its principal organs, ECOSOC, was entrusted with the task of considering these reports. ECOSOC established a Working Group of Governmental Experts to deal with the State reports, but its actual role was left unclear<sup>10</sup>. Note that the Covenant itself does not provide for the creation of a supervisory committee as is the case with the ICCPR which provides for the legal basis of the Human Rights Committee (Art. 28 ICCPR). The record of this Working Group in examining State reports was a poor one. The main criticism related to the politicized nature of the discussions (the Group was composed of governmental experts, not of independent experts) and the Group failed to establish standards for the evaluation of State reports<sup>11</sup>. In 1985, as a response to this unsatisfactory situation, ECOSOC established a new supervisory body to be composed of experts, acting in their personal capacity<sup>12</sup>. The new body was to be named the Committee on Economic, Social and Cultural Rights and is a subsidiary body of ECOSOC. The new Committee began its work in 1987. It meets twice a year for sessions of three weeks. Over the years, its mandate, composition and working methods have developed according to those of the other UN human rights treaty bodies with respect to the consideration of State reports. In addition, the Committee gave a fresh impetus to the examination of State reports. Some of these new developments will be discussed below.

The composition of the Committee is based on a geographical distribution of its members. They should be persons of high moral character and have recognized competence in the field of human rights. Members are elected by ECOSOC for four years with the possibility of

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<sup>10</sup> ECOSOC Res. 1978/10 of 3 May 1978.

<sup>11</sup> See for an overview of criticism, CRAVEN, *supra* note 3, pp. 39-42.

<sup>12</sup> ECOSOC Res. 1985/17 of 28 May 1985.

re-election. The composition of the Committee in 2008 was such that a majority of members had a legal background (professors of law; judges). Social scientists and economists were quite under-represented. Although the Committee is performing legal functions and legal expertise is certainly necessary, it has quite rightly been argued by some commentators that more expertise on economic, health, social and educational matters is required<sup>13</sup>. Such expertise would enrich the Committee's work and deepen its understanding of the non-legal obstacles countries face in realizing the rights.

#### 4.2. *The Committee's Working Methods*<sup>14</sup>

The Committee engages in a so-called 'constructive' dialogue with representatives of a State party whose periodic report is subject to examination. State reports should be drafted in accordance with guidelines established by the Committee. These contain requests to provide detailed information about the extent to which a particular right has been realized in a country. For example, on the right to adequate food, a government should provide information on whether hunger and/or malnutrition exists in a country, with specific attention for the situation of vulnerable groups, such as the urban poor, children and elderly people<sup>15</sup>. The dialogue is an oral exchange of views between members of the Committee and representatives of a government, usually in the form of questions and answers. This exchange of views is not meant to be confrontational, but rather to assist a State party to better implement the Covenant rights. In order to prepare this dialogue, the Committee will establish a pre-sessional working group, composed of five members, which is in charge of drafting a list of issues and questions that will constitute the principal focus of the dialogue with the reporting State. The State is requested to answer these questions in writing before the public consideration of the State report takes place. This list of issues certainly has an added value, because it gives the Committee the opportunity to go beyond the often rather generally worded, descriptive and legalistic

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<sup>13</sup> CRAVEN, *supra* note 3, pp. 45-46 and DOWELL-JONES, M.: *Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the Economic Deficit*, Martinus Nijhoff Publishers, Leiden/Boston, 2004, pp. 163-164.

<sup>14</sup> For an overview of working methods, see <http://www2.ohchr.org/english/bodies/cescr/workingmethods.htm>

<sup>15</sup> Revised general guidelines regarding the form and contents of reports to be submitted by States parties under Articles 16 and 17 of the ICESCR, UN Doc. E/C.12/1991/1.

sections in the State report. It may ask for clarification and an exposition of the real difficulties affecting implementation of the Covenant. The examination of the State report concludes with the adoption of Concluding Observations by the Committee. These contain an assessment of the progress made and obstacles encountered by the State party in realizing the rights. This document mentions positive developments, principal issues of concern and suggestions and recommendations aimed at a better implementation of the Covenant provisions. Recommendations may deal with policy issues and legislative issues. An example of the former was the recommendation to the Netherlands government to strengthen its effort to overcome the obstacles faced by ethnic minority women in accessing the labour market<sup>16</sup>. An example of the latter was the recommendation to the Netherlands to adopt specific legislation on domestic violence<sup>17</sup>. Concluding Observations are not legally binding, but they do have authority, because they were adopted by the treaty body in charge of reviewing States' implementation of treaty obligations. According to O'Flaherty, their authority is stronger when a treaty body is of the view that a particular situation is a violation of the State's obligations. The authority is weaker when a concluding observation only contains general advice aimed at a better implementation of the Covenant<sup>18</sup>. Through the constructive dialogue and the Concluding Observations, the Committee has contributed to strengthening States' parties accountability for their acts and omissions in the area of esc-rights implementation. However, the reporting procedure is a relatively weak mechanism as it is based on persuasion and its recommendations are non-enforceable.

States parties are often (very) late in submitting their periodic reports, but after reminders have been sent, governments may still be persuaded to submit a report. However, there is a number of countries whose reports are very significantly overdue. For these types of cases the Committee has adopted a special procedure which entails that it will consider these countries in the absence of a State report, but in the light of alternative information. This information may come from NGOs, specialized agencies, news papers, magazines, research institutes etc. In 2008, the Committee announced that it will consider the

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<sup>16</sup> Concluding Observations on the Netherlands, UN Doc. E/C.12/NLD/CO/3, para. 22 (24 November 2006).

<sup>17</sup> Concluding Observations on the Netherlands, UN Doc. E/C.12/NLD/CO/3, para. 27.

<sup>18</sup> See O'FLAHERTY, M.: "The Concluding Observations of United Nations Human Rights Bodies", *Human Rights Law Review*, Vol. 6, no. 1, 2006, pp. 27-52, at 36.

situation in Mali and Tanzania, in the absence of an initial State report, in 2010.

There are ample possibilities for NGOs to contribute to the consideration of State reports by the Committee. As the Committee is a subsidiary body of ECOSOC, the rules for NGO participation that apply to ECOSOC also apply to the Committee. This means that NGOs in general or special consultative status with ECOSOC or on the Roster may submit a written statement to the Committee at the reporting session. An NGO without consultative status with ECOSOC may also submit a written statement, provided that it is sponsored by an NGO in consultative status with ECOSOC. NGOs may also participate in the work of the pre-sessional working group by submitting written parallel reports, or by making an oral statement to the working group, or to the country rapporteur prior to its meeting. Finally, on the first day of each session of the Committee an NGO hearing is organized during which NGOs can voice their concerns in an oral statement about one of the countries whose report will be subject to examination at that session. NGOs, however, cannot participate in the dialogue between the Committee and representatives of governments<sup>19</sup>.

Another important tool of the Committee is the adoption of General Comments. These are authoritative explanations and interpretations of the nature, content and scope of treaty provisions, in particular substantive rights. These are based on the examination of State reports and are meant to assist States parties in the implementation of the Covenant at the domestic level. They explain what is to be expected from States in terms of obligations and policy objectives seen through the lens of the Covenant. Input for General Comments also comes from so-called Days of General Discussion that are organized during each session. Specialized agencies, NGOs, academics, UN Special Rapporteurs and individual experts may submit written and oral information that might help the Committee in getting a proper understanding of substantive issues. For example, in May 2008, during its 40<sup>th</sup> session, the Committee held a Day of General discussion on the right to take part in cultural life (Art. 15(1)(a)), a right which is still underdeveloped in terms of right holders, duty bearers and nature of State obligations<sup>20</sup>.

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<sup>19</sup> For a detailed overview of the options for NGO to participate in the activities of the Committee, see UN Doc. E/2001/22, Annex V.

<sup>20</sup> See for a summary of the discussions UN Doc. E/C.12/2008/SR.17 and SR.18.

#### 4.3. *Role of Specialized Agencies in the Work of the Committee*

The Covenant provides for a role for UN specialized agencies in the process of monitoring the implementation of esc-rights and assisting ECOSOC in its supervisory activities (Articles 18-20). The mandate of a number of specialized agencies is closely related to one or more of the Covenant rights, such as the FAO (food), WHO (health), ILO (work, labour conditions) and education (UNESCO), but also the IMF and World Bank<sup>21</sup>. So far the cooperation between the Committee and the specialized agencies has been quite poor. This is not due to a lack of interest with the Committee, but to some reluctance among a number of specialized agencies to establish a close working relationship with the Committee. Also bureaucratic formalities are sometimes an obstacle for establishing fruitful forms of cooperation. Specialized agencies do not report on the situation of esc-rights in individual countries whose reports are being examined by the Committee. This would probably go beyond the mandate of those agencies and could be seen as an interference in the domestic affairs of States and therefore politically too sensitive. However, for some years now, the Committee has established regular forms of cooperation with the ILO and UNESCO. ILO actively took part in the discussion on the drafting of a General Comment on the right to social security which was adopted in 2007<sup>22</sup>. With UNESCO the Committee has established a Joint Expert Group on the monitoring of the right to education which meets on an annual basis<sup>23</sup>. These forms of cooperation are useful for dealing with thematic issues that require special expertise. Although Article 24 ICESCR guarantees the independence of specialized agencies in relation to matters dealt with in the Covenant, there is definitely a need for other specialized agencies to work more closely with the Committee.

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<sup>21</sup> The World Trade Organization is not a specialized agency under Articles 57 and 63 of the UN Charter and therefore excluded from arrangements on cooperation between specialized agencies and ECOSOC. When the text of the Covenant was adopted, the idea was that the specialized agencies would become 'the executing agencies of the Covenant with a major share of the responsibility for its effective implementation'. See JENKS, C.W.: *A New World of Law*, Longmans, London, 1969, p. 54. Jenks argues that this could be achieved through the adoption of detailed conventions and recommendations within the framework of the specialized agencies.

<sup>22</sup> UNCESCR, General Comment No. 19 on the right to social security, UN Doc. E/C.12/GC/19.

<sup>23</sup> See for a report of the fifth, sixth and seventh meeting of the Joint Expert Group held in 2006 and 2007, UNESCO Doc. 177 EX/37 and 179 EX/24.

## 5. Developing the Normative Content of ESC-rights

### 5.1 *Clarifying States' Parties Obligations*

From the outset it was clear that the Committee, which began its work in 1987, should focus on clarifying the normative content of the Covenant rights. The first Chairperson of the Committee, Mr. Philip Alston from Australia, in a leading publication<sup>24</sup>, made some important proposals in this respect which served as a source of inspiration for the Committee in its future work. One of the main challenges facing the Committee was to clarify the nature of States parties' obligations resulting from Article 2(1) of the Covenant. This major issue was discussed at an expert meeting which took place in Maastricht (The Netherlands) in 1986. The outcome of this meeting was the so-called Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights<sup>25</sup>. They provide an interpretation of the nature and scope of States parties' obligations under Articles 2-5 in particular. These Principles were used by the Committee as inspiration and input when it started drafting a General Comment on Article 2(1)<sup>26</sup>. This key General Comment was adopted in 1990 at the fifth session<sup>27</sup>. It laid the foundation for the future normative and monitoring activities of the Committee.

The importance of this General Comment is great; that's why it will be discussed in here in some detail.

The Committee begins this General Comment by clarifying the meaning of the obligation 'to take steps'. It is of the view that, although the full realization of the Covenant rights may be realized progressively, a State Party must begin to take measures aimed at implementing the

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<sup>24</sup> ALSTON, PH.: "Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights", *Human Rights Quarterly*, Vol. 9, 1987, pp. 332-381.

<sup>25</sup> The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/CN.4/1987/17, Annex; also published in the *Human Rights Quarterly*, Vol. 9, 1987, pp. 122-135, together with a commentary and preparatory papers (pp. 136-273).

<sup>26</sup> It should be noted that four of the participants in the meeting at which the Principles were drafted were members of the new Committee, among them Philip Alston who was the Committee's Chairperson from 1991-1998. On the meaning and impact of the Principles see COOMANS, F.: "The Limburg Principles on Socio-Economic Rights", in FORSYTHE, D. (ed.): *Encyclopedia of Human Rights*, Oxford University Press, Oxford, forthcoming.

<sup>27</sup> UNCESCR, General Comment No. 3, The Nature of States Parties' Obligations (Art. 2, par. 1), UN Doc. E/1991/23, Annex III.



rights shortly after the Covenant gets into force for that particular State. Such measures should be 'deliberate, concrete and targeted as clearly as possible' towards meeting its obligations<sup>28</sup>. This means that a government may not lean back and take a passive attitude once it has ratified the Covenant. After all, the ICESCR is aimed at realizing higher levels of realization of the substantive rights. However, the clause 'achieving progressively the full realization of the rights' means that the drafters were aware of the fact that in many countries full realization will not be achieved in a short period of time. Therefore, in the view of the Committee, on the one hand progressive realization is 'a necessary flexibility device', which reflects the realities and difficulties of the real world. On the other hand, the object and main feature of the Covenant is that it lays down obligations for States aimed at the full realization of rights. Consequently, the phrase 'progressive realization' imposes an obligation 'to move as expeditiously and effectively as possible' towards full realization. Deliberately retrogressive measures which imply a step backwards in the level of enjoyment of rights, would require careful consideration and full justification in light of object and purpose of the Covenant<sup>29</sup>.

In General Comment no. 3 the Committee introduces a new concept that is meant to lay down some minimum level of enjoyment of a right that should be guaranteed under all circumstances. This is the notion of 'minimum core obligations to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights'<sup>30</sup>. Thus, each right has a minimum or core content which must be observed under all circumstances. If such a minimum level cannot be realized a human right would lose its *raison d'être*. In other words, the core content of a right refers to the essential elements of a right in terms of protecting human dignity. The Committee argued that 'a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is *prima facie*, failing to discharge its obligations under the Covenant'<sup>31</sup>. The Committee also thinks that, in light of the obligation to take steps to the maximum of its available resources, States

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<sup>28</sup> General Comment No. 3, *supra* note 27, para. 2.

<sup>29</sup> General Comment No. 3, *supra* note 27, para. 9. Compare the Limburg Principles, *supra* note 25, paras. 21-24. See also ALSTON, *supra* note 24, pp. 352-353.

<sup>30</sup> General Comment No. 3, *supra* note 27, para. 10. Compare the Limburg Principles, *supra* note 25, para. 28. For application of this concept to the right to education, see COOMANS, F.: "Exploring the Normative Content of the Right to Education as a Human Right: Recent Approaches", *Persona y Derecho*, Vol. 50, 2004, pp. 61-100.

<sup>31</sup> General Comment No. 3, *supra* note 27, para. 10. Compare the Limburg Principles, *supra* note 25, para 25.

must give priority to the satisfaction of minimum core obligations<sup>32</sup>. In this respect it is important to note that 'available resources' both refer to domestic resources and those from the international community through international cooperation and assistance<sup>33</sup>. It may also imply that a State must reorient national priorities, for example from spending on military equipment to health issues. In addition, a government may be obliged to reallocate resources within one sector, for example from higher education to primary education. In times of severe resource constraints a government may also be required to adopt low-cost targeted programs or safety nets to protect the most vulnerable members of society<sup>34</sup>. The final clause to be mentioned here is the obligation to take steps 'by all appropriate means'. Legislative measures are singled out in Article 2(1), but other measures may also be appropriate, depending on the domestic situation<sup>35</sup>. One may think of judicial remedies, financial measures such as a progressive income policy, a housing policy facilitated by allowances for low income households, or the distribution of food to those in need who are unable to take care of themselves.

General Comment no. 3 has been influential, because some of its key notions have been applied in other General Comments on substantive rights. An example is the notion of core obligations which is included in all General Comments since 1999<sup>36</sup>.

Most General Comments on substantive rights have been structured along similar lines. They include, in addition to an introductory part, sections on the normative content of a right, obligations of States parties, violations, implementation at the national level, and obligations of actors other than States. Each part is divided into subsections on specific issues, such as non-discrimination and equality, monitoring domestic implementation and remedies and accountability. The Committee broke new ground by drafting a General Comment on a right which is not included in the Covenant. This is about the right to water whose legal basis, according to the Committee, can be found in Article 11(1), the right of everyone to an adequate standard of living and Article 12, the right

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<sup>32</sup> General Comment No. 3, *supra* note 27, para. 10.

<sup>33</sup> General Comment No. 3, *supra* note 27, para. 13. Compare the Limburg Principles, *supra* note 25, para. 26.

<sup>34</sup> General Comment No. 3, *supra* note 27, para. 12.

<sup>35</sup> General Comment No. 3, *supra* note 27, para. 3, 4. Compare the Limburg Principles, *supra* note 25, para. 16-20.

<sup>36</sup> Compare, for example, General Comment No. 13 on the right to education, UN Doc. E/C.12/1999/10, para. 57 and General Comment No. 19 on the right to social security, UN Doc. E/C.12/GC/19, paras. 59-61. See also the Committee's Statement on Poverty and the ICESCR, UN Doc. E/C.12/2001/10, paras. 15-18.

to health<sup>37</sup>. This General Comment has been criticized for creating a new right which States have not recognized and which does not exist in international law. In addition, the template used for drafting was said to focus too much on a State-centric model, largely excluding the role and responsibilities of the private sector<sup>38</sup>.

There are other concepts and notions that have been developed in the academic debate on esc-rights and subsequently applied in General Comments. These include the so-called typology of obligations – to respect, to protect, to fulfil – meant to clarify and specify obligations of States' parties<sup>39</sup>. Each General Comment on a substantive right uses this typology to define negative and positive State obligations. For example, the obligation to respect the right to social security requires States parties to refrain from interfering directly or indirectly with the enjoyment of the right to social security. The obligation to protect requires that States parties prevent third parties, such as employers, from interfering with the enjoyment of the right to social security. Finally, the obligation to fulfill requires States parties to adopt the necessary measures, such as the establishment and implementation of a social security scheme, directed towards the full realization of this right<sup>40</sup>.

## 5.2. A 'Violations' Approach to ESC-Rights

Another approach developed by academics and subsequently applied by the Committee in General Comments is the so-called violations approach to esc-rights. The idea to identify violations of esc-rights came up as response to the problems encountered in measuring progressive realization of human rights. After all, Article 2(1) ICESCR grants considerable discretion to governments in taking measures to realize the rights. In addition, there was a lack of an agreed methodology and reliable indicators and statistical information to assess whether a State was complying with its obligation to realize progressively the rights<sup>41</sup>. Conse-

<sup>37</sup> General Comment No. 15 on the right to water, UN Doc. E/C.12/2002/11.

<sup>38</sup> See TULLY, S.: "A Human Right to Access Water? A Critique of General Comment No. 15", *Netherlands Quarterly of Human Rights*, Vol. 23, 2005, pp. 35-63.

<sup>39</sup> See, for a detailed discussion of the development of the typology of obligations, SEPÚLVEDA, M.: *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, Intersentia, Antwerp-Oxford, 2003, chapter V.

<sup>40</sup> See for a more detailed discussion, General Comment No. 19, *supra* note 36, para. 43-51 and RIEDEL, E. (Ed.): *Social Security as a Human Right – Drafting a General Comment on Article 9 ICESCR*, Springer, Berlin, 2007.

<sup>41</sup> See ROBERTSON, R.: "Measuring State Compliance with the Obligation to Devote the 'Maximum Available Resources' to Realizing Economic, Social and Cultural Rights",

quently, there was a lack of effective monitoring of States' performance. An alternative approach was suggested by Audrey Chapman in a leading article in the *Human Rights Quarterly*<sup>42</sup>. Building on the Limburg Principles<sup>43</sup>, she proposed to distinguish between three types of violations: violations resulting from actions and policies on the part of governments; violations related to patterns of discrimination; and violations related to a State's failure to fulfil minimum core obligations emanating from rights<sup>44</sup>. This violations approach was not meant to replace measuring progressive realization, but rather to complement it. Early 1997, an expert meeting was held in Maastricht whose objective was to draft guidelines for identifying violations of esc-rights. Such guidelines could be of assistance to monitoring expert and judicial bodies at the national, regional and international levels. The outcome of this meeting was the adoption of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights<sup>45</sup>. These Guidelines distinguish between violations as a consequence of active interference (acts of commission) by the State and a failure to act (acts of omission) by the State<sup>46</sup>. Examples of the former include forced evictions of people from their home or land, or forced closure of schools. Examples of the latter are a failure to adopt a law on non-discrimination and equal treatment in labour matters, or the failure to take steps to address the negative consequences of the privatization of health systems (reduced accessibility due to higher fees). Furthermore, violations related to patterns of discrimination are also referred to in the Maastricht Guidelines. An example is the exclusion and discrimination of people from Roma descent in schools and housing policy in a number of European countries. Finally, violations of minimum

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*Human Rights Quarterly*, Vol. 16, 1994, p. 694. See for an overview of approaches CHAPMAN, A.: 'The Status of Efforts to Monitor Economic, Social and Cultural Rights', in HERTEL, S. & MINKLER L. (Eds.): *Economic Rights – Conceptual, Measurement, and Policy Issues*, Cambridge, Cambridge University Press, 2007, pp. 143-164.

<sup>42</sup> CHAPMAN, A.: "A 'Violations Approach' for Monitoring the International Covenant on Economic, Social and Cultural Rights", *Human Rights Quarterly*, Vol. 18, 1996, pp. 23-66. See also CHAPMAN, A. & RUSSELL, S. (eds.): *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Intersentia, Antwerp-Oxford, 2002; VAN BOVEN, TH.C., FLINTERMAN, C., WESTENDORP, I. (eds.): *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Netherlands Institute of Human Rights, SIM Special No. 20, Utrecht, 1998.

<sup>43</sup> The Limburg Principles already contained some criteria for identifying violations of esc-rights. See Limburg Principles, *supra* note 25, para. 70-72.

<sup>44</sup> CHAPMAN, *supra* note 42, p. 43.

<sup>45</sup> Published in the *Human Rights Quarterly*, Vol. 20, 1998, pp. 691-705. Three members of the Committee participated in the meeting at Maastricht.

<sup>46</sup> Maastricht Guidelines, *supra* note 45, para. 14, 15.

core obligations are identified as a type of violations in the Maastricht Guidelines<sup>47</sup>. An example is the failure to make primary education compulsory and free to all as required by Article 13(2)(a) and 14 ICESCR.

However, not all of these acts or failures amount to violations of esc-rights. The Maastricht Guidelines distinguish between the inability of a State to comply *versus* the unwillingness to comply with treaty obligations<sup>48</sup>. The former may be due to an objective lack of resources as a result of a natural disaster. There is thus an objective justification for not complying, dispelling it as a violation. Such a situation may call for international assistance and cooperation. The unwillingness of a State to comply may be caused by a lack of political will, wrong policy choices made deliberately, retrogressive measures and corruption. Such a situation would certainly qualify as a violation. A good example were the deliberate actions of the Nigerian authorities violating the right to health, housing, food and a healthy environment of the Ogoni people in the Niger delta in the 1990s. These acts were qualified as violations by the African Commission on Human and Peoples' Rights<sup>49</sup>.

This so-called violations approach was adopted by the Committee in its General Comments, starting with the General Comment on the right to health by explaining what a violation of this right means<sup>50</sup>. However, in its Concluding Observations on the examination of periodic State reports, the Committee is quite hesitant to use violation language, because such language would not fit the so-called constructive dialogue approach between the Committee and the government of the reporting State. Instead it uses language which expresses (deep) concern about a particular situation<sup>51</sup>. However, a good listener will understand that the Committee is often referring to situations which amount to a violation of esc-rights.

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<sup>47</sup> Maastricht Guidelines, *supra* note 45, para. 9.

<sup>48</sup> Maastricht Guidelines, *supra* note 45, para. 13.

<sup>49</sup> See COOMANS, F.: "The Ogoni Case Before the African Commission on Human and Peoples' Rights", *International and Comparative Law Quarterly*, Vol. 52, 2003, pp. 749-760.

<sup>50</sup> General Comment on the right to the highest attainable standard of health, UN Doc. E/C.12/2000/4, paras. 46-52.

<sup>51</sup> For example, the Concluding Observations on Ukraine contain the following observation: "The Committee is deeply concerned about reports on substandard living conditions and overcrowding in prisons, pre-trial detention centres and centres for refugees and asylum-seekers, including in medical wards for inmates and detainees suffering from tuberculosis". UN Doc. E/C.12/UKR/CO/5, para. 26 (4 January 2008). With respect to Guatemala the Committee expressed its concern about the fact that only 30 percent of children living in rural communities complete primary education, and in the case of indigenous children, only 20 percent the primary level of education. See UN Doc. E/C.12/1/Add.93, para. 27 (12 December 2003).

## 6. The Justiciability of Economic, Social and Cultural Rights

It is one thing to have a treaty and an authoritative interpretation of its provisions by a treaty body. However, it is quite another thing to be able to invoke those provisions before a domestic court. This is the issue of the justiciability of esc-rights, which can be defined as the ability to claim a remedy before an independent and impartial body when a violation of a right has occurred. A justiciable right grants a holder of a right a legal course of action to enforce it<sup>52</sup>. According to the traditional view about esc-rights, these rights are non-justiciable. These are rights that are directed at governmental action that cannot be defined in terms of law. Thus the courts do not have a role in assessing their implementation. This should be left to the political branches of the State, namely government and parliament. This is in accordance with the doctrine of the separation of powers. Justiciability is thus seen as a static concept. Modern approaches argue that justiciability is a fluid concept. One cannot say, for example, that the right to adequate housing is a non-justiciable right. On the contrary, the justiciability of a right depends on:

- the characteristics and the context of a particular case (is it concrete enough);
- the attitude/ approach of the judge dealing with the case (is she/he willing to review; does she/he has the knowledge and training to do so);
- the role of the judiciary in the domestic system (is there a form of constitutional review, judicial activism versus judicial constraint, separation of power arguments);
- the wording of the provision invoked (is it sufficiently clear and precise);
- the relationship between national and international law (does the country have a monist or a dualist system).

Already in its General Comment on the nature of States' parties obligations, the Committee emphasized that a number of provisions of the Covenant 'would seem to be capable of immediate application by judicial and other organs in many legal systems'<sup>53</sup>. As examples the Committee mentioned, among others, Article 7(a)(i), the right to equal remuneration for work of equal value without distinction of any kind, and

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<sup>52</sup> *Courts and the Legal Enforcement of Economic, Social and Cultural Rights*, Report by the International Commission of Jurists, Geneva, 2008, p. 6.

<sup>53</sup> General Comment No. 3, *supra* note 27, para. 5.

Article 13(2)(a), the right to free and compulsory primary education. In another General Comment, the Committee reaffirmed that all Covenant rights could, in the great majority of domestic systems, be considered to possess at least some justiciable dimensions<sup>54</sup>. It added: 'the adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent'<sup>55</sup>. Legal or administrative remedies are thus important to make a right fully effective. This is also required by Article 8 of the Universal Declaration of Human Rights. Domestic practice, however, is largely not in conformity with the idea that esc-rights should be fully justiciable. The Committee observed in 1998 that the impact of the Covenant on the reasoning and outcome of court cases was very limited<sup>56</sup>. A study by Craven in 1993 of a number of Western countries showed very few examples of direct or indirect application of Covenant provisions by national courts<sup>57</sup>. Indeed, in Western countries, Covenant rights have a weak status in the domestic legal order. This is mainly due to the fact that governments and courts still consider Covenant provisions as directives for the government, drafted in vague and general terms, and not as individual rights. Consequently, their justiciable nature is denied. For example, the Committee in its Concluding Observations on the Netherlands periodic report, expressed concern that the courts in the Netherlands apply the provisions of the Covenant only to the extent that they consider that these are directly applicable and that most provisions of the Covenant cannot be applied directly. It recommended the Netherlands to promote the use of the Covenant by the courts and as a domestic source of law<sup>58</sup>. In a number of countries from the South the status and role of the Covenant is more prominent, especially in the case law. Examples include the Philippines, Argentina and, to some extent, India<sup>59</sup>. Creative strategies and training

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<sup>54</sup> General Comment No. 9 on the Domestic Application of the Covenant, UN Doc. E/C.12/1998/24, para. 10.

<sup>55</sup> *Ibidem*.

<sup>56</sup> General Comment No.9, *supra* note 54, para. 13.

<sup>57</sup> M.C.R. CRAVEN, "The Domestic Application of the International Covenant on Economic, Social and Cultural Rights", *Netherlands International Law Review*, Vol. 40, 1993, pp. 367-404.

<sup>58</sup> UNCESCR, Concluding Observations on the Netherlands, UN Doc. E/C.12/NLD/CO/3, para. 11, 19.

<sup>59</sup> See COOMANS, F. (Ed.): *Justiciability of Economic and Social Rights – Experiences from Domestic Systems*, Intersentia, Antwerp-Oxford, 2006. See for more examples, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights*, *supra* note 52.

of judges and lawyers are required to promote that the Covenant rights really mean something for those who claim that their rights have been violated and seek an effective remedy before a domestic court<sup>60</sup>.

## 7. Towards a Right to Complain

The fact that the ICESCR lacks an (individual) complaints procedure has its roots in discussions about the nature of civil and political *versus* esc-rights in the 1950s when the Covenant was drafted, as mentioned in section 2 above. The Committee took up the issue of developing an Optional Protocol to the Covenant providing for a complaints procedure in the early 1990s. These efforts were meant to restore the imbalance in supervisory mechanisms between the two Covenants. This was deemed to be necessary in light of the principle expressed in the Vienna Declaration of the Second World Conference on Human Rights that all human rights must be treated in a fair and equal manner, on the same footing and with the same emphasis<sup>61</sup>. Also Article 8 of the Universal Declaration requires establishing effective remedies in case of alleged violations of human rights, thus including esc-rights. The ratio for having a complaints protocol to the Covenant was well expressed by the Committee. It said:

‘As long as the majority of the provisions of the Covenant (and most notably those relating to education, health care, food and nutrition, and housing) are not the subject of any detailed jurisprudential scrutiny at the international level, it is most unlikely that they will be subject to such examination at the national level either’<sup>62</sup>.

Over the years the question of adding a complaints procedure to the ICESCR has led to an intense debate in academic circles, governmental circles and UN bodies. Some have emphasized the need to close the “protection gap” in the area of esc-rights<sup>63</sup>, others have argued

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<sup>60</sup> For a number of concrete suggestions see, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights*, pp. 103-105.

<sup>61</sup> The World Conference also encouraged the UN Commission on Human Rights and the Committee to continue the examination of an optional protocol to the ICESCR. See UN Doc. A/CONF.157/23, para. 75.

<sup>62</sup> Towards an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Analytical paper adopted by the Committee at its seventh session, 11 December 1992, UN Doc. A/CONF.157/PC/62/Add.5, Annex II, para. 24.

<sup>63</sup> See ALSTON, PH.: “No Right to Complain About Being Poor: The Need for an Optional Protocol to the Economic Rights Covenant”, in EIDE, A. & J. HEGELSEN, J. (Eds.): *The Future of Human Rights Protection in a Changing World – Essays in Honour of Torkel Opsahl*, Norwegian University Press, Oslo, 1991, pp. 79-100.



that, taking into account the nature of esc-rights, a quasi-judicial procedure is not a suitable mechanism for vindicating these rights<sup>64</sup>. In addition, some governments remain opposed to accepting a complaints procedure at the international level for rights they consider as primarily directed at governments and therefore not justiciable<sup>65</sup>. Many NGOs, on the other hand, have strongly advocated the adoption of a complaints procedure to the ICESCR<sup>66</sup>. Over the years several proposals have been made containing draft texts for a Protocol, both by academics<sup>67</sup> and the Committee itself<sup>68</sup>. The debate got a fresh impetus when the UN Commission on Human Rights in 2003 decided to establish an "Open-Ended Working Group", with the mandate to discuss options for the elaboration of a Protocol<sup>69</sup>. In April 2008, after four years of intensive discussions, the Working Group was able to submit a text for a Protocol to the Human Rights Council. This text was adopted by the Council on June 18, 2008. On 10 December 2008, the General Assembly unanimously adopted the Optional Protocol<sup>70</sup>.

In addition to the general concerns about the justiciability of esc-rights, a number of specific issues were raised during the discussions in the Working Group<sup>71</sup>.

The first one was whether, in addition to individual complaints, collective complaints would also be possible under the Protocol. This would give NGOs, either national or international, the right to submit a communication, more or less similar to the Collective Complaints Procedure under the European Social Charter. Another issue was the

<sup>64</sup> See TOMUSCHAT, C.: *Human Rights Between Idealism and Realism*, Oxford University Press, Oxford, 2003, p. 47; TOMUSCHAT, C.: "An Optional Protocol for the International Covenant on Economic, Social and Cultural Rights?", in *Weltinnenrecht – Liber Amicorum Jost Delbrück*, Duncker & Humblot, Berlin, 2005, pp. 815-834.

<sup>65</sup> See DENNIS, M.J. & STEWART, D.P.: "Justiciability of Economic, Social and Cultural Rights", *American Journal of International Law*, Vol. 98, 1004, p. 462.

<sup>66</sup> One example is the International NGO Coalition for an Optional Protocol to the ICESCR, <http://www.opicescr-coalition.org>.

<sup>67</sup> See COOMANS, F. & VAN HOOF, F.: *The Right to Complain about Economic, Social and Cultural Rights*, Netherlands Institute of Human Rights, SIM Special No. 18, Utrecht, 1995; ARAMBULO, K.: *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights*, Intersentia, Hart, Antwerpen-Oxford, 1999.

<sup>68</sup> Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/C.12/1994/12 and E/CN.4/1997/105.

<sup>69</sup> See Commission on Human Rights resolutions 2003/18 and 2004/29. This Working Group was chaired by Mrs. Catarina de Albuquerque from Portugal.

<sup>70</sup> An overview of the history of the drafting process may be found at: <http://www2.ohchr.org/english/issues/escr/intro.htm>

<sup>71</sup> See the following documents for an overview of the discussion and hot issues: UN Doc. A/HRC/6/WG.4/2, A/HRC/6/8, A/HRC/8/WG.4/2, A/HRC/8/WG.4/2/Rev.1, A/HRC/8/7.

scope, *ratione materiae*, of the right to complain. This relates to several questions, namely whether the Protocol should apply to all of the substantive rights listed in Part III of the Covenant; whether complaints about the general clause of progressive realization (Article 2(1) should be included; whether States should be free to choose the rights or provisions to which the right to complain should apply (*à la carte* approach), or alternatively whether a State could declare that it does not recognize the competence of the Committee to consider communications under certain provisions (opt-out clause). Another key issue was how the Committee should deal with complaints alleging that a State has failed to progressively realize the rights as provided for in Article 2(1). What type of standard should be used to assess an alleged violation of the notion of progressive realization?

In the text that was finally adopted by the Open-Ended Working Group and the Human Rights Council<sup>72</sup>, the right to complain is limited to communications by individuals, the possibility of lodging collective complaints was thus not accepted (Article 2). Communications may deal with alleged violations of any of the right set forth in Part II and Part III of the Covenant, thus excluding the right of self-determination in Part I. This means that both an *à la carte* approach and an opt-out approach were rejected. The Protocol provides in Article 3 for the usual admissibility criteria, including the exhaustion of domestic remedies. The solution found for reviewing complaints alleging a violation of the obligation to progressively realize one or more of the rights is included in Article 8(4) on the examination of the merits of a communication. Article 8(4) reads as follows:

When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with Part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set in the Covenant.

The concept of reasonableness as a standard of review was most likely copied from the jurisprudence of the Constitutional Court of South Africa which applies this standard for assessing the extent to which the government has complied with its obligation to progressively realize a number of esc-rights listed in the South African Constitution<sup>73</sup>.

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<sup>72</sup> UN Doc. A/HRC/8/7, Annex I.

<sup>73</sup> See on the notion of reasonableness review COOMANS, F.: "Reviewing Implementation of Social and Economic Rights: An Assessment of the 'Reasonableness' Test as De-

The Committee is also in favour of applying some form of reasonableness review and it has elaborated on this in a recent Statement. In that Statement the Committee mentioned some criteria to be applied in evaluating whether States have complied with the obligation to take steps to the maximum of available resources when examining cases under an optional Protocol<sup>74</sup>. In that Statement the Committee also said that it would respect the margin of appreciation of a State Party to determine the optimum use of its resources and to adopt national policies and prioritize certain resource demands over others<sup>75</sup>. This Statement is important, because it is clearly meant to reassure especially Western States that the Committee would not interfere with policy decisions in the field of esc-rights, provided these measures are reasonable. Finally, the Protocol provides for an inter-State communications procedure (Article 10) an inquiry procedure (Article 11) and the possibility of so-called interim measures aimed at avoiding irreparable damage to victims (Article 5).

The Protocol is a logical step aimed at remedying a long-term gap in human rights protection on the international level. This is the more so now that international complaints under other treaties may already deal with alleged violations of esc-rights. These include International Labour Organisation special communications procedures, the Collective Complaints procedure adopted as a Protocol to the European Social Charter and the Optional Protocol to the UN Convention on the Elimination of All Forms of Discrimination Against Women. So States have already accepted voluntarily the possibility to bring alleged violations of esc-rights before an international quasi-judicial body of experts. Consequently, an Optional Complaints Procedure under the ICESCR would acknowledge and reaffirm the indivisibility of all human rights.

In addition, an Optional Protocol to the ICESCR is important for a number of other reasons. First of all a complaints procedure at the international level would strengthen the accountability of governments before an international body for the manner in which they have complied with their treaty obligations. These governments will then be under a strong pressure to justify their policies, their acts or failures to act. The mere possibility that complaints may be brought before an international forum may or even should stimulate governments to en-

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veloped by the South African Constitutional Court", *Zeitschrift für ausländische öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law*, Vol. 65, 2005, pp. 167-196.

<sup>74</sup> UN Doc. E/C.12/2007/1, para. 8.

<sup>75</sup> UN Doc. E/C.12/2007/1, para. 12.

sure that effective remedies are available at the domestic level. In addition, a Protocol to the Covenant would be a stimulus for NGOs and lawyers to support victims of violations of esc-rights in bringing their claims before an international quasi-judicial body. Finally, and perhaps most importantly, in some cases a complaint lodged with the Committee and the views or findings adopted by it may lead to a remedy for the victim. This can be the halt of the violation; compensation for the harm incurred; a commitment by the government to observe its treaty obligations, for example by amending domestic legislation; the actual enjoyment of a right, for example getting access to a school, health service or housing program. These possible outcomes would of course depend on the willingness of the government to implement in good faith the views of the Committee which are non-binding under international law.

## 8. Challenges

It is beyond doubt that the ICESCR has gained importance over the years in terms of the meaning of rights and obligations and the operation of its supervisory procedure. A number of actors have contributed to this positive development, but the key one was certainly the Committee. Since its inception it has contributed substantively to a dynamic and evolutive development and interpretation of the treaty provisions which were said to be vague and permissive. However, it has to be acknowledged that the Covenant is still rather weak legally and practically in the domestic order of many States parties. Its relevance for domestic law and practice is still limited. This may change once an Optional Protocol to the Covenant providing for a complaints procedure gets into force and the Committee is able to develop quasi-jurisprudence that has an impact on the domestic level. In addition, in the coming years the Committee will face a number of challenges that have to be addressed in order to strengthen the importance and relevance of the Covenant. Perhaps the most important one is whether the Covenant is an appropriate instrument to deal with challenges to human rights caused by the process of globalization. Although the Covenant applies primarily on the territory of States parties, it is increasingly being recognized that the Covenant also has an extraterritorial scope. In an era of (economic) globalization, States, international organizations, NGOs, corporations and individuals increasingly act beyond national borders. Such acts or failures to act may affect the esc-rights of people living in other countries. An example is the dumping

of cheap rice or chicken meat by Western States in developing countries, thus undermining the local economy and standard of living in the latter States. This may have negative consequences for the enjoyment for the right to food and the right to work in these countries. The question is whether the Covenant contains clues to address such issues. Article 2(1) refers to international assistance and cooperation as a supplementary means to realize rights, but the international dimension of the realization and violation of esc-rights is still poorly developed. In a number of General Comments the Committee has observed that States have international obligations to respect, protect and fulfil the rights in other countries<sup>76</sup>. However, the legal basis for such obligations is still little defined and understood and needs more study and reflection by the Committee and other actors<sup>77</sup>.

A second challenge is to involve intergovernmental organizations and specialized agencies more in the work of the Committee and strengthen the role of the Covenant in the activities of these organizations. This would apply to the WTO, FAO, WHO, but also to IMF and World Bank. An example is the importance of the right to food as a human right for the efforts of WTO, FAO and the International Fund for Agricultural Development in dealing with the world food crisis<sup>78</sup>.

Finally, the role of the Covenant at the domestic level needs to be strengthened. The Covenant has to become a source of law and inspiration and a touchstone for civil servants, lawyers, judges and NGOs. This requires awareness raising and training, but also a willingness to accept and disseminate that the Covenant contains rights that are fundamental to live a life in dignity.

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<sup>76</sup> General Comment No. 14 on the right to the highest attainable standard of health, UN Doc. E/C.12/2000/4, paras. 38-42.

<sup>77</sup> See for several interesting contributions on this topic WINDFUHR, M. (Ed.): *Beyond the Nation State – Human Rights in Times of Globalization*, Uppsala, 2005. See also SKOGLY, S.I.: "Right to Adequate Food: National Implementation and Extraterritorial Obligations", *Max Planck Yearbook of United Nations Law*, Vol. 11, 2007, pp. 339-358, and COOMANS, F.: "Application of the International Covenant on Economic, Social and Cultural Rights in the Framework of International Organisations", *Max Planck Yearbook of United Nations Law*, Vol. 11, 2007, pp. 359-390.

<sup>78</sup> See "The World Food Crisis", Statement by the Committee on Economic, Social and Cultural Rights adopted on 16 May 2008, UN Doc. E/C.12/2008/1.



# Genocide Law in a Time of Transition: Recent Developments

William A. Schabas

**Summary:** 1. Groups protected by the Convention. 2. Cultural genocide. 3. 'Ethnic cleansing'. 4. 'In whole or in part'. 5. Prevention of genocide. 6. Conclusion.

Since the adoption of the *Convention for the Prevention and Punishment of the Crime of Genocide* by the United Nations General Assembly, on 9 December 1948, there have been more or less incessant calls to amend the definition of the crime set out therein. Article 2 says the crime of genocide consists of

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

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group<sup>1</sup>.

The definition is narrow in two important respects. It protects four enumerated groups, in contrast, for example, with the cognate concept of crimes against humanity which contemplates 'any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender ... or other grounds that are universally recognized as impermissible under international law'<sup>2</sup>. Moreover, it is essentially confined to the physical destruction or extermination of a group, as contrasted with crimes against humanity which extends to various forms of 'persecution', meaning 'the intentional and severe deprivation of fun-

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<sup>1</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, (1951) 78 UNTS 277. See, generally: SCHABAS, W.A.: *Genocide in International Law*, 2<sup>nd</sup> ed., Cambridge, Cambridge University Press, 2009.

<sup>2</sup> *Rome Statute of the International Criminal Court*, (2002) 2187 UNTS 90, Art. 7(1)(h).

damental rights contrary to international law by reason of the identity of the group or collectivity'<sup>3</sup>.

The explanation for this curious legal situation is rooted in the history of international criminal law. Both genocide and crimes against humanity were forged in the crucible of post-Second World War efforts to prosecute Nazi atrocities. The architects of the Nuremberg trial, that is, the four 'great powers', opted for the term crimes against humanity. They treated it as a species of war crime, requiring a link or *nexus* with aggressive war. The International Military Tribunal refused to convict Nazi leaders for atrocities perpetrated prior to the outbreak of the war. It was in reaction to the failure at Nuremberg to deal with what some called 'peacetime genocide' that the 1948 *Convention* was born. Until the 1990s, the two concepts existed in parallel: genocide was narrowly defined but acts committed in peacetime were subject to prosecution, whereas crimes against humanity was defined more broadly, but it was shackled to the link with aggressive war.

In the 1990s, international criminal law went through its greatest period of dynamism since the post-Second World War years. The definition of crimes against humanity evolved dramatically, most significantly in the recognition that there was no longer any *nexus* with armed conflict. In contrast, the definition of genocide remained unchanged, although not for want of opportunity. The adoption of the *Rome Statute of the International Criminal Court* in 1998 was the ideal opportunity for developments in the definition of genocide in response to the many proposals that had been made over the years. But at the Rome Conference, when the *Statute* was adopted, Cuba was the only State to suggest a modification in the definition, and its proposal fell on deaf ears<sup>4</sup>.

The context indicates that this should not in any sense be taken as proof of resistance to progressive development of the law concerning atrocities. At the same time as they insisted on retaining the classic definition of genocide, the drafters of the *Rome Statute* embraced a broad and innovative concept of crimes against humanity, capable of addressing a range of atrocities in peacetime committed against groups and individuals. The international community simply made a choice about how to fill the legal gap that had existed since the 1940s. It chose to enlarge the definition of crimes against humanity rather than the definition of genocide.

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<sup>3</sup> *Ibid.*, Art. 7(2)g).

<sup>4</sup> UN Doc. A/CONF.183/C.1/SR.3, para. 100.



Such a development might well have pushed the concept of genocide into a period of stagnation and atrophy. But this was not the case. Rather, in the late 1990s and in the first years of the 21<sup>st</sup> century, the law concerning genocide has itself passed through a period of unprecedented dynamism, as concepts and principles have been explored and clarified. Such developments are the subject of this article.

## 1. Groups protected by the Convention

The introductory paragraph of Article II of the *Convention on the Prevention and Punishment of the Crime of Genocide* states that the intent to destroy must be directed against one of four enumerated groups: national, racial, ethnical or religious. The limited scope of the *Convention* definition has led many academics and human rights activists in two distinct directions. There have been frequent attempts to stretch the *Convention* definition, often going beyond all reason, in order to fit particular atrocities within the meaning of Article II. Sometimes this is presented as the argument that the lacunae in the definition are filled by customary norms<sup>5</sup>. Other commentators have proposed new definitions in order to enlarge the scope of the term, among them Israel W. Charney<sup>6</sup>, Vahakn Dadrian<sup>7</sup>, Helen Fein<sup>8</sup>, and Frank Chalk and Kurt Jonassohn<sup>9</sup>. Some States, in introducing offences

<sup>5</sup> VAN SCHAACK, B.: 'The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot', 106 *Yale Law Journal* 1997, p. 2259 at pp. 2280-2282.

<sup>6</sup> CHARNEY, I.W.: 'Toward a Generic Definition of Genocide,' in ANDREOPOULOS, G.J.: *Genocide, Conceptual and Historical Dimensions*, Philadelphia, University of Pennsylvania Press, 1994, pp. 64-94 at p. 75: 'Genocide in the generic sense is the mass killing of substantial numbers of human beings, when not in the course of military action against the military forces of an avowed enemy, under conditions of the essential defenselessness and helplessness of the victims'.

<sup>7</sup> DADRAN, V.: 'A Typology of Genocide', 5 *International Review of Modern Sociology* 201, 1975: 'Genocide is the successful attempt by a dominant group, vested with formal authority and/or with preponderant access to the overall resources of power, to reduce by coercion or lethal violence the number of a minority group whose ultimate extermination is held desirable and useful and whose respective vulnerability is a major factor contributing to the decision for genocide'.

<sup>8</sup> FEIN, H.: 'Genocide, Terror, Life Integrity, and War Crimes,' in ANDREOPOULOS, G.J.: *Genocide, Conceptual and Historical Dimensions*, Philadelphia, University of Pennsylvania Press, 1994, pp. 95-107 at p. 97: 'Genocide is sustained purposeful action by a perpetrator to physically destroy a collectivity directly or through interdiction of the biological and social reproduction of group members'.

<sup>9</sup> CHALK, F. and JONASSOHN, K.: 'The Conceptual Framework', in CHALK, F. and JONASSOHN, K. (eds.): *The History and Sociology of Genocide*, New Haven and London, Yale

of genocide into their own domestic law, have deviated from the *Convention* terminology, adopting original and occasionally idiosyncratic formulations. For example, in place of the term 'group', the Portuguese Penal Code of 1982 uses 'community'<sup>10</sup>, although the word disappeared in the 1995 revision when lawmakers decided to return to the letter of the *Convention* definition<sup>11</sup>. The Romanian Penal Code of 1976 employs the term 'collectivity', but this appears to have been chosen in order to reflect the meaning of 'group' within Article II of the *Convention*, not to modify it. The Canadian legislation adopted in 2000 for implementation of the *Rome Statute of the International Criminal Court* defines genocide as an attempt to destroy 'an identifiable group of persons', to the extent that the definition is consistent with 'genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations'<sup>12</sup>. Because the Canadian legislation deems the definition in the *Rome Statute* to be consistent with customary international law, the Canadian Parliament was simply leaving room for future evolution of the definition of genocide so as to comprise groups other than those enumerated in the 1948 *Convention*.

Generally, it is the perpetrator of genocide who defines the individual victim's status as a member of a group protected by the *Convention*. The Nazis, for example, had detailed rules establishing, according to objective criteria, who was Jewish and who was not. It made no difference if the individual, perhaps a non-observant Jew of mixed parentage, denied belonging to the group. As Jean-Paul Sartre wrote in *Réflexions sur la question juive*: 'Le juif est un homme que les autres hommes tiennent pour juif: voilà la vérité simple d'où il faut partir. En ce sens le démocrate a raison contre l'antisémite: c'est l'antisémite qui fait le juif'<sup>13</sup>. In Rwanda, Tutsis were betrayed by their identity cards, for in many cases, there was no other way to tell.

The debate has been framed as one between objective and subjective approaches to the identification of targeted groups. One Trial

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University Press, 1990, pp. 3-43, at p. 23: 'Genocide is a form of onesided mass killing in which a State or other authority intends to destroy a group, as that group and members in it are defined by the perpetrator'.

<sup>10</sup> Penal Code of 1982 (Portugal), Art. 189.

<sup>11</sup> Decree-Law No. 48/95 of 15 March 1995 (Penal Code (Portugal), Art. 239).

<sup>12</sup> *Crimes Against Humanity and War Crimes Act*, 48-49 Elizabeth II, 1999-2000, C-19, s. 4(3).

<sup>13</sup> SARTRE, J-P.: *Réflexions sur la question juive*, Paris, Gallimard, 1954, pp. 81-84.

Chamber of the International Criminal Tribunal for Rwanda has said an ethnic group could be 'a group identified as such by others, including perpetrators of the crimes'<sup>14</sup>. Indeed, it concluded that the Tutsi were an ethnic group based on the existence of government-issued official identity cards describing them as such. Another Trial Chamber wrote that '[a]lthough membership of the targeted group must be an objective feature of the society in question, there is also a subjective dimension'<sup>15</sup>. It explained:

A group may not have precisely defined boundaries and there may be occasions when it is difficult to give a definitive answer as to whether or not a victim was a member of a protected group. Moreover, the perpetrators of genocide may characterize the targeted group in ways that do not fully correspond to conceptions of the group shared generally, or by other segments of society. In such a case, the Chamber is of the opinion that, on the evidence, if a victim was perceived by a perpetrator as belonging to a protected group, the victim could be considered by the Chamber as a member of the protected group, for the purposes of genocide<sup>16</sup>.

A similar approach has been taken by a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia. In *Jelisić*, it said: 'It is the stigmatisation of a group as a distinct national, ethnical or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators'<sup>17</sup>. In *Brđanin*, a Trial Chamber said 'the relevant protected group may be identified by means of the subjective criterion of the stigmatisation of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnical, racial or religious characteristics. In some instances, the victim may perceive himself or herself to belong to the aforesaid group'<sup>18</sup>.

The International Commission of Inquiry on Darfur concluded that the persecuted tribes were subsumed within the scope of the crime of

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<sup>14</sup> *Prosecutor v. Rutaganda* (Case No. ICTR-96-3-T), Judgment, 6 December 1999, para. 56. However, in the same judgment, the Trial Chamber said, at para. 57, 'that a subjective definition alone is not enough to determine victim groups as provided for in the Genocide Convention'.

<sup>15</sup> *Prosecutor v. Bagilishema* (Case No. ICTR-95-1A-T), Judgment, 7 June 2001, para. 65. Also: *Prosecutor v. Musema* (Case No. ICTR-96-13-T), Judgment and Sentence, 27 January 2000, paras. 161-162.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Prosecutor v. Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999, para. 70.

<sup>18</sup> *Prosecutor v. Brđanin* (Case No. T-99-36-T), Judgment, 1 September 2004, para. 683 (references omitted).

genocide to the extent that victim and persecutor 'perceive each other and themselves as constituting distinct groups'<sup>19</sup>. The Commission noted that '[t]he various tribes that have been the object of attacks and killings (chiefly the Fur, Massalit and Zaghawa tribes) do not appear to make up ethnic groups distinct from the ethnic group to which persons or militias that attack them belong. They speak the same language (Arabic) and embrace the same religion (Muslim)'<sup>20</sup>. Nevertheless, although 'objectively the two sets of persons at issue do not make up two distinct protected groups'<sup>21</sup>, over recent years 'a self-perception of two distinct groups' has emerged<sup>22</sup>. According to the Darfur Commission, the rebel tribes were viewed as 'African' and their opponents as 'Arab', even if the distinction lacked a genuinely objective basis.

The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia has insisted that the subjective approach alone is not acceptable:

[C]ontrary to what the Prosecution argues, the *Krstić* and *Rutaganda* Trial Judgments do not suggest that target groups may only be defined subjectively, by reference to the way the perpetrator stigmatises victims. The Trial Judgment in *Krstić* found only that 'stigmatisation ... by the perpetrators' can be used as 'a criterion' when defining target groups –not that stigmatisation can be used as the sole criterion. Similarly, while the *Rutaganda* Trial Chamber found national, ethnical, racial, and religious identity to be largely subjective concepts, suggesting that acts may constitute genocide so long as the perpetrator perceives the victim as belonging to the targeted national, ethnical, racial, or religious group, it also held that 'a subjective definition alone is not enough to determine victim groups, as provided for in the Genocide Convention'<sup>23</sup>.

Therefore, determination of the relevant protected group should be made on a case-by-case, referring to both objective and subjective criteria<sup>24</sup>. At the International Court of Justice, in the case filed by Bosnia and Herzegovina against Serbia, the two parties 'essentially agree[d]

<sup>19</sup> Report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur', UN Doc. S/2005/60, para. 509.

<sup>20</sup> *Ibid.*, para. 508.

<sup>21</sup> *Ibid.*, para. 509.

<sup>22</sup> *Ibid.*, para. 511.

<sup>23</sup> *Prosecutor v. Stakić* (Case No. IT-97-24-A), Judgment, 22 March 2006, para. 25.

<sup>24</sup> *Prosecutor v. Brđanin* (Case No. IT-99-36-T), Judgment, 1 September 2004, para. 684. Also: *Prosecutor v. Semanza* (Case No. ICTR-97-20-T), Judgment and Sentence, 15 May 2003, para. 317; *Prosecutor v. Kajelijeli* (Case No. ICTR-98-44A-T), Judgment and Sentence, 1 December 2003, para. 811.

that international jurisprudence accepts a combined subjective-objective approach', and the Court said it was not interested in pursuing the matter<sup>25</sup>. In practice, however, the subjective approach seems to function effectively virtually all the time. Trying to find an objective basis for racist crimes suggests that the perpetrators act rationally, and this is more credit than they deserve.

The four terms in the Convention not only overlap<sup>26</sup>, they also help to define each other, operating much as four corner posts that delimit an area within which a myriad of groups covered by the Convention find protection. This was certainly the perception of the drafters. For example, they agreed to add the term 'ethnicity' so as to ensure that the term 'national' would not be confused with 'political'<sup>27</sup>. On the other hand, they deleted the reference to 'linguistic' groups, 'since it is not believed that genocide would be practised upon them because of their linguistic, as distinguished from their racial, national or religious, characteristics'<sup>28</sup>. The drafters viewed the four groups in a dynamic and synergistic relationship, each contributing to an understanding of the meaning of the other.

There is a danger that a search for autonomous meanings for each of the four terms will weaken the overarching sense of the enumeration as a whole, forcing the jurist into an untenable Procrustes bed. To a degree, this problem is manifested in the 2 September 1998 judgment of the International Criminal Tribunal for Rwanda in the *Akayesu* case<sup>29</sup>, as well as in the definitions accompanying the genocide legislation adopted by the United States<sup>30</sup>, both of which dwell on the individual meanings of the four terms. Deconstructing the enumeration risks distorting the sense that belongs to the four terms, taken as a whole.

The 1996 report of the International Law Commission on the Draft Code of Crimes Against the Peace and Security of Mankind considered 'tribal groups' to fall within the scope of the definition of genocide<sup>31</sup>,

<sup>25</sup> *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, para. 191.

<sup>26</sup> 'Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur', UN Doc. A/CN.4/398, para. 56.

<sup>27</sup> UN Doc. A/C.6/SR.73 (Petren, Sweden); UN Doc. A/C.6/SR.74 (Petren, Sweden).

<sup>28</sup> UN Doc. A/401.

<sup>29</sup> *Prosecutor v. Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998.

<sup>30</sup> *Genocide Convention Implementation Act of 1987 (Proxmire Act)*, S. 1851, s. 1093.

<sup>31</sup> 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May-26 July 1996', UN Doc. A/51/10, p. 89.

although the 2005 Darfur Commission report disagreed, stating that 'tribes as such do not constitute a protected group'<sup>32</sup>. The Commission looked to anthropological textbooks for the meaning of 'tribe' or 'tribal'. The *Shorter Oxford English Dictionary* defines a tribe as '[a] group of families, esp. of an ancient or indigenous people, claiming descent from a common ancestor, sharing a common culture, religion, dialect, etc., and usually occupying a specific geographic area and having a recognized leader'. Certainly, tribal groups are cognates of the four terms used in Article II of the *Convention*, whereas it is obvious that other categories, such as political or gender groups, are not. In any event, the Darfur Commission subsequently concluded that the three 'tribes' were in fact protected groups because they themselves as well as their oppressors viewed them as such. Thus, a tribe that is perceived as a racial or ethnic group falls within the scope of the *Convention*. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia noted that Raphael Lemkin conceived of genocide as targeting 'a race, *tribe*, nation, or other group with a particular positive identity'<sup>33</sup>.

A negative approach to definition, referring to a group by what it is not rather than what it is, has been fairly convincingly rejected by the courts. The theory had first been mooted by the Commission of Experts for the former Yugoslavia<sup>34</sup>. An early Trial Chamber decision of the International Criminal Tribunal for the former Yugoslavia agreed that 'all individuals thus rejected would, by exclusion, make up a distinct group'<sup>35</sup>, but the view has since been rejected by another Trial Chamber<sup>36</sup> whose views were upheld on appeal<sup>37</sup>. The conclusions of the Appeals Chamber were subsequently endorsed by the International Court of Justice. In *Bosnia v. Serbia*, the applicant had argued that the victim of genocide has been 'the non-Serb national, ethnical or religious group within, but not limited to the territory of Bosnia and Herzegovina, including in particular the Muslim population'. According to the Court, genocide 'requires an intent to destroy a collection of people who have a particular group identity. It is a matter of who those

<sup>32</sup> 'Report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur', UN Doc. S/2005/60, para. 496.

<sup>33</sup> *Prosecutor v. Stakić* (IT-97-24-A), Judgment, 22 March 2006, para. 21 (emphasis added).

<sup>34</sup> 'Final Report of the Commission of Experts established pursuant to Security Council resolution 780 (1992)', UN Doc. S/1994/674, para. 96.

<sup>35</sup> *Prosecutor v. Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999, para. 71.

<sup>36</sup> *Prosecutor v. Stakić* (Case No. IT-97-24-T), Judgment, 31 July 2003, para. 512.

<sup>37</sup> *Prosecutor v. Stakić* (Case No. IT-97-24-A), Judgment, 22 March 2006, paras. 20-28.

people are, not who they are not'<sup>38</sup>. The Court referred to General Assembly Resolution 96(I), which contrasted genocide, as 'the denial of the existence of entire human groups', with homicide, considered as 'the denial of the right to live of individual human beings'<sup>39</sup>. According to the International Court of Justice, the drafters of the *Genocide Convention* 'gave close attention to the positive identification of groups with specific distinguishing characteristics in deciding which groups they would include and which (such as political groups) they would exclude'<sup>40</sup>.

The International Criminal Tribunal for Rwanda, in its 2 September 1998 decision in *Akayesu*, considered the enumeration of protected groups in Article II of the Genocide Convention, as well as in Article 2 of the Tribunal's *Statute*, to be too restrictive. The categorization of Rwanda's Tutsi population clearly vexed the Tribunal. It was visibly uncomfortable with use of the rather outmoded concept of 'racial group', but could not figure how else to describe the Tutsi. The Trial Chamber concluded that the drafters of the 1948 *Convention* meant to encompass all 'stable' and 'permanent' groups<sup>41</sup>. It was a somewhat extravagant reading of the *travaux préparatoires*, based on rather isolated comments by a few delegations and, moreover, it appeared to contradict a finding elsewhere in the judgment that the Tutsi were an ethnic group for the purposes of charges of crimes against humanity<sup>42</sup>. According to Guénaël Mettraux, '[a]lthough the meritorious agenda behind such a position is obvious, this proposition would appear to be, unfortunately, unsupported in law and at the time of its exposition in fact constitute purely judicial law-making'<sup>43</sup>. The novel interpretation was repeated in two subsequent decisions of the same Trial Chamber, although in a rather more guarded fashion: 'It appears from a reading of the *travaux préparatoires* of the Genocide Convention that certain groups, such as political and economic groups have been excluded from the protected groups, because they are considered to be "mobile groups" which one joins through individual, political commitment. That

<sup>38</sup> *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, para. 193.

<sup>39</sup> *Ibid.*, para. 195.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Prosecutor v. Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998, para. 515.

<sup>42</sup> *Ibid.*, para. 652.

<sup>43</sup> METTRAUX, G.: *International Crimes and the ad hoc Tribunals*, Oxford, Oxford University Press, 2005, p. 230.

would seem to suggest a *contrario* that the Convention was presumably intended to cover relatively stable and permanent groups<sup>44</sup>.

The 'stable and permanent' theory put forward by Trial Chamber I of the International Criminal Tribunal for Rwanda had been effectively forgotten until it was revived by the Darfur Commission of Inquiry in its January 2005 report. According to the Commission, the 'interpretative expansion' effected by the Trial Chamber in *Akayesu* was 'in line with the object and scope of the rules on genocide (to protect from deliberate annihilation essentially stable and permanent human groups, which can be differentiated on one of the grounds contemplated by the Convention and the corresponding customary rules)'. The Commission suggested that the theory had been generally accepted by both Tribunals, adding that 'perhaps more importantly, this broad interpretation has not been challenged by States'. Therefore, [i]t may therefore be safely held that that interpretation and expansion has become part and parcel of international customary law<sup>45</sup>.

In fact, the *Akayesu* Trial Chamber's approach was never affirmed by the Appeals Chamber of the International Criminal Tribunal for Rwanda, and has been ignored by other Trial Chambers<sup>46</sup>. Moreover, the 'permanent and stable groups' hypothesis finds no echo whatsoever in any of the judgments of the International Criminal Tribunal for the former Yugoslavia. For this reason, States could not be expected to challenge such an isolated judicial finding. Their silence is therefore of no assistance in identifying a customary norm, contrary to the suggestion of the Darfur Commission.

Trial Chambers of the Yugoslavia Tribunal have noted that that the crime of genocide in many respects fits within the historical framework of the international legal protection of national minorities, and that the concept of 'national, ethnic, racial or religious' groups should be interpreted in this context<sup>47</sup>. This approach indicates a quite different view of the philosophical basis for the crime of genocide than the 'stable and permanent groups' theory initially advanced in the *Akayesu* ruling. The Darfur Commission surely went too far in suggesting that the 'in-

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<sup>44</sup> *Prosecutor v. Rutaganda* (Case No. ICTR-96-3-T), Judgment and Sentence, 6 December 1999, para. 57; *Prosecutor v. Musema* (Case No. ICTR-96-13-T), Judgment and Sentence, 27 January 2000, para. 162 (reference omitted).

<sup>45</sup> 'Report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur', UN Doc. S/2005/60, para. 501.

<sup>46</sup> MUGWANYA, G.W.: *The Crime of Genocide in International Law, Appraising the Contribution of the UN Tribunal for Rwanda*, London, Cameron May, 2007, p. 67.

<sup>47</sup> *Prosecutor v. Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, paras. 555-556. Also: *Prosecutor v. Brđanin* (Case No. IT-99-36-T), Judgment, 1 September 2004, para. 682.



terpretative expansion' of the four groups enumerated in the *Genocide Convention* 'has become part and parcel of international customary law'. The Commission said this could be 'safely held', but the opposite is the better view.

## 2. Cultural genocide

Raphael Lemkin's seminal work, *Axis Rule in Occupied Europe*, attached great attention to the cultural aspects of genocide<sup>48</sup>. Destruction of a people often began with a vicious assault on culture, particularly language, religious and cultural monuments and institutions. During the post-war trials, attention had focused on the cultural aspects of the Nazi genocide. In the RuSHA case, the defendants were charged with participation in a 'systematic program of genocide' that included 'limitation and suppression of national characteristics'<sup>49</sup>. But there is not doubt that the drafters of the *Genocide Convention* intentionally excluded cultural genocide from the scope of the instrument<sup>50</sup>.

In his dissenting opinion in the 2004 decision in *Prosecutor v. Krstić*, Judge Shahabuddeen of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia set out a theory by which acts of cultural genocide would be subsumed within the definition of genocide, albeit indirectly, through the manifestly physical act of killing. He explained that '[a] group is constituted by characteristics – often intangible – binding together a collection of people as a social unit. If those characteristics have been destroyed in pursuance of the intent with which a listed act of a physical or biological nature was done, it is not convincing to say that the destruction, though effectively obliterating the group, is not genocide because the obliteration was not physical or biological'<sup>51</sup>.

Judge Shahabuddeen acknowledged 'the generally accepted view' that cultural genocide was excluded from the *Convention*, but said:

<sup>48</sup> LEMKIN, R.: *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington, Carnegie Endowment for World Peace, 1944, pp. 84-85.

<sup>49</sup> *United States of America v. Greifelt et al.* ('RuSHA trial'), (1948) 13 LRTWC 1 (United States Military Tribunal), pp. 36-42.

<sup>50</sup> UN Doc. A/C.6/SR.83 (25 in favor, 16 against, with four abstentions). See *Yearbook... 1991*, Vol. 2 (Part 2), p. 102.

<sup>51</sup> *Prosecutor v. Krstić* (Case No. IT-98-33-A), Partially Dissenting Opinion of Judge Shahabuddeen, 19 April 2004, para. 50.

'The intent certainly has to be to destroy, but, except for the listed act, there is no reason why the destruction must always be physical or biological'<sup>52</sup>. He said that if there was inconsistency between his view and the *travaux préparatoires*, 'the interpretation of the final text of the Convention is too clear to be set aside by the *travaux préparatoires*'<sup>53</sup>. He concluded:

[T]he foregoing is not an argument for the recognition of cultural genocide. It is established that the mere destruction of the culture of a group is not genocide : none of the methods listed in Article 4(2) of the Statute need be employed. But there is also need for care. The destruction of culture may serve evidentially to confirm an intent, to be gathered from other circumstances, to destroy the group as such. In this case, the razing of the principal mosque confirms an intent to destroy the Srebrenica part of the Bosnian Muslim group.

To the extent that Judge Shahabuddeen was arguing that destruction of cultural institutions is evidence of intent to commit physical or biological genocide, his observations are uncontroversial. The tone of his dissent, however, suggests an indication to enlarge the definition so as to include borderline cases, where there are abundant examples of ethnic hatred but an absence of evidence that physical destruction was intended. His views were formally adopted by a Trial Chamber of the Yugoslavia Tribunal in a subsequent case<sup>54</sup>, and found an echo in a judgment of another Trial Chamber, in *Krajisnik*:

'Destruction', as a component of the mens rea of genocide, is not limited to physical or biological destruction of the group's members, since the group (or a part of it) can be destroyed in other ways, such as by transferring children out of the group (or the part) or by severing the bonds among its members. Thus it has been said that one may rely, for example, on evidence of deliberate forcible transfer as evidence of the mens rea of genocide<sup>55</sup>.

A footnote to this paragraph provided further explanation:

It is not accurate to speak of 'the group' as being amenable to physical or biological destruction. Its members are, of course, physical or biological beings, but the bonds among its members, as well as

<sup>52</sup> *Ibid.*, para. 51.

<sup>53</sup> *Ibid.*, para. 52.

<sup>54</sup> *Prosecutor v. Blagojević* (Case No. IT-02-60-T) Judgment, 17 January 2005, paras. 659-660.

<sup>55</sup> *Prosecutor v. Krajisnik* (Case No. IT-00-39-T), Judgment, 27 September 2006, para. 854 (references omitted).

such aspects of the group as its members' culture and beliefs, are neither physical nor biological. Hence the Genocide Convention's 'intent to destroy' the group cannot sensibly be regarded as reducible to an intent to destroy the group physically or biologically, as has occasionally been said<sup>56</sup>.

The Trial Chamber did not provide any precise references or authority, beyond indicating that 'it has been said', although the obvious references would be to the Shahabuddeen dissent in *Krstić* and the Trial Chamber judgment in *Blagojević*. Several months after these words were written, the conviction of Blagojević for complicity in genocide was reversed by the Appeals Chamber<sup>57</sup>.

In *Bosnia v. Serbia*, the International Court of Justice cited approvingly the views of a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia that even in customary law, 'despite recent developments', genocide was limited to physical or biological destruction of a group<sup>58</sup>. Accordingly, the Court concluded 'that the destruction of historical, religious and cultural heritage cannot be considered to be a genocidal act within the meaning of Article II of the Genocide Convention'. Nevertheless, the Court endorsed a statement in *Krstić* that "where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group"<sup>59</sup>.

### 3. 'Ethnic cleansing'

The expression 'ethnic cleansing' may first have been used immediately following the Second World War by Poles and Czechs intending to 'purify' their countries of Germans and Ukrainians. But if this is the case, the language is the direct descendant of expressions used by the Nazis in their racial 'hygiene' programmes. The latter had a term, *sauberung*, and their goal was to make Germany territory *judenrein*, that is, free of Jews<sup>60</sup>. The expression 'ethnic cleansing' resurfaced in 1981 in Yugoslav

<sup>56</sup> *Ibid.*, fn. 1701.

<sup>57</sup> *Prosecutor v. Blagojević* (Case No. IT-02-60-A), Judgment, 9 May 2007.

<sup>58</sup> *Ibid.*, p. 344, citing *Prosecutor v. Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 580.

<sup>59</sup> *Ibid.*

<sup>60</sup> KRAMER, M.: 'Introduction', in KRAMER, M. (ed.): *Redrawing Nations: Ethnic Cleansing in East Central Europe*, Boulder, Rowman & Littlefield, 2001, p. 1.

media accounts of the establishment of 'ethnically clean territories' in Kosovo<sup>61</sup>. It entered the international vocabulary in 1992, used to describe policies being pursued by the various parties to the Yugoslav conflict aimed at creating ethnically homogeneous territories<sup>62</sup>.

According to the Security Council's Commission of Experts on violations of humanitarian law during the Yugoslav war: 'The expression "ethnic cleansing" is relatively new. Considered in the context of the conflicts in the former Yugoslavia, "ethnic cleansing" means rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area'<sup>63</sup>. This definition proposed by the Commission of Experts was accepted by the International Court of Justice in its important ruling in February 2007<sup>64</sup>.

The term 'ethnic cleansing' was unknown to the drafters of the Genocide Convention. It certainly never figured in any of their debates. But the notion of 'rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area' has a long history in international relations, and only in the late twentieth century has it come to be understood as a serious human rights violation<sup>65</sup>. For example, in post-war Europe, the Allies forcibly removed ethnic German populations from areas in Western Poland. As many as 15 million Germans were expelled and resettled pursuant to Article XII of the 1945 Potsdam Protocol<sup>66</sup>. It was to be conducted 'in an orderly

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<sup>61</sup> PETROVIC, D.: 'Ethnic Cleansing - An Attempt at Methodology', 5 *European Journal of International Law*, 1994, p. 343.

<sup>62</sup> See CIGAR, N.: *Genocide in Bosnia: The Policy of Ethnic Cleansing*, College Station, TX, Texas A&M University Press, 1995; LERNER, N.: 'Ethnic Cleansing', 24 *Israel Yearbook of Human Rights*, 1994, p. 103; WEBB, J.: 'Genocide Treaty - Ethnic Cleansing - Substantive and Procedural Hurdles in the Application of the Genocide Convention to Alleged Crimes in the Former Yugoslavia', 23 *Georgia Journal of International and Comparative Law*, 1993, p. 377; MIRKOVIC, D.: 'Ethnic Cleansing and Genocide: Reflections on Ethnic Cleansing in the Former Yugoslavia', 548 *Annals of the American Academy of Political and Social Science*, 1996, p. 191; BELL-FIALKOFF, A.: 'A Brief History of Ethnic Cleansing', *Foreign Affairs*, Summer 1993, pp. 110-121.

<sup>63</sup> 'Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)', UN Doc. S/35374 (1993), para. 55. See also Bassiouni and Manikas, International Criminal Tribunal, p. 608.

<sup>64</sup> *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, para. 191.

<sup>65</sup> PREECE, J.J.: 'Ethnic Cleansing as an Instrument of Nation-State Creation: Changing State Practices and Evolving Legal Norms', 20 *Human Rights Quarterly*, 1998, p. 817.

<sup>66</sup> DE ZAYAS, A.: 'International Law and Mass Population Transfers', 16 *Harvard International Law Journal*, 1975, p. 207; DE ZAYAS, A.: *Nemesis at Potsdam: The Expulsion of the Germans from the East*, Lincoln, NE, University of Nebraska Press, 1989; VON BRAUN,

and humane manner', according to Article 12 of the Agreement, but in practice was associated with much human suffering.

The drafters of the *Genocide Convention* quite deliberately resisted attempts to encompass the phenomenon of ethnic cleansing. In the Sixth Committee of the General Assembly, Syria proposed an amendment to the definition of genocide corresponding closely to our contemporary conception of 'ethnic cleansing'. The Syrian amendment read: 'Imposing measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment'<sup>67</sup>. The Syrian representative said: 'The problem of refugees and displaced persons to which his delegation's proposal referred had arisen at the end of the Second World War and remained extremely acute'<sup>292</sup>. Yugoslavia supported the amendment, citing the Nazis' displacement of Slav populations from a part of Yugoslavia in order to establish a German majority. 'That action was tantamount to the deliberate destruction of a group', said the Yugoslav delegate. 'Genocide could be committed by forcing members of a group to abandon their homes', he added<sup>68</sup>. But the United States argued that the Syrian proposal 'deviated too much from the original concept of genocide'<sup>69</sup>. The Syrian amendment was resoundingly defeated, by 29 votes to five, with eight abstentions<sup>70</sup>. There has been reference in the case law to the rejection of the Syrian amendment as evidence of the exclusion of 'ethnic cleansing' from the scope of the *Convention*<sup>71</sup>.

The concept of 'ethnic cleansing' has never figured in any of the work of the International Criminal Tribunal for Rwanda. The case for full-blown genocide was too clear. No doubt earlier atrocities, committed over Rwanda's long history of post-colonial ethnic conflict, might fit within the term. The same cannot be said, of course, for the International Criminal Tribunal for the former Yugoslavia, where the debate about whether 'ethnic cleansing' constituted genocide has been central to many of the cases as well as to the political debate. In its first years of operation the Office of the Prosecutor was extremely cautious in lay-

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F.: 'Germany's Eastern Border and Mass Expulsions', 58 *American Journal of International Law*, 1964, p. 747.

<sup>67</sup> UN Doc. A/C.6/234, UN Doc. A/C.6/SR.82 (Tarazi, Syria).

<sup>68</sup> *Ibid.* (Bartos, Yugoslavia).

<sup>69</sup> *Ibid.* (Maktos, United States).

<sup>70</sup> UN Doc. A/C.6/SR.82.

<sup>71</sup> *Prosecutor v. Stakić* (Case No. IT-97-24-T), Judgment, 31 July 2003, para. 519; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, para. 190.

ing charges of genocide. Acts of ethnic cleansing carried out by the Milošević regime in Kosovo in early 1999 were addressed under the rubrics of 'deportation' and 'persecutions', both of which belong within the general category of crimes against humanity.

A doctrine by which some overlap between the two terms was admitted began to emerge. In *Krstić*, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia said 'there are obvious similarities between a genocidal policy and the policy commonly known as "ethnic cleansing"'<sup>72</sup>. The *Brđanin* Trial Chamber cited these words approvingly, adding that it did 'not negate that ethnic cleansing may under certain circumstances ultimately reach the level of genocide, but in this particular case, it is not the only reasonable inference that may be drawn from the evidence'<sup>73</sup>. It also cited an excerpt from a closed session in the *Krstić* trial: "'Ethnic cleansing" was a strategy to force people to move through different steps, starting by threats, by selective killings, selective destruction of building, and then once the separation of the communities took place, i.e., when the Serbian people left the places, then the second phase started with the use of paramilitary to take control of the towns and then organise the return of Serbs from the village and Serbs coming from other areas of Yugoslavia. I'm talking about displaced Serbs coming from Croatia, for instance'<sup>74</sup>. The *Brđanin* Trial Chamber noted that the underlying criminal acts of 'ethnic cleansing' and genocide may often be the same<sup>75</sup>.

The *Krstić* Trial Chamber said 'it must interpret the Convention with due regard for the principle of *nullum crimen sine lege*' and that therefore 'despite recent developments, customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group'. By recent developments, it cited the 1992 General Assembly resolution equating genocide with 'ethnic cleansing'<sup>76</sup> and a 2000 judgment of the Federal Constitutional Court of Germany holding that 'the intent to destroy the group [...] extends beyond physical and biological extermination'<sup>77</sup>.

<sup>72</sup> *Prosecutor v. Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 562.

<sup>73</sup> *Prosecutor v. Brđanin* (Case No. IT-99-36-T), Judgment, 1 September 2004, para. 977, fn. 2455.

<sup>74</sup> *Ibid.*, para. 982, fn. 2465.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Prosecutor v. Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 578, citing UN Doc. A/RES/47/121.

<sup>77</sup> *Ibid.*, para. 579, citing Federal Constitutional Court, 2 BvR 1290/99, 12 December 2000, para. (III)(4)(a)(aa).

In the 13 September 1993 provisional measures ruling of the International Court of Justice in *Bosnia v. Serbia*, *ad hoc* Judge Lauterpacht appended a separate opinion in which he asked 'Has Genocide Been Committed?' He noted 'the forced migration of civilians, more commonly known as "ethnic cleansing", is, in truth, part of a deliberate campaign by the Serbs to eliminate Muslim control of, and presence in, substantial parts of Bosnia-Herzegovina'. Judge Lauterpacht declared he was prepared to order, pursuant to the Genocide Convention, 'a prohibition of "ethnic cleansing" or conduct contributing thereto such as attacks and firing upon, sniping at and killing of non-combatants, and bombardment and blockade of areas of civilian occupation and other conduct having as its effect the terrorization of civilians in such a manner as to lead them to abandon their homes'<sup>78</sup>. These individual views were not, however, echoed in the majority decision.

When the Court returned to the matter, in 2007, it said that ethnic cleansing can only be a form of genocide within the meaning of the *Convention* if it corresponds to or fell within one of the categories of acts prohibited by Article II. 'Neither the intent, as a matter of policy, to render an area "ethnically homogeneous", nor the operations that may be carried out to implement such policy, can as *such* be designated as genocide: the intent that characterizes genocide is "to destroy, in whole or in part" a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement', said the Court<sup>79</sup>. The Court acknowledged that 'certain acts described as 'ethnic cleansing' could correspond to prohibited acts under the Convention, giving as an example the direct infliction on the group of conditions of life calculated to bring about its physical destruction in whole or in part, 'that is to say with a view to the destruction of the group, as distinct from its removal from the region'<sup>80</sup>. The Court cited, with approval, a statement in the judgment of the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia, in *Stakić*, that '[a] clear distinction must be

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<sup>78</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Further Requests for the Indication of Provisional Measures, 13 September 1993, Separate Opinion of Judge Lauterpacht, [1993] ICJ Reports 407, para. 123.

<sup>79</sup> *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, para. 190.

<sup>80</sup> *Ibid.*

drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide<sup>81</sup>. Thus, said the Court, 'whether a particular operation described as "ethnic cleansing" amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such. In fact, in the context of the Convention, the term "ethnic cleansing" has no legal significance of its own'<sup>82</sup>.

The Court's opinion provides an authoritative definition of the term, namely 'rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area', or more succinctly, 'forced displacement'. It usefully distinguishes ethnic cleansing from genocide, although with a fuzzy rather than a bright line. The tendency in the case law and in legal writing to blur the line between the two concepts remains. Thus, it is argued, 'ethnic cleansing' may involve some of the acts prohibited by Article II of the *Convention*. To the extent these are perpetrated with a genocidal intent, they constitute acts of genocide. This line of reasoning is not very productive, however, because essentially the same thing can be said about other violations of international law, such as apartheid, or aggressive war, or colonialism, or the use of weapons of mass destruction. Any of these phenomena might involve 'killing', 'causing serious bodily or mental harm', and even 'preventing births' within a group. They *might* also amount to genocide if associated with an intent to destroy the group. But it does not seem at all helpful to muddy discussions about apartheid, or aggressive war or colonialism, by suggesting that in some cases they may also be genocidal. Each has its own 'specific intent', implied in the concept itself. The same can be said of 'ethnic cleansing', whose intent or purpose is 'forced displacement' rather than 'physical destruction'.

#### 4. 'In whole or in part'

The initial sentence of Article II of the *Genocide Convention* says that acts of genocide must be committed with the intent to destroy a protected group 'in whole or in part'. In *Axis Rule in Occupied Europe*, Raphael Lemkin did not focus on the quantitative question, declaring simply that genocide means 'the destruction of a nation or of an ethnic

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<sup>81</sup> *Ibid.*, citing *Prosecutor v. Stakić* (Case No. IT-97-24-T), Judgment, 31 July 2003, para. 519.

<sup>82</sup> *Ibid.*



group'<sup>83</sup>. However, the notion that genocide might constitute destruction of groups 'entirely or in part' appeared in the preamble of General Assembly Resolution 96(I), which was adopted in December 1946<sup>84</sup>. The Secretariat draft defined genocide as 'a criminal act directed against any one of the aforesaid groups of human beings, with the purpose of destroying it in whole or in part, or of preventing its preservation or development'<sup>85</sup>.

The term 'in whole or in part' refers to the intent of the perpetrator, not to the result. As the International Law Commission noted in its 1996 report on the draft Code of Crimes: 'it is not necessary to achieve the final result of the destruction of a group in order for a crime of genocide to have been committed. It is enough to have committed any one of the acts listed in the article with the clear intention of bringing about the total or partial destruction of a protected group as such'<sup>86</sup>.

There are four approaches to the scope of the term 'in part'. The first is the most narrow, and effectively insists that while the result may only be partial destruction, the intent must be to destroy the entire group. It was advanced by the Truman administration in its failed attempt to get approval for the *Genocide Convention*. Members of the Senate were concerned that Article II might apply to the lynching of African-Americans, a not infrequent occurrence in the *apartheid*-like regime of the southern United States of America at the time<sup>87</sup>. Raphael

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<sup>83</sup> LEMKIN, R.: *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington, Carnegie Endowment for World Peace, 1944, p. 79.

<sup>84</sup> See also the first draft: UN Doc. A/BUR/50.

<sup>85</sup> UN Doc. A/AC.10/41; UN Doc. A/362, appendix II, Art. I § II. The Saudi Arabian draft expressed the same idea with the word 'gradually'. Art. I defined genocide as 'the destruction of an ethnic group, people or nation carried out either gradually against individuals or collectively against the whole group, people or nation' (UN Doc. A/C.6/86).

<sup>86</sup> 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May-26 July 1996', UN Doc. A/51/10, p. 126.

<sup>87</sup> LEBLANC, L.J.: 'The Intent to Destroy Groups in the Genocide Convention', 78 *American Journal of International Law*, 1984, 370, at p. 377. According to a 1947 State Department internal memorandum, 'The possibility exists that sporadic outbreaks against the Negro population in the United States may be brought to the attention of the United Nations, since the treaty, if ratified, would place this offence in the realm of international jurisdiction and remove the 'safeguard' of Article 2(7) of the Charter. However, since the offence will not exist unless part of an overall plan to destroy a human group, and since the Federal Government would under the treaty acquire jurisdiction over such offences, no possibility can be foreseen of the United States being held in violation of the treaty': 'U.S. Commentary on Secretariat Draft Convention on Genocide, Memorandum, Sept. 10, 1947, Gross and Rusk to Lovett', NATIONAL ARCHIVES, UNITED STATES OF AMERICA, 501.BD-Genocide, 1945-49.

Lemkin wrote the Senate Committee in 1950 that 'the destruction in part must be of a substantial nature so as to affect the entirety'<sup>88</sup>.

The second approach adds the adjective 'substantial' in order to modify 'part'. This is the interpretation that the United States eventually adopted when it ratified the *Convention*. The United States formulated a declaration affirming that the meaning of Article II is 'in whole or in substantial part'<sup>89</sup>. In its own domestic legislation, the United States defines 'substantial part' as 'a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such group is a part'<sup>90</sup>. The final draft statute of the Preparatory Committee of the International Criminal Court noted that '[t]he reference to "intent to destroy, in whole or in part... a group, as such" was understood to refer to the specific intention to destroy more than a small number of individuals who are members of a group'<sup>91</sup>. The International Criminal Tribunal for Rwanda, in *Kayishema and Ruzindana*, said 'that "in part" requires the intention to destroy a considerable number of individuals'<sup>92</sup>. The International Criminal Tribunal for the Former Yugoslavia said that genocide must involve the intent to destroy a 'substantial' part, although not necessarily a 'very important part'<sup>93</sup>. In another judgment, the Tribunal referred to a 'reasonably substantial' number relative to the group as a whole<sup>94</sup>. The 'substan-

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<sup>88</sup> Executive Sessions of the Senate Foreign Relations Committee, Historical Series 370 (1976). These views were not new to Lemkin, who had written, in 1947, that the definition of genocide was subordinated to the intent 'to destroy or to cripple permanently a human group'. See LEMKIN, R.: 'Genocide as a Crime in International Law', 41 *American Journal of International Law*, 1947, at p. 147.

<sup>89</sup> Lemkin had proposed the text of an 'understanding' that he invited the United States to file at the time of ratification: '[o]n the understanding that the Convention applies only to actions undertaken on a mass scale and not to individual acts even if some of these acts are committed in the course of riots or local disturbances'. Executive Sessions of the Senate Foreign Relations Committee, Historical Series 370 (1976).

<sup>90</sup> *Genocide Convention Implementation Act of 1987*, sec. 1093(8).

<sup>91</sup> 'Draft Statute for the International Criminal Court. Part. 2. Jurisdiction, Admissibility and Applicable Law', UN Doc. A/AC.249/1998/CRP.8, p. 2, n. 1.

<sup>92</sup> *Prosecutor v. Kayishema et al.* (Case No. ICTR-95-1-T), Judgment and Sentence, 21 May 1999, para. 97. Cited in: *Prosecutor v. Bagilishema* (Case No. ICTR-95-1A-T), Judgment, 7 June 2001, para. 64; *Prosecutor v. Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 586.

<sup>93</sup> *Prosecutor v. Jelisić* (Case No. IT-95-10-T), Judgment, 19 October 1999; also *Prosecutor v. Bagilishema* (Case No. ICTR-95-1A-T), Judgment, 7 June 2001, Ch. III, para. 2.1.1.

<sup>94</sup> *Prosecutor v. Sikirica et al.* (Case No. IT-95-8-I), Judgment on Defence Motions to Acquit, 3 September 2001, para. 65.

tial part' interpretation is well entrenched in the case law of the *ad hoc* tribunals<sup>95</sup>.

Critics of the 'substantial part' terminology fear it might shelter individuals responsible for killing millions of blacks who will plead they did not intend to kill a 'substantial part' of the African-American population in the United States<sup>96</sup>. Similarly, the 'viable entity' notion that appears in the United States legislation has been challenged: 'If ninety-five percent of a group of thirty-five million men, women and children was brutally and systematically exterminated at the hands of some nation wide conspirators, would a defence be that the remaining five percent, now even more unified in its group identification and determination, was never targeted and still constitutes a viable entity?'<sup>97</sup> But this view seems to cast the net too broadly, as it fails to make room for a meaningful distinction between genocide and the racist killing of only a few people.

More helpful is the observation of a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia to the effect that

the intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it. Although the perpetrators of genocide need not seek to destroy the entire group protected by the Convention, they must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such. A campaign resulting in the killings, in different places spread over a broad geographical area, of a finite number of members of a protected group might not thus qualify as genocide, despite the high total number of casualties, because it would not show an intent by the perpetrators to target the very existence of the group as such<sup>98</sup>.

In *Sikirica*, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia said it must be the group which is targeted, and not merely individuals within the group, adding that this is the meaning to be ascribed to the words 'as such' in the definition of genocide<sup>99</sup>.

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<sup>95</sup> *Prosecutor v. Semanza* (Case No. ICTR-97-20-T), Judgment and Sentence, 15 May 2003, para. 316; *Prosecutor v. Simba* (Case No. ICTR-2001-76-T), Judgment and Sentence, 13 December 2005, para. 409.

<sup>96</sup> PAUST, J.J.: 'Congress and Genocide: They're Not Going to Get Away with It', 11 *Michigan Journal of International Law*, 1989, pp. 95-96.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Prosecutor v. Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 590.

<sup>99</sup> *Prosecutor v. Sikirica et al.* (Case No. IT-95-8-I), Judgment on Defence Motions to Acquit, 3 September 2001, para. 89.

The International Court of Justice endorsed the ‘substantial part’ interpretation in its ruling on the merits in the Bosnian application against Serbia:

In the first place, the intent must be to destroy at least a substantial part of the particular group. That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to have an impact on the group as a whole<sup>100</sup>.

The Court described the substantiality criterion as ‘critical’<sup>101</sup>.

A third approach takes more of a qualitative than a quantitative perspective on the meaning of ‘in part’, reading in the adjective ‘significant’. In a sense, it is similar to the ‘viable group’ concept of the United States declaration, although it treats viability not as if there is some critical mass of a group in a numeric sense below which it cannot survive, but rather in terms of irreparable impact upon a group’s chances of survival when a stratum of its population, generally political, social or economic, is liquidated. There is nothing to support this in the *travaux*, and the idea seems to have been launched by Benjamin Whitaker in his 1985 report<sup>102</sup>. Citing the Whitaker report, the Commission of Experts established by the Security Council in 1992 to investigate violations of international humanitarian law in the former Yugoslavia held that ‘in part’ had not only a quantitative but also a qualitative dimension<sup>103</sup>.

The approach of the Commission of Experts was invoked by the Prosecutor of the International Criminal Tribunal for the former Yugoslavia in some indictments<sup>104</sup>, and subsequently endorsed by the judges

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<sup>100</sup> *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, para. 198.

<sup>101</sup> *Ibid.*, para. 201.

<sup>102</sup> WHITAKER, B.: ‘Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide’, UN Doc. E/CN.4/Sub.2/1985/6, p. 16, para. 29.

<sup>103</sup> BASSIUNI, M.CH.: ‘The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia’, 5 *Criminal Law Forum* 279, 1994, pp. 323-324.

<sup>104</sup> *Prosecutor v. Karadžić and Mladić* (Case Nos. IT-95-18-R61, IT-95-5-R61), Transcript of hearing of 27 June 1996, p. 15 (the Prosecutor (Eric Ostberg) noted that he relied on the Whitaker report); *Prosecutor v. Jelisić and Česić* (Case No. IT-95-10-I), Indictment, 21 July 1995, para. 17; *Prosecutor v. Jelisić and Česić* (Case No. IT-95-10-I), Amended Indictment, 12 May 1998, para. 16; *Prosecutor v. Jelisić and Česić* (Case No. IT-95-10-I), Second Amended Indictment, 19 October 1998, para. 14.

themselves. According to a Trial Chamber in *Jelisić*, it might be possible to infer the requisite genocidal intent from the “desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such”<sup>105</sup>. However, ultimately the Trial Chamber said it was not possible ‘to conclude beyond all reasonable doubt that the choice of victims arose from a precise logic to destroy the most representative figures of the Muslim community in Brcko to the point of threatening the survival of that community’<sup>106</sup>. The same scenario of relatively small numbers of killings in concentration camps returned in *Sikirica*, but again, the judges could not discern any pattern in the camp killings that suggested the intent to destroy a ‘significant’ part of the local Muslim community so as to threaten its survival. The victims were taxi drivers, schoolteachers, lawyers, pilots, butchers and café owners but not, apparently, community leaders. The Trial Chamber observed that ‘they do not appear to have been persons with any special significance to their community, except to the extent that some of them were of military age, and therefore could be called up for military service’<sup>107</sup>.

Finally, some interpretations of ‘in whole or in part’ focus on the groups in a geographic sense. Thus, destroying all members of a group within a continent, or a country, or an administrative region or even a town, might satisfy the ‘in part’ requirement of Article II. The Turkish government targeted Armenians within its borders, not those of the Diaspora. The intentions of the Nazis may only have been to rid Europe of Jews; they were probably not ambitious enough, even in their heyday, to imagine this possibility on a world scale. Indications they were prepared to accept the departure of Jews from Europe for Palestine, even in the later stages of the war, could support such a claim. Similarly, in 1994 the Rwandan extremists do not appear to have given serious consideration to eliminating Tutsi populations beyond the country’s borders.

But if this approach seems plausible when applied to a single country, can it also work with respect to much smaller units? A Trial Chamber of the Yugoslavia Tribunal has noted that ‘[i]n view of the particular intent requirement, which is the essence of the crime of genocide, the relative proportionate scale of the actual or attempted physical destruc-

<sup>105</sup> *Prosecutor v. Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999, para. 82.

<sup>106</sup> *Ibid.*, para. 93.

<sup>107</sup> *Prosecutor v. Sikirica et al.* (Case No. IT-95-8-I), Judgment on Defence Motions to Acquit, 3 September 2001, para. 80.

tion of a group, or a significant section thereof, should be considered in relation to the factual opportunity of the accused to destroy a group in a specific geographic area within the sphere of his control, and not in relation to the entire population of the group in a wider geographic sense<sup>108</sup>. In *Jelisić*, another Trial Chamber of the same Tribunal agreed that genocide could be committed in a 'limited geographic zone'<sup>109</sup>. And in *Krstić*, the Trial Chamber held that 'the physical destruction may target only a part of the geographically limited part of the larger group because the perpetrators of the genocide regard the intended destruction as sufficient to annihilate the group as a distinct entity in the geographic area at issue'<sup>110</sup>. The International Court of Justice said that 'it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area'<sup>111</sup>. Recent judgments of the Federal Constitutional Court of Germany and the Bavarian Appeals Chamber also confirm this view<sup>112</sup>. Nehemiah Robinson wrote that the real point of the term 'in part' is to encompass genocide where it is directed against a part of a country, or a single town<sup>113</sup>.

## 5. Prevention of genocide

Although the *Genocide Convention's* title speaks of both prevention and punishment of the crime of genocide, the essence of its provisions is directed to the second limb of that tandem. The concept of prevention is repeated in Article I: 'The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war,

<sup>108</sup> *Prosecutor v. Karadžić and Mladić* (Case Nos. IT-95-18-R61, IT-95-5-R61), Transcript of hearing of June 27, 1996, pp. 15-16.

<sup>109</sup> *Prosecutor v. Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999, para. 83.

<sup>110</sup> *Prosecutor v. Krstić* (Case No. IT-98-33-T), Judgment, 2 August 2001, para. 590. Also: *Prosecutor v. Sikirica et al.* (Case No. IT-95-8-I), Judgment on Defence Motions to Acquit, 3 September 2001, para. 68.

<sup>111</sup> *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, para. 199.

<sup>112</sup> *Nikolai Jorgić, Bundesverfassungsgericht* [Federal Constitutional Court], Fourth Chamber, Second Senate, 12 December 2000, 2 BvR 1290/99, para 23; *Novislav Djajić, Bayerisches Oberstes Landesgericht*, 23 May 1997, 3 St 20/96, excerpted in 1998 NEUE JURISTISCHE WOCHENSCHRIFT 392.

<sup>113</sup> ROBINSON, N.: *The Genocide Convention: A Commentary*, New York, Institute of Jewish Affairs, 1960, p. 63.

is a crime under international law which they undertake to prevent and punish'. Of course, punishment and prevention are intimately related. Criminal law's deterrent function supports the claim that prompt and appropriate punishment prevents future offences<sup>114</sup>. Moreover, some of the 'other acts' of genocide imply a preventive dimension. Prosecution of conspiracy, attempts and above all of direct and public incitement are all aimed at future violations. But the drafters of the *Convention* resisted going further upstream, rejecting efforts to criminalize 'preparatory acts' such as hate speech and racist organizations.

Article I of the *Genocide Convention* is not merely 'hortatory or purposive', insisted the International Court of Justice in its February 2007 ruling on the Bosnian application against Serbia. The undertaking to prevent and punish genocide is unqualified, said the Court. 'It is not to be read merely as an introduction to later express references to legislation, prosecution and extradition... Article I, in particular its undertaking to prevent, creates obligations distinct from those which appear in the subsequent Articles. That conclusion is also supported by the purely humanitarian and civilizing purpose of the Convention'<sup>115</sup>. The Court explained that the *travaux préparatoires* of the *Convention* confirm the 'operative and non-preambular character of Article I'<sup>116</sup>.

Describing the obligation to prevent genocide as being 'normative and compelling', the Court said it cannot be regarded as simply a component of the duty to punish. The Court noted that the *Genocide Convention* is not the only international instrument to provide for duties of prevention<sup>117</sup>. It said it was not laying down any general principles concerning a duty of prevention under international law, and that its conclusions were specific to the case of genocide. The Court explained 'that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to suc-

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<sup>114</sup> *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007, para. 426.

<sup>115</sup> *Ibid.*, para. 162.

<sup>116</sup> *Ibid.*, para. 164.

<sup>117</sup> *Ibid.*, para. 429. The Court provided four examples: *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, (1987) 1465 UNTS 85, Art. 2; *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents*, (1977) 1035 UNTS 167, Art. 4; *Convention on the Safety of United Nations and Associated Personnel*, UN Doc. A/RES/49/59, annex, Art. 11; *International Convention on the Suppression of Terrorist Bombings*, UN Doc. A/RES/52/164, annex, Art. 15.

ceed, whatever the circumstances, in preventing the commission of genocide'<sup>118</sup>. However, responsibility is incurred 'if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide'<sup>119</sup>. The Court said it was 'irrelevant' whether the State claims that if it had employed all means reasonably at its disposal, they would not have been sufficient to prevent genocide.

A State's obligation to prevent, 'and the corresponding duty to act', arise when the State 'learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit. Nevertheless, the obligation to prevent genocide is only breached if genocide is in fact committed, the Court noted'<sup>120</sup>.

The obligation to prevent genocide 'varies greatly from one State to another', the Court explained, depending upon the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself is assessed taking into consideration the geographical distance of the State concerned from the scene of the events, and the strength of political and other links between the authorities of that State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide'<sup>121</sup>.

The Court placed emphasis upon the distinction between breach of the duty to prevent genocide and complicity in the crime itself. Complicity involves furnishing aid or assistance with knowledge that the principal perpetrators are engaged in genocide, whereas violation of the obligation to prevent results from inaction. As the Court explained, 'this is merely the reflection of the notion that the ban on genocide

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<sup>118</sup> *Ibid.*, para. 430.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*, para. 431.

<sup>121</sup> *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007, para. 430.



and the other acts listed in Article III, including complicity, places States under a negative obligation, the obligation not to commit the prohibited acts, while the duty to prevent places States under positive obligations, to do their best to ensure that such acts do not occur<sup>122</sup>. In the case of complicity, there is a knowledge requirement, whereas with respect to the failure to prevent, it is enough that there existed a 'serious danger that acts of genocide would be committed'<sup>123</sup>.

In the specifics of the Bosnian application, the Court had decided that genocide had not been committed during the 1992-1995 war, with the exception of the Srebrenica massacre of July 1995. The Srebrenica events had already been identified as genocide by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia<sup>124</sup>, and the Court said it could see no reason to disagree with that finding<sup>125</sup>. Serbia could not be linked directly to the crimes, said the majority of the Court, and as a result it could not be deemed an accomplice. Nevertheless, the duty to prevent remained, and here Serbia was in default.

In view of their undeniable influence and of the information, voicing serious concern, in their possession, the Yugoslav federal authorities should, in the view of the Court, have made the best efforts within their power to try and prevent the tragic events then taking shape, whose scale, though it could not have been foreseen with certainty, might at least have been surmised. The [Federal Republic of Yugoslavia] leadership, and President Milošević above all, were fully aware of the climate of deep-seated hatred which reigned between the Bosnian Serbs and the Muslims in the Srebrenica region. As the Court has noted in paragraph 423 above, it has not been shown that the decision to eliminate physically the whole of the adult male population of the Muslim community of Srebrenica was brought to the attention of the Belgrade authorities. Nevertheless, given all the international concern about what looked likely to happen at Srebrenica, given Milošević's own observations to Mladić, which made it clear that the dangers were known and that these dangers seemed to be of an order that could suggest intent to commit genocide, unless brought under control, it must have been clear that there was a serious risk of genocide in Srebrenica. Yet the

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<sup>122</sup> *Ibid.*, p. 432.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Prosecutor v. Krstić* (Case No. IT-98-33-A), Judgment, 19 April 2004.

<sup>125</sup> *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007, para. 296.

Respondent has not shown that it took any initiative to prevent what happened, or any action on its part to avert the atrocities which were committed. It must therefore be concluded that the organs of the Respondent did nothing to prevent the Srebrenica massacres, claiming that they were powerless to do so, which hardly tallies with their known influence over the [Army of the Republika Srpska]. As indicated above, for a State to be held responsible for breaching its obligation of prevention, it does not need to be proven that the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them<sup>126</sup>.

Because Serbia could not necessarily have prevented the crimes, no reparation or damages were assessed. According to the Court, a required nexus for an award of compensation could only be considered 'if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations. However, the Court clearly cannot do so'<sup>127</sup>.

This fascinating conclusion seems pregnant with potential for the promotion of human rights and the prevention of atrocities. As the Court explained, '[t]he obligation to prevent the commission of the crime of genocide is imposed by the Genocide Convention on any State party which, in a given situation, has it in its power to contribute to restraining in any degree the commission of genocide. [T]he obligation to prevent genocide places a State under a duty to act which is not dependent on the certainty that the action to be taken will succeed in preventing the commission of acts of genocide, or even on the likelihood of that outcome'<sup>128</sup>. Do these powerful words not also apply to France and Belgium, and even the United States, with respect to Rwanda in 1994? And what of Darfur, in 2008? As for Srebrenica itself, there is much support within the judgment for the view that if Belgrade should have anticipated the impending atrocities in Srebrenica in July 1995, then so too should others. As Judge Keith noted in his individual opinion,

Coming closer to the time of the atrocities, not just the leadership in Belgrade but also the wider international community was alerted to the deterioration of the security situation in Srebrenica by Security

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<sup>126</sup> *Ibid.*, para. 438.

<sup>127</sup> *Ibid.*, para. 462.

<sup>128</sup> *Ibid.*, para. 461.

Council resolution 1004 (1995) adopted on 12 July 1995 under Chapter VII of the Charter. The Council expressed grave concern at the plight of the civilian population “in and around the safe area of Srebrenica”. It demanded, with binding force, the withdrawal of the Bosnian Serb forces from the area and the allowing of unimpeded access for international humanitarian agencies to the area to alleviate the plight of the civilian population<sup>129</sup>.

Certainly the Serbs in Belgrade were not the only ones who might have done more, and who could have one more, to protect the Muslims of Srebrenica.

On this important point, the International Court of Justice reinforced the ‘responsibility to protect’ set out in the 2005 Outcome Document of the Summit of Heads of State and Government<sup>130</sup>. But it went further, elevating the duty to a treaty obligation, and one that is actionable before the International Court of Justice for those States that have ratified the *Genocide Convention* without reservation to Article IX. Even for those States that have not accepted Article IX of the *Convention*, if they have otherwise embraced the jurisdiction of the Court, through a declaration under Article 36 of its Statute, they would be liable to the extent that the duty set out in Article I of the *Genocide Convention* is also a duty under customary international law.

The Court did not insist upon any distinction between genocide committed within a State’s own territory and genocide committed outside its borders. Nevertheless, this is an important component of its findings. In the past, many States have argued that their obligation to prevent genocide, however nebulous it might have been, was confined to their own territory. It is now clear that this is not the case. To the extent that the obligation arises abroad, the Court quite explicitly affirms that a State must act within the confines of international law, ‘while respecting the United Nations Charter and any decisions that may have been taken by its competent organs’<sup>131</sup>. The Court does not provide comfort for the view that the obligation to prevent genocide is so potent that it trumps the Charter of the United Nations, and authorizes military intervention even when the Security Council does not act. Its

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<sup>129</sup> *Ibid.*, Declaration of Judge Keith, para. 11.

<sup>130</sup> ‘Outcome Document of the 2005 World Summit’, UN Doc. A/RES/60/1, paras. 138-139. Also: UN Doc. S/RES/1674 (2006), para. 4.

<sup>131</sup> *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007, para. 426.

findings on these points are entirely consistent with the formulation of the 'responsibility to protect' doctrine by the General Assembly of the United Nations.

## 6. Conclusion

The definition of the crime of genocide, set out in Article II of the 1948 *Genocide Convention*, has stood the test of time. For more than half a century, debate has raged as to whether or not the enumeration of groups should be expanded, principally to include political groups, as well as whether the punishable acts of genocide should be extended to include cultural genocide and ethnic cleansing. But, when given the opportunity, at the Rome Conference in 1998, the international community showed no inclination to amend or revise the definition of genocide. With due respect for views to the contrary, of which there are many, the definition of genocide was not an unfortunate drafting compromise but rather a logical and coherent attempt to address a particular phenomenon of human rights violation, the threat to the existence of what we would now call 'ethnic' groups and what the drafters conceived of essentially as 'national minorities'.

Legal developments of the past decade indicate that the definition of genocide is unlikely to change or evolve much in the foreseeable future. Calls for its enlargement to cover additional protected groups, or to contemplate forms of destruction falling short of physical extermination, such as ethnic cleansing, are unlikely to prosper. Not only have opportunities for amendment been missed or avoided, prestigious international courts and other bodies have adopted a relatively narrow interpretation of the *Convention* definition.

It would be a great misunderstanding to attribute this to any conservatism in the international community. The dramatic expansion in the concepts of both war crimes and crimes against humanity, as reflected in the provisions of the *Rome Statute*, should dispel any doubts as to a general willingness to cover a broad range of atrocities through the medium of international criminal law. Rather, the definition has remained and should continue to remain relatively stable precisely because the definition of crimes against humanity has evolved so dramatically in recent years. To be sure, before the mid-1990s there was a major 'impunity gap' waiting to be filled, and many looked to an enlarged concept of genocide as the remedy. Instead, it has been crimes against humanity, not genocide, that has stepped into the breach.

Genocide is often called 'the crime of crimes'. Apparently used for the first time by the Rwandan representative to the Security Council in 1994, the term featured in one of the earliest judgments of the International Criminal Tribunal for Rwanda<sup>132</sup>. The obvious suggestion is that genocide sits at the apex of a pyramid of criminality<sup>133</sup>, and that it is even more serious and grave than the other 'core crimes' of international criminal law, namely war crimes, crimes against humanity and aggression. Despite their initial acceptance of genocide as the crime of crimes, and a more general thesis that there was at least an implied hierarchy even within international crimes, the International Tribunals have muddied their position. The Appeals Chambers of the two Tribunals have said that genocide, crimes against humanity and war crimes are all of equally gravity. It is only by looking at the specifics of an individual case that differentiation can be made<sup>134</sup>. Nevertheless, there is also at least one recent example of using the expression 'crime of crimes' to describe genocide by the Appeals Chamber<sup>135</sup>. In 2005, the International Commission of Inquiry on Darfur wrote: '[G]enocide is not necessarily the most serious international crime. Depending upon the circumstances, *such international offences as crimes against humanity or large scale war crimes may be no less serious and heinous than genocide*'<sup>136</sup>.

The Darfur Commission was trying to preempt critics, and there were many, who claimed that in categorizing atrocities as crimes against humanity rather than as genocide, it was in some way trivializing their scale and insulting the victims. Much the same phenomenon

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<sup>132</sup> *Prosecutor v. Kambanda* (Case No. ICTR 97-23-S), Judgment and Sentence, 4 September 1998, para. 16. Also: *Prosecutor v. Akayesu* (Case No. ICTR 96-4-T), Sentencing Judgment, 2 October 1998; *Prosecutor v. Rutaganda* (Case No. ICTR-96-3-T), Judgment and Sentence, 6 December 1999, para. 451; *Prosecutor v. Serushago* (Case No. ICTR-98-39-S), Sentence, 5 February 1999, para. 15; *Prosecutor v. Musema* (Case No. ICTR-96-13-T), Judgment and Sentence, 27 January 2000, para. 981

<sup>133</sup> Judge Wald, of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, said 'genocide is at the apex': *Prosecutor v. Jelisić* (Case No. IT-95-10-A), Partial Dissenting Opinion of Judge Wald, 5 July 2001, para. 13. Also: *Prosecutor v. Kistić* (Case No. IT-98-33-T), Judgment, 2 August 2001, paras. 699-700.

<sup>134</sup> *Prosecutor v. Furundžija* (Case No. IT-95-17/1-A), Judgment, 21 July 2000, para. 247; *Prosecutor v. Tadić* (Case No. IT-94-1-Abis), Judgment in Sentencing Appeals, 26 January 2000, para. 69.

<sup>135</sup> *Niyitegeka v. Prosecutor* (Case No. ICTR-96-14-A), Judgment, 9 July 2004, para. 49.

<sup>136</sup> 'Report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur', UN Doc. S/2005/60, para. 522 (emphasis in the original).

occurred when the International Court of Justice ruled that genocide had not taken place during the war in Bosnia and Herzegovina, with the exception of the Srebrenica massacre. There could be no real argument that crimes against humanity had occurred during the conflict, but the Court had no jurisdiction to pronounce on that question. Both the Darfur Commission and the International Court of Justice presented clearly reasoned and accurate analyses, but that did not silence those who view the matter of genocide as a political rather than a legal determination.

Recalling that crimes against humanity are of comparable gravity to genocide helpfully addresses these emotional charges. If labelling genocide the 'crime of crimes' has contributed to the difficulty in explaining the terrible seriousness of crimes against humanity which, after all, formed the basis of the 1915 allegations against the Ottomans as well as the judgments at Nuremberg, then there are solid grounds to abandon the expression.

Nevertheless, instead of bringing genocide and crimes against humanity closer together, the case law has tended to maintain the distinction between them. Crimes against humanity encompasses a range of acts of persecution falling short of physical destruction, and it applies to many other victim categories in addition to the national, ethnic, racial and religious groups contemplated by the *Convention*. Genocide is focussed on the right to life, and on racial discrimination. To that extent, the prohibition of genocide is at the heart of the values that underpin modern international human rights law. Although its direct origins are closely associated with the Holocaust directed against European Jews in the 1940s, it must surely reflect something more general in the public consciousness at the time of its adoption. The Holocaust was the most contemporary and appalling manifestation of a cancer of racism that had knawed at humanity for many centuries, and that was manifested in such phenomena as the slave trade and colonialism. That is what makes genocide the 'crime of crimes'.

# The International Convention on Elimination of All Forms of Racial Discrimination and the evolution of the concept of racial discrimination

Natalia Álvarez Molinero

**Summary:** 1. Introduction. 2. Evolution of the definition of racial discrimination under the CERD. 3. Minorities, indigenous peoples, and women: new challenges in fighting against discrimination or a “leftist” agenda? 4. The Committee on Elimination of Racial Discrimination: mechanisms and procedures.

## 1. Introduction

The Convention on the Elimination of All Forms of Racial Discrimination was the first human rights treaty elaborated under the UN treaty-body system. This Convention was adopted by the United Nations General Assembly resolution 2106 (XX) on the twenty first of December 1965, and entered into force on fourth of January 1969. The rapid process of elaboration and entry into force in comparison to other human rights treaties was due to the interest and the political pressure that the African countries imparted to the process at the United Nations<sup>1</sup>.

When the newly created States in Africa were accepted as members of United Nations, the composition of the General Assembly and the Human Rights Commission changed dramatically. In 1960, seventeen newly independent States joined the United Nations, constituting one of the biggest increases in its membership in any single year. The Human Rights Commission was also subjected to major changes in its membership, bringing about a new approach to human rights violations, as reflected in the authorisation given by the Economic and Social Council (ECOSOC) to the Human Rights Commission to deal with

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<sup>1</sup> The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights were both adopted by the General Assembly in 1966 but not entered into force until 1976.

gross violations of human rights<sup>2</sup>. Some legal scholars perceived this shift in power, in favour of the General Assembly but to the detriment of the Security Council, as a problem. This was mainly because the new States that were actively taking the lead at the General Assembly and ECOSOC were considered poor, instable and “*in a state of social turmoil*”<sup>3</sup>.

All these changes in the composition of major United Nations bodies indicated that the main area of concern for the next decades had moved towards the decolonisation process and the issue of racial discrimination. For most of these territories, the decolonization process ended in the eighties, and as a consequence during the nineties the agenda in terms of racial discrimination became somewhat distanced from the decolonization issues, instead becoming more focused on different forms of racial discrimination.

However, in 1965, international concerns were not limited to the issue of discrimination. The United Nations proclaimed 1965 as the United Nations Cooperation Year. It was also the 20<sup>th</sup> anniversary of the United Nations Charter. In his speech on the proclamation of 1965 as a Cooperation Year, the President of United States, Lyndon B Johnson, said that the year would be devoted to finding avenues for cooperation in the pursuit of peace<sup>4</sup>. The kind of cooperation President Johnson was thinking about was not precisely centred on discrimination or human rights. In fact, he stepped back from previous commitments taken by the Kennedy Administration in that field. This position was also very convenient because it did not imply at this point the adoption of any specific policies on human rights at international level.

The world in the sixties was concerned also about avoiding an open confrontation between the main powers. In 1964, China tested its first atom bomb, challenging the 1963 Test Ban Treaty on Nuclear Weapons<sup>5</sup>. New countries were created out of former British colonies such as Kenya or Sierra Leone. Senegal, Mauritania and Chad emerged also from former French colonies. There was a war in Algeria with impor-

<sup>2</sup> ECOSOC resolution 1235.

<sup>3</sup> FRIEDMANN, W.: “United States policy and the crisis of International Law”, *American Journal of International Law*, Vol. 59, 1965, p. 861.

<sup>4</sup> President Lyndon B. Johnson, Remarks about Proclaiming 1965 as International Cooperation Year, 2 October 1964 <http://www.presidency.ucsb.edu/ws/index.php?pid=26550> (Accessed 23 July 2008).

<sup>5</sup> China did not sign this treaty arguing that it was designed by the United States and the Soviet Union to put China at a disadvantage, CHANG, W. S. W.: “China and the Comprehensive Test Ban Treaty Negotiations”, *Stanford Journal of East Asian Affairs*, Vol. 1, 2001, pp. 34-45.



tant consequences for France and in United States the movement for civil rights reached its peak at the Washington March in 1963 when Martin Luther King gave his famous speech "I have a dream".

However, although the Cold War and the sequent tensions created in different places such as Cuba were attracting great international efforts and resources, the fact is that the agenda for the prohibition of discrimination was successfully included as one of the main priorities of United Nations.

With the passage of time, this agenda has changed. Between 1990 and up to 2005 the concept of racial discrimination evolved so as to include new patterns of discrimination that did not pertain exclusively to the question of "race"<sup>6</sup>. This evolution enriched the definition and arsenal available in the fight against racism, including at the same time other cultural or gender elements.

In this article, I will explain the evolution in the application and implementation of measures to prevent and fight against discrimination under the United Nations Convention on the Elimination of All Forms of Racial Discrimination (hereinafter, the Convention). For this purpose, I will firstly analyse the definition of racial discrimination in the Convention, and will then consider the new challenges that the Committee on the Elimination of Racial Discrimination (hereinafter, the Committee) is facing in the field of indigenous people's and women's rights. Finally, I will focus on the procedures developed by the Committee to guarantee the application of the Convention.

## 2. Evolution of the definition of racial discrimination under the CERD

Finding a definition of racial discrimination has proved to be a difficult task. Discrimination is definitely more than a "skin colour" issue<sup>7</sup>. Racial discrimination is related to power inequalities between different groups that might be based on the grounds of race, colour, descent,

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<sup>6</sup> Thornberry rightly points out that the term used in the Convention is "racial discrimination" not "race". In this regard he says "*It is not necessary to believe in "races" or accept horizontal narratives of separation, or, vertical narratives of hierarchy, in order to combat racial discrimination*", THORNBERRY, P.: "Confronting Racial Discrimination: A CERD Perspective", *Human Rights Law Review*, vol. 5, No. 2, 2005, p. 250.

<sup>7</sup> FELICE, W. F.: "The UN Committee on the Elimination of All Forms of Racial Discrimination: Race and Economic and Social Human Rights", *Human Rights Quarterly*, Vol. 24, No. 1, 2002, p. 207.

origin or any other aspect. Racial discrimination becomes in many cases a condition under which many people are obliged to live their lives, affecting their access to and enjoyment of fundamental human rights. The transversality of the condition of being discriminated against implies that a definition of racial discrimination has to reflect this complexity. That is why the Committee looked for a broad definition of discrimination in order to encompass all of the possible combinations under which discrimination might appear. The Convention refers to racial discrimination in Article 1 as:

“any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”.

However discrimination operates in different contextual settings and it might be difficult to detect. For that reason, the Committee has established that discrimination includes not only measures that are clearly discriminatory, but also those that might be considered as “indirect discrimination”. Indirect discrimination refers to rules, practices or policies that although apparently neutral have a disproportionate impact on certain groups. In *L.R. et al. v. Slovak Republic*<sup>8</sup>, the Committee examined the consequences of a decision adopted by a local council revoking a previous decision approving the construction of low-cost housing for the Roma inhabitants of Dobsiná. This revocation was based on a petition sent by other citizens of the district to the local council complaining about the fact that this low-cost housing plan would potentially bring an influx of “inadaptable citizens” to the town.

The State party claimed that these council resolutions were not binding and accordingly could not confer rights to the petitioners. They justified their decision based on the European Court of Human Rights jurisprudence on cases concerning travelling communities and Gypsies. In these cases<sup>9</sup>, the European Court found that although travelling communities and Gypsies have a right to their own lifestyle and culture, the State party is entitled to deny a group permission to station

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<sup>8</sup> *L.R. et al. v. Slovak Republic*, CERD/C/66/D/31/2003, Communication No. 31/2003, 10 March 2005.

<sup>9</sup> *Chapman v. United Kingdom*, judgment of 18 January 2001, and *Coster v. United Kingdom*, judgment of 18 January 2001. See also, MEDDA-WINDISCHER, R.: “The European Court of Human Rights and Minority Rights”, *Journal of European Integration*, Vol. 25, No. 3, 2003, pp. 249-271.

their caravans in certain areas based on public interest. Based upon this jurisprudence, the State party argued that it was possible to restrict certain activities and policies towards Roma people if these prove to be detrimental to the general and public interest.

However, in this case, the Committee considered that it would be to “*elevate formalism over substance*”<sup>10</sup> to consider both decisions in isolation. The first measure implied an important advancement for human rights of Roma people, whereas the second one was a “*weaker measure*”<sup>11</sup>. Taken together, both measures implied an “*impairment for the full enjoyment of the right to housing free of racial discrimination as it is recognised in Article 5 (c)*”<sup>12</sup>.

Indirect discrimination has also been the subject of specific references by the Committee in its concluding observations to different States. In the case of Liechtenstein, the Committee requested information on the conditions applied in cases of familiar reunifications in order to find out whether there was any kind of indirect discrimination underlying the restrictive conditions of the reunification<sup>13</sup>. Housing rights have also been subjected to recommendations in relation to indirect discrimination. In 2008, the Committee recommended to Belgium the need to guarantee that access to housing rights and other social benefits was based on the principle of non-discrimination. This recommendation was related to reported restrictions to access social rights based on the fact that the applicants did not speak Dutch<sup>14</sup>.

Another characteristic of racial discrimination is that when it happens it affects the overall spectrum of personal relations of the target. Racial discrimination cannot be understood exclusively as something that takes place in the public realm. Yet, the concept of discrimination in the Convention is not just confined to decisions or policies adopted in the public space. Any measure implemented by entities other than governmental ones can be also subjected to scrutiny by the Committee. Article 2 (d) establishes that “*each State party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or*

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<sup>10</sup> *L.R. et al. v. Slovak Republic*, CERD/C/66/D/31/2003, Communication No. 31/2003, 10 March 2005, para. 10.7.

<sup>11</sup> *Ibid.* para. 10.7.

<sup>12</sup> *Ibid.* para. 10.7.

<sup>13</sup> CERD Concluding Observations Liechtenstein, CERD/C/LIE/CO/3, 8 March, 2007, para. 20.

<sup>14</sup> CERD Concluding Observations Belgium, CERD/C/BEL/CO/15, 11 April 2008, para. 16.

organization". That was the core of the subject examined by the Committee in the case of *Habassi v. Denmark*, in which a Tunisian citizen residing in Denmark was denied a loan on the basis of his lack of Danish nationality. In this view, the Committee recommended Denmark to "take measures to counteract racial discrimination in the loan market"<sup>15</sup>.

There are however some aspects to the scope of the definition of discrimination that are controversial. Firstly, questions based exclusively on religious discrimination are excluded from the Convention. In *A.W.R.A.P v. Denmark*, the Committee explicitly stated that

"the Committee recalls that the Convention does not cover discrimination based on religion alone, and that Islam is not a religion practised solely by a particular group, which could otherwise be identified by its 'race, colour, descent, or national or ethnic origin'"<sup>16</sup>.

Nevertheless, the Committee also stated clearly that double discrimination cases, such as those based on religious and another ground will be taken into account by the Committee. Thornberry ascertains the difficulty for the Committee in drawing the line between ethnic/national origin and religion. He believes that "it is perhaps possible to distinguish a "religious minority" from a "minority religion", with the former term implying some ethnic or cultural connection"<sup>17</sup>. In this regard, in the concluding observation concerning Georgia, the Committee requested specific information on "ethno-religious minorities", especially Yezidi-Kurds<sup>18</sup>. Same approach was taken in the case of Moldova in which the Committee inquired about the obstructions encountered by some Muslim ethnic minorities in relation to having access to the registration of religious communities<sup>19</sup>. It seems then that this area is becoming an increasing field of concern for the Committee. According to Thornberry, the area of intersection between race and religion, especially in the field of Islamophobia, Anti-Semitism and Christianophobia, should be one of the future concerns that the Committee will take in consideration<sup>20</sup>.

<sup>15</sup> *Habassi v. Denmark*, CERD/C/54/D/10/1997, Communication No. 10/1997, 6 April 1999, para. 11.1.

<sup>16</sup> *A.W.R.A.P v. Denmark*, CERD/C/71/D/37/2006, Communication No. 37/2006, 8 August 2007, para. 6.3.

<sup>17</sup> THORNBERRY, P.: *op. cit.*, p. 258.

<sup>18</sup> CERD Concluding Observations Georgia, CERD/C/GEO/CO/3, 27 March 2007, para. 18.

<sup>19</sup> CERD Concluding Observations Moldova, CERD/C/MDA/CO/7, 16 May 2008, para. 14.

<sup>20</sup> *Ibid.* p. 259.

A second restriction in the definition of what constitutes racial discrimination relates to the distinction between citizens and non-citizens. According to Article 1.2,

“this Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State party to this Convention between citizens and non-citizens”.

This aspect has been very problematic for States Parties and the Committee itself. The Convention establishes that distinctions between citizens and non-citizens can be made by the States Parties, but at the same time provisions of Article 5 of the Convention should also be respected. This Article lists some fundamental rights that State Parties should protect and guarantee without discrimination. The provisions of Article 5 refer to both civil and political rights, and to economic, social and cultural rights. This Article recognises that States Parties will prohibit and eliminate racial discrimination in all its forms and will guarantee the right of everyone, including *inter alia*, the right to enjoy equal treatment before tribunals; the right to marriage, the right to freedom of movement and residence; the right to freedom of thought, conscience and religion; the right to work; the right to housing and the right to public health, medical care and social security.

The difficulties of engineering an appropriate balance between the standard of non-discrimination, the enjoyment of fundamental rights and the right of the State to confer different rights based on citizenship led the Committee to elaborate a general comment on the matter. Concerning this distinction, the Committee formulated a recommendation in 2004 in which it is specified that:

“Article 1, paragraph 2, must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights”<sup>21</sup>.

The relationship between Article 1 and Article 5 is often tense, difficult and complex. The assumption of the Committee is that there is the legal possibility to regulate different rights for migrants without violating the fundamental rights recognised in Article 5. This was demon-

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<sup>21</sup> General Recommendation XXX on Discrimination Against Non-Citizens, 1 October 2004, para. 2.

strated in *Diop v. France*. This case related to the refusal of the Bar Council of Nice to grant membership to Mr. Diop. He claimed that this refusal was based on the fact that he was Senegalese, whereas the State party claimed that it was due to the fact that he was not French. France argued that:

“The *ratio legis* of Article 11, paragraph 1, of Act No. 71.1130 of 31 December 1971<sup>22</sup> is to protect French lawyers from foreign competition. In so doing, France exercises her sovereign prerogatives expressly recognized by Article 1, paragraph 2, of the Convention”<sup>23</sup>.

Finally, the Committee agreed on the fact that the case did not disclose any violation of Article 5 precisely because France was entitled to exercise a legitimate distinction in relation to the requirements as to giving access to the legal profession to non-French citizens. However, the question of different rights based on citizenship has become increasingly problematic. A close examination of the proceedings of the reporting procedure reveals that the Committee is very much concerned about the conformity of Alien Laws and migrant legal regulations to anti-discrimination standards. Recent concluding observations in the cases of Italy<sup>24</sup> and Belgium<sup>25</sup> show this aspect.

The concerns about discrimination and citizenship or immigration status have not been addressed by the Committee solely. Migrants and asylum-seekers in waiting areas at airports, ports and borders have been the subjects of close scrutiny by the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Mr. Doudou Diène. He has insisted that persons in a

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<sup>22</sup> This Article stipulates that “no one may enter the legal profession if he is not French, except as provided for in international Conventions” (Note added by the author, not in the original quotation).

<sup>23</sup> *Diop v. France*, CERD/C/39/D/2/1989, Communication No 2/1989, 10 May 1991, para. 4.2.

<sup>24</sup> In the case of Italy the Committee stated: “The Committee, recalling its General Recommendation No. 30 on Non-citizens, urges the State party to take measures to eliminate discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects. Furthermore, it recommends that the State party take effective measures to prevent and redress the serious problems commonly faced by non-citizen workers, including debt bondage, passport retention, illegal confinement and physical assault”, Concluding Observations Italy, CERD/C/ITA/CO/15, 16 May 2008, para. 17

<sup>25</sup> “The Committee, recalling its General Recommendation 30 (2004) on discrimination against non citizens, recommends that the State party adopt all necessary measures to use non custodial measures for asylum seekers and, when detention is required, that conditions meet international standards”, Concluding Observations Belgium, CERD/C/BEL/CO/15, 7 March 2008, para. 17.

waiting area subjected to expulsion should be guaranteed legal assistance and also the assurance that he/she will not be expelled to a country where his/her fundamental rights will be violated<sup>26</sup>.

The approach that both the Committee and the Special Rapporteur have adopted in relation to the issue of the rights of non-citizens evidences consistency in the sense that they allow States to take steps to control the access of migrants to the country. However, the procedures and the measures applied to these persons should not be in contradiction to the International Law of Human Rights, and will have to take into account the provisions of Article 5 of CERD. The key question therefore is how can a State comply with international human rights standards while applying national provisions on waiting areas in airports, ports and borders. This problem exemplifies a delicate issue in which the balance between national and International Law has to be struck nationally in relation to human rights standards. The Committee has showed a good deal of concern in such different areas as the conditions of detention centres for illegal migrants<sup>27</sup>, the situation of refugee women<sup>28</sup> or the application of anti-terrorist legislation and its impact on refugee and migrants<sup>29</sup>.

In spite of the problems relating to the enjoyment of different rights based on citizenship, the fact is that "different treatment" can be also used for the advancement of minority and socially disadvantaged groups. The Convention establishes that measures adopted to secure the advancement of certain racial groups or ethnic groups might not constitute racial discrimination (Article 1.4). These kinds of actions are considered necessary in order to permit the groups in question to have access on an equal basis to the resources and goods available to other persons or groups in the State. Affirmative actions and national law exceptions in favour of cultural or religious groups have been included as measures to fight against discrimination.

Examples of affirmative actions can be found also in other United Nations mechanisms linked to the field of racial discrimination. For example, in July 2004, the Special Rapporteur on Contemporary Forms of

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<sup>26</sup> *The Fight against Racism, Racial Discrimination, Xenophobia and Related Intolerance and the Comprehensive implementation of and Follow-up to the Durban Declaration and Programme of Action*, A/60/283, 19 August 2005, p. 18, para. 56.

<sup>27</sup> Summary Records, Sixteenth and Seventeenth periodic reports of Spain, CERD/C/SR.1616, 11 March 2004, para. 40.

<sup>28</sup> Summary Records, Tenth to twelfth periodic reports of Australia, CERD/C/SR.1393, 29 March 2000, para. 38.

<sup>29</sup> Summary Records, Fourth to sixth periodic reports of the United States of America, CERD/C/SR.1854, 28 February 2008, para. 29.

Racism, Mr. Doudou Diène, visited Guatemala, Honduras and Nicaragua. In his mission to Nicaragua, the Special Rapporteur encouraged the government to demarcate and restore the property rights of indigenous peoples and to implement the Bilingual Intercultural Education Programme<sup>30</sup>. These measures can be easily understood as positive actions that the government should take in order prevent discrimination against indigenous peoples.

In recent years, the Committee has begun to articulate new concerns in relation to Article 1, such as the situation of Afro descendants. In 2002, the Commission of Human Rights in its resolution 2002/68 of 25 April 2002 created a working group of experts on people of African descent<sup>31</sup> and the Committee produced its recommendation on this issue on first November 2002. The Committee defined Afro descendants as being those persons who suffer discrimination based on caste or analogous inherited systems. Some of the characteristics of persons belonging to this group are:

“Inability or restricted ability to alter inherited status; socially enforced restrictions on marriage outside the community; private and public segregation, including in housing and education, access to public spaces, places of worship and public sources of food and water; limitation of freedom to renounce inherited occupations or degrading or hazardous work; subjection to debt bondage; subjection to dehumanizing discourses referring to pollution or untouchability; and generalized lack of respect for their human dignity and equality”<sup>32</sup>.

Since the creation of the working group, it has focused on racial profiling<sup>33</sup>, the empowerment of women of African descent, the role of political parties in the integration of people of African descent into the political decision-process<sup>34</sup>, and access to health and housing<sup>35</sup>.

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<sup>30</sup> E/CN.4/2005/18/Add.6, 4 March 2005, p. 12.

<sup>31</sup> In 2002, a regional seminar on Afro-descendants in the Americas was held in Honduras. This seminar was organised by the UN working Group on Minorities in cooperation with Organización de Desarrollo Étnico Comunitario. Final recommendations of this seminar can be found at E/CN.4/Sub.2/2002/40, 10 June 2002.

<sup>32</sup> General Recommendation XXIX on Article 1, paragraph 1 of the Convention (Descent), 1 January 2002, para. 1.

<sup>33</sup> Racial profiling can be defined as a “practice of police and others law enforcement officers relying, to any degree, on race, colour, descent or national or ethnic origin as the basis for subjecting persons to investigatory activities, or determining whether an individual is engaged in criminal activities”, A/HRC/4/39, 9 March 2007, p. 14, para. 55.

<sup>34</sup> E/CN.4/2006/19, 6 December 2005.

<sup>35</sup> E/CN.4/2005/21, 26 January 2005.



The expansion of the scope of the application of the concept of "racial discrimination" to other disadvantaged groups has presented new challenges for the Committee. Issues on collective rights and gender have proved to be key aspects in the development of the new agenda of the Committee. Yet, minorities, indigenous peoples and women have been included as priorities in its work. In the next chapter, I will focus on how these new elements have been integrated by the Committee.

### 3. Minorities, indigenous peoples, and women: new challenges in fighting against discrimination or a "leftist" agenda?

Since the nineties, the Committee has become increasingly interested in areas more traditionally related to multiculturalism or cultural identity<sup>36</sup>. Accordingly, the protection of cultural diversity has become one of the focus areas in its plans and workload. All of these factors have combined to (re)formulate the concept of discrimination and to include new patterns and elements that were previously sidelined, if even recognised in the first place.

However, this extension in the activities and field of work of the Committee has not been welcomed in all quarters. The following passage shows the reluctance of some sectors in United States to endorse what is perceived as a trend towards a "leftist agenda":

"The supposed purpose of the CERD and the CERD Committee is to review the efforts of the U.S. government and report on the U.S. record on improving race relations and addressing racial disparities and discrimination. Unfortunately, however, the CERD Committee does very little of that, instead using its resources and reports to deliver a demonstrably leftist attack on U.S. policy on social issues, immigration, the detention facility at Guantanamo Bay, abortion, the death penalty, and various other matters high on the liberal agenda"<sup>37</sup>.

However, the fact is that the Committee has been working in the direction of an extension of the definition of racial discrimination since the nineties. In 1996, the Committee produced recommendations on

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<sup>36</sup> On the relationship between multiculturalism and human rights, see McGOLDRICK, D.: «Multiculturalism and its Discontents», *Human Rights Law Review*, Vol. 5, No 1, 2005, pp. 30-31.

<sup>37</sup> GROVE, S.: "Furthering the UN's leftist Agenda: The U.N CERD Committee Report", Margaret Thatcher Centre for Freedom, Heritage Foundation, <http://www.heritage.org/research/internationalorganizations/wm1899.cfm> ( Accessed 23 July 2008).

(i) self-determination and (ii) refugees and displaced persons. In 1997 the Committee dealt with the issue of indigenous peoples; and finally in 2000 the Committee elaborated recommendations on (i) gender and (ii) discrimination against Roma. This approach challenged any liberal notions of discrimination based solely on individual standards. Thus, discrimination is analysed as a practice that operates in a different manner for groups than for individuals. In order to understand how discrimination was acting in relation to groups the Committee based its approach in the idea that discrimination affecting women, Roma or indigenous peoples was rooted in structural causes and long-standing injustices suffered by these groups.

This step has meant that groups such as indigenous peoples have been able to challenge national laws affecting their right to land or to sacred places on the basis of discrimination. This new perspective has highlighted changes in the field of how the Committee should deal with discrimination against indigenous peoples or Roma. The question is therefore no longer one solely concerning individual rights, but also encompasses how discrimination operates as institutional and structural patterns that make people's choices irrelevant and insignificant in certain States.

In this regard, land rights have been one the main areas of concern for the Committee in relation to indigenous peoples and discrimination. This approach was based on General Recommendation XXIII, in which the Committee refers to four fields: a) culture, history, language and identity, b) sustainable economic and social development compatible with cultural characteristics, c) effective participation in public life and d) protection of territories, land and resources<sup>38</sup>. Other areas related to discrimination are effective representation of indigenous peoples in the public affairs<sup>39</sup>.

The Committee's approach to minorities is also rooted in the assumption that the State has to adopt positive measures in order to secure the application of equal standards between the members of the minority and the rest of the population. These affirmative actions are very varied and imply different measures. In the General Recommendation on Roma, the Committee makes an extensive list of which measures the States parties should adopt to eliminate discrimination against Roma, including references to education, racial violence, living conditions, media and public life.

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<sup>38</sup> General Recommendation XXIII on indigenous peoples, 18 August 1997.

<sup>39</sup> Concluding Observations Australia, CERD/C/AUS/CO/14, 14 April 2005, pp. 12-13, para. 11.

In 2000, the Committee produced a recommendation on the gender-related aspects of racial discrimination. In this recommendation the Committee recognised that there are some specific forms of discrimination that affect primarily women. In many cases, their access to remedies is also more limited. According to the Committee, the appropriate methodology for working with gender and discrimination would be the one that includes in the analysis the form and the manifestation of discrimination, the circumstances in which it occurred, its consequences, and the accessibility and availability of legal remedies<sup>40</sup>.

The Special Rapporteur on violence against women, in her contribution in 2001 to the General Assembly debate on race, gender and violence, said that in the field of gender and race the key concept was that of intersectional subordination:

“The idea of ‘intersectionality’ seeks to capture both the structural and dynamic consequences of the interaction between two or more forms of discrimination or systems of subordination. It specifically addresses the manner in which racism, patriarchy, economic disadvantages and other discriminatory systems contribute to create layers of inequality that structures the relative positions of women and men, races and other groups. Moreover, it addresses the way that specific acts and policies create burdens that flow along these intersecting axes contributing actively to create a dynamic of disempowerment”<sup>41</sup>.

According to the Special Rapporteur, there are three types of intersectional subordination: a) Targeted discrimination that results from abuses that are specifically targeted at racialized women, as occurred in the context of armed conflict in areas such as Bosnia and Herzegovina or Colombia; b) Compound discrimination when women are sometimes subject to discrimination because of their gender roles and because they are members of racial or ethnic groups; c) Structural discrimination applies when policies intersect with underlying structures of inequality to create a compounded burden for particularly vulnerable women. As a consequence, women’s experience of discrimination is different from that experienced by men in their communities<sup>42</sup>.

This approach reveals that discrimination, gender and race can act at different levels, and, as a consequence, the measures to fight against

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<sup>40</sup> General Recommendation XXV on gender related dimensions of racial discrimination, 20 March 2000.

<sup>41</sup> A/CONF.189/PC.3/5, 27 July 2001, p. 8, para. 23.

<sup>42</sup> *Ibid.* pp. 9 and ff.

all these practices should take into account the nature and the origin of this type of discrimination.

In the case of women, the Committee on Elimination of Discrimination against Women (CEDAW Committee) has recommended that States should adopt temporary special measures to accelerate the achievement of a concrete goal of women's de facto or substantive equality. These measures are also included in the Committee's approach to women and race showing the necessary complementary role that the CEDAW Committee and the CERD Committee should play in this field.

All these challenges imply new ideas and new aspects of discrimination that may generate new standards. Discrimination is not a static concept, as it varies and evolves so as to include different elements and situations. Human rights responses must take into account the fact that people's lives can be affected by discrimination in different manners depending on gender or which ethnic group they belong to. The evolution of the Committee's works shows that other groups and concerns can be taken into account in order to improve mechanisms for fighting against discrimination. In this regard, the contribution of NGOs and civil society is essential in order to reveal the practices and structures that sustain racism in our societies.

The evolution of the definition of racial discrimination has been the result of different activities and actions taken in United Nations, such as the World Conference on Racism. However, many of these changes would have never taken place if the monitoring mechanisms of the CERD had been inactive. The current consensus, if there is any, on what racial discrimination entails has been shaped by the activity of the Committee, especially in three main areas: reporting, examination of individual cases and urgent procedures.

#### **4. The Committee on Elimination of Racial Discrimination: mechanisms and procedures**

The Committee on Elimination of Racial Discrimination is the monitoring body of the CERD. It is made up of eighteen independent experts that examine the level of compliance of State's policies and measures to the provisions of the Convention. In order to fulfil this mission, all States parties are compelled to submit periodic reports to the Committee on the level of compliance with the standards provided by the Convention. States must report initially one year after ratifying and the entry into force of the Convention and then every two years. The

Committee allows State parties to combine several reporting obligations in a single document. Since 1988, the Committee has asked for a more detailed report every four years and a brief updating report every two years. The Committee organises its work into two sessions every year. Normally, the Committee might examine between eight to eleven country reports per session.

However, the Committee has had to face constant delays in relation to some States that do not submit their reports on time. To deal with this situation, the Committee decided in 1991 to examine reports overdue by five years or more on the basis of information included in last reports submitted by the State party concerned. At the sixteenth meeting of chairpersons of the human rights treaty bodies held in Geneva in June 2004, the chairperson of the Committee declared that regarding non-reporting, there were one third of all reports that were overdue by more than five years, whereas 6 reports were more than 20 years overdue<sup>43</sup>. These figures have shown some sort of improvement over time. In the annual report for 2005, submitted by the Committee to the General Assembly, there were no reports overdue by more than twenty years. There were 16 countries with overdue reports for at least ten years<sup>44</sup> and 25 countries with overdue report for more than five years<sup>45</sup>.

In 1996, the Committee also decided that State parties whose initial reports were overdue by five years or more, would also be subjected to a procedure based on information submitted by the State party to other organs of the United Nations. In exceptional cases, the Committee can even use other sources of information, including non-governmental ones. Finally, in 2004, the Committee decided that concluding observations adopted under what it was called the review procedure, would be considered as provisional and would be commu-

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<sup>43</sup> *Effective implementation of international instruments on human rights, including reporting obligations under international instruments of human rights*, note by the Secretary-General, A/59/254, 11 August 2004, p. 6, para. 9.

<sup>44</sup> Sierra Leone, Liberia, Gambia, Togo, Somalia, Papua New Guinea, Solomon Islands, Central African Republic, Mozambique, Afghanistan, Seychelles, Ethiopia, Congo, Antigua and Barbuda, Saint Lucia and Maldives. Report on the Committee on the Elimination of Racial Discrimination, A/60/18, Supplement No 18, 2005, p. 85, para. 425.

<sup>45</sup> Chad, Monaco, Nicaragua, Democratic Republic of Congo, Malawi, United Arab Emirates, Burkina Faso, Namibia, Bulgaria, India, Kuwait, Niger, Pakistan, Panama, Philippines, Serbia and Montenegro, Swaziland, Former Yugoslav Republic of Macedonia, Peru, Burundi, Cambodia, Iraq, Cuba, Gabon and Jordan. Report on the Committee on the Elimination of Racial Discrimination, A/60/18, Supplement No 18, 2005, pp. 85-86, para. 426.

nicated confidentially to the State party concerned. These concluding observations would be adopted as definitive in the event of non-compliance by the State party in the form of continuing non-submission of the overdue report. This was the case with, among others, Saint Lucia, which was subjected to this procedure in 2004<sup>46</sup> and also with Seychelles in 2006<sup>47</sup>.

The examination of the State party report by the Committee is conducted by means of a constructive dialogue. The State party delegation normally opens the session with an oral presentation of the report after which members of the Committee submit questions and comments based on the presentation and the information provided by the State. NGOs do not have an official role in this procedure, but it is commonly accepted that they can submit an alternative report on the situation of racial discrimination in the country subjected to examination.

The quality and number of NGO participants in the preparation of the alternative reports varies from country to country<sup>48</sup> and there are no guidelines that NGOs have to follow in order to prepare an alternative report. In past years, and due to the extension of this procedure, some NGOs have produced documents providing useful information on how to prepare and submit alternative reports to the Committee<sup>49</sup>.

In other treaty bodies, pre-sessional working groups are set up to prepare documentation and discuss about some aspects of the country report that are going to be examined by the Committee at that session. These pre-sessional working groups are held in private sessions and NGOs might be invited after a request. In the case of the Committee on Economic, Social and Cultural Rights and the Committee on the

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<sup>46</sup> Report of the Committee on Elimination of Racial Discrimination, General Assembly, Supplement No. 18, A/59/18, pp. 82 and ff.

<sup>47</sup> Report of the Committee on the Elimination of Racial Discrimination, A/61/18, Supplement No 18, p. 94, para 473.

<sup>48</sup> There are various NGOs that have submitted alternative reports to the Committee. In 2003, nineteen NGOs from Sweden participated in the alternative report on the situation of racial discrimination in Sweden. Information on this alternative report can be founded in <http://www.sfn.se/svefn/files/CERD2004.pdf> (Accessed 23 July 2008). Various Indonesian NGOs prepared in 2007 a joint alternative report titled "Breaking the smoke-screen of Discrimination and Impunity in Indonesia", see <http://www2.ohchr.org/english/bodies/cerd/docs/ngos/NGO-Indonesia.pdf> (Accessed 23 July 2008). Transnational Racial Justice Initiative elaborated a report in 2001 titled "The persistence of white privilege and institutional racism in US policy" [http://www.thepraxisproject.org/tools/White\\_Privilege.pdf](http://www.thepraxisproject.org/tools/White_Privilege.pdf) (Accessed 23 July 2008).

<sup>49</sup> See TANAKA, A. and NAGAMINE, Y.: *The International Convention on the Elimination of All Forms of Racial Discrimination: A Guide for NGOs*, Minority Rights Group and IMADR, London, 2001.

Rights of the Child, both organs have produced specific guidelines to regulate NGO participation in pre-sessional meetings. However, in the case of the CERD Committee, pre-sessional working groups do not exist and previous pre-meeting briefings with members of the Committee represent the only possibility for NGOs to make oral presentations on the State party concerned to the Committee members. These briefings normally take place prior to the examination of the State party report.

Once the Committee examines the State party report, it produces a recommendation called "concluding observations" in which the Committee mentions positive aspects, areas of concern and recommendations to the State party concerned. These recommendations are published as official documents of the UN. However, the Committee generally urges State parties to publish the concluding observations in their own countries in all the official language(s) of the State, in order to give widespread access to civil society and general public. In spite of this recommendation, which is commonly used by treaty-bodies, few States take further action in this regard.

Due to the need to up-date the reporting procedure to take account of new realities, the Committee established a follow-up procedure in order to monitor how States comply with its recommendations.

In 2005, the Committee reformed its rules of procedure in the area of follow-up activities. The new regulations established the possibility to nominate one or more follow-up Special Rapporteurs to determine the level of compliance of State parties with the recommendations provided by the Committee<sup>50</sup>. The CERD Follow-up coordinator is appointed for two years. He/she might ask a State party to submit information before the next reporting session, then analysing the information received and making recommendations to the Committee for further actions<sup>51</sup>.

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<sup>50</sup> See <http://www2.ohchr.org/english/bodies/cerd/followup-procedure.htm> (Accessed 23 July 2008).

<sup>51</sup> Terms of reference for the work of the CERD Follow-up Coordinator, CERD/C/66/Misc.11/Rev.2, 10 March 2005. In 2008 and 2007, the Committee, after a request on the follow-up procedure, received information on the implementation of concluding observations in the case of France (CERD/C/FRA/CO/16/Add.1, 13 February 2007), Lithuania (CERD/C/LTU/CO/3/Add.1, 24 May 2007), Azerbaijan (CERD/C/AZE/CO/4/Add.1, 29 May 2007), Mexico (CERD/C/MEX/CO/15/Add.1, 29 June 2007), Uzbekistan (CERD/C/UZB/CO/5/Add.2, 5 July 2007) Ukraine (CERD/C/UKR/CO/18/Add.1, 17 September 2007) Denmark (CERD/C/DEN/CO/17/Add.1, 7 December 2007), Norway (CERD/C/NOR/CO/18/Add.1, 11 December 2007) Guatemala (CERD/C/GTM/CO/11/Add.1, 22 January 2007), Bosnia & Herzegovina (CERD/C/BIH/CO/6/Add.1, 28 January 2008), Georgia (CERD/C/GEO/CO/3/Add.1, 17 March 2008), Guyana (CERD/C/GUY/CO/14/Add.1, 14 May 2008), Turkmenistan (CERD/C/TKM/CO/5/Add.1, 25 June 2008).

In addition to the reporting procedure, the Committee is in charge of three more mechanisms: the *early-warning procedure* and the urgent cases procedure, the examination of *individual complaints* and the *inter-State complaints* procedure.

The Committee launched the early warning procedure and urgent procedure in the nineties. The early warning procedure aims to prevent potential violent situation from transforming into conflicts. The Committee uses different criteria in order to decide whether the early warning procedure should be applied to a State party. These criteria include the lack of legislative measures to define and penalize racial discrimination, a lack of legal remedies to combat racial discrimination, the existence of a pattern of racial hatred violence either promoted or tolerated by the government, a constant pattern of racial discrimination revealed in social and economic indicators, and the existence of an increasing exodus of refugees caused by racially discriminatory acts<sup>52</sup>.

The urgent procedure was created to respond to situations that needed a rapid intervention due to the escalation of discrimination into a serious, massive or persistent pattern of racial discrimination. Both procedures are based on a request made by the Committee to the State party for "further information" about a subject matter of its concern. After the Committee considers the State's reply and other relevant information, it makes a decision on the issue. This decision can involve bringing the matter to the attention of the UN High Commissioner for Human Rights, to the UN Secretary General or to the General Assembly. In some cases, these procedures can lead to a technical co-operation mission to the State concerned. As these mechanisms do not have any specific procedures, there is very limited information available on them. In fact, there is very little information on how and why the Committee decides to subject particular States to these procedures.

The results of the application of an early warning procedure depend very much on the support that the issue may have nationally and internationally, but also on the people's ability to claim and negotiate their situation with the State. In 1999, the Yomba Shoshone Tribe from the United States submitted an initial request for an early warning and urgent action procedure before the Committee. This urgent action was based on the denying of ownership and access to traditional lands of Yomba Shoshone and the extinction of their native title in a discrimina-

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<sup>52</sup> Report of the Committee on Racial Discrimination, General Assembly A/48/18, 15 September 1993, p. 128.



tory manner<sup>53</sup>. The Western Shoshone lands cover approximately 60 million acres stretching across what is now referred to as the States of Nevada, Idaho, Utah and California. The United States claims around 90% of the land base as "public" or federally-controlled lands. The Western Shoshone challenged the United States assertion of ownership stating that there has never been a legally valid transfer, sale or cession of land by the Western Shoshone to the United States<sup>54</sup>.

On 15 August 2005, the Committee welcomed a private meeting between members of the Committee and the delegation of the United States. On 19 August, a formal letter was sent to the State party in which the Committee request the State to respond to various questions related to the approval of expanded mining activities in the Mount Tenabo area and the decision to store nuclear waste at Yucca Mountain. Both areas are of spiritual and cultural importance to the Western Shoshone and are considered to be the Western Shoshone people's creation myths birthplace. The Committee invited the State party to submit a report by 31 December 2005 and went on to to examine it in Geneva on 20 February 2006. In March 2006, the Committee issued a decision under this procedure in which the Committee urged the United States to initiate a dialogue with the representatives of the Western Shoshone peoples to find a solution to the human rights violations, along with the recommendation to freeze any plan to privatise Western Shoshone ancestral lands. The Committee set up a new dead-line for new information to be delivered on July 2006 <sup>55</sup>.

This early warning procedure has allowed the Western Shoshone peoples to claim their rights internationally and to transfer the debate about how federal authorities applied indigenous laws to the field of discrimination and human rights. This shift is important because implies that there is not just a concrete violation of human rights, but a sustained, historical and extended situation of racial discrimination against Western Shoshone people.

The outcome of this procedure is still open and the possibility for the negotiation and conclusion of an agreement between Western

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<sup>53</sup> The initial request for an early warning and urgent procedure was submitted to the Committee on 1 July 2001. A second request was submitted on 29 July 2005, see [http://www.wsdp.org/final\\_cert\\_request\\_v2.pdf](http://www.wsdp.org/final_cert_request_v2.pdf) (Accessed 23 July 2008).

<sup>54</sup> The situation of the Western Shoshone has also been reflected in a report from Amnesty International United States. This report can be consulted at [http://www.law.arizona.edu/depts/iplp/advocacy/shoshone/documents/Appendix5WS\\_Amnesty\\_Intl\\_Report\\_2003.pdf](http://www.law.arizona.edu/depts/iplp/advocacy/shoshone/documents/Appendix5WS_Amnesty_Intl_Report_2003.pdf) (Accessed 23 July 2008).

<sup>55</sup> Decision 1(68).

Shoshone and federal authorities is on the table. Since the Committee adopted its decision, the Western Shoshone has been sending updating information on the situation to the Committee. This information turned to be of considerable importance at the examination of the United States periodic report in 2008<sup>56</sup>. In its concluding observations, the Committee reiterated the urgency of securing compliance with decision 1(68)<sup>57</sup>.

The early warning and urgent procedures are both an extension of the Committee's capacity to request information based on the reporting procedure established in Article 9 of the Convention. The Convention, at Article 14, designated the individual complaint system as an optional mechanism subject to the declaration of its acceptance by the States parties. This procedure came into operation in 1982. The communications are subject to some requirements established in Article 91 of the Committee Rules of Procedure. These requirements specify that: a) The communication cannot be anonymous; b) The communication has to be submitted by the claimant, relatives, representatives or in exceptional cases by others on behalf of the alleged victim; c) The communication has to be compatible with the provisions of the Convention; d) The claimant must have exhausted all available domestic remedies; e) The communication has to be submitted within six months after all the domestic remedies have been exhausted<sup>58</sup>.

Finally, Articles 11 to 13 of the Convention regulate the inter-State complaint procedure. This procedure is applicable to all States parties of the Convention and does not require any other declaration. It aims at solving disputes arising from any State's compliance with their obligations under the Convention. It has to date never been applied.

## 5. Conclusion

The Convention was the first international human rights treaty at the United Nations to establish a mechanism for monitoring the compliance of States parties with anti-discrimination standards. After more than 40 years, the Convention and the Committee have proved that

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<sup>56</sup> The alternative or shadow report on indigenous people's rights in the United States of America can be consulted at <http://www2.ohchr.org/english/bodies/cerd/docs/ngos/usa/USHRN8.doc> ( Accessed 23 July 2008).

<sup>57</sup> Concluding Observations United States of America, CERD/C/USA/CO/6, 8 May 2008.

<sup>58</sup> Committee on Elimination of Racial Discrimination, Rules of Procedure, HRI/GEN/3/Rev.2, 28 May 2005, pp. 57-93.

they are able to evolve from a particular decolonialism context to new approaches of contemporary racial discrimination. Although the Convention has not reached universal ratification, as it was planned at the World Conference Against Racism, still it is one of the most widely ratified instruments in the treaty-body system, following the Convention of the Rights of the Child and the Convention for the Elimination of All Forms of Discrimination against Women. This widespread acceptance shows a growing international consensus as to the importance of fighting against racial discrimination in all its forms, including not only an individual rights perspective but also a collective one. There is still a lot of work to do in this field, but at least, the Convention and the Committee seem to be able to adapt to combat one of the most durable injustices and violations of human dignity.



# The Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol

Felipe Gómez Isa

**Summary:** 1. Introduction. 2. Historical overview. 2.1. Exclusion of Women's Rights from the Traditional Discourse on Human Rights. 2.2. The United Nations and the Principle of Non-discrimination. 3. The Convention on the Elimination of All Forms of Discrimination Against Women. 3.1. Substantive Provisions of CEDAW. 3.2. Addressing the Problem of States' Reservations to the Convention. 3.3. The Protection Mechanisms Under CEDAW Needed to be Strengthened. 4. The Optional Protocol to CEDAW. 4.1. The Negotiation Process. 4.2. Examining the Content of the Optional Protocol. 5. Conclusions.

## 1. Introduction

This article presents a very brief historical overview of the different stages through which women's rights have crossed at the international level. Thus, I fundamentally analyze the efforts, from 1945 to the present, of the United Nations towards the recognition of the principle of non-discrimination based on gender. I pay special attention to the Convention on the Elimination of all Forms of Discrimination Against Women, adopted in 1979 by the General Assembly of the United Nations<sup>1</sup>. Nevertheless, the main focus is the elaboration of an Optional Protocol to this Convention<sup>2</sup>, which aims to reinforce the weak mechanisms that exist to protect the rights of women at the international level. The process of elaboration, which started at the beginning of the 1990s, has faced many obstacles and difficulties. However, in spite of these problems, the Optional Protocol was finally adopted by the Gen-

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<sup>1</sup> Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, available at <http://www.un.org/womenwatch/daw/cedaw/states.htm> [hereinafter CEDAW].

<sup>2</sup> *Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women*, G.A. Res. 4, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/RES/54/4 (1999), available at <http://www.un.org/womenwatch/daw/cedaw/protocol/op.pdf> [hereinafter *Optional Protocol to CEDAW*].

eral Assembly through Resolution 54/4 on 6 October 1999 and entered into force on 22 December 2000.

## 2. Historical overview

### 2.1. *Exclusion of Women's Rights from the Traditional Discourse on Human Rights*

The concept of human rights arose relatively recently, dating from the liberal revolutions that took place throughout Europe and North America at the end of the 18th century<sup>3</sup>. The French Revolution undoubtedly lent a sense of legitimacy to the idea of human rights through the ratification of the *Déclaration des droits de l'homme et du citoyen* in 1789<sup>4</sup>. However, this important Declaration and the period of the Illustration are not especially favorable to the reinforcement of women's rights, especially with respect to their involvement in the political sphere<sup>5</sup>. Encarnación Fernández has pointed out that not acknowledging their right to participate in politics was an obvious contradiction of the revolutionary principles, above all, the principle of equal rights<sup>6</sup>. Nevertheless, the revolutionary impulse in France inspired the emergence of voices reclaiming the presence of women's rights. Two clear examples include Condorcet's *Essai sur l'admission des femmes au droit de cité* (1790) and Olympe de Gouges' *Déclaration des droits de la femme et de la citoyenne* (1791). Contemporaneously with the publication of the essays of Condorcet and Olympe de Gouges, Mary Wollstonecraft, one of the precursors of the British feminist movement, wrote *A Vindication of the Rights of Women* (1792). These contributions were arguably the first attempts at establishing legal rights for

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<sup>3</sup> This does not mean that there were no attempts to acknowledge certain human rights before the 18th century. An example is the important contribution of the Salamanca School of International Law towards the recognition of the rights of indigenous peoples in the context of the colonization of the Americas. See BEUCHOT PUENTE, M.: *Los fundamentos de los derechos humanos en Bartolomé de las Casas*, Anthropos, Barcelona, 1994. An interesting contribution regarding the history of human rights can be found in OESTRICH, G. & SOMMERMANN, K-P.: *Pasado y presente de los derechos humanos*, Tecnos, Madrid, 1990.

<sup>4</sup> The title itself of this Declaration, with its exclusive reference to the rights of *man* and (male) *citizens*, indicates clearly the prevailing concept of human rights.

<sup>5</sup> On feminism during the Enlightenment, see MOLINA PETIT, C.: *Ilustración y Feminismo: lo privado y lo público en el pensamiento liberal*, 1987 (unpublished Ph.D. dissertation, Universidad Complutense).

<sup>6</sup> FERNÁNDEZ, E.: "Los derechos de las mujeres", in BALLESTEROS, J. (ed.): *Derechos Humanos*, Tecnos, Madrid, 1992, p. 148.

women. The situation of women in the legal sphere has been—and in many countries remains—characterized by a deep sense of inequality<sup>7</sup>. From the French Revolution until today, society has seen a widespread development in the recognition of human rights, both nationally and internationally. Throughout this evolution, including the emergence of the three generations of human rights<sup>8</sup>, there has been a gradual affirmation of principles of non-discrimination and the rights of women. However, according to many women writers, an *androcentric* concept of human rights has prevailed. This concept of rights is centered on the experiences and needs of men, which excludes women's vision of the world. Carmen Magallón, for example, believes that androcentrism is a defining characteristic in the tradition of Western thought and human rights principals<sup>9</sup>. Furthermore, the very structure of human rights, such as it has been historically designed, does not consider the needs of women. Even international human rights law and the set of international legal norms it encompasses has developed in such a way that it reflects the experiences of men, excluding those of women<sup>10</sup>. One reason for this marginalization is that women are underrepresented in the environments where these international norms are created, such as States' governments and International Organizations. Women are appallingly invisible and occupy very few of the important positions, which contributes to the predominance of a male perspective<sup>11</sup>.

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<sup>7</sup> A study of the historical stages of women's rights is included in BENSADON, N.: *Les Droits des Femmes des origines à nos jours*, Presses Universitaires de France, Paris, 1980. On the legal situation of women during specific periods in history, see GARDNER, J.F.: *Women in Roman Law and Society*, Routledge, London, 1990; JUST, R.: *Women in Athenian Law and Life*, 1994; GUERRA MEDICI, M.T.: *I Diritti delle donne nella società altomedievale*, 1986; Sealey, R.: *Women and Law in Classical Greece*, The University of North Carolina Press, Chapel Hill, 1990.

<sup>8</sup> The first generation of human rights would be the civil and political rights born out of the 18th century liberal Revolutions. Second generation rights would include economic, social, and cultural rights resulting from the Communist and Socialist movements, which appeared during the second half of the 19th century. Lastly, the third generation of rights are those that arose during the 1960s as an attempt to bring solidarity to the international scene. For a brief review of these three generations of human rights, see Felipe Gómez Isa in this volume.

<sup>9</sup> MAGALLÓN, C.: "Los Derechos Humanos Desde el Género", in CENTRO PIGNATELLI (ed.): *Los Derechos Humanos, camino hacia la paz*, Diputación General de Aragón-Seminario de Investigación para la Paz, Zaragoza, 1997, p. 259.

<sup>10</sup> CHARLESWORTH, H.: "Human Rights as Men's Rights", in PETERS, J. & WOLPER, A. (eds.): *Women's Rights, Human Rights: International Feminist Perspectives*, Routledge, New York, 1995, p. 103.

<sup>11</sup> *Ibid.*, p. 104. The author includes data concerning the presence of women in various human rights bodies that clearly demonstrates discrimination occurring.

Another important reason why human rights have not met women's expectations is that the concept of human rights is based on the dichotomy between the public and the private spheres. Human rights generally concern only the public realm. International human rights law was originally intended to protect individuals against abuses by the State. Violations of rights that legal norms try to prevent are those that take place in the public sphere, since it is controlled by the State. However, women are generally relegated to the private sphere due to their subordinate status in society. Therefore, the principal violations of women's rights take place in the private sphere, fundamentally within the family. Traditionally, States have been reluctant to intervene in matters of the home and family life. Furthermore, according to the traditional theory of human rights, the State has no access to the private sphere. Feminist legal scholar Charlotte Bunch has stated that the dichotomy between the public and the private has been widely used to justify the subordination of women and to exclude human rights abuses committed in the private sphere from public view<sup>12</sup>.

The traditional discourse on human rights has developed without considering its impact upon women. Transforming this discourse to a perspective that will consider the needs and vindications of women is absolutely essential<sup>13</sup>. The United Nations must play a central role in this transformative process.

## 2.2. *The United Nations and the Principle of Non-discrimination*

### 2.2.1. UNITED NATIONS CHARTER

The United Nations was created following World War II. Its purpose and the basic principles it affirms, including the principle of non-discrimination, are set forth in the UN Charter<sup>14</sup>. In the Preamble, the peoples of the United Nations declare themselves to be "determined... to reaffirm faith in... the equal rights of men and women"<sup>15</sup>. Article 1 of the Charter establishes as a goal of the UN "promoting and encourag-

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<sup>12</sup> BUNCH, CH.: "Transforming Human Rights from a Feminist Perspective", in PETERS, J. & WOLPER, A. (eds.): *supra* note 10, p. 14.

<sup>13</sup> FREEMAN, M.A. & FRASER, A.S.: "Women's Human Rights: Making the Theory a Reality", in HENKIN, L. & HARGROVE, J. (eds.): *Human Rights: An Agenda for the next century*, The American Society of International Law, Washington, D.C., 1994, p. 104.

<sup>14</sup> U.N. CHARTER.

<sup>15</sup> *Ibid.*, Preamble.



ing respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion"<sup>16</sup>. As an attempt to apply the principle of non-discrimination to the workings of the Organization itself, Article 8 of the Charter states that "the United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs"<sup>17</sup>. As we can see, from the very beginning the United Nations aimed for the recognition of the principle of non-discrimination<sup>18</sup>.

### 2.2.2. THE COMMISSION ON THE STATUS OF WOMEN

The Commission on the Status of Women was created in 1946, just one year after the United Nations Charter entered into force<sup>19</sup>. This Commission, which deals with all matters concerning women, demonstrates the United Nations' commitment to the principle of non-discrimination in relation to women<sup>20</sup>. The Commission has played a very important role in the process of elaborating the human rights mechanisms adopted within the framework of the United Nations<sup>21</sup>.

### 2.2.3. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

The human rights provisions in the United Nations Charter were extremely vague and general; it soon became apparent that they would need to be specified. Therefore, interested States Parties drafted the Universal Declaration of Human Rights, which was adopted on 10 December 1948<sup>22</sup>. It is important to point out the significant role of the Commission on the Status of Women in the creation of the Universal

<sup>16</sup> *Ibid.*, Art. 1, para. 3.

<sup>17</sup> *Ibid.*, Art. 8.

<sup>18</sup> For a comprehensive study on the work of the United Nations regarding women, see WINSLOW, A. (ed.): *Women, Politics and the United Nations*, Greenwood Press, Westport, 1995.

<sup>19</sup> The UN Charter entered into force on 24 October 1945. U.N. CHARTER.

<sup>20</sup> For an overview of the work done by this Commission, see GALEY, M.E.: "Promoting Non-Discrimination Against Women: The Commission on the Status of Women", 23 *International Studies Quarterly*, 1979, p. 273.

<sup>21</sup> This Commission, as discussed *infra* Part IV.A., later created the Working Group for the elaboration of an Optional Protocol to CEDAW.

<sup>22</sup> *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR, 3d Sess., Art. 1, U.N. Doc. A/217 (1948). For a brief commentary on the Universal Declaration on its 60th anniversary, see ORAÁ, J. & GÓMEZ ISA, F.: *La Declaración Universal de los Derechos Humanos*, Universidad de Deusto, Bilbao, 2008.

Declaration. Throughout the drafting process, the Commission constantly defended the inclusion of the female perspective into the text. Mrs. Bergtrup, who was President of the Commission, played an important role in this matter.

The Preamble to the Universal Declaration of Human Rights reaffirms the "equal rights of men and women," mentioned in the Preamble to the United Nations Charter<sup>23</sup>. Article 1 of the Declaration is particularly important from the point of view of women's rights. It states, "*all human beings* are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood"<sup>24</sup>. The expression "all human beings" sparked a great deal of controversy during the negotiations leading to the ratification of the Universal Declaration<sup>25</sup>. One of the initial proposals for Article 1 used the expression "all men"<sup>26</sup>. This would have been a poor beginning for the Universal Declaration, which would have adversely affected women. The Commission on the Status of Women and some delegations from countries more open to the vindications of women, pressured drafters of the Declaration to use inclusory language<sup>27</sup>. As a result, the expression that now appears in Article 1 of the Declaration was included, which demonstrates more respect for the rights of a group that constitutes half of the human race.

Article 2 of the Universal Declaration establishes the principle of non-discrimination. In its first paragraph, Article 2 states "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". This provision expands the prohibition against discrimination originally stated in Article 1.3 of the United Nations Charter. Another achievement of the women's movement was the inclusion of expressions such as "everyone," "all," and "no one," in all provisions of the Universal Declaration. The purpose of such language was to clar-

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<sup>23</sup> "We the Peoples of United Nations Determined... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women...", UN CHARTER pmbI.

<sup>24</sup> *Universal Declaration of Human Rights*, *supra* note 22 (emphasis added).

<sup>25</sup> For a discussion of the events surrounding these discussions and negotiations, see MORSINK, J.: "Women's Rights in the Universal Declaration", 13 *Human Rights Quarterly*, 1991, pp. 229-233.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*, pp. 234-235.

ify that the principle of non-discrimination applies to all of the human rights recognized by the Universal Declaration.

There are, nevertheless, some references in the Universal Declaration that are rather negative from the perspective of women's rights. For example, Article 23.3, concerning the recognition of the right to work, states "everyone who works has the right to just and favourable remuneration ensuring *for himself and his family* an existence worthy of human dignity..."<sup>28</sup>. This provision assumes that the man is the only wage earner and provider for the family<sup>29</sup>.

Notwithstanding the negative references towards women included in the Declaration, Johannes Morsink argues that the Universal Declaration is a very progressive document in respect to women's rights<sup>30</sup>. According to Morsink, this is evidenced by the inside history of the writing process, and the struggle to reach the final product<sup>31</sup>. Such an optimistic view of the Declaration is not, however, shared by other writers<sup>32</sup>.

#### 2.2.4. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

The United Nations adopted two International Covenants on human rights in 1966: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights<sup>33</sup>. In addition to promoting human rights, these covenants also contain specific references to the principle of non-discrimination. Article 2 of each document makes a general statement concerning non-discrimination on the basis of sex<sup>34</sup>. Article 3 of the ICCPR establishes, "the States Parties to the present Covenant undertake to ensure

<sup>28</sup> *Universal Declaration of Human Rights*, *supra* note 22, Art. 23.3 (emphasis added).

<sup>29</sup> This same logic is followed by Article 25 of the Declaration, which proclaims the right to an adequate standard of living. *Ibid.*, Art. 25.

<sup>30</sup> MORSINK, J.: *supra* note 25, p. 255.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*, p. 233 (quoting POLLIS, A. & SCHAWB, P.: *Toward a Human Rights Framework*, 1982, p. 7).

<sup>33</sup> International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3, 6 *I.L.M.* 360 (entered into force 3 January 1976) [hereinafter ICESCR]; International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 135, 6 *I.L.M.* 360 [hereinafter ICCPR].

<sup>34</sup> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

ICCPR, *supra* note 33, Art. 2.1.

the equal right of men and women" to the enjoyment of the rights set forth in the Covenant<sup>35</sup>. The language of the ICESCR is practically identical and was intended to have the same meaning<sup>36</sup>.

## 2.2.5. THE DEVELOPMENT OF HUMAN RIGHTS INSTRUMENTS SPECIFIC TO WOMEN

A brief historical overview indicates that the United Nations has also done a commendable job recognizing certain aspects of women's rights<sup>37</sup>. The International Labour Organization (ILO), a specialized agency of the United Nations, was the first to create an instrument elaborating women's rights. With the intent to define women's rights in the labor field, the ILO approved a Convention dealing with women in the industrial sector who work night shifts on 9 July 1948<sup>38</sup>. Three years later, in 1951, the Convention on Equal Pay for Equal Work of Men and Women was adopted<sup>39</sup>. In 1952, the United Nations approved the Convention on the Political Rights of Women<sup>40</sup>. The Declaration of the General Assembly of the United Nations on the Elimination of Discrimination Against Women was issued in 1967. Most recently, the United Nations adopted the Convention on the Elimination of All Forms of Discrimination Against Women. All of these international treaties, and many others, clearly demonstrate the United Nations' commitment to women's rights.

Without a doubt, the most important texts concerning the fight to eliminate discrimination against women are the Declaration of the General Assembly of the United Nations on the Elimination of Discrimi-

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The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

ICESCR, *supra* note 33, Art. 2.2.

<sup>35</sup> ICESCR, *supra* note 33, Art. 2.

<sup>36</sup> The ICESCR states "[t]he States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant." *Ibid.*, Art. 3. As we can see, the differences are in the wording alone; the meaning is identical in both.

<sup>37</sup> For a complete analysis of the main instruments in this field adopted by the United Nations, see STAMATOPOULOU, E.: "Women's Rights and the United Nations", in PETERS, J. & WOLPER, A. (eds.): *supra* note 10, p. 37.

<sup>38</sup> Night Work (Women) Convention (Revised), 9 July 1948, 81 U.N.T.S. 147, available at <http://www.ilo.org/lolex/cgi-lex/convde.pl?c089>.

<sup>39</sup> Equal Remuneration Convention, 6 June 1951, 165 U.N.T.S. 303, available at <http://www.ilo.org/ilolex/english/convdisp1.htm>.

<sup>40</sup> Convention on the Political Rights of Women, 20 December 1952, 193 U.N.T.S. 135.

nation Against Women<sup>41</sup> and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>42</sup>. CEDAW completed and gave legal force to what was established by the Declaration of the General Assembly. The Declaration on the Elimination of Discrimination Against Women expressed the concern that extensive discrimination against women continued to exist despite instruments such as the Charter of the United Nations, the Universal Declaration of Human Rights, and the International Covenants on Human Rights<sup>43</sup>.

Certainly, great progress has been made in the context of legal equality in all countries compared to the much slower advances made in the field of *de facto* equality<sup>44</sup>. The most important Article of the Declaration is Article 1, which defines the principle of non-discrimination in a general sense. The rest of the Declaration attempts to specify this general principle in concrete areas such as political participation, nationality, legal capacity, education, and marriage. According to Article 1 of the Declaration, "discrimination against women, denying or limiting as it does their equality of rights with men, is fundamentally unjust and constitutes an offence against human dignity"<sup>45</sup>.

#### 2.2.6. UN CONFERENCES AND OTHER SPECIAL EFFORTS RELATED TO THE RIGHTS OF WOMEN

The United Nations has sponsored activities aimed at promoting equality between men and women. Within this framework, the General Assembly of the United Nations proclaimed 1975 to be International Women's Year. That same year, the United Nations held the First International Conference on Women, which took place in Mexico. Once International Women's Year was over, the General Assembly declared the United Nations Decade for Women in order to follow up on the advancement of women. The Mexico Conference was followed by further conferences held in Copenhagen, Nairobi, and, most recently, in Beijing in 1995<sup>46</sup>. All

<sup>41</sup> *Declaration on the Elimination of Discrimination Against Women*, G.A. Res. 2263, U.N. GAOR, 22d Sess., Supp. No. 16, at 35, U.N. Doc. A/6880 (1967).

<sup>42</sup> CEDAW, *supra* note 1.

<sup>43</sup> *Ibid.*, pmbi.

<sup>44</sup> FERNÁNDEZ: *supra* note 6, p. 155.

<sup>45</sup> *Declaration on the Elimination of Discrimination Against Women*, *supra* note 41, Art. 1.

<sup>46</sup> ELIZONDO LOPETEGI, A.: "Veinte años de cooperación internacional para las mujeres: De México a Pekín (1975-1995)", in *Segundas Jornadas Municipales sobre la Cooperación Norte-Sur: La Dimensión global de la solidaridad*, Servicio Central de Publicaciones del Gobierno Vasco, Vitoria-Gasteiz, 1995, pp. 185-211.

of these Conferences have been great steps forward along the tortuous path leading to the recognition and achievement of women's rights.

In June 1993, the World Conference on Human Rights was held in Vienna. The Vienna Declaration and Program of Action that resulted is the most explicit proclamation supporting the acknowledgement and expansion of women's rights<sup>47</sup>. This Declaration establishes:

The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community... The human rights of women should form an integral part of the United Nations human rights activities, including the promotion of all human rights instruments relating to women...<sup>48</sup>.

The UN has promoted human rights instruments relating specifically to the rights of women. CEDAW represents the most serious systematic attempt by the United Nations to fight decidedly for the rights of women.

### 3. The Convention on the Elimination of All Forms of Discrimination Against Women

#### 3.1. *Substantive Provisions of CEDAW*

After lengthy and complicated negotiations, CEDAW<sup>49</sup> was approved by the General Assembly of the United Nations on 17 December 1979<sup>50</sup>. The ratification process as indicated by Article 27.1 resulted in this Convention entering into force<sup>51</sup> on 3 September 1981, following the

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<sup>47</sup> At the World Conference on Human Rights, held in Vienna from 14-25 June 1993, the Vienna Declaration and Program of Action was written. It was adopted by the United Nations in 1994. G.A. Res. 121, U.N. GAOR, 48th Sess., Supp. No. 49, U.N. Doc. A/121 (1994) [hereinafter *Vienna Declaration*].

<sup>48</sup> *Ibid.*, para. 18.

<sup>49</sup> For an interesting analysis of the negotiations over CEDAW, see FRASER, A.: "The Convention on the Elimination of All Forms of Discrimination Against Women (The Women's Convention)", in *Women, Politics and the United Nations: supra* note 18, p. 84.

<sup>50</sup> The results of the vote in the Assembly are symbolic of the problems surrounding its negotiation and the obstacles that the Convention would face: 130 States voted in favor, none voted against, and eleven abstained. The countries that abstained are mostly those with strong family and religious traditions: Bangladesh, Brazil, Comores, Djibouti, Haiti, Mali, Mauritania, Mexico, Morocco, Saudi Arabia, and Senegal.

<sup>51</sup> As of 15 February 2008, there were 185 States Parties to the Convention.

“deposit with the Secretary General of the United Nations of the twentieth instrument of ratification or accession”<sup>52</sup>. CEDAW is composed of a Preamble and thirty Articles that establish different measures to be adopted by the States and by specific private parties. The purpose of these measures is the recognition and expansion of the principle of non-discrimination. In the Preamble itself, States Parties affirm the main goal of the Convention by declaring they are “determined to implement the principles set forth in the Declaration on the Elimination of Discrimination Against Women and, for that purpose, to adopt the measures required for the elimination of such discrimination in all its forms and manifestations”<sup>53</sup>.

One of the most important aspects of CEDAW is that it not only addresses the States, but also the private sphere. This field is where the most serious violations of women’s rights take place. Donna Sullivan, an expert in these matters, has stated that the Convention plans for the restructuring of gender relations within the family, requiring the State to adopt positive measures to protect women against discrimination inflicted by private actors<sup>54</sup>. One of the more radical provisions in CEDAW, Article 5, urges the States “to modify the social and cultural patterns of conduct of men and women”<sup>55</sup>. Furthermore, this provision promotes establishing the “common responsibility of men and women in the upbringing and development of their children”<sup>56</sup>. Similarly, Article 16 promotes equality in all matters related to marriage and family relations.

The progressive nature of some of the provisions of CEDAW warrants further discussion<sup>57</sup>. Discrimination against women, as defined by Article 1 of the Convention, comprises:

[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights

<sup>52</sup> CEDAW, *supra* note 1, Art. 27. 1.

<sup>53</sup> *Ibid.*, preamble.

<sup>54</sup> SULLIVAN, D.J.: “The Public/Private Distinction in International Human Rights Law”, in *Women’s Rights, Human Rights: supra* note 10, p. 129.

<sup>55</sup> CEDAW, *supra* note 1, Art. 5(a).

<sup>56</sup> *Ibid.*, Art. 5(b).

<sup>57</sup> For studies of the main points of CEDAW, see FREEMAN & FRASER: *supra* note 13, p. 112; WRIGHT, S.: “Human Rights and Women’s Rights: An Analysis of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women”, in MAHONEY, K.E. & MAHONEY, P. (eds): *Human Rights in the Twenty-First Century: A Global Challenge*, Martinus Nijhoff Publishers, Dordrecht, 1993, pp. 75-88.

and fundamental freedoms in the political, economic, social, cultural, civil or any other field<sup>58</sup>.

In Article 2 of CEDAW, the States Parties “condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women”<sup>59</sup>. In order to achieve this, States Parties agree to a series of measures to be specified in the various sections of the Convention. Thus, in Article 3 the States agree to “ensure the full development and advancement of women”<sup>60</sup>. Article 4 refers to special measures to attain “*de facto* equality between men and women”<sup>61</sup>. Article 6 discusses the suppression of “all forms of traffic in women and exploitation of prostitution of women”<sup>62</sup>. Article 7 refers to the elimination of any “discrimination against women in the political and public life of the country”<sup>63</sup>. The advancement of rural women is encouraged in Article 14<sup>64</sup>. The Convention, in Article 8, also refers to the need to ensure the participation of women at the international level<sup>65</sup>. It also addresses non-discrimination on the basis of nationality<sup>66</sup>. Additionally, CEDAW promotes equal rights in the fields of education<sup>67</sup>, employment<sup>68</sup>, and health care<sup>69</sup>.

### 3.2. *Addressing the Problem of States’ Reservations to the Convention*

A serious problem that has had a profound impact on the effectiveness of CEDAW is that States Parties expressed a great number of reservations concerning certain provisions<sup>70</sup>. This has turned CEDAW into the international human rights treaty with the greatest number of reservations. Furthermore, according to certain experts, some of these reservations go against the object and purpose of the Convention<sup>71</sup>,

<sup>58</sup> CEDAW, *supra* note 1, Art. 1.

<sup>59</sup> *Ibid.*, Art. 2.

<sup>60</sup> *Ibid.*, Art. 3.

<sup>61</sup> *Ibid.*, Art. 4.

<sup>62</sup> *Ibid.*, Art. 6.

<sup>63</sup> *Ibid.*, Art. 7.

<sup>64</sup> *Ibid.*, Art. 14.

<sup>65</sup> *Ibid.*, Art. 8.

<sup>66</sup> *Ibid.*, Art. 9.

<sup>67</sup> *Ibid.*, Art. 10.

<sup>68</sup> *Ibid.*, Art. 11.

<sup>69</sup> *Ibid.*, Art. 12.

<sup>70</sup> COOK, R.J.: “Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women”, 30 *Vanderbilt Journal of International Law*, 1990, p. 643.

<sup>71</sup> STAMATOPOULOU: *supra* note 37, p. 38.



which is expressly prohibited both by the Vienna Convention on the Law of Treaties<sup>72</sup> and by CEDAW Article 28.2<sup>73</sup>. The Committee for the Elimination of Discrimination Against Women has repeatedly expressed its concern regarding the large number of reservations that seem to be incompatible with the object and purpose of the Convention. The Committee issued a General Recommendation suggesting that all States Parties should reconsider their reservations with the aim of withdrawing them<sup>74</sup>. In this regard, considering the number of reservations and the significance of their content, the World Conference on Human Rights held in Vienna in June 1993 decided that “ways and means of addressing the particularly large number of reservations to the Convention should be encouraged”<sup>75</sup>. The Conference also urged the States to “withdraw reservations that are contrary to the object and purpose of the Convention or which are otherwise incompatible with international treaty law”<sup>76</sup>.

### 3.3. *The Protection Mechanisms Under CEDAW Needed to be Strengthened*

The protection mechanisms for women’s rights established by CEDAW are much weaker than those included in other international human rights treaties<sup>77</sup>. With respect to this, Theodor Meron has pointed out that CEDAW has become a second-class instrument with-

<sup>72</sup> Vienna Convention on the Law of Treaties, *opened for signature*, 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980). Article 19 of the Convention proclaims that a State can express reservations, but not if “the reservation is incompatible with the object and purpose of the treaty”. *Ibid.*, Art. 19.

<sup>73</sup> Article 28.2 states that “a reservation incompatible with the object and purpose of the present Convention shall not be permitted”. CEDAW, *supra* note 1, Art. 28. 2.

<sup>74</sup> General Recommendation No. 4, The Committee on the Elimination of Discrimination Against Women (sixth session, 1987), available at <http://www.un.org/womenwatch/daw/cedaw/recomm.htm> (last visited Apr. 25, 2003) [hereinafter CEDAW, General Recommendation 4].

<sup>75</sup> *Vienna Declaration*, *supra* note 47, para. 39.

<sup>76</sup> *Ibid.*

<sup>77</sup> Cf. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 113 (entered into force 26 June 1987); CEDAW, *supra* note 1, Art. 17; First Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171. For a very interesting study conducted by the Secretary General of the United Nations comparing the protection mechanisms for women’s rights with those established by other human rights treaties see *Elaboration of a Draft Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, U.N. Commission on the Status of Women, 41st Sess., E/CN.6/1997/4, 1997.

in the family of United Nations human right treaties<sup>78</sup>. Various types of mechanisms exist for protecting human rights at the international level, such as periodical reports, individual complaints, inter-State complaints, and inquiry procedures. However, CEDAW only provides for the periodical reports mechanism. Article 17 of the Convention establishes a Committee for the Elimination of Discrimination Against Women, which aims to analyze the progress made by the States Parties in enforcing the Convention. In order to monitor the success of the States in fulfilling CEDAW, Article 18 of the Convention declares:

States Parties undertake to submit to the Secretary General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect<sup>79</sup>.

These reports, according to Article 18.1 (a) and (b), shall be presented “within one year after the entry into force for the State concerned; thereafter at least every four years and further whenever the Committee so requests”.

Once the Committee for the Elimination of Discrimination Against Women<sup>80</sup> has analyzed the reports submitted by the States Parties to the Convention, the Committee “may make suggestions and general recommendations based on the examination of reports and information received from the States Parties”<sup>81</sup>. This is a rather weak mechanism, since all responsibility falls primarily on the State to submit information, and because the Committee’s powers are quite limited. An added difficulty is that, according to Article 20.1 of CEDAW, “the Committee shall normally meet for a period of not more than two weeks annually in order to consider the reports submitted”<sup>82</sup>. This period of two weeks has

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<sup>78</sup> MERON, TH.: “Enhancing the Effectiveness of the Prohibition of Discrimination Against Women”, 84 *American Journal of International Law*, 1990, p. 213.

<sup>79</sup> CEDAW, *supra* note 1, Art. 18.

<sup>80</sup> CEDAW mandates that the Committee will include:

[T]wenty-three experts of high moral standing and competence in the field covered by the Convention. The experts shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilisation as well as the principal legal systems, CEDAW, *supra* note 1, Art.17. 1.

<sup>81</sup> *Ibid.*, Art. 21. For a detailed analysis of the system of periodic reports set out by CEDAW see ILC, Z. and CORTI, I.: “The Convention on the Elimination of All Forms of Discrimination Against Women”, in *Manual on Human Rights Reporting under six major international human rights instruments*, United Nations, Geneva, 1997, pp. 305-365.

<sup>82</sup> CEDAW, *supra* note 1, Art. 20.1.

clearly proven to be insufficient for a calm, detailed analysis of the reports submitted by the States. This has been the reason for the Committee's considerable delay in the examination of the periodical reports<sup>83</sup>. For these reasons, the Committee for the Elimination of Discrimination Against Women recommended that the States Parties to the Convention adopt an amendment to Article 20.1 that would allow the Committee to hold as many meetings as needed to fulfill its duties properly<sup>84</sup>. Echoing this suggestion by the Committee, the eighth meeting of the States Parties to the Convention, 22 May 1995, resulted in a resolution recommending the adoption of said amendment. This amendment will enter into force once it has been ratified by at least two thirds of the States Parties to CEDAW. The General Assembly of the United Nations is fully conscious of the difficulties faced by the Committee due to the brief period allowed for its meetings. Therefore, in recent years, the United Nations has authorized the Committee to meet during two three-week sessions a year.

Since the beginning of the 1990s, the significant weaknesses in the protection mechanisms for women's rights established by CEDAW has motivated an increasingly insistent demand for the expansion of these mechanisms. The Commission on the Status of Women created a Working Group for the purpose of finding solutions to strengthen these mechanisms. As a result, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women was developed and opened for ratification in October 1999.

#### **4. The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women**

##### *4.1. The Negotiation Process*

During the negotiation process of CEDAW, some States discussed the appropriateness of including individual complaints within the framework of the Convention<sup>85</sup>. Such a mechanism would allow a person to file a complaint of an alleged violation of a provision of the Con-

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<sup>83</sup> For a study of the experiences of the Committee on the Elimination of Discrimination Against Women, see FRASER: *supra* note 49.

<sup>84</sup> General Recommendation No. 22, The Committee on the Elimination of Discrimination Against Women (fourteenth session, 1995), available at <http://www.un.org/womenwatch/daw/cedaw/recomm.htm>.

<sup>85</sup> The Netherlands was the biggest proponent of a mechanism for individual complaints under CEDAW.

vention before the Committee on the Elimination of Discrimination Against Women. However, ultimately this possibility was discarded<sup>86</sup>. Once CEDAW entered into force and the Committee started to carry out its functions, it was clear that it suffered from an excessive weakness in its protection mechanisms. For this reason, there has been a strong insistence on the need to strengthen these procedures since the beginning of the 1990s. Two possibilities for reform were put forth. Some argued for major reforms of CEDAW itself, while others advocated for the adoption of an Optional Protocol to the Convention, following the example of the International Covenant on Civil and Political Rights. It soon became clear that a reform of CEDAW would create many inconveniences, especially due to the large number of reservations to this instrument. In the face of these difficulties, an Optional Protocol was determined to be the more practical solution.

Both legal scholars<sup>87</sup> and the organs of the United Nations in charge of women's rights began to ask that a negotiation process be opened for an Optional Protocol. In 1991, at a meeting of experts organized by the Division for the Advancement of Women, it was first recommended that the United Nations Organization examine the possibility of adopting an Optional Protocol to CEDAW. The Committee on the Elimination of Discrimination Against Women took the lead. In Recommendation Number 4, the Committee addressed the World Conference on Human Rights to be held in Vienna, recommending that the right to petition be included in CEDAW<sup>88</sup>. The Committee stated that the Optional Protocol was necessary in order to make CEDAW equal to other human rights treaties ratified by the United Nations. Subsequently, the World Conference on Human Rights decided that new procedures to reinforce the international community's commitment to women's equality and human rights should be adopted. For this purpose, the Vienna Declaration and Plan of Action recommended the creation of an Optional Protocol to CEDAW:

The Commission on the Status of Women and the Committee on the Elimination of Discrimination against Women should quickly

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<sup>86</sup> See BYRNES, A. and CONNORS, J.: "Enforcing the Human Rights of Women: A Complaints Procedure for the Women's Convention", 21 *Brooklyn Journal of International Law*, 1996, p. 679. (discussing BYRNES & CONNORS: *The Adoption of a Petition Procedure under the Convention on the Elimination of All Forms of Discrimination Against Women*, Background Paper prepared for the Expert Group Meeting on the Adoption of an Optional Protocol to CEDAW organized by the Women in Law Project International Human Rights Group and the Maastricht Centre for Human Rights, 1994).

<sup>87</sup> MERON: *supra* note 78, pp. 216-217.

<sup>88</sup> CEDAW Recommendation 4, *supra* note 74.

examine the possibility of introducing the right of petition through the preparation of an optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women<sup>89</sup>.

In 1994, the Committee on the Elimination of Discrimination Against Women adopted Suggestion 5 recommending that the Commission on the Status of Women establish a group of independent experts to prepare a draft for the Optional Protocol. The Commission, however, ignored this recommendation by the Committee. That same year, the Human Rights Center in Maastricht and the International Human Rights Group called a meeting of women's rights experts. This meeting, financed by the governments of the Netherlands and Australia, resulted in the most serious and elaborate draft for an Optional Protocol. This draft became the basis for later discussions and negotiations<sup>90</sup>. In January 1995, the Committee on the Elimination of Discrimination Against Women issued Suggestion Number 7, which declared the different elements that must be included in an Optional Protocol to CEDAW<sup>91</sup>.

Finally, in July 1995 the stage was set for Resolution 1995/29, in which the Social and Economic Council of the United Nations (ECOSOC) asked the Commission on the Status of Women to establish an Open-Ended Working Group for the elaboration of an Optional Protocol to CEDAW. In September 1995, the Fourth International Conference on Women held in Beijing, encouraged the Commission on the Status of Women to draft an optional protocol to CEDAW. The Conference also asked that the optional protocol enter into force in the near future, and include the right to petition<sup>92</sup>. In March 1996, in fulfillment of resolution 1995/29 of ECOSOC, the Commission on the Status of Women created an Open-Ended Working Group for the elaboration of a Draft Optional Protocol to CEDAW. This Working Group met in New York on March 11-22, and mainly examined Suggestion 7 made by the Committee on the Elimination of Discrimination Against Women. The

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<sup>89</sup> *Vienna Declaration*, *supra* note 47, para. 40.

<sup>90</sup> A draft Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women was adopted by The Expert Group Meeting on the Adoption of an Optional Protocol to CEDAW organized by the Women in the Law Project International Human Rights Group and the Maastricht Centre for Human Rights, which met 29 September-1 October 1994. For relevant portions of the draft, see *Draft Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, U.N. Commission on the Status of Women, U.N. Doc. E/CN.6/5, 1997.

<sup>91</sup> Suggestion 7, Committee on the Elimination of Discrimination Against Women, U.N. GAOR, 50th Sess., Supp. No 38, at 8, U.N. Doc. A/38, 1995.

<sup>92</sup> *Report of the Fourth World Conference on Women*, Beijing Declaration, Annex I, at 116, U.N. Doc. A/Conf.177/20, 1995.

Committee also considered the opinions sent by several States to the Secretary General of the United Nations, which expressed support or opposition to an Optional Protocol to CEDAW. Some of the letters listed important characteristics that such a Protocol should have<sup>93</sup>. The Spanish expert who participated in this Working Group pointed out that, even though no government openly opposed the elaboration of an Optional Protocol, there were significant reservations concerning the project<sup>94</sup>.

The second meeting of the Open-Ended Working Group for the elaboration of an Optional Protocol to CEDAW was held on 10-21 March 1997. During this second meeting, the President of the Working Group, Aloisia Wörgetter from Austria, presented a document that became a basis for the discussions<sup>95</sup>. This text was based on discussions held during the 1996 session, Suggestion 7 made by CEDAW Committee, and the opinions sent by the States to the Secretary General of the United Nations<sup>96</sup>. During this session, there was an initial reading of the document prepared by the President, which resulted in the elaboration of an official Draft Optional Protocol to CEDAW<sup>97</sup>. This Draft would become the basic document for the discussions and negotiations of the Working Group.

The Working Group held its third meeting on 2-13 March 1998. During this period, there was a second reading of the Draft Optional Protocol to CEDAW. Following the second reading, experts expressed the main reservations of some countries about this Optional Protocol. There was much hope at this time that the Working Group could reach a consensus before the fiftieth anniversary of the Universal Declaration of Human Rights. In her speech before the Commission on the Status of Women, Mary Robinson, United Nations High Commissioner for Human Rights, emphasized the great importance of ratifying the Optional Protocol to CEDAW. She stated that such action would signi-

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<sup>93</sup> These opinions appear in the REPORT OF THE SECRETARY GENERAL: *Elaboration of a Draft Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women*, U.N. ESCOR, 40th Sess., Supp. No. 6, U.N. Doc E/CN.6/10, 1996.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Working Group on the Elaboration of a Draft Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women*, U.N. ESCOR, 41st Sess., U.N. Doc. E/CN.6/WG/L.1, 1997 [hereinafter *Working Group*].

<sup>96</sup> For new opinions on the Draft Optional Protocol, particularly those of the Spanish government, see *Additional Views of Governments, Intergovernmental Organizations and Non-Governmental Organizations on an Optional Protocol to the Convention*, U.N. ESCOR, 41st Sess., U.N. Doc. E/CN.6/5, 1997 [hereinafter *Additional Views*].

<sup>97</sup> *Working Group: supra* note 95.

fy a great step towards better protecting the rights of women<sup>98</sup>. However, not all of these expectations were met. Since there were still differences of opinion, the ratification of the Optional Protocol had to be postponed<sup>99</sup>.

The fourth meeting of the Working Group was held on 1-12 March 1999. Again, there were many hopes placed on this fourth meeting, and this time these hopes were not in vain: the Optional Protocol to CEDAW was finally born. At the opening session of the Working Group, several delegations expressed their desire for a definite adoption of the Optional Protocol to CEDAW. The European Union, a main contributor in the effort to ratify the Protocol, was fully confident that this could finally happen on the twentieth anniversary of the adoption of CEDAW. Furthermore, the European Union was convinced that the Protocol would be a very useful tool for supporting the enforcement of women's human rights<sup>100</sup>. Other delegations, such as the ones from Norway<sup>101</sup>, Lesotho<sup>102</sup>, and Namibia<sup>103</sup>, made similar initial declarations. Notwithstanding their support, adoption of the Protocol turned out to be extremely complicated since the different delegations had clashing opinions on its most controversial aspects. The process involved two weeks of intense and complicated negotiations and seemingly impossible obstacles. Finally, the Optional Protocol to CEDAW was approved by consensus within the Open-Ended Working Group and the Commission on the Status of Women.

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<sup>98</sup> *Statement made to the 42d Session of the Commission on the Status of Women*, Mar. 3, 1998, at 3 (statement of Mary Robinson, U.N. High Commissioner for Human Rights); see also *Statement made to the 42d Session of the Commission on the Status of Women*, Mar. 2, 1998 (statement of the Representative of the United Kingdom of Great Britain and Northern Ireland).

<sup>99</sup> See U.N. ESCOR, 43d Sess., U.N. Doc. E/CN.6/27, 1998. For an account of this session, see GÓMEZ ISA, F.: "El Proyecto de Protocolo Facultativo a la Convención sobre la Eliminación de Todas las Formas de Discriminación contra la Mujer: hacia una mayor efectividad de los derechos de las mujeres en la esfera internacional", *II Congreso Internacional sobre Género y Políticas de Acción Positiva*, Emakunde, San Sebastián, 1999.

<sup>100</sup> *Statement made to the Open-Ended Working Group on the Elaboration of a Draft Optional Protocol to CEDAW*, Mar. 1, 1999 (statement by Dr. Christine Bergmann, Federal Minister for Family Affairs, Senior Citizens, Women and Youth).

<sup>101</sup> *Statement made to the Open-Ended Working Group on the Elaboration of a Draft Optional Protocol to CEDAW*, Mar. 1, 1999 (statement by the Permanent Mission of Norway).

<sup>102</sup> *Statement made to the Open-Ended Working Group on the Elaboration of a Draft Optional Protocol to CEDAW*, Mar. 1, 1999 (statement by Phakiso Mochochoko, representative of the Permanent Mission of the Kingdom of Lesotho).

<sup>103</sup> *Statement made to the Open-Ended Working Group on the Elaboration of a Draft Optional Protocol to CEDAW*, Mar. 1, 1999 (statement by Netumbo Nandi-Ndaitwah, Mp Director-General, Dept. of Women's Affairs).

#### 4.2. *Examining the Content of the Optional Protocol*<sup>104</sup>

Many problematic issues existed in the Draft Optional Protocol, which resulted in the postponement of its adoption. In fact, the text of the adopted Protocol does not satisfy all of the demands and assertions of all the delegations. The Optional Protocol to CEDAW is the result of a delicate negotiation; it reflects the balance, compromise, and consensus among the different opinions expressed by the members of the Working Group.

The inclusion of protection mechanisms in the Optional Protocol was one of the most intensely debated topics in the negotiations. Some consensus existed among the different delegations of the Working Group as to the importance of including the procedure of individual communications. However, no consensus was found on the issue of including an *ex officio* inquiry procedure by the CEDAW Committee. The procedure of inter-State communications was introduced in early drafts of the Protocol as an alternative to an *ex officio* procedure. Although some experts have emphasized its positive aspects, this alternative was soon discarded since this procedure has hardly been used in the international sphere<sup>105</sup>. As a result, the Optional Protocol to CEDAW includes a procedure for individual communications as well as an inquiry procedure.

##### 4.2.1. NEGOTIATIONS OVER THE INDIVIDUAL COMMUNICATION PROCEDURE

Early in the Protocol discussions, most parties agreed that the procedure of individual communications should be at the heart of the Protocol. Most government delegations accepted a mechanism that would allow women who had suffered violations of their rights to denounce their State before the CEDAW Committee. However, significant differ-

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<sup>104</sup> For one of the most thorough studies of the Draft Optional Protocol project, see BYRNES and CONNORS: *supra* note 86; see also SULLIVAN, D.J.: *The Adoption of an Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, Center for Women's Global Leadership, 1997. The Inter-American Institute of Human Rights has likewise provided an article-by-article commentary of the Draft Optional Protocol, along with very interesting proposals, INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS: *Protocolo Facultativo. Documento de trabajo. Convención sobre la Eliminación de Todas las Formas de Discriminación contra la Mujer*, Instituto Interamericano de Derechos Humanos, San José, 1998 [hereinafter PROTOCOLO FACULTATIVO].

<sup>105</sup> For Theodor Meron, there is an enormous "symbolic significance" in this procedure, since it allows one State to accuse another State for violations of the rights of women. See MERON: *supra* note 78, p. 217. This opinion is shared by BYRNES and CONNORS: *supra* note 86.



ences of opinion remained concerning the details of this procedure. The most controversial points surrounding the individual communication mechanism were those of *active legitimation* and the question of *justiciability* of CEDAW provisions.

#### 4.2.1.1. The Debate over Active Legitimation

The question of *active legitimation* (who can present an individual communication to the CEDAW Committee) is the most problematic element of the entire Optional Protocol. This thorny issue prevented the consensus and final development of a Protocol during the March 1998 sessions. The main focus of the controversy was whether someone other than the victim could present an individual communication before the Committee on behalf of the victim. Countries such as Mexico, Colombia, Cuba, China, Egypt, Tunisia, Morocco, Algeria, and India were concerned that international non-governmental organizations, which constitute real international networks, could use the individual petition procedure "on behalf of the victims". On the other hand, another important group of countries<sup>106</sup> supported allowing non-governmental organizations to petition the Committee. This group argued that such action was necessary in order for the mechanism to defend the human rights of *all* women, and not just of those who have the economic and intellectual resources to take action in the international sphere. Amnesty International is one of the NGOs that made the greatest efforts during the negotiation process and pointed out that this possibility is:

[C]rucial if the Optional Protocol is to provide a real remedy for women victims of violations of the Convention. In Amnesty International's many years of working on behalf of victims of human rights violations, we have found that those most in need of redress, those whose rights have been most violated, are often those least able to come forward and speak of their suffering and obtain redress. Thus, the role of human rights defenders, including non-governmental organizations (NGOs), in facilitating victims claiming their rights is a crucial one. Women may be reluctant to complain because of fear of reprisal, such as in cases involving violence against women in the family. For example, permitting an organization which provides shelter and legal services to women subjected to violence in the family to raise such claims would minimize the risk of harm to individual wom-

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<sup>106</sup> To view the opinions of countries such as Costa Rica, South Africa, Italy, Spain, Panama, and Chile, see *Additional Views, supra* note 96, p. 17.

en. The concept of sufficient interest will also take into account the often systemic nature of gender discrimination and the particular obstacles women may face in seeking remedies, including danger of reprisals, low levels of literacy and legal literacy and resource constraints. National or international NGOs and groups with a “sufficient interest” in the matter may be less [reluctant to complain]<sup>107</sup>.

A similar opinion has been expressed by Andrew Byrnes and Jane Connors, who argued that Articles 1 and 2 of the Optional Protocol must be at least as extensive as those of other human rights Conventions<sup>108</sup>. For these authors, requiring a person to be a victim of a violation would excessively restrict the range of communications that can be received. Byrnes and Connors also point out that many forms of structural discrimination against women affect many, or perhaps all, women in a society<sup>109</sup>. An NGO would be better positioned than individual victims to bring such complaints.

Although not all parties were satisfied, consensus on this matter was finally reached. This result can be considered a good basis for employing the individual communication procedure by women victims of human rights violations. Articles 1 and 2 of the Optional Protocol describe how this mechanism will function. Article 1 simply supposes that every State that ratifies the Optional Protocol will accept the Committee’s competence to receive communications. Article 1 states: “[a] State Party to this Protocol (“State Party”) recognizes the competence of the Committee on the Elimination of Discrimination against Women (“the Committee”) to receive and consider communications submitted in accordance with Article 2”.

Article 2, on the other hand, is much more controversial and led to many more discussions within the Working Group. This provision establishes who will be able to submit a communication. The disagreements were based on whether communications could be submitted on behalf of a person; and, in this case, whether that specific person’s consent should be required. Finally, Article 2 stated:

Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights set forth in the Convention by that State Party. Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with

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<sup>107</sup> AMNESTY INTERNATIONAL: *The Optional Protocol to the Women’s Convention*, AI: IOR 51/04/97, Dec. 1997, at 10 [hereinafter Amnesty International].

<sup>108</sup> BYRNES and CONNORS: *supra* note 86.

<sup>109</sup> *Ibid.*

their consent unless the author can justify acting on their behalf without such consent<sup>110</sup>.

This was one of the most debated articles and nearly caused the negotiations to fall through once again. In the end, this second Article constitutes a fine balance between the different opinions held by the members of the Working Group. However, because many States were dissatisfied, this Article has raised the most interpretative statements.

#### 4.2.1.2. The Need for Consent when Presenting Communications on Behalf of the Victim

Communications may be presented by individuals or groups of people, on their own or on behalf of someone. This means that a woman, or a group of women, whose rights have been violated by a State Party to the Optional Protocol can submit a communication to the Committee, either by themselves or through another person or organization acting on their behalf. The person, group, or organization that presents the communication, either for herself or on behalf of another, must be under the jurisdiction of the accused State. Article 2 states this provision in a somewhat confusing manner. If the communication is presented on behalf of a victim, "this shall be with their consent unless the author can justify acting on their behalf without such consent"<sup>111</sup>. Therefore, consent will be essential in submitting a communication to the Committee on someone's behalf. This requirement is not as progressive as other international human rights instruments<sup>112</sup>, which make no specific mention of the need for consent. However, many of the delegations were not prepared to compromise on the issue of consent. For the sake of consensus, accepting the inclusion of the need for consent into the Protocol's text instead of into the Committee's rules of procedure was necessary.

As previously stated, Article 2 is one of the provisions that has elicited the greatest number of interpretative statements. For the Canadian government, "the CEDAW Committee has the authority to determine the question of consent according to the particular circumstances of each case and the Committee should interpret Article 2 in a way no less favorable than the existing practice and procedures of other hu-

<sup>110</sup> *Optional Protocol to CEDAW, supra* note 2, Art. 2.

<sup>111</sup> *Ibid.*

<sup>112</sup> See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 77.

man rights treaty bodies”<sup>113</sup>. This view was shared by the European Union and by a group of African countries, including Ghana, Botswana, Kenya, Lesotho, Malawi, South Africa, and Uganda<sup>114</sup>. Denmark<sup>115</sup> also opposed the exclusion of NGOs from the text of Article 2 but interprets the expression “groups of individuals” to mean “NGOs alleging to be victims of a violation can bring a communication to the attention of the Committee”<sup>116</sup>. On the other hand, China wanted Article 2 to be as restrictive as possible, arguing that this provisions should prevent certain persons “from taking advantage of the special situation of the victims for their own purposes by acting in the name of the victims...; the will of the victims should be fully respected, and... their representatives, if any, should be from the same country as the victims”<sup>117</sup>. Clearly, China’s opinion tries to greatly restrict any organization, especially international organizations, from representing a potential victim. The Indian representative issued a similar declaration that interpreted the word “consent” as “not acting contrary to the wishes of the victim and without violating her right to privacy should she so desire”<sup>118</sup>.

#### 4.2.1.3. Justiciability: Are Individual Communications to the CEDAW Committee Limited to Certain Rights in the Convention?

The other problematic issue in the context of the procedure for individual communications is that of *justiciability*. The question here was: which of the rights included in the Convention are eligible for individual communications, since many establish obligations of a programmatic nature for the States Parties? While there were conflicting opinions, these views were not as extreme as in the case of active legitimation. Most governments agreed that all of the Convention’s substantive provisions should be justiciable since all human rights are considered, to a greater or lesser extent, justiciable<sup>119</sup>. Most NGOs and legal scholars that have analyzed this matter share this view<sup>120</sup>. However, reaching a consensus based on the opinions mentioned was not impossible; therefore, parties decid-

<sup>113</sup> U.N. ESCOR, 43d Sess., Annex 2, Supp. No. 7, at 60, E/CN.6/10/Annex 2, 1999 [hereinafter *Interpretative Statements*].

<sup>114</sup> *Ibid.*, p. 64.

<sup>115</sup> Denmark also spoke on behalf of Finland, Iceland, and Norway.

<sup>116</sup> *Interpretive Statements*, *supra* note 113, p. 62.

<sup>117</sup> *Ibid.*, pp. 61-62.

<sup>118</sup> *Ibid.*, pp. 64-65.

<sup>119</sup> *Additional Views*, *supra* note 96.

<sup>120</sup> PROTOCOLO FACULTATIVO: *supra* note 104, pp. 16-17; BYRNES and CONNORS: *supra* note 86; AMNESTY INTERNATIONAL: *supra* note 107, p. 20.

ed to adopt a far different solution than the one initially proposed. Therefore, communications may be presented when there is an alleged violation of "any of the *rights* set forth in the Convention"<sup>121</sup>. In other words, only provisions of the Convention that include rights, as established by Article 2 of the Protocol, may be defended before the Committee. Once again, this controversial matter has resulted in the formulation of interpretative statements by several delegations. The Danish delegation, also on behalf of Finland, Iceland, and Norway, opposed this compromise. As a result of their interpretive statements, the Committee will be able to accept communications from victims of those States concerning "each and every substantive provision set forth in the Convention"<sup>122</sup>.

#### 4.2.2. THE INDIVIDUAL COMMUNICATION PROCEDURE IN ACTION

An individual communication submitted to the CEDAW Committee must go through four stages: (1) the admission of the communication; (2) an in-depth examination of the matter; (3) the Committee's decision; and (4) the follow-up to this decision.

##### 4.2.2.1. Admission of Communications

Articles 3 and 4 of the Optional Protocol establish the procedure for admission of individual communications. Article 3 states that communications must be submitted "in writing" and "shall not be anonymous"<sup>123</sup>. Also, in order for the Committee to study any communication, the communication must refer to a State that has ratified both CEDAW and its Optional Protocol. Article 4 requires "that available domestic remedies have been exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief"<sup>124</sup>. Likewise, the Committee will not accept communications where the same matter has already been examined by the Committee or has been, or is being, examined under another procedure of international investigation or settlement<sup>125</sup>. The Committee will not accept communications incompatible with the provisions of the Convention<sup>126</sup>. A communication is not admissible if it is manifestly ill-founded or not

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<sup>121</sup> *Optional Protocol to CEDAW*, *supra* note 2, Art. 2 (emphasis added).

<sup>122</sup> *Interpretative Statements*, *supra* note 113, p. 64.

<sup>123</sup> *Optional Protocol to CEDAW*, *supra* note 2, Art. 3.

<sup>124</sup> *Ibid.*, Art. 4.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

sufficiently substantiated, nor if it is an abuse of the right to submit a communication<sup>127</sup>. Finally, if the alleged violation occurred prior to the entry into force of this Protocol for the State Party concerned, the communication is not admissible, unless the violation continued after that date<sup>128</sup>. The Protocol includes many of the same admission requirements normally included in international human rights treaties that allow individual communications.

The Committee's first step after admission of the communication is to take measures to protect the victim who made the communication. According to Article 5, once the Committee has received the communication, it may ask the State Party involved to "take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation"<sup>129</sup>. Furthermore, Article 5.2 of the Optional Protocol states that the Committee's adoption of certain provisional measures "does not imply a determination on admissibility or on the merits of the communication"<sup>130</sup>.

#### 4.2.2.2. In-depth Examination of the Matter

The second stage is the in-depth examination of the communication, established in Articles 6 and 7 of the Protocol. Once the Committee has decided that the communication fulfills all of the requisites for admission, it sends the communication, confidentially, to the State involved. Within six months, the State must present to the Committee "written explanations or statements clarifying the matter and the remedy, if any, that may have been provided by that State Party"<sup>131</sup>. The Committee holds private sessions to study the communications. The interest of procedural fairness, communications are considered in light of the information received from all parties.

#### 4.2.2.3. The Committee Reaches a Decision and Communicates with the State

After full consideration of all sides, the Committee reaches a decision. According to Article 7.3, once the Committee has decided on the merit of the communication, "the Committee shall transmit its views

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<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*, Art. 5.

<sup>130</sup> *Ibid.*, Art. 5, para. 2.

<sup>131</sup> *Ibid.*, Art. 6, para. 2.

on the communication, together with its recommendations, if any, to the parties concerned”<sup>132</sup>. Therefore, the CEDAW Committee can make certain recommendations to a State Party to the Optional Protocol when it determines the State has violated the Convention. Furthermore, the State Party must give “due consideration to the views of the Committee, together with its recommendations, if any”<sup>133</sup>.

#### 4.2.2.4. Follow-up to the Committee’s Decision

After the State receives the Committee’s decision regarding the merits of the communication, it must respond with a report and actions to implement the recommendations. The State must submit to the Committee “within six months, a written response, including information on any action taken in the light of the views and recommendations of the Committee”<sup>134</sup>. The Protocol also allows for a follow-up by the Committee. Article 7.5 states that the Committee may invite the State Party “to submit further information about any measures the State Party has taken in response to its views or recommendations, if any, including as deemed appropriate by the Committee, in the State Party’s subsequent reports under Article 18 of the Convention”<sup>135</sup>. Therefore, the Committee will continue to track the fulfillment of its views and recommendations.

Several individual communications have been submitted before the Committee so far but, unfortunately, only in a limited number of cases the Committee has taken a final decision on the merits. In the first case before the Committee, *Ms. B-J v. Germany*<sup>136</sup>, the author alleged that she was subject to gender-based discrimination under the statutory regulations regarding the law on the legal consequences of divorce (equalization of accrued gains, equalization of pensions, and maintenance after termination of marriage). According to her view, the regulations systematically discriminate against older women with children who are divorced after long marriages in which women usually assume the role of homemaker. She defended that the law does not take into account the improved or devalued “human capital” of marriage partners. She maintained that this constitutes discrimination, as it results in

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<sup>132</sup> *Ibid.*, Art. 7, para. 3.

<sup>133</sup> *Ibid.*, Art. 7, para. 4.

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid.*, Art. 7, para. 5.

<sup>136</sup> Communication no. 1/2003, Decision adopted on 14 July 2004, thirty-first session, A/59/38.

providing a husband with his wife's unremunerated labour. Unfortunately, the Committee decided to declare the communication inadmissible under Article 4.1, for the author's failure to exhaust domestic remedies, and Article 4.1.e), because the disputed facts occurred prior to the entry into force of the Optional Protocol for the State Party and did not continue after that date<sup>137</sup>.

Another interesting case that also was declared inadmissible is *Rahime Kayhan v. Turkey*<sup>138</sup>. In this case, the author, a teacher of religion and ethics, complained that she was a victim of a violation of Article 11 of CEDAW by Turkey by dismissing her and terminating her status as a civil servant for wearing a headscarf. Allegedly she is one of more than 1.500 women civil servants who have been dismissed for wearing a headscarf. It was a very interesting case from different angles, since it involved questions regarding freedom of religion, right to work, gender discrimination on religious grounds... It is a pity that once again the communication was declared inadmissible by the Committee under Article 4.1 of the Optional Protocol for failure to exhaust domestic remedies<sup>139</sup>.

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<sup>137</sup> *Ibid.*, para 8.8. Two members of the Committee, Krisztina Morvai and Belmi-houb-Zerdani, issued a dissenting individual opinion, considering the communication as "partly admissible". In their view, "the separate claim regarding the ongoing proceedings concerning the issues of accrued gains and spousal maintenance in fact do meet all admissibility criteria". In the present case, proceedings as regards spousal maintenance and accrued gains had been ongoing for about five years. The author of the communication, as so many women in the world, devoted her whole adult life to unpaid work in the family, while her husband had advanced his career and his income. Her financial situation was very uncertain at the time of submitting the communication, since she is considered an "older woman" and, therefore, has very little chance to enter the labour market. Under all these circumstances, the domestic courts should have determined and granted her a decent maintenance a long time ago. Then, the two members conclude by defending that "for an older woman who raised three children and worked for the benefit of her spouse..., living in such uncertainty five years after the divorce is rightly considered to be unacceptable and a serious violation of her human rights". Taking all this into consideration, the opinion of the two dissenting members of the Committee is that "the application of domestic remedies is *unreasonably prolonged*". Therefore, the general rule in Article 4.1 concerning the exhaustion of all domestic remedies does not apply here, instead the "unreasonable prolongation" exception to the rule applies, and the communication should have been declared as partially admissible.

<sup>138</sup> Communication No. 8/2005, Decision adopted on 27 January 2006, thirty-fourth session.

<sup>139</sup> *Ibid.*, para. 7.9. Other challenging case that was declared inadmissible by the Committee had to do with the communication by a Spanish woman on the ground that, according to the historical rules of succession in Spain, men are given primacy over women in the ordinary line of succession of titles of nobility, see Communication No. 7/2005, Decision adopted on 9 August 2007, thirty-ninth session.



A very interesting case in which the Committee has adopted its views after considering the merits of the communication is *Ms. A.T. v. Hungary*<sup>140</sup>, a case related to gender violence<sup>141</sup>. The author of the communication alleged that for more than four years she had been subjected to severe domestic violence by her husband. Although the life of the author has been threatened on several occasions, she did not go to a shelter, reportedly because no shelter in the whole country is equipped to take in a fully disabled child together with his mother and sister. On the other hand, the author also stated that there were no protection orders or restraining orders available under Hungarian law. On the contrary, her husband had not been detained at any time and no action had been taken by the Hungarian authorities to protect the author from him. In sum, the author alleges the violation of Articles 2.a), b) and e), Article 5.a) and Article 16 of CEDAW by Hungary, for its failure to provide effective protection from her husband. She claims that the State passively neglected its "positive" obligations under CEDAW and supported the continuation of a situation of domestic violence against her. At the same time, on 10 October 2003 the author of the communication also urgently requested effective interim measures, in accordance with Article 5.1 of the Optional Protocol, in order to avoid possible irreparable damage to her, namely to save her life from the violent conduct from her husband. On 20 October 2003, ten days after the request, the Committee sent a note verbale to the State Party for its urgent consideration, requesting the Government to provide immediate, appropriate and concrete preventive interim measures of protection of the author, as may be necessary, to avoid irreparable damage to her. The Committee invited Hungary to provide information no later than 20 December 2003 of the type of measures it had taken to give effect to the Committee's request of interim measures. On July 2004 the Working Group on Communications came to the conclusion that "the State Party had furnished little information on the interim measures taken to avoid irreparable damage to

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<sup>140</sup> Communication No. 2/2003, Views adopted on 26 January 2005, thirty-second session.

<sup>141</sup> There are two other dramatic cases brought by the Vienna Centre against Domestic Violence and the Association for Women's Access to Justice on behalf of victims of gender violence against Austria in which the Committee decided that the State violated the rights to life and to physical and mental integrity under Article 2 and Article 3 of the Convention read in conjunction with Article 1 and General Recommendation 19 of the Committee, see Communication No. 5/2005, Decision adopted on 6 August 2007, thirty-ninth session, para. 12.3, and Communication No. 6/2005, Decision adopted on 6 August 2007, thirty-ninth session, para. 12.3.

the author". Accordingly, the Working Group requested that the author "be immediately offered a safe place for her and her children to live and that the State Party ensure that the author receive adequate financial assistance, if needed"<sup>142</sup>. As a response to the communication by the author, the State Party assumes that "the system of remedies against domestic violence is incomplete in Hungarian law and that the effectiveness of the existing procedures is not sufficient". For that reason, Hungary instituted a comprehensive action programme against domestic violence in 2003, and on 16 April 2003 the Hungarian Parliament adopted a resolution on the national strategy for the prevention and effective treatment of violence within the family, to be followed by a number of legislative and other actions<sup>143</sup>. More than one year later after the adoption of the national strategy just mentioned, the State Party had to admit that "the legal and institutional system in Hungary is not ready yet to ensure the internationally expected, coordinated, comprehensive and effective protection and support for the victims of domestic violence"<sup>144</sup>. Once the Committee had ascertained that it had no reason to declare the communication inadmissible, it started with the consideration of the merits. First of all, it recalled its General Recommendation no. 19 on violence against women, in which the Committee addressed the question of whether States can be held accountable for the conduct of non-State actors. As stated in this very relevant general recommendation, "... discrimination under the Convention is not restricted to action by or on behalf of Governments.... Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation". The Committee noted that the State Party "has admitted that the remedies pursued by the author were not capable of providing immediate protection to her against ill-treatment by her former partner..."<sup>145</sup>. On the other hand, the Committee also noted that for four years and continuing to the time when it was considering the communication, the author felt threatened by her former partner, she was battered by him, and she was unsuccessful to temporarily or permanently bar her partner from the apartment where she and her children have continued to reside.

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<sup>142</sup> *Ibid.*, para. 4.7.

<sup>143</sup> *Ibid.*, para. 5.7. See the different initiatives taken by Hungary from para. 5.7 to para. 5.10.

<sup>144</sup> *Ibid.*, para. 7.4.

<sup>145</sup> *Ibid.*, para. 9.3.

The author could not have asked for restraining or protection order since neither option exist in the State Party. Finally, she could not flee to a shelter because none are equipped to accept her together with her children, one of whom is fully disabled. Last, but not least, the Committee also found the lack of effective legal and other measures to deal in an appropriate manner with its request for interim measures. In light of all these considerations, the Committee concluded that "the State Party has failed to fulfil its obligations and has thereby violated the rights of the author under Article 2.a), b) and e) and Article 5.a) in conjunction with Article 16"<sup>146</sup> of CEDAW, and made a number of recommendations to Hungary. The recommendations have a twofold nature: a) *recommendations concerning the author of the communication*: to take immediate and effective measures to guarantee the physical and mental integrity of the author of the communication and her family; to ensure that she is given a safe home, receives child support and legal assistance as well as reparation proportionate to the physical and mental harm undergone and the gravity of the violation of her rights, and b) *general recommendations*: to respect, protect, promote and fulfil women's human rights, including the right to be free from all forms of domestic violence; to assure victims of domestic violence the maximum protection of the law by acting with due diligence to prevent and respond to such violence; to take all necessary measures to ensure that the national strategy for the prevention and effective treatment of violence within the family is promptly implemented and evaluated; to take all necessary measures to provide regular training on CEDAW and its Optional Protocol thereto to judges, lawyers and law enforcement officials; to implement expeditiously and without delay the Committee's concluding comments of August 2002 on the combined fourth and fifth periodic report of Hungary in respect of violence against women and girls, in particular the recommendation that a specific law be introduced prohibiting domestic violence against women, which would provide for protection and exclusion orders as well as support services, including shelters; to investigate promptly, thoroughly and seriously all allegations of domestic violence and bring offenders to justice; to provide victims of domestic violence with safe and prompt access to justice, to provide offenders with rehabilitation programmes and programmes on non-violent conflict resolution methods. As we can see, the Committee has recommended a very comprehensive and systematic set of measures to be able to deal

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<sup>146</sup> *Ibid.*, para. 9.6.

effectively with the plague of domestic violence, one of the gravest forms of structural violation of women's rights and dignity. Finally, as mentioned before, the Optional Protocol provides for a mechanism of follow-up of the views and recommendations of the Committee. According to Article 7.4 of the Protocol, the State Party shall give due consideration to the views of the Committee, together with its recommendations, and shall submit to the Committee, within six months, a written response, including any information on any action taken in light of its views and recommendations. The State Party was also requested to publish the Committee's views and recommendations and to have them translated into the Hungarian language and widely distributed in order to reach all relevant sectors of society.

#### 4.2.3. THE INQUIRY PROCEDURE

##### 4.2.3.1. Negotiations for Inclusion of an Inquiry Procedure in the Protocol and the Compromise of the Opt Out Clause

The inclusion of an inquiry procedure is one of the most sensitive matters for many States, due to the implications that such a procedure may have. Nonetheless, most of the countries that participated in the Working Group for the elaboration of an Optional Protocol to CEDAW supported its inclusion. Countries such as Cuba, China, India, and Egypt are among those who most vehemently opposed the introduction of the inquiry procedure<sup>147</sup>. The Chinese delegation believed there should only be one communication procedure in the Optional Protocol to the Convention<sup>148</sup>. On the other hand, other delegations, including the Spanish one, were firmly in favor of the inquiry procedure. The Spanish government thought that the Protocol should contain both procedures, and that the inquiry procedure would be essential to confront grave and systematic violations of women's rights<sup>149</sup>.

The inquiry procedure is a protection mechanism for the rights of women that demands cooperation and transparency from the States. This provision gives the CEDAW Committee ample power to open an inquiry in those countries where it believes grave or systematic violations of women's rights are being committed. For this reason, inclusion of this procedure has been one of the main points for debate. This clash of opinions led the President of the Working Group to propose

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<sup>147</sup> *Additional Views*, *supra* note 96.

<sup>148</sup> *Ibid.*, p. 16, para. 74.

<sup>149</sup> *Ibid.*, p. 16, para. 76.

the inclusion of Article 10<sup>150</sup> during the March 1998 sessions. The proposed Article included an *opt-out clause*, which would allow any State to declare, at the moment of ratification of the Optional Protocol, that it did not want to be bound to this inquiry procedure. This solution seemed to satisfy the delegations opposed to inquiry, although the Chinese representative proposed including an opt-in rather than an opt-out clause<sup>151</sup>. According to this opt-in clause, each State, at the moment of ratification of the Optional Protocol, would declare that it acknowledges the competence of the CEDAW Committee to open an inquiry procedure. This proposal was supported by other delegations, including the Cuban and Algerian delegations. However, these same delegations, conscious of being in the minority, expressed their willingness to be “flexible” on this point<sup>152</sup>.

As a result of this flexibility, the Optional Protocol to CEDAW has incorporated an inquiry procedure. However, in order to reach a minimum of consensus, the opt-out clause had to be accepted.

#### 4.2.3.2. Operation of the Inquiry Procedure

This inquiry procedure is included in Articles 8, 9, and 10 of the Protocol. Article 8.1 describes the circumstances under which the Committee can initiate an inquiry and the extent of State cooperation that is required. If the Committee receives reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned.

Once the State has submitted its observations regarding the alleged violations the Committee will analyze them. Then, “the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee”<sup>153</sup>. Furthermore, “where warranted and with the consent of the State Party, the inquiry may include a visit to its territory”<sup>154</sup>. Although the procedure gives the CEDAW

<sup>150</sup> It was Article 11(b) of the Draft Optional Protocol proposed during the 1998 sessions, but has since become Article 10 in the adopted Protocol. See GÓMEZ ISA: *supra* note 99.

<sup>151</sup> *Additional Views, supra* note 96, p. 16, para 74.

<sup>152</sup> *Commission on the Status of Women Report on the 42d Session*, U.N. ESCOR, 42d Sess., Annex 2, Supp. No. 7, p. 78, U.N. Doc. E/CN.6/12, 1998.

<sup>153</sup> *Optional Protocol to CEDAW, supra* note 2, Art. 8, para. 2.

<sup>154</sup> *Ibid.*, Art. 8, para. 2.

Committee ample powers to investigate, it must always count on the cooperation of the State under investigation. Additionally, procedure requires this inquiry to “be conducted confidentially”<sup>155</sup>.

When the inquiry is complete, the Committee will communicate its conclusions, comments, and recommendations to the State Party involved<sup>156</sup>. The State then has six months to submit its own observations to the Committee<sup>157</sup>. Furthermore, the Committee may invite the State to include in subsequent reports, required by Article 18 of CEDAW<sup>158</sup>, “details of any measures taken in response to an inquiry”<sup>159</sup>. As discussed previously, an opt-out clause had to be admitted into the framework of the inquiry procedure due to the need for a consensus. Through this compromise, the States that objected to this type of procedure could accept the Protocol without being bound by the inquiry procedure. This was, obviously, a necessary sacrifice, if the inquiry procedure was to be included in the Protocol. Many States still absolutely refuse to accept the inquiry procedure, because of its potential implications. The opt-out clause is included in Article 10 of the Protocol, which states “[e]ach State Party may, at the time of signature or ratification of this Protocol or accession hereto, declare that it does not recognize the competence of the Committee provided for in Articles 8 and 9”<sup>160</sup>.

The inquiry procedure has been used once by the Committee to investigate the abduction, rape and murder of women in and around Ciudad Juárez (Chihuahua, Mexico), and a very challenging report has been issued by the Committee with detailed findings and demanding recommendations to the Government of Mexico<sup>161</sup>. The procedure was initiated when the NGOs Equality Now and Casa Amiga, an international and a local NGO respectively, requested in October 2002 the Committee to conduct an inquiry under Article 8 of the Optional Protocol<sup>162</sup>. The two NGOs provided specific and precise information about the alleged violations of women’s human rights. In January 2003 the Committee requested two members of the Committee (ac-

<sup>155</sup> *Ibid.*, Art. 8, para. 5.

<sup>156</sup> *Ibid.*, Art. 8, para. 3.

<sup>157</sup> *Ibid.*, Art. 8, para. 4.

<sup>158</sup> Under Article 18 of CEDAW, States must submit a report to the Committee within one year after ratification and every five years thereafter. CEDAW, *supra* note 1, Art. 18.

<sup>159</sup> *Optional Protocol to CEDAW*, *supra* note 2, Art. 9, para. 1.

<sup>160</sup> *Ibid.*, Art. 10.

<sup>161</sup> CEDAW/C/2005/OP.8/MEXICO, 32<sup>nd</sup> session, 10-28 January 2005.

<sup>162</sup> Mexico had ratified the Optional Protocol on 15 March 2002. Therefore, the inquiry procedure was applicable to Mexico.

ording with Article 82 of its Rules of Procedure) to undertake a detailed examination of the information provided. Taking into account this detailed examination by the two members, the Committee concluded that the information provided by the two NGOs "was reliable and that it contained substantiated indications of grave and systematic violations of rights set forth in the Convention"<sup>163</sup>. In accordance with Article 8.1 of the Optional Protocol, the Committee decided to invite the Government of Mexico to cooperate with it in the examination of the information and, in order to do that, to submit its observations by May 2003. On 15 May Mexico submitted its observations, including information about different actions taken to address the situation in Ciudad Juárez. In the observations, the Government also invited the Committee to visit the country and committed to guarantee the conditions and facilities necessary to conduct the inquiry in total freedom.

On June 2003 Casa Amiga, Equality Now and the Mexican Committee for the Defence and Promotion of Human Rights submitted additional information to the Committee. The new information referred to "newly-discovered murders, the ongoing impunity of those responsible, threats directed towards those calling for justice for women, growing frustration on account of the authorities' lack of due diligence in investigating and prosecuting the crimes in an appropriate manner and an emerging pattern of irregularities and incidents pointing to the possible complicity of the authorities in the continuing violence against women in Ciudad Juárez"<sup>164</sup>. In July 2003, after having examined carefully the information submitted by the Government and the new information provided by the NGOs just mentioned, the Committee decided to conduct a confidential inquiry under Article 8.2 of the Optional Protocol. For that purpose, it nominated two of its members (Ms. María Yolanda Ferrer Gómez and Ms. Maria Regina Tavares da Silva) to conduct the inquiry. According to Article 8.2 abovementioned, the Committee requested the Government of Mexico to consent to a visit by the two members to be carried out in October 2003. On August 2003 the Government replied positively and made a commitment to provide all the assistance necessary to guarantee the adequate conducting of the visit. The official visit of the two experts of the Committee took place from 18 to 26 October 2003, and visited both the Federal District and the State of Chihuahua (Chihuahua City and Ciudad Juárez). The

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<sup>163</sup> CEDAW/C/2005/OP.8/MEXICO..., *op. cit.*, para. 4.

<sup>164</sup> *Ibid.*, para. 6.

experts conducted interviews with official authorities, organizations of civil society and the mothers of the victims.

In the light of all the information obtained by the experts both before and during the visit to Mexico, the Committee finds that the facts alleged "constitute grave and systematic violations"<sup>165</sup> of the provisions of the CEDAW. Besides, the Committee "is greatly concerned at the fact that these serious and systematic violations of women's rights have continued for over 10 years, and notes with consternation that it has not yet been possible to eradicate them, to punish the guilty and to provide the families of the victims with the necessary assistance"<sup>166</sup>. Finally, the Committee is also aware that the methods used in the murders and disappearances in Ciudad Juárez have been also used more recently in Chihuahua City and, apparently, in other parts of Mexico<sup>167</sup>. These facts have led the Committee to conclude that "we are faced not with an isolated although very serious situation, nor with instances of sporadic violence against women, but rather with systematic violations of women's rights, founded in a culture of violence and discrimination that is based on women's alleged inferiority, a situation that has resulted in impunity"<sup>168</sup>.

Taking into consideration all these findings and conclusions, the Committee made a whole set of precise and concrete recommendations to the Government of Mexico. These recommendations include, among others, the following: the need of coordination and participation at all levels of authority, with respect to both their mutual relations and to their relations with civil society, with a view to increasing the effectiveness of the mechanisms and programmes adopted; incorporate a gender perspective into all investigations, policies to prevent and combat violence, bearing in mind the specific characteristics of gender-based violence against women; constant consultation and dialogue

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<sup>165</sup> *Ibid.*, para. 259.

<sup>166</sup> *Ibid.*, para. 260.

<sup>167</sup> There are some worrying reports of these methods being also used in other countries of the region. According to the UN Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, "the pattern of murders of women in Guatemala show similarities with those reported in El Salvador, Honduras and Mexico. The rate at which women are being killed, however, is much higher in Guatemala. Although 370 women were killed in Chihuahua, Mexico, over a 10-year period (1993 to 2003), nearly the same number of women was killed in Guatemala in 2003 alone", E/CN.4/2005/72/Add.3, 10 February 2005, *Mission to Guatemala*. See also AMNESTY INTERNATIONAL: "Intolerable killings. Mexico: 10 years of abductions and murder in Ciudad Juárez and Chihuahua", AMR 41/026, 2003.

<sup>168</sup> *Ibid.*, para. 261.



with civil society organizations; investigate thoroughly and punish the negligence and complicity of public authorities in the disappearances and murders of women, the fabrication of confessions under torture, their tolerance of persecution, harassment or threats directed against victims' relatives, members of organizations representing them and other persons involved in defending them; establish early warning and emergency search mechanisms for cases involving missing women and girls in Chihuahua State; guarantee that the mothers and relatives of the victims be treated with due respect, consideration, compassion, and sympathy for their grief, and punish the authorities responsible for this cruel and inhuman treatment; urgently implement and strengthen effective measures for the protection of persons and institutions working to clear up the facts; sensitize all State and municipal authorities to the need for violence against women to be regarded as a violation of fundamental rights; organize, with the active participation of civil society, campaigns to eradicate discrimination against women, promote equality between women and men and contribute to women's empowerment; include in educational and training programmes information and sensitization modules on equality and on gender violence as a violation of human rights; promote training and capacity-building for public officials, judges and judicial personnel in the area of gender violence and human rights; set up violence prevention programmes and policies; measures of economic, medical and psychological reparation for victims of violence and the relatives of the murdered and abducted women...

As we can see, the inquiry procedure may become a useful tool to face this kind of grave and systematic violations of women's rights, as the case just analysed shows. On the other hand, the usefulness in practice of the procedure to really put an end to structural violations of women's dignity remains to be seen.

#### 4.2.4. THE PROHIBITION AGAINST RESERVATIONS TO THE OPTIONAL PROTOCOL

One final problem, discussed *ad nauseam* by the Working Group, was whether to allow reservations to the Optional Protocol to CEDAW. For many delegations it was essential that the Protocol, given its fundamentally procedural character, not allow for the possibility of including reservations. Allowing reservations could seriously weaken the Protocol, contrary to its aim of increasing the efficacy of CEDAW<sup>169</sup>. In this respect, the statements of Silvia Cartwright, an ex-

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<sup>169</sup> *Commission on the Status of Women Report on the 42d Session, supra* note 141.

pert from the CEDAW Committee, were especially eloquent. In her opinion, one of the main reasons for the poor efficacy of CEDAW was that some of the States made a great number of reservations. In many cases, these reservations work against the object and purpose of the Convention itself. For this reason, Cartwright believed it would be desirable to include a provision that would expressly prohibit parties from establishing reservations at the moment of its ratification. One way to do this would be to insert the concerns of the States into the Protocol's text so that the parties would not have to resort to formulating reservations. With the goal of avoiding reservations at all costs, during the March 1998 sessions the President of the Working Group handed out a document that studied the possibility of including, within the Protocol itself, any problems that the States were likely to face<sup>170</sup>. As a result, the Optional Protocol to CEDAW rejects the possibility of formulating reservations. This is, without a doubt, one of the Protocol's most positive aspects, since this action may set a good precedent for future developments in international human rights law. Thus, according to Article 17, "[n]o reservations to this Protocol shall be permitted"<sup>171</sup>.

Naturally, this Article has inspired a large number of interpretative statements. The Algerian government expressed one of the most interesting opinions, arguing that the limitation against reservations to the Protocol should not become a precedent to either the Vienna Convention on the Law of Treaties or customary international law prohibiting adherence to international agreements<sup>172</sup>. This delegation emphasized that it accepted Article 17 of the Protocol simply because this action is optional, of a procedural nature, and because it did not want to break the consensus<sup>173</sup>. The delegations from China, Egypt, India, Israel, and Jordan<sup>174</sup> expressed a similar opinion. All indicated that the prohibition of reservations established by Article 17 of the Optional Protocol should not be considered a precedent for future instruments and for the development of international human rights law<sup>175</sup>. Lastly, the United States likewise made known its "serious concern with Article 17",

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<sup>170</sup> This is an extremely valuable document because it attempts to address the various problems that the States likely would face in ratifying the Optional Protocol and tries to include these obstacles in the Protocol's text. *Reservations and the Draft Optional Protocol*, March 1998.

<sup>171</sup> *Optional Protocol to CEDAW*, *supra* note 2, Art. 17.

<sup>172</sup> *Interpretative Statements*, *supra* note 113, at 59.

<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid.*, p. 61.

<sup>175</sup> *Ibid.*

which it considered "contrary to the well established practice of permitting appropriate reservations"<sup>176</sup>.

## 5. Conclusion

Ratification of the Optional Protocol to CEDAW will strengthen the protection mechanisms of women's rights. Furthermore, it will place the Convention alongside the most important human rights treaties adopted by the United Nations. The existence of more demanding protection mechanisms in the Protocol should also encourage better compliance from States Parties. Mechanisms such as the individual communications and inquiry procedures will force the States that ratify the Protocol to initiate significant efforts towards a better and more effective application of CEDAW. States Parties will take these positive steps, if only as a means to avoid being called before the CEDAW Committee. Likewise, the CEDAW Committee will contribute, through its opinions and recommendations, to a better understanding of the Convention. The Committee's expanded powers will lead, above all, to a better and more rigorous application of the Convention by the States. In this sense, the Committee will be responsible for developing a very interesting body of jurisprudence on diverse aspects of the Convention.

The active participation of States is required to strengthen the movement for the defense of women's rights. This need became clear during the process of creating and discussing the Draft Optional Protocol when States' participation was relatively scarce<sup>177</sup>. According to the Inter-American Institute of Human Rights, which has been an important lobby in support of the Optional Protocol, the women's movement has had limited participation in elaborating and negotiating the Protocol<sup>178</sup>. A small group of NGOs and women were involved in the technical and legal aspects of the Protocol. However, this process of elaborating the Protocol did not involve a defined political strategy from within the women's movement. The Institute has expressed concern that this process will not become strong until the women's movement claims the document as its own<sup>179</sup>. At this point, States Parties

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<sup>176</sup> *Ibid.*, p. 71.

<sup>177</sup> This lack of participation has been especially serious in the case of Spain, which showed scarce familiarity with CEDAW and took almost no part in the discussions and negotiations surrounding the Optional Protocol.

<sup>178</sup> PROTOCOLO FACULTATIVO, *supra* note 104, pp. 143-44.

<sup>179</sup> *Ibid.*

must disseminate information about the Protocol's content in order to make women aware of the new protective mechanisms available to advance their human rights<sup>180</sup>. The Protocol itself establishes that "each State Party undertakes to make widely known and to give publicity to the Convention and this Protocol"<sup>181</sup>.

Finally, as its name implies, the Protocol is an optional instrument. Therefore, the effectiveness of the new mechanisms depends on ratification by States Parties to CEDAW. Once the General Assembly of the United Nations adopted the text of the Protocol in October 1999, the process of ratification was swift and the Optional Protocol entered into force on 22 December 2000. As of 5 November 2008, ninety four States have ratified the Optional Protocol to CEDAW. However, as a result of the inclusion of stronger enforcement mechanisms, many States will be reticent to ratify this instrument. Obviously, those States that are responsible for serious violations of women's rights and that were the most obstructionist during the elaboration process are not likely to ratify the Optional Protocol. The international community should encourage these States to change their positions in this regard. All States Parties, organizations, and individuals have the responsibility to give this instrument life for use in the fight against discrimination of all women.

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<sup>180</sup> We must admit that, in this case, the Spanish government has already adopted measures to transmit the content of both the Convention and the Protocol. In the first place, it has edited a bilingual English-Spanish version of CEDAW and the Protocol, MINISTERIO DE TRABAJO Y ASUNTOS SOCIALES-INSTITUTO DE LA MUJER: *La Convención sobre la Eliminación de Todas las Formas de Discriminación contra la Mujer y el Protocolo Opcional a la Convención*, 1999. Likewise there has been a Seminar on the Protocol, INSTITUTO DE LA MUJER: *El Protocolo Opcional a la Convención sobre la Eliminación de Todas las Formas de Discriminación contra la Mujer*, 1999. The Seminar was held on 25 May 1999, with the participation of Jane Connors, from the Division for the Advancement of Women of the United Nations Social and Economic Affairs Department, and of Aloisia Wörgetter, President of the Working Group for the elaboration of an Optional Protocol to CEDAW.

<sup>181</sup> *Optional Protocol to CEDAW*, *supra* note 2, Art. 13.

# The Convention Against Torture and its Optional Protocol

Fernando M. Mariño Menéndez

**Summary:** 1. The Relevance of the Convention to the International Community. 2. Obligations which the Convention imposes on Member States. 3. Norms of general International Law regarding torture and ill-treatment, and their relationship with those set out in the Convention. 4. The control system set up by the Convention: the Committee Against Torture and its procedures. 4.1. The examination of the reports by States Parties. 4.2. The procedure of *confidential inquiry*. 4.3. The examination of communications submitted by States Parties. 4.4. The examination of individual complaints. 5. Publication of the proceedings and results of the various procedures before the Committee. Observations. 6. The Optional Protocol to the Convention Against Torture. 7. Final considerations.

## 1. The Relevance of the Convention to the International Community

The *International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* constitutes an essential milestone in the fight of the international community and International Law against such criminal acts. As the number of States Parties increases, so too does its legal relevance. Efforts have finally culminated in providing it with an Optional Protocol, which reinforces action in favour of the prevention of torture and in recent years there have also been reforms of the different Rules of Procedure of its Committee, so as to make its working more efficient. It is useful therefore in this short essay to note those normative innovations which are, basically, procedural in nature.

The Convention (hereinafter referred to as the CAT) was adopted on 10 December 1984, through resolution 39/46<sup>1</sup> of the General Assembly

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<sup>1</sup> The specific antecedents of the Convention can be found in Article 5 of the Universal Declaration of Human Rights (Res. GA 217 A (III) of 10-12-1948), Article 7 of the International Covenant on Civil and Political Rights (Res. GA 2200 A (XXI), 16 December 1966), and the Declaration on the Protection of all people from Torture and other cruel

of the United Nations, opened for signature from 4 February 1985, and entered into force, in accordance with its Article 27, on 26 June 1987. The Convention can be denounced by any State (although it never effectively has been), and expressly only admits reservations in accordance with two of its provisions, Article 28, which permits reserving the procedure allowing a "confidential inquiry" established under Article 20, and Article 30, which allows the reservation of the obligation to submit to arbitration and successively to the International Court of Justice any dispute concerning the interpretation or application of the Convention, arising among States Parties, which can not be settled by negotiation. However, it does not prohibit other reservations which some other States Parties have made known, the most significant of these being those which attempt to make their domestic law in general, or some of its particular interpretations, prevail over the provisions of the Convention, particularly the reservations of certain Islamic countries and of the United States<sup>2</sup>.

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or inhuman treatment or punishment (Res. GA 3452 (XXX), 9 December 1975). See *United Nations Treaty Collection* (as of 5 February 2001). *Multilateral treaties deposited with the Secretary-General*. Treaty I-IV-12. As general monographs of the UN Convention against Torture (the object of significant study since its coming into force), the following can be highlighted: GONZÁLEZ GONZÁLEZ, R.: *El control internacional de la prohibición de la tortura y otros tratos o penas inhumanos y degradantes*, Granada, 1998; BOULESBAA, A.: *The United Nations Convention on Torture and the prospects for enforcement*, La Haya, M. Nijhoff, 1999. The selection of materials from practice is useful, especially that concerning the application of the European Convention for the prevention of torture, to be found in BOEREFUJN, I. (ed.): *Prevention of Torture (a Digest of cases)*, OLP, SIM, Dordrecht, 2001. More specifically, see RODLEY, N.S.: *The treatment of prisoners under International Law*, 2<sup>nd</sup> ed., Oxford, 1999. See also *The definition of torture. Proceedings of an expert Seminar*, APT, Geneva, 2001; RODLEY, N.S.: "The definition(s) of torture in International Law", in FREEMAN, M.D. (ed.): *Current legal problems*, Oxford, 2002, vol. 55, pp. 467 ff.; EVANS, M.D.: "Getting to grips with torture", *International and Comparative Law Quarterly*, Vol. 51, April 2002, pp. 365 ff.; FERNÁNDEZ PUYANA, D.: *La noción de tortura y otros tratos o penas crueles, inhumanos o degradantes en el marco del Comité de derechos humanos y del Comité contra la tortura de Naciones Unidas*, Barcelona, 2003; FERNÁNDEZ DE CASADEVANTE, C.: "Régimen jurídico internacional de la lucha contra la tortura (I)", in FERNÁNDEZ DE CASADEVANTE, C. (coord.): *Derecho Internacional de los derechos humanos*, 2<sup>nd</sup> ed., Madrid, 2003, pp. 265 ff.; FAIREN GUILLÉN, V.: *Habeas corpus y tortura oficializada*, Zaragoza, 2005. HOPE, D.: "Torture", *International and Comparative Law Quarterly*, Vol. 53, October 2004, pp. 807 ff.; VAN BOVEN, TH.: "Urgent appeals on behalf of torture victims", in *Mélanges en hommage au Doyen G. Cohen-Jonathan*, Paris, 2004, pp. 1637 ff.; MARIÑO MENÉNDEZ, F.M.: "En torno a la prohibición internacional de la tortura", in *Pacis Artes. Libro Homenaje al Prof. J. González Campos*, Vol. I, Madrid, 2005, pp. 402-482; EDWARDS, A.: "The 'feminizing' of torture under International Human Rights Law", *Leiden Journal of International Law*, Vol. 19, 2006, pp. 349-391.

<sup>2</sup> See HRI/MC/2008/4. The following States Parties have declared that they do not accept the obligatory jurisdiction of the International Court of Justice: Afghanistan, Saudi Arabia, Bahrain, Chile, China, Cuba, United States, France, Ghana, Equatorial

On 18 April 2008, a total of 145 States (including the Holy See) had either ratified it, had acceded, or had succeeded another State as a member<sup>3</sup>. These figures make it the second least accepted of the eight United Nations Conventions, already in force, most significant due to their general nature and universality, regarding the protection of human rights<sup>4</sup>.

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Guinea, Indonesia, Israel, Kuwait, Mauritania, Morocco, Monaco, Panama, Poland, and Turkey. These others have declared not accepting the procedure of Article 20: Afghanistan, China, Equatorial Guinea, Israel, Kuwait, Mauritania, Morocco, Saudi Arabia and Syria. The desire to make internal law prevail has, in many respects, caused the reservations of Bangladesh, Botswana, United States, and Qatar, which have all been strongly objected to. The insistence of the United States to redefine the Convention's conception of torture through reservations is notable, as is their attempt to make it fit in with the norms of its domestic law and in particular its Constitution. Objections to the reservations of the United States have come from Finland, the Netherlands, and Sweden. For its part, Chile (which in 1990 withdrew and reinterpreted some of its earlier reservations) has maintained its objections, according to which "in its relations with American States that are Parties to the Inter-American Convention to Prevent and Punish Torture, it will apply that Convention in cases where its provisions are incompatible with those of the present Convention". In any case, the validity of a "regional international law" against torture is not admissible, if it were contradictory to universal law. The 1984 Convention admits (Article 1.2) the prevalence of "provisions of wider application" from any international instrument or national legislation. Also the Article 16.2 of CAT establishes: "The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion". On the other hand, the amendments adopted on 9 September 1992 by States Parties (accepted by 27 among them) have not come into force; they are aimed at superseding the seventh paragraph of Article seventeen and the fifth of Article eighteen, and inserting a new fourth paragraph into Article eighteen, according to which members of the Committee against Torture will receive remuneration from the funds of the United Nations, in accordance with the terms and conditions decided upon by the General Assembly. The General Assembly showed its support for these amendments in its resolution 47/111 of 16 December 1992.

<sup>3</sup> See the following web page: [ohchr.org/english/bodies/ratification/index.htm](http://ohchr.org/english/bodies/ratification/index.htm). The last States becoming Parties to the Convention are: Andorra (22-9-2006), Montenegro (23-10-2006), S. Marino (27-11-2006) and Thailand (2-10-2007).

<sup>4</sup> Without being members, eleven States have signed it: Comoros, Gambia, Guinea-Bissau, India, Nauru, Dominican Republic, Pakistan, São Tomé e Príncipe, and Sudan. Forty nine States and territories are not parties, of which eleven are American (Bahamas, Barbados, Dominica, Granada, Haiti, Jamaica, Dominican Republic, St Kitts and Nevis, Santa Lucia, Surinam, and Trinidad and Tobago); fourteen are in Oceania (Cook Islands, Fiji, Kiribati, Marshall Islands, Federated States of Micronesia, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu); fourteen are Asian (Bhutan, Brunei Darussalam, United Arab Emirates, Iraq, India, Malaysia, Myanmar, Oman, Pakistan, People's Democratic Republic of Korea, Independent Republic of Iran, People's Democratic Republic of Laos, Singapore and Vietnam); and ten are African (Angola, Comoros, Eritrea, Gambia, Guinea-Bissau, Central African Republic, United Repub-

Of the most populous States of the international community, only India and Pakistan (both signatory States) are not parties to the CAT, but non-acceptance of the Convention is also notable from, as well as various Oceanic States, five of the Islamic Middle Eastern States (United Arab Emirates, Oman, Pakistan, Iraq and the Islamic Republic of Iran), five States from Indo-China and South-East Asia (Brunei Darussalam, Malaysia, Myanmar, People's Democratic Republic of Laos and Vietnam), and a number of Caribbean States, especially those with links to Britain (Bahamas, Barbados, Dominica, Granada, Dominican Republic, Haiti, Jamaica, Saint Kitts and Nevis, Santa Lucia, and Trinidad and Tobago).

## 2. Obligations which the Convention imposes on Member States

In its Preamble, the CAT states that its objective is "to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world". In its first Article, it defines the term "torture" as:

"... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions".

The three central elements of this definition are therefore: i) any act or conduct which intentionally inflicts on a person severe pain or suffering be this physical or mental. ii) the aim with which the pain or suffering is caused being not solely private. iii) the person causing the suffering, be this by action or omission, being a public agent, or acting at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

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lic of Tanzania, São Tomé e Príncipe, Sudan, and Zimbabwe). The least accepted universal Conventions are, incidentally, the "International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families": on 26 May 2008 it had been ratified by 37 States; and the "Convention on the rights of persons with disabilities": 27 States were Parties on that date.



According to this definition of torture, the main norms of the Convention impose obligations on member States not to torture, and to adopt measures to effectively prevent torture, to repress torture, and to guarantee domestic remedies for appeal and reparation for the victims (Articles 2 to 4 and 9 to 15). In each case, the corresponding obligation is imposed on every State Party in its relations with any other and, simultaneously, should be interpreted in the sense that individuals finding themselves in any territory under the jurisdiction of a State Party are holders, in accordance with the Convention, of subjective international rights *vis-a-vis* States Parties, rights which must be enforceable within the corresponding internal legal order.

Specifically, in the language used in the Convention, its norms impose the following obligations on member States<sup>5</sup>:

- A) *To take effective measures to prevent* acts of torture in any territory that falls under their jurisdiction: legislative, administrative, judicial or any other type of measures (Article 2.1).
- B) To prevent torture, in particular by:
  - a) *Not expelling, returning, or extraditing* a person to another State where there are “substantial grounds” for believing that he or she would be in danger of being subjected to torture; in other words, preventing torture that could be reasonably believed to be committed by (a) third State(s) against the person who was passed on to it by the State Party (Article 3.1).
  - b) *Ensuring* that no statement obtained under torture can be used as evidence in any proceedings (Article 15).
  - c) *Ensuring* that full education and information regarding the prohibition of torture are part of the training of law enforcement personnel, civil or military, medical personnel, public officials, and any other people who may be involved in the custody, interrogation or care of any person subject to any form of arrest, detention, or imprisonment (Article 10.1).
  - d) Keeping under systematic review interrogation rules, instructions, methods and practices as well as arrangements regard-

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<sup>5</sup> The Committee against torture, which controls the implementation of CAT by States Parties, has adopted, along the years, two *General Observations* which have specified the content of the obligations imposed on them: No. 1: “Non refoulement and communications: implementation of Article 3 in the context of Art. 22”, 21 November 1997; A/53/44 Annex IX. No. 2: “Implementation of Article 2 by States Parties”: CAT/C/GC/2, 24 January 2008.

ing the custody and treatment of any individual subjected to any form of arrest, detention or imprisonment in any territory under their jurisdiction (Article 11).

C) To repress all acts of torture by, in particular:

a) *Ensuring* that:

- i) All acts of torture, or attempts to commit them, or acts of complicity or participation in torture, *are offences under its criminal law and these offences are made punishable by appropriate penalties that “take into account their grave nature”* (Article 4).
- ii) The competent authorities perform a prompt and impartial *investigation* as long as there are reasonable grounds to believe that an act of torture has been committed in any territory under their jurisdiction (Article 12).

b) *Establishing and exercising criminal jurisdiction* regarding crimes of torture, in accordance with the norms and procedures established in the Convention, and affording (between member States) *all possible help* regarding any criminal proceedings concerning crimes of torture (Article 9). In particular, to ensure that at least one State Party always exercises its jurisdiction *in all cases* of alleged torture, the Convention (without excluding any criminal jurisdiction exercised in accordance with national laws) obliges every one of its States Parties:

- i) *To establish their own jurisdiction* regarding crimes of torture:
  - whenever they are committed in any territory under their jurisdiction<sup>6</sup>, or on an aeroplane or ship registered in the State.
  - when the accused is a national of the State<sup>7</sup>, and
  - when the accused is present in any territory under its jurisdiction, and extradition is not granted either by obligation or free choice to any State Party competent to proceed according to the Convention (Articles 5.1 and 5.2).

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<sup>6</sup> As *General Observation no. 2* affirms (para. 7): “The Committee also understands that the concept of ‘any territory under its jurisdiction’ includes any territory or facilities and must be applied to protect any person, citizen or non citizen without discrimination, subject to the *de jure* or *de facto* control of a State Party”.

<sup>7</sup> On the other hand, this jurisdiction will only be put into practice *if it is deemed* appropriate, when the victim is a national of the State in question (Article 5.1 c).

ii) *To exercise their jurisdiction* over those presumed responsible for the torture who are present in their territory, and, in this way (Articles 6 and 7):

- Immediately proceeding to a preliminary inquiry into the facts;
- if the circumstances justify it, *detaining* the person in question, or adopting other means to ensure his or her presence;
- and, finally, submitting the case to the competent authorities for the purpose of prosecution, or *extraditing* the person presumed responsible to a State Party which has set up its jurisdiction by obligation according to the Convention, or from a free choice (Articles 6 and 7). The Convention against Torture therefore imposes on member States the general obligation of extradition in cases of their own jurisdiction not being exercised, and may be considered as a legal base for extradition, on the repressive principle of *aut dedere aut judicare* (Article 8)<sup>8</sup>.

D) To guarantee domestic remedies for appeal and reparation to the victims, in particular:

- a) Ensuring that anyone alleging having been a victim of torture “in any territory under its jurisdiction” has the right to complain and to have his case promptly and impartially examined by the competent authorities (Article 13).
- b) Ensuring that in its legal system the victim of an act of torture obtains *redress and has an enforceable right to fair and adequate compensation*, including “the means for as full rehabilitation as possible” (Article 14.1).

Regarding those acts which constitute *cruel, inhuman or degrading treatment or punishment* “which do not amount to torture”, as this is defined by the Convention, States Parties undertake, in accordance with Article 16, to *prohibit and prevent them* in any territory under their jurisdiction, when such acts are committed by a public official or another person acting in an official capacity, or by instigation or by the consent or acquiescence of this public official or person<sup>9</sup>.

<sup>8</sup> *Cfr. the decision* adopted by the Committee in the case *Suleymane Guengueng et al. v. Senegal*, CAT/C/36/D/181/2001, 19 May 2006.

<sup>9</sup> As to the narrow normative interrelations between the obligation to prevent torture and the obligation to prevent “ill treatment”, see *General Observation No. 2*, para. 3.

Similarly, through references to the corresponding Articles in the Convention, member States are obliged to:

- i) *Prevent* the types of treatment indicated and, more concretely, to *ensure* full education and information regarding their prohibition in the training of people who will be involved in the custody, interrogation, or care of any person subject to any form of arrest, detention, or imprisonment; similarly, *to keep under systematic review interrogation* norms and regulations, methods and practices, and regulations regarding the custody and care of persons subject to any type of arrest, detention, or imprisonment in any territory under their jurisdiction;
- ii) *Repress such treatments*, in particular, *ensuring* that the competent authorities conduct prompt and impartial *investigations*, as long as there are reasonable motives for believing that one of the specified acts or crimes was committed in any territory within their jurisdiction, and
- iii) Ensure that any person alleging having been subjected to one of the indicated treatments, in any territory under their jurisdiction, has the *right to complain and to have* their case promptly and impartially examined by the competent authorities.

However, the references which Article 16 makes to other provisions of the Convention regarding the specified acts or crimes does not include Articles 5 to 9 or 14 and 15 of the mentioned instrument.

### 3. Norms of general International Law regarding torture and ill-treatment, and their relationship with those set out in the Convention

The regulations of the CAT and their practices of application form an essential part of the constituent elements of international practice regarding norms of general International Law against torture and other cruel, inhuman or degrading treatment and punishment<sup>10</sup>. In particular,

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<sup>10</sup> On a universal level, see Article 7 of the International Covenant on Civil and Political Rights; Article 5 b) of the International Convention of 1966 on the Elimination of all Forms of Racial Discrimination; Article 1 (and those corresponding to it) of the 1979 Convention on the Elimination of all Forms of Discrimination against Women; Article 37 a) of the 1989 Convention on the Rights of the Child (to which only the United States and Somalia are not Parties). *Cfr.* also the Convention for the protection of all persons from enforced disappearance of 20 December 2006, actually not in force: this international crime may conform in

its own definition of “torture” has an authority which stems from its inclusion within the conventional text which is the most universal on this topic. Even though the obligation to “incorporate” this definition

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some circumstances a form of torture. On a regional level, the following have been adopted specifically against torture: i) in Europe, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which came into force on 1 February 1989, and created the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and also has two additional protocols, both from 4 November 1989, of principally procedural interest, even though the first of them extends the potential subjective scope of the application of the Convention to States which are not members of the Council of Europe. ii) In the Americas, the Inter-American Convention to Prevent and Punish Torture of 9 December 1985, in force since 28 February 1987, whose definition of torture (Article 2, especially its second paragraph) makes it into one “of wider application” than that of the United Nations Convention of 1984. Similarly, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (‘Belem do Pará Convention’), of 9 June 1994, linked to the jurisdictional system of the San José Convention of 1969; and the Inter-American Convention on the Forced Disappearance of Persons of 9 June 1994 (Articles I and II). It is hardly necessary to remind those regional instruments for the general protection of human rights that protect the right of the human being not to be subject to torture or to cruel, inhuman, or degrading treatments or punishments: Convention of Rome of 4 November 1950 (Article three, which does not expressly refer to *cruel* punishments or treatments), the American Convention of 22 November 1969 (Article 5.20), the African Charter on Human and Peoples’ Rights of 26 June 1981 (Article 5), with its protocol relating to the rights of women in Africa (July 2003), and the African Charter on the Rights and Welfare of the Child of 11 July 1990 (Article 16). Also, the Guidelines and measures for the prohibition and prevention of torture, cruel, inhuman or degrading treatment or punishment in Africa (Robben Island Guidelines, 14 February 2002), adopted by the African Commission on Human and Peoples’ Rights. Similarly, section VII of the World Declaration on Human Rights in Islam of 19 September 1981, adopted in Paris by the Islamic Council, which regulates the “right to be free from torture”; and Article 13 of the Arab Charter on Human Rights, adopted by the Council of the League of Arab States on 15 September 1994. Regarding humanitarian law conventions, see *infra*. For a complete view of international standards on the topic, see also the different non-conventional instruments, especially the resolutions and declarations of the General Assembly, adopted by the United Nations for recommending general rules, of significant authority and which are vital points of reference, and describe their relevance to different areas of protection against torture and other illegal treatment. The last relevant resolution: A/RES/62/148 of 4 March 2008 (see [unhcr.ch/html/intlist.htm](http://unhcr.ch/html/intlist.htm)). Particularly noteworthy is paragraph 5 of section B of part II of the Declaration and the Vienna Plan of Action adopted in June 1993 by the World Human Rights Conference (A/CONF.157/239); and the Istanbul Principles, annexes to the resolution G.A. 55/89 of 4 December 2000, regarding the efficient investigation and documentation of torture and other cruel, inhuman, or degrading treatments or punishments. Finally, the Recommendations from the Special Rapporteur on the Prevention and Eradication of Torture, submitted to the General Assembly in accordance with resolution 55/89 of 3 July 2001 (Doc. A/56/156) and the report of the then Special Rapporteur Theo Van Boven (E/CN.4/2004/56, of 23 December 2003), replaced in 2004 by the actual Rapporteur Manfred Nowak (his last Report in: A/HRC/4/33 of 15 January 2008).

into their respective domestic legal systems does not derive explicitly from the text of the Convention, any other definition or norm which they adopt and which is related to it should at least have the same scope and the same protective nature as those in the CAT.

Three norms of *general* International Law on torture place inter-related obligations *on States* (and, eventually, on any other subject of International Law), together forming a group of provisions which are indivisible and complementary.

These general rules are: i) that which obliges States not to practice torture, or, in other words, to respect the prohibition of torture; ii) that which obliges the prevention and monitoring of the practice of torture within those areas under the jurisdiction or the effective control of the State in question; and iii) that which obliges States to prosecute and punish the authors of torture under their jurisdiction, at the same time guaranteeing *fair reparation* for victims.

The three norms and the obligations established by them have an imperative nature (*ius cogens*): its validity can never be suspended and no person can renounce to their protection. To prove these statements there is a widespread international practice including the adoption, interpretation and application of universal and regional international legal instruments, their accompanying norms of internal law, and the decisions of internal and international jurisdictional bodies<sup>11</sup>, especially if

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<sup>11</sup> See General Observation no. 2 of the CAT, *op. cit.*, para. 2 to 7; Resolution G.A. 3452 (XXX) of 1975 (Article 4); the International Covenant of Civil and Political Rights of 1966 (Article 4); the Convention against torture (...) of 1984 (Article 2.2); the Convention of Rome of 1950 (Article 15); the San José Convention of 1969 (Article 27). Regarding absolute prohibition in the area of humanitarian law, as regards international armed conflicts: Convention III of Geneva of 1949 (Articles 13, 14, 17, and 130); Convention IV of Geneva of 1949 (Article 147); Protocol I of 8 June 1977, in addition to the Conventions of Geneva (Article 75). Regarding non-international armed conflicts: Protocol II of 8 June 1977, in addition to the Geneva Conventions (Article 4); Article 3, common to the four Geneva Conventions of 1949. As stated in the G.A. resolution 56/143 of 1 February 2002, "... freedom from torture is a right that must be protected under all circumstances, including in times of internal or international disturbance or armed conflict". See also the authoritative "General observation number 29" on Article 4 of the International Covenant on Civil and Political Rights, made by the Human Rights Committee in 2001 (HR/GEN/1/Rev. 7, pp. 215 ff). On the imperative nature of the international law prohibiting torture, see the decisions of the International Tribunal on former Yugoslavia in the *Furundzija* cases (10 December 1998), case number IT-95-17/1, and *Kunarac et al.* (22 February 2001), case number IT 96-23-T/1. See also the TEDH decision of 21 November 2001 regarding the case of *Al-Adsani vs. United Kingdom* (34 EHRR, 11 (2002)), para. 62. Regarding doctrine see, among others, RODLEY, N. S.: *The treatment of prisoners under International Law*, 2<sup>nd</sup> ed., 1999, and CASSESE, A.: *International Law*, Oxford, 2001, p. 254.

it is considered from the perspective of the fundamental right not to be subjected to torture or other inhuman treatments.

One must remark the indisputable nature of the imperative character of the general norm which *abstractly* obliges States (and other subjects) to take the necessary measures for *foreseeing and preventing* torture. As has been shown above, according to Article 1 of the CAT, States can be “responsible” for torture also “... with the consent or acquiescence of a public official or other person acting in an official capacity”<sup>12</sup>.

In practice, a concrete norm which makes precise this abstract norm obliging prevention has acquired relevance: the norm or principle of non-devolution (*non-refoulement*) which obliges not returning, extraditing, expelling, or handing over in any way, a foreigner to a State where he or she will run the risk of being subject to torture (or of being arbitrarily deprived of life or subjected to slavery or servitude); or (once handed over) runs the risk of being handed over to a third State and there subject to these dangers. This norm is contained, as was stated above, in the CAT (Article 3)<sup>13</sup>; in fact, more than 80% of individual *complaints* submitted until now to the Committee Against Torture refer to the (possible) violation of the rights which this norm protects. So important is this norm in practice that,

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<sup>12</sup> The Committee's decision in the *Hajrizi Dzemajl et al. vs Yugoslavia* (no. 161/2000 of 21 November 2002), CAT/C/29/D/161/2000, includes this pronouncement: “... the Committee considers that the complainants have sufficiently demonstrated that the police (public officials), although they had been informed of the immediate risk that the complainants were facing and had been present at the scene of the events, did not take any appropriate steps in order to protect the complainants, thus implying acquiescence in the sense of Article 16 of the Convention...”.

<sup>13</sup> See also the Declaration on Territorial Asylum” (G.A. Res. 2132 (XXII) of 14 December 1976), and Article 33 of the Geneva Convention Relating to the Status of Refugees, which sets out the *principle of non-refoulement*, which nevertheless admits some exceptions regarding its application. On this issue in Spanish doctrine see GORTÁZAR ROTAECHE, C.: *Derecho de asilo y no rechazo del refugiado*, Madrid, 1997. On the application of the principle of non-devolution in the context of the application of Article three of the Convention of Rome, see GIL BAZO, M.T.: “La protección de los refugiados en la Unión Europea tras la entrada en vigor del Tratado de Amsterdam a la luz del Derecho Internacional de los derechos humanos”, in MARIÑO MENÉNDEZ, F.M. and FERNÁNDEZ LIESA, C. (Dirs.): *La protección de las personas y grupos vulnerables en el Derecho Europeo*, Madrid, Instituto Francisco de Vitoria y Ministerio de Trabajo y Asuntos Sociales, 2001, pp. 147-187. More recently see LAUTERPACHT, S.E. and BETHLEHEM, D.: “The scope and content of the principle of non-refoulement: Opinion”, in FELLER, E., TURK, V. and NICHOLSON, F. (eds.): *Refugee protection in International Law. UNHCR's Global Consultations on International protection*, Cambridge University Press and UNHCR, 2003, pp. 8 ff.

as also indicated previously, the first General Observation adopted by the Committee Against Torture refers to it under the rubric of “Implementation of Article 3 of the Convention in the context of Article 22”<sup>14</sup>. The jurisprudence of the Committee on this topic is long and extended<sup>15</sup>. As a rule of general International Law, this norm must be considered self-executing, and directly enforceable by individuals before internal authorities.

For its part, the general international norm which obliges States to prosecute and, if necessary, punish those responsible for torture, does not definitively place upon them the obligation to exercise a criminal jurisdiction that is *universal and absolute*. More specifically, it has been set out by internal and international jurisprudence that if any State whose criminal jurisdiction is based on generally accepted criteria (the alleged author and/or victim of the crime hold their nationality, and/or the crime took place in their territory, and/or the alleged authors of the crime are at the time of the prosecution under their territorial jurisdiction) does not efficiently exercise its criminal jurisdiction (for example, preventing its exercise through the laws of “self amnesty”, or other obstacles of internal law), every third State is internationally authorised by general international law to exercise its own jurisdiction against the person allegedly responsible of torture<sup>16</sup>.

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<sup>14</sup> General Comment no. 1, 21 November 1997 (A/53/44, annexe IX). See HRI/GEN/1/Rev. 7, *op. cit.*, p. 329. According to its sixth paragraph, “... the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable”.

<sup>15</sup> In fact, eighty per cent of the decisions of the Committee against torture are related to the implementation of Article 3 of CAT. I would call the attention in this context on the decision of the Committee referring to Communication no. 233/2003, adopted in the *Agiza vs. Sweden* case on 24 May 2005 (CAT/C/34/D/233/2003), due to its specific importance for “devolutions” regarding presumed terrorists, including the acceptability in this context of the so-called “diplomatic assurances”.

<sup>16</sup> It is not necessary to make reference here to the series of internal jurisdictional decisions which support this practice of universal jurisdiction in cases of the prosecution of great criminals who are also responsible of torture (the Eichmann, Demjanjuk, Pinochet etc... cases). Regarding this, see the decision of 10 December 1998 by the International Tribunal for the former Yugoslavia regarding the *Prosecutor vs. Furundzija* case (paras. 155–157), text in 38 *I.L.M.* 317 (1999). Especially significant regarding this is the *Carmelo Soria* case (a victim of torture an murder by DINA agents in Chile under General Pinochet’s regime) (OEA/Ser/LV/II.105.Doc. 12, of 19 November 1999, report no. 133/99, case 11.723, Chile, p. 40), even though it is partially based on the application of the Convention of New York of 1973 regarding the prevention and punishment of crimes against people who are internationally protected, including diplomatic agents. Regarding interference between the norm being examined here and the norms of international law concerning the individual immunity of the highest



But, having said this, it should also be stated more generally that admitted the description in general international law of torture as a “crime against international law”, it implies that the exercising of *universal jurisdiction* against the alleged authors of the crime is internationally lawful in all cases.

In addition, the commission of an act or acts of torture which can be classified as “genocide”, “crime against humanity” or “war crime”<sup>17</sup> can imply the international criminal responsibility of *individuals* before international criminal tribunals. If this is the assumption, then the notion of torture is included in a penal classification distinct to that of the 1984 Convention. Thus the internal courts of member States of the Rome Statute of the International Criminal Court (ICC) are obliged to apply its norms and consider all laws defined within it to be “like internal laws” and, as such, also the acts of torture which are included according to international classification.

Furthermore, the fact that the CAT does not extend the full range of all its regulations and guarantees relating to the crime of torture to the completion of its own regulations regarding cruel, inhuman, or degrading *treatments or punishments*, which also impose obligations of prohibition, prevention, prosecution, punishment, and reparation, does not mean that, at least for some of them, they cannot be established as norms of general International Law. This is certainly the case for the duty that States have to establish domestic remedies and fair compensation for victims of (other) cruel, inhuman, or degrading treatment or punishments. On the other hand, a progressive extension of the obligatory nature of the “principle of non-devolution” in cases of such “treatments and punishments” is evident. However, the principle of *authorisation of absolute universal jurisdiction* does not appear to have a specific application in the context of ensuring international norms regarding these treatments and punishments.

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State dignitaries, see TORRES BERNÁRDEZ, S.: “Acerca de las inmunidades del Jefe de Estado o de Gobierno en Derecho Internacional y de sus límites”, in MARIÑO MENÉNDEZ, F.M. (ed.): *El Derecho Internacional en los albores del siglo XXI. Estudios de Derecho Internacional en Homenaje al Profesor Juan Manuel Castro Rial*, Madrid, 2002, pp. 593-639. See also the recent book by OLLE, M.: *Justicia Universal para crímenes internacionales*, Madrid, 2008.

<sup>17</sup> The most authoritative classification of the international crimes of individuals is to be found in the Rome Statute of the International Criminal Court (adopted on 17 July 1998, it entered into force on 1 July 2002).

#### 4. The control system set up by the Convention: the Committee Against Torture and its procedures

The Convention created the *Committee Against Torture* (CoAT) as a body competent to control the implementation by the States Parties of the obligations which it places on them. This Committee therefore belongs to the group of treaty bodies which makes up the universal system for the promotion and protection of human rights, and perform their functions within the framework of different universal conventions, set up and adopted by the United Nations<sup>18</sup>.

The Committee acts following the basic rules of the Convention and its Rules of Procedure. According to the Convention, six of its members constitute a quorum, and the decisions of the Committee will be taken by majority vote of the members present (Article 18.2)<sup>19</sup>.

The new third paragraph of rule 61 of the Rules of Procedure specifically sets out that the Committee “may also appoint one or more of its members as rapporteurs to perform such duties as mandated by the Committee”. Designation as rapporteur constitutes a manifestation of the more general power of the Committee to establish the subsidiary

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<sup>18</sup> From the Spanish-language bibliography regarding this “universal system”, it is useful to consult VILLÁN DURÁN, C.: *Curso de Derecho Internacional de los derechos humanos*, Madrid, 2002. The most significant criticism, although not official, regarding the whole of the conventional system is that of BAYEFSKI, A.F.: *The U.N. Human Rights Treaty System: Universality at the Crossroads*, New York, 2001. See also BAYEFSKI, A.F. (ed.): *On the Future of the UN Human Rights Treaty System*, Dordrecht, 2001. Philip Alston wrote the official critical report from the Human Rights Commission, and it is highly relevant: *Final Report of the independent expert on enhancing the long-term effectiveness of the UN human rights treaty system*, UN Doc. E/CN.4/1997/74.

<sup>19</sup> The final, and important, amendments to the Rules of Procedure were adopted at the 28 session of the Committee, which took place in May 2002. See the current text in the following document: CAT/C/3/Rev.4., of 9 August 2002, and the Report of the Committee Against Torture of the 27 period of sessions (G.A. Official Document Supplement number 44 (A/57/44) pp. 217 ff.). See *Compilation of Rules of procedure adopted by human rights treaty bodies*, HRI/GEN/3/Rev.3, 28 May 2008, p. 127. The Committee is made up of ten experts “of high moral standing and recognized competence in the field of human rights” (CAT, Art. 17.1). Its members are chosen by States Parties at biennial meetings, and by secret ballot from a list of persons nominated by them; they are chosen for four years and can be re-elected if they are willing to become candidates again. They perform their jobs “in their personal capacity”. The Committee meets, in principle, at two ordinary annual sessions, which it has done since 1993. It chooses its bureau for a period of two years, and bureau members can be re-elected. According to the new second paragraph of Rule 12, “the Chairperson, members of the Bureau and rapporteurs may continue performing the duties assigned to them until one day before the first meeting of the Committee, composed of its new members, at which it elects its officers”.

bodies it considers necessary (Article 61.1). As we will see below, recourse to rapporteurs is expressly envisaged in many different Articles of the Rules of Procedure.

The Committee performs its tasks through four different control procedures<sup>20</sup>, in accordance with the corresponding regulations of the Convention: *consideration of the reports* of member States; *confidential inquiries* regarding the situation in particular countries; *admission and examination of communications presented by a State Party*, which alleges that another State is not fulfilling their obligations under the Convention; and the *admission and consideration of complaints made by individuals* (or made on their behalf), subjected to the jurisdiction of a State Party, who allege that they have been victims of a violation by another State Party of the provisions of the Convention.

#### 4.1. *The examination of the reports by States Parties*

In the first place, the *consideration of reports* by States Parties takes place regarding the reports that each of them must submit (Article 19 of the CAT and Articles 64 to 68 of the Rules of Procedure). The *initial report* shall be presented within the year immediately following the coming into force of the Convention for the State Party concerned, and other supplementary reports shall be presented successively and periodically every four years (without affecting the authority of the Committee to request other reports, should these be necessary), with a view to recording the measures which have been adopted to give effect to their undertakings under the Convention. The reports shall be presented in accordance with the guidelines set out by the Committee<sup>21</sup>.

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<sup>20</sup> For a critical analysis of these new procedures, see BANK, R.: «Country-oriented procedures under the Convention against Torture: Towards a New Dynamism», in ALSTON, P. and CRAWFORD, J. (eds.): *The future of U.N. Human rights Treaty monitoring*, Cambridge University Press. Cambridge, 2000 pp. 145-175. SORENSEN, B.: «CAT and Articles 20 and 22», in ALFREDSSON, G.; GRIMHEDEN, J.; RAMCHARAN, B.G. and DE ZAYAS, A. (eds.): *International human rights. Monitoring mechanisms. Essays in honour of Jakob Th. Möller*, The Hague, Boston, and London, 2001, pp.167-185. More generally on the Committee Against Torture see INGELSE, CH.: *The UN Committee against torture – An assessment*, Kluwer, The Hague, 2001.

<sup>21</sup> The guidelines can be found in CAT/C/14/ Rev. 1 of 2 June 1998. Similarly G/SO 221 (1) of 26 April 1991. There are special guidelines for the initial report: CAT/C/Rev.2 of 18 June 1991 and, finally, CAT/C/4/Rev.3, 18 July 2005. In general see HRI/GEN/2/ Rev.5, 29 May 2008: «Compilation of guidelines on the form and content of reports to be submitted by States Parties to the international human rights treaties» (HRI/GEN/2/ Rev.5), 29 May 2008, which contains the «Harmonized guidelines on reporting under the international human rights treaties, including guidelines on a core document and treaty

The Committee considers each report in a public session. According to recently established practice, which is in harmony with that already followed by other committees, except in the case of the initial reports the Committee sends a specific questionnaire (proposed by the rapporteurs and approved by the Committee as a whole) to each State whose report is to be examined, several weeks before the corresponding examination session, made up of particular questions which it is deemed will make concrete those points which have been established as being of most interest. The State shall, therefore, specifically respond to these questions, which it will do orally at the initial public session, without affecting the fact that it has submitted written responses to the Committee either a few days before the debate or on the day of the debate itself.

Furthermore, the CoAT has recently adopted the decision that some future reporting States have already expressly accepted: to consider the written answers presented by the State to the questionnaire as the *Report itself*. This will be an experiment that other committees might adopt according to the results obtained, as a good practice.

At this point it is significant to highlight the fact that some committees have begun to follow the practice of holding “formal” working meetings for the direct reception of the information and impressions regarding the situation in each country with the most relevant NGOs. In the case of the CoAT, the decision to hold these meetings was taken in the session of May 2004, and entered into force in the session of November 2004.

In addition, at the examination session, following the relevant oral presentation, the rapporteur and co-rapporteur present and formulate to the State delegation their observations and questions regarding the contents of the aforementioned questionnaire, to which the questions of other members of the Committee can also be added. A few days later, as fixed by the Committee, the State will publicly respond to the new questions posed at a second meeting, which is an occasion for the exchange of questions and answers between members of the State delegation and members of the Committee. Finally, the Committee (following relevant internal debate, which is confidential), adopts its

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specific documents”(HRI/MC/2006/3, 10 May 2006). These harmonized guidelines have been adopted by the CoAT. A *normal* report contains information regarding new regulations and innovations regarding the application of the Convention, any additional information that has been requested by the Committee, and information regarding the application of the previous conclusions and recommendations by the Committee.

“conclusions and recommendations”<sup>22</sup>, in which it can make clear, if relevant, that the member State has not implemented some of its obligations as regards the CAT, and can make recommendations for the better fulfilment of those obligations. These conclusions and recommendations will be communicated directly to the interested State before being made public.

If necessary, the Committee can indicate the timeframe within which observations in reply from member States should be received (rule 68.2), highlighting those recommendations which need a speedy response in order to be put into practice. In fact, in 2003 the CoAT (according to the practice of other committees) initiated the practice of determining in its “Conclusions and Recommendations” three or four concrete recommendations in relation to which it demands to receive information on the status of implementation, in one year.

The Committee is faced with the same problems as the other convention control mechanisms of the United Nations: the fact that States do not present the required reports; or that they do it late, sometimes significantly; or the non-appearance of a State at the examination session of its report which has previously been submitted<sup>23</sup>.

In order to tackle these problems, the 2002 version of the Rules of Procedure has introduced a few new rules, in line with those already adopted by other committees especially the Human Rights Committee of the International Covenant on Civil and Political Rights of 1966. These are:

- A) In those cases where it is deemed relevant, the Committee will be able to consider that the information contained within the last report submitted covers the information which should have been included in overdue reports (rule 64.2)<sup>24</sup>.

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<sup>22</sup> The new Rule 68 of the regulations requests precisely the “Conclusions and recommendations by the Committee”, terminology which replaces the previous “General comments”. The text of Rule 68.1 sets out that the Committee can formulate “general comments, conclusions or recommendations”.

<sup>23</sup> See HRI/GEN/4/Rev.5, 3 June 2005: *Recent reporting history under the principal international human rights instruments*. On the current reform efforts for the system for the presentation of reports to conventional bodies see my work “Cuestiones actuales de regulación del procedimiento de examen de informes estatales por el Comité de Naciones contra la tortura”, in *Libro Homenaje al Prof. J. A. Pastor Ridruejo*, Madrid, 2005, pp. 171-183, *infra*, note 22.

<sup>24</sup> For example, in its “Conclusions and Recommendations” regarding the second report submitted by the Bolivarian Republic of Venezuela (CAT/C/XIX/Misc.6, 21 November 2002), the Committee welcomed “with satisfaction the second periodic report of

- B) If it is considered necessary, the Committee may notify the defaulting State through the Secretary-General that it has the intention to examine, on a date specified in the notification, the measures adopted by the member State to protect or give effect to the rights recognised in the Convention, and to make general comments as it deems to be appropriate under those circumstances (rule 65.3).
- C) If the State in question has submitted its report for examination but does not appear before the Committee, this body has the discretion to take one of the following decisions (Rule 66.2):
- a) notify the member State through the Secretary-General that it intends to examine the report at a specified session, in accordance with the general Rules of Procedure, and, eventually, come to conclusions and make recommendations; or
  - b) proceed at the originally specified session to examine the report and submit to the State party its provisional concluding observations. The Committee will determine the date on which the report will be examined, in accordance with the general rules, or the date on which the new periodic report should be submitted as an "additional report".

Until the session of May 2008, the Committee had examined reports from 90 States Parties. However, delays in the presentation of reports from many States is notable, to the point where some, having been under the obligation to do so for many years, have still not even submitted their initial reports<sup>25</sup>.

In each successive report, member States should provide information regarding their compliance with the recommendations which the Committee has made to them as regards their examination of previously submitted reports. In addition, the Committee may appoint one or more rapporteurs to follow up with the compliance by the State of its

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Venezuela, which should have been submitted in August 1996 but was received in September 2000 and updated in September 2002. This report contains the information which the State Party was to have included in its third periodic report, which should have been submitted in August 2000. The Committee therefore decided to consider document CAT/C/33/Add.5 as the second and third periodic reports of Venezuela" (para. 2), and invited "the State Party to submit its fourth periodic report at latest by 20 August 2004" (para. 13).

<sup>25</sup> In accordance with document CAT/C/40/CRP.2/Add.7, 18 April 2008, 36 member States had not yet submitted their *initial* reports, with eight of these more than ten years late: Guinea, Somalia, The Seychelles, Cape Verde, Antigua and Barbuda, Ethiopia, Côte d'Ivoire and Malawi. A total of 210 reports had been received by CAT.

conclusions and recommendations (Rule 68.1). These should act in accordance with the procedural mandates received, which can involve specific acts such as the Committee asking for supplementary information before (as indicated above) the next periodic report on its conclusions and recommendations, or the Committee considering that circumstances between periodic reports demand certain particular questions to be answered. Their actions can even cover the situation of a member State which is delaying with regard to either its initial report or its periodic report<sup>26</sup>.

In fact, the harmonization of procedures for monitoring the implementation of conclusions and recommendations now constitutes one of the main motives of concern for the Secretariat, the HCHR and the States Parties.

#### 4.2 *The procedure of confidential inquiry*

In accordance with Article 20 of the CAT, the performance of a *confidential inquiry*<sup>27</sup> procedure into the situation existing in particular countries can be decided on by the Committee, in certain cases, as long as the Member State which is to be the object of the investigation has not declared that it does not recognise this specific competence<sup>28</sup>.

It is the Secretary-General who brings to the attention of the Committee the information which has been, "or appears to be", submitted for examination by the Committee in accordance with Article 20.1 of the Convention (Rule 69.1 of the Rules of Procedure), and will maintain a permanent register of this information. In this way, in a "preliminary examination", the Committee will determine whether it considers that the information it has received contains "well-found-

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<sup>26</sup> Regarding questions posed by the rationalisation of the procedure for the submission and examination of member States reports to committees created by human rights treaties, see Doc. HRI/ICM/2002/2, 25 April 2004. See also HRI/MC/2007/2, 9 January 2007, *Report of the working Group on the harmonization of working methods of treaty bodies*; A/62/224 *Report of the Annual meeting of the Chairpersons of the HR Treaty Bodies and the inter-Committee meeting*; HRI/MC/2008/2, *Report on the implementation of recommendations of the nineteenth meeting of chairpersons and the sixth inter-Committee meeting*.

<sup>27</sup> The corresponding rules of the Rules of Procedure (from 69 to 84) have not suffered any modification in the reforms which took place in 2002.

<sup>28</sup> The "reservation" of not recognising this authority, allowed by Article 28 of the Convention and which can be withdrawn at any moment, was entered in January of 2006 by eleven member States, see *supra*, note 2.

ed indications" that torture *is being systematically practiced* within the territory of the State Party in question. If the Committee considers the information received to be "reliable" and to contain indicators that, effectively, torture is systematically practiced in a Member State, it will invite that State to cooperate in the examination of the information and present its observations regarding the information in question. In the light of these observations and any other relevant information available<sup>29</sup>, the Committee may, if it decides that the information is warranted, designate one or more of its members to make a confidential inquiry and urgently report to the Committee. The cooperation of the Member State in question will be essential, as the investigation might include a visit to the territory (Rules 78 to 80). When conducting such a "visiting mission", those taking part will even be able to organise *hearings* in connection with the inquiry as they deem it appropriate (Rule 81.1).

The conclusions of the member or members of the visiting mission will be examined by the Committee and then transferred to the Member State, together with any comments or suggestions deemed appropriate in the light of the situation. The State "shall be invited" to inform the Committee within a reasonable delay of the action it is taking with regard to the Committee's findings and in response to its comments and suggestions (Rule 83).

In the light of the confidential nature of all these proceedings, once they have ended, the Committee can decide, following consultation with the State concerned (which will be invited to transmit its thoughts after a reasonable period of time), to include a *summary account* of the results of the proceedings in its annual report (Rule 84).

In its first *summary account* regarding its investigation into the situation in Turkey (1993), the Committee<sup>30</sup> produced its doctrine, later disseminated in other reports, regarding when "systematic torture" can be said to have taken place:

"The Committee considers that torture is practised systematically when it is apparent that the torture cases reported have not occurred fortuitously in a particular place or at a particular time, but are seen to be habitual, widespread and deliberate in at least a considerable part of the territory of the country in question. Torture may in fact be of a systematic character without resulting from the

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<sup>29</sup> The Committee has full discretion to make use of all sources of information it deems appropriate for dealing with the information it receives, and for acquiring more (Rules 76.4 and 5).

<sup>30</sup> See paragraph 39 of document A/48/44/Add.1, 15 November 1993.



direct intention of a Government. It may be the consequence of factors which the Government has difficulty in controlling, and its existence may indicate a discrepancy between policy as determined by the central Government and its implementation by the local administration. Inadequate legislation which in practice allows room for the use of torture may also add to the systematic nature of this practice”.

*Summary accounts* have been published regarding five confidential investigations which have taken part in Turkey (1993), Egypt (1996), Peru (2001), Sri Lanka (2002), Mexico (2003) and Brazil (2005)<sup>31</sup>. In the case of Turkey (para. 58), the Committee confirmed “the existence and systematic character of the practice of torture”. In the case of Egypt, a country which did not allow the entrance of the inquiry mission, the Committee (para. 220) “... is forced to conclude that torture is systematically practised by the security forces in Egypt, in particular by State Security Intelligence, since in spite of the denials of the Government, the allegations of torture submitted by reliable non-governmental organizations consistently indicate that reported cases of torture are seen to be habitual, widespread and deliberate in at least a considerable part of the country”. In the case of Peru (para. 20), “the large number of complaints of torture, which have not been refuted by the information provided by the authorities, and the similarity of the cases, in particular the circumstances under which persons are subjected to torture and its objectives and methods, indicate that torture is not an occasional occurrence but has been systematically used as a method of investigation”. In the case of Sri Lanka (para. 177), it was indicated that “even though the number of instances of torture is rather high, the majority of suspects are not tortured; some may be treated roughly”. In the case of Mexico (para. 218), it was stated that “... the police commonly use torture and resort to it systematically as another method of criminal investigation, readily available whenever required in order to advance the process”.

In the case of Brazil, according to its understanding of the issue, the Committee affirmed the existence in Brazilian prisons of systematic torture (CAT/C/36/R.1/dd.1, paragraph 178). The Government of Brazil did not accept this description (CAT/C/38/CRP.5).

There is no doubt regarding the usefulness of this process, although, until now, its use has been limited and very slow; in prac-

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<sup>31</sup> Respectively Docs. A/48/44/Add.1; A/51/44, paras.18-222; A/56/44, paras.144-193; A/57/44 paras. 123-195; CAT/C/75; CAT/C/36/R.1/Add.1. The Report on the visit to Serbia and Montenegro has not been published in the web page of the CAT.

tice, this can take years. One of the issues raised by its effectiveness is that of the follow up of the recommendations made by the Committee according to the results of the inquiry. The Committee Against Torture has recently shown its willingness to carry out this follow up<sup>32</sup>.

#### 4.3 *The examination of communications submitted by States Parties*

In accordance with Article 21 of the Convention, the *admission and consideration of communications submitted by a member State* alleging that another member State is not fulfilling the obligations under the Convention takes place through an optional procedure, since it depends on a declaration by both States Parties stating that they recognise the competence of the Committee to receive and consider this kind of communications<sup>33</sup>.

The Committee can intervene only if the concerned Member States have previously attempted to resolve the affair through direct contact between the two and, nevertheless, this has not been settled to the satisfaction of both States Parties within six months after the receipt by the receiving State of the initial communication. In this case, "either State shall have the right to refer the matter to the Committee" (Article 21.1.b). There is also a requirement that domestic remedies must have been exhausted (Article 21.1.c) of the Convention and Rule 91 c) of the Rules of Procedure).

Once the communication has been accepted, the Committee makes available its good offices to the parties with a view to a friendly solution, including, if necessary, the creation of an *ad hoc* conciliation commission. After having examined the case during a period of sessions where the "concerned" States are present and have made writ-

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<sup>32</sup> So, in para. 7 of the "Recommendations" adopted by the Committee following its examination of the fourth periodic report from Egypt (CAT/C/CR/29/4, 23 December 2002) it is stated that "the Committee reiterates to the State Party the recommendations addressed to it in May 1996 on the basis of the conclusions the Committee reached under the procedure provided for in Article 20 of the Convention, and requests the State Party to inform it of the steps it has taken to implement them".

<sup>33</sup> As of 18 April 2008, 56 States had made known their declaration of acceptance of this authority of the Committee: Algeria, Argentina, Australia, Austria, Belgium, Bolivia, Bosnia-Herzegovina, Bulgaria, Cameroon, Canada, Chile, Cyprus, Croatia, Costa Rica, Denmark, Ecuador, Russian Federation, Finland, France, Ghana, Germany, Greece, Hungary, Ireland, Iceland, Italy, Japan, Liechtenstein, Luxembourg, Malta, Monaco, New Zealand, Norway, Netherlands, Paraguay, Peru, Poland, Portugal, Czech Republic, Slovakia, Slovenia, Spain, Senegal, Serbia, South Africa, Sweden, Switzerland, Togo, Tunisia, Turkey, Ukraine, Uganda, United States, United Kingdom, Uruguay and Venezuela.

ten and oral presentations, the Committee shall submit a report (within a maximum period of one year after the date of the receipt of notice) in which it will either confirm the agreement that has been reached, or will make only a brief statement of the facts, and will add the written submissions and record of the oral submissions made by the member States concerned. In any case, the report by the CoAT shall be sent to those States involved.

Given that this procedure has never been used, nor does it look as if it will ever be (similar to what happens with other analogous “inter-State” procedures set out by other conventions), there is no need to consider it further, especially as its rules have not suffered any of the changes of the Rules of Procedure reforms of 2002 (Rules 85 to 95).

#### 4.4 *The examination of individual complaints*

Similarly optional is the acceptance by States Parties<sup>34</sup> of the procedure relating to *the admission and consideration of “individual complaints”*<sup>35</sup> which are submitted by individuals (or on their behalf) subject to the jurisdiction of any State Party, alleging that they have been victims of a violation by a State Party of the norms of the Convention, in other words violation of the rights enshrined in the Convention. It deals therefore with the allegation that an individual right, derived from the CAT, has been violated by the State in question. This procedure has been the object of various reforms, some of which are relevant, through the new Rules of Procedure adopted in 2002.

Below is a summary of the Articles regarding general regulations, the organisation, and the phases of the procedure in light of the latest modifications.

A) The Secretary-General shall bring to the attention of the Committee complaints of individuals “which are or appear to be” submitted for consideration in accordance with Article 22.1 of the

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<sup>34</sup> The list of States which have accepted this procedure is almost the same as that in the previous footnote, except that Japan, the United Kingdom, the United States, and Uganda have not accepted it; Azerbaijan, Burundi, Guatemala, Mexico, and the Seychelles have accepted the procedure of Article 22 but not that of Article 21.

<sup>35</sup> In the new 2002 version, the Rules of Procedure notably substitute the term “communication” for that of “complaint”, which accents both the formal complaint nature of the violation regarding the active legitimisation of victims, and the contradictory and almost contentious nature of the procedure. Thus the rubric of chapter XIX of the new text sets out “Procedure for the consideration of communications received under Article 22 of the Convention”.

CAT (doubts as to the wish of the complainant will be dealt with at this stage) (Rule 97). A list of the complaints brought to the attention of the Committee shall be prepared by the Secretary-General who will circulate it at regular intervals to the members of the Committee, maintaining a “permanent register” of all such complaints (Rule 98).

Complaints may be “registered” by the Secretary-General or by a decision of the Committee or by the Rapporteur on new complaints and interim measures (Rule 98.1). But the *Secretary-General* shall not register any complaint against a Member State which has not accepted the Committee’s competence to accept and consider them. Neither will anonymous complaints be registered, nor those which have not been submitted in writing by the person alleging that he or she is the victim, or by close relatives writing in his or her name, or by a representative with the appropriate written authorisation (Rule 98.2). In this last case, the decision to not register may be revised by a favourable decision concerning the admissibility of a complaint, always taken under the ultimate control of the Committee (see below).

In practice, the Rapporteur on new complaints and interim measures, in consultation with the Secretariat, decides to register or not the complaint, when the Committee is not in session.

B) The procedure for determining the admissibility of the complaints of individuals has been made more precise and has undergone significant developments:

- a) The general norm (Rule 105.1) is that the Committee decides, *by simple majority and as soon as possible*, whether or not a complaint is admissible under Article 22 of the Convention.
- b) According to Rules 61, 105.2, and 106.1, a *Working Group* created by the Committee may also (always under the ultimate control of the Committee) declare the admissibility of the complaint by majority vote, or inadmissibility by unanimity, and also may make recommendations to the Committee regarding the merits of the complaints<sup>36</sup>.

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<sup>36</sup> According to the Rules, the working group will be made up of no fewer than three and no more than five members of the Committee, and chosen by it for every two periods of sessions (Rule 106.2), and will be able to choose Special Rapporteurs from among its members, who will be charged with dealing with specific complaints (Rule 106.3) (authority which in the previous version of the Rules of Procedure was attributed to the Committee as such).

In practice, the usefulness of this working group has been called into question, and it does not work. So, the Committee as a whole adopts the decision.

- c) The Rules 105 (3-5) now set out that *the Committee* (the working group), or *the special rapporteur(s)* (unless they have expressly decided otherwise), will examine complaints in the order that they were “received” by the Secretariat. The Committee will be able to make a decision regarding whether to conduct the joint examination of two or more complaints, or to divide the complaints into those proposed by different authors, in such a way that the complaints, thus divided, will receive separate registry numbers.
- d) In accordance with Rule 107, the following conditions for the admissibility of complaints will be verified by *the Committee* (the working group), *the rapporteur on new complaints and interim measures*, or *a rapporteur* charged with dealing with specific complaints. The last two, according to the previous version of the Rules of Procedure, had not the authority to exercise powers in this proceeding. In practice, only the Committee in plenary session decides on the admissibility of the claim, according to the following criteria:
  - i) The individual submitting the complaint should do so as a victim of a violation at the hands of the Member State concerned, in accordance with the provisions of the Convention<sup>37</sup>.
  - ii) The complaint does not constitute an “abuse of the Committee’s process nor is it manifestly unfounded”.
  - iii) The complaint is not incompatible with the provisions of the Convention.
  - iv) The same issue has not been and is not being examined under another procedure of international investigation or settlement.
  - v) The person has exhausted all available domestic remedies, a condition which cannot be demanded if the application of said remedies is unreasonably prolonged, or is unlikely to bring effective relief to the person who is the victim of the violation of the Convention.

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<sup>37</sup> According to Rule 107 a), “the complaint should be submitted by the individual himself/herself or by his/her relatives or designated representatives, or by others on behalf of an alleged victim when it appears that the victim is unable personally to submit the complaint, and when appropriate authorization is submitted to the Committee”. This motive for inadmissibility is a reason for the *rejection of the registration of a complaint*.

- vi) The time elapsed since the exhaustion of domestic remedies is not so unreasonably prolonged as to render consideration of the claims unduly difficult by the Committee or the State Party.
- e) *The Committee* (or the working group) can decide that a complaint is inadmissible (or that consideration of it should be suspended or discontinued). The decision regarding inadmissibility can be reviewed *by the Committee* upon a request from one of its members, or by a written request by or on behalf of the individual concerned (Rule 110), in which documentary evidence should be provided to the effect that the reasons for inadmissibility established in Article 22.5 of the Convention are no longer applicable.
- f) As soon as possible “after the complaint has been registered”, it should be transmitted to the Member State with a request for a written reply within six months (Rule 109.1). A complaint may not be declared admissible unless the Member State concerned has received its text, and has had the opportunity to provide information or observations (Rule 109.8).  
The response of the State concerned shall include an explanation or statement relating both to admissibility and the merits of the complaint, as well as to the corrective measures which have been taken regarding the incident, unless the *Committee* (the working group), or the *rappporteur on new complaints and interim measures* have, due to the exceptional nature of the case, decided to request a written response referring only to the issue of admissibility (Rule 109.2). The State that receives such a request may, for its part, make allegations, within a period of two months, in favour of inadmissibility, but the Committee or the *rappporteur on new complaints and interim measures* (the text does not include the working group here) will take a decision regarding whether or not the issue of admissibility should be considered separately from the merits (Rule 109.3).
- g) Once the adversarial process regarding the merits of the complaint has begun, the Committee may revoke its decision regarding the admissibility of a complaint in the light of explanations or statements made by the Member State during this phase; however, before doing this, “the explanations or statements concerned must be transmitted to the complainant so that he or she may submit additional information or observations within a time limit set by the Committee” (Rule 111.5).

C) The new rule regarding “interim measures” is especially worthy of comment. According to the new Rule 108, at any time after having received the complaint, *the Committee*, (a working group,) *or the rapporteur(s) for new complaints and interim measures* may transmit to the State party concerned a request that it takes such interim measures “as the Committee considers necessary to avoid irreparable damage to the victim or victims of alleged violations”. Where a request for interim measures has been made, the working group or rapporteur(s) should inform the Committee members “of the nature of the request... at the next regular session of the Committee” (Rule 108.3), and the Secretary-General shall maintain a list of such requests (Rule 108.4). For its part, the Member State may inform the Committee that the reasons for the adoption of the interim measures have disappeared, or may set out the reasons why the request for such measures should be withdrawn (Rule 108.6).

The rapporteur for new complaints and interim measures will also be charged with monitoring compliance with the Committee’s request for interim measures. *The Committee* (the working group), *or the rapporteur* may withdraw the request for interim measures (Rules 108.5 and 7)<sup>38</sup>.

In the new version of the Rules of Procedure, all reference to the possible adoption of interim measures during the Committee’s examination of communications regarding the merits of the complaint has been dropped<sup>39</sup>. Until now, to use the terminology of the previous version of the Rules of Procedure, the degree of fulfilment of the “view” of the Committee regarding the utility of the adoption of interim measures has been very wide by the required States. In any case, the new rule of the Rules of Procedure shows the willingness to emphasize the *compulsory nature* of the petition for provisional measures.

This is plausible given the fact that this is the same practice followed by other committees, taking into account that in some cases there has been danger to the life or physical integrity of foreigners “returned” to third countries by Member States, through leaving unfulfilled the *request* of the Committee in those cases in favour of the application of

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<sup>38</sup> Given the fact that the Committee meets only in two annual sessions, the power of the rapporteur(s) to withdraw the petition for interim measures can be exercised in conditions in which the person making a complaint lack effective remedies before the Committee (which is not meeting) against a decision which could potentially seriously affect them. In any case, the Committee has prepared some guidelines for its own actions and those of subsidiary bodies as regards provisional measures. See the Committee’s decision on the “Mandate of the Rapporteur on new complaints and interim measures”, in Doc. A/57/44, *op. cit.* p. 215.

<sup>39</sup> See Article 110.3 of the previous version of the Rules of Procedure, which refers to the “view” of the Committee regarding the adoption of interim measures.

the provisional measure of “non-refoulement” while a decision could not have been reached yet on the merits of the individual complaint in question. It is possibly legitimate to doubt the good faith that is demanded of a Member State regarding their obligations in accordance with the Convention, if the State generally *does not fulfil* the “requests” for interim measures which were directed towards it by control bodies. Reinforcement of international control which deals with the fulfilment of such requests guarantees this consideration<sup>40</sup>.

D) Article 111 of the Rules sets out the procedure relating to the examination of the merits of individual complaints once they have been declared admissible. The Committee sets out the timeframe for the State Party concerned (which will be informed what information it is required to produce) to submit its written explanations or statements, as well as the written information and observations provided by the author of the complaint. In addition, the Committee may invite the complainant or his or her representative, and the representative of the Member State, “to be present at specified closed meetings of the Committee in order to provide further clarifications or to answer questions on the merits...”. Once one *party* has been invited, the other *party* (the Rules of Procedure now uses the terminology appropriate to an adversarial procedure of a contentious nature) shall also be informed and invited to attend the session and make any observations it deems necessary. However, if one party does not appear, this will not prejudice the consideration of the case (Rule 111.4)<sup>41</sup>.

Once the procedure has been completed the Committee will formulate its “decisions”<sup>42</sup> on the merits, although before doing this it may refer the communication to the working group or to a case rapporteur designated under Rule 106.3, so that either of the two can make recommendations to the Committee (Rule 112.1). As a general rule, the Member State concerned shall be invited to inform the Committee within a specific timeframe of the measures it has adopted in accordance with the decisions of the Committee (Rule 112.5).

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<sup>40</sup> Some cases may be reported in which the State Party did not implement the decision of the CAT not to expel the author of the claim. See, lastly: CAT/C/38/D/281/2005, Comm. no. 281/2005, *Elif Petit c. Azerbaijan*, 29 May 2007; CAT/C/38/D/300/2006, Comm. no. 300/2006, *Tebourski c. France*, 11 May 2007.

<sup>41</sup> It is not the case to discuss here about the essential problems of the evaluation by the CAT of the facts and proofs already evaluated by the internal organs. The Committee has under consideration a paper on these issues, and might adopt new guidelines on them. See CAT/C/39/CRP.4, 28 April 2008.

<sup>42</sup> In the previous version of the Rules of Procedure the term used was “view of the Committee”.



As stated above, the “conclusions and recommendations” are not strictly compulsory for the State at which they are directed, but the adoption of all necessary measures for putting them into practice should be taken in good faith. Certainly, the CoAT is not jurisdictional in nature, and its activities, especially during the period of the examination of reports, are not aimed at “condemning” a Member State for violation of its obligations, or establishing and demanding international responsibility for such a violation. Far from a “jurisdictional” approach, it deals with “dialogue” with the State in question, and the progressive obtaining of good faith assurances that they are acting in accordance with the provisions and legal standards set out in the Convention and, more generally, by the international legal order.

An important innovation was the creation, through Rule 114, of a *follow-up procedure* for the decision taken within the framework of the examination procedure of individual complaints, which consists in the designation by the Committee of one or more special rapporteur(s) “for the purpose of ascertaining the measures taken by States Parties to give effect to the Committee’s findings”. These rapporteurs will be able to take measures and establish the appropriate contacts for the due completion of the mandate for the appropriate follow-up and will report to the Committee. In addition, they will recommend further action to the Committee as may be necessary, and shall regularly inform the Committee of activities taking place to follow-up on its decisions. On the other hand, its mandate is also to bring about, with the approval of the Committee, the necessary visits to the Member States concerned (Rule 114.4)<sup>43</sup>. In the text of its annual reports the Committee has begun to include information on follow-up activities by the rapporteurs.

## **5. Publication of the proceedings and results of the various procedures before the Committee. General observations**

In referring to the publication of the proceedings and results of the procedures which take place before the Committee, it must be said that the “sanction by public opinion” (internal or international) is an instrument which in many cases aids international progress regarding human dignity, although we should not ignore the danger and cases of programmed “manipulation”.

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<sup>43</sup> See the text of the Committee’s decision taken on 16 May 2002 on “Mandate of Rapporteur on follow-up of decisions on communications submitted according to Article 22”, in Doc. A/57/44, *op. cit. supra*, p. 216.

In line with this, the Rules of Procedure foresee that, in particular cases, the Committee may decide to issue “communiqués” on its activities, through the Secretary-General, for the use of the media and the general public<sup>44</sup>.

In a more general and institutional manner, it is set out that the Committee shall submit an annual report of its activities according to the Convention to the States Parties and to the General Assembly of the United Nations (Article 24 of the CAT and Rule 63 of the Rules of Procedure), in which it must include a list of those States which have not submitted their obligatory periodic reports (Rule 2). The CoAT may, at its discretion, decide whether to include the conclusions and recommendations made at the end of the procedure of examination of State reports, as well as the observations of the Member States concerned, and a copy of the report of the State Party concerned if thus requested by the State itself (Rule 68.3).

Similarly, the Committee, having consulted the Member State in question, may include a summary of the results of the *confidential inquiry* procedure under Article 20<sup>45</sup>. Before this, the Committee will, through the Secretary General, invite the State concerned to inform the Committee of its observations on the issue of possible publication, indicating a date by which this should be done. Logically, if it decides to include the summary in question, the Committee shall forward, through the Secretary-General, the text of the summary account to the Member State concerned (Rule 84).

The Committee may decide whether to include in its annual report a summary of the complaints examined and, where it considers appropriate, a summary of the explanations and statements of the States Parties concerned and of the Committee’s evaluation (Rule 115.1). In the annual report the text of the final decisions will also be included, including decisions relating to the merits of the complaints received, as well as the text of any decision declaring the inadmissibility of a com-

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<sup>44</sup> Rule 74 of the Rules of Procedure, referring to communiqués on activities in accordance with Article 20 of the Convention; Rule 90, on activities in accordance with Article 21 (in this case, “after consultation with the States Parties concerned”); and Rule 102, regarding activities which take place in accordance with Article 22.

<sup>45</sup> The almost completely reserved nature of the procedure of the “confidential inquiry” of Article 20 of the Convention, and the demand for “reservation” of many transactions of other control proceedings, have double foundations in the nature of international crimes which they attempt to prevent and repress (in particular the protection of their victims, be these real or potential), and in the fear of States of seeing themselves publicly disgraced if they are made responsible for acts which disgust the majority of people.

plaint. Similarly, information on activities regarding the follow-up of this will also be included (Rule 115).

Finally, the Committee has recently initiated the practice to include in the Annual Report a reference to the developments and results of its follow-up procedures on implementation of recommendations to State Parties and of decisions adopted on individual claims<sup>46</sup>.

As previously indicated, the Committee has at its disposal an instrument that is particularly useful for the interpretation, precision and clarification of the norms which place obligations upon States, the "General Observation (Comments)" made on the different provisions of the Convention. This possibility has been used on two occasions<sup>47</sup>.

## 6. The Optional Protocol to the Convention Against Torture

The adoption of the *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*<sup>48</sup> is the result of a request from the World Conference on Hu-

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<sup>46</sup> For the last Follow-up report on individual communications see CAT/C/40/R.1, 18 April 2008.

<sup>47</sup> See *supra* note 5. *Cfr.* HRI/GEN/1/Rev.9 (Vol I y II), 27 May 2008. *A compilation of general comments and general recommendations adopted by human rights treaty bodies*, p. 329. The "recommendations", "observations", "conclusions", and "decisions" of the CAT have given rise to a rich and coherent casuistry which could be rationalised, even more so when other conventional human rights committees have adopted interpretations and commentaries on the meaning of the prohibition of torture and mistreatment in their respective environments. On the application by internal legal bodies of standards established by different decisions and the general comments of the Committee Against Torture, see IWASAWA, Y.; BYRNES, A.C. and KAMMINGA, M.T. (Rapp. and co-rapp.), Committee on International Human Rights Law and Practice, I.L.A. New Delhi Conference (2002), Report of the 70<sup>th</sup> Conference, London, 2002, pp. 507 and ff.

<sup>48</sup> E/CN.4/2002/WG.11/CRP.1, 17 January 2002. This project was approved by the Human Rights Commission in its 58<sup>th</sup> session (from 18 March to 26 April 2002; Doc. E/CN.4/2002/L.5, 2 April 2002) which was presented by the open-ended working group. See the final report of the working group in E/CN.4/2002/78, 20 February 2002, and the annexed documentation on the preparatory work. This report contains a clear summary of the opposing positions of groups of States in favour of and against an instrument which, in my opinion, complements the actions and competences of the Committee Against Torture. Following approval from ECOSOC, the third commission of the General Assembly approved the protocol on 7 November with 104 votes in favour and 8 against (among them the U.S., China, Cuba, Israel, Syria, Nigeria, and Vietnam), and 37 abstentions. The Protocol was finally adopted by the General Assembly on 18 December 2002 (A/RES/57/199) and entered into force on 12 June 2006. On 12 June 2008, 35 States were already Parties to the Protocol and 61 were signatories. Spain deposited its instrument of ratification on 4 April 2006.

man Rights of 1993, and has the aim of establishing of a *system of regular visits* undertaken by independent international and national bodies to those places where people are deprived of their freedom, in order to prevent torture and other cruel, inhuman, or degrading treatment or punishment (Article 1 of the Protocol). Definitively, what it deals with, as shown in the Preamble of this new instrument, is the aim of achieving the eradication of such criminal practices, and strengthening, through different types of measures, the protection of individuals against torture and other cruel, inhuman or degrading treatment or punishment, which is seen as “a common responsibility shared by all”.

The optional protocol is a conventional instrument linked to the 1984 Convention, such that only States which are members of the Convention can be members of the optional protocol. Reservations to the text of the Protocol are prohibited (Article 30), and it incorporates the possibility of its denouncement or amendment (Articles 33 and 34).

Given that a “system of regular visits” to places of detention also exists under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 26 November 1987<sup>49</sup>, Article 31 of the Protocol includes a clause of compatibility between the two systems, and encourages the Subcommittee on Prevention (see above) and the bodies established under regional conventions to consult one another and cooperate so as to avoid duplication and promote effectively the objectives of the Protocol. In addition, Article 32 of the Protocol includes another compatibility clause regarding the four Geneva Conventions on International Humanitarian Law of 1949, and their Additional Protocols of 1977, foreseeing in particular that their provisions shall in no way affect the capacity that any Member State has to authorise the International Committee of the Red Cross to visit places of detention in situations not covered by International Humanitarian Law.

The Protocol’s prevention system is based on the inter-related and complementary actions of bodies belonging to two *pillars*: the international and the national of each State. On a universal level, only this system of *double* legitimacy has allowed a difficult consensus to be reached for the adoption of the instrument; this consensus lies in a balance between the defence of values and universal interests through in-

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See a general presentation of the Protocol in *Protocolo Facultativo. Convención de las NN. UU. contra la Tortura y otros tratos o penas crueles, inhumanos o degradantes. Un Manual para la Prevención*, IIDH y APT, San José de Costa Rica and Geneva, 2004.

<sup>49</sup> See *supra*, note 6.

ternational mechanisms provided with “supra-national” competences, and the protection of “sovereignty” or national interests against undesirable or inconvenient “foreign interventions”.

The international body created by the Protocol is the *Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee Against Torture* (hereinafter referred to as the Subcommittee), which is guided by the principles of confidentiality, impartiality, non-selectivity, universality, and objectivity, as well as the purposes and principles set out in the Charter of the United Nations and in the norms of the United Nations concerning the treatment of persons deprived of their liberty (Article 2)<sup>50</sup>.

The Subcommittee consists of ten members (this number can increase to 25 if the number of States Parties reaches fifty) who shall exercise their functions in their individual capacity. They shall be chosen for a term of four years, and may be re-elected<sup>51</sup>.

Their mandate has a threefold nature (Article 11):

- a) Visiting any “place of detention”<sup>52</sup>, and making recommendations to member States regarding the protection of “people de-

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<sup>50</sup> Its condition as an international body is reinforced by Article 25 of the Optional Protocol, according to which the expenditure incurred by the Subcommittee are borne by the United Nations; the Secretary-General shall provide the necessary staff and facilities for the effective performance of its tasks; finally, a Special Fund shall be set up for contributing to the financing of the implementation of its recommendations after a visit, as well as education programmes of the national preventive mechanisms (Article 26). Compare these provisions with Articles 17.7 and 18.5 of the 1984 Convention, whose amendments, as has been indicated (see note 2), have not been able to come into force due to lack of acceptance by member States who, in the majority, do not want to finance the functions of the Committee and its members with the United Nations budget.

<sup>51</sup> Specifically, it is foreseen that the composition of the Subcommittee will have to take into account an equitable geographic distribution of members, the representation of different “forms of civilization and legal systems of the States parties”, and (the biggest innovation), the need for a “for a balanced gender representation on the basis of principles of equality and non-discrimination” (Articles 5.3 and 4). Members of the Subcommittee shall be accorded privileges and immunities, in accordance with Sections 22 and 23 of the Convention on the Privileges and Immunities of the United Nations of 1946.

<sup>52</sup> In other words, in accordance with what is set out in Article 4.1, “... any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence...”. No express reference to “control” is found in the provisions of the 1984 Convention. According to its first Annual Report (*vide infra*) to the CAT, Mauritius, Maldives and Sweden were visited in 2007 and early in 2008. Next countries to be visited will be Mexico, Paraguay and Benin.

prived of their liberty"<sup>53</sup> from torture or other cruel, inhuman, or degrading treatment or punishment.

The visits will take place in accordance with "a programme of regular visits to the States Parties", established at first by lot; such a programme shall be notified to the States Parties "in order that they may, without delay, make the necessary practical arrangements for the visits to be conducted" (Article 13). At least two members of the Subcommittee will take part in the visit, but they can be accompanied by experts of demonstrated professional experience and knowledge selected from a roster of experts. The State Party concerned may show its opposition to the inclusion of a specific expert in the visit. If that is the case the Subcommittee "shall propose another expert" (Article 13.3). In addition, if the Subcommittee considers it appropriate, it may propose a short *follow-up visit* after a regular visit (Article 13.4).

On the other hand, the Subcommittee shall communicate its recommendations and observations confidentially to the State Party and, "if relevant, to the national preventive mechanism" (Article 16.1). More concretely, the Subcommittee shall publish its report, together with any observations of the Member State concerned, if thus requested by the State; but if the State itself makes part of the report public, the Subcommittee may publish its report in whole or in part, avoiding the inclusion of personal data without the express consent of the person involved (Article 16.2).

- b) Acting in relation to the national prevention mechanisms, advising and assisting States in their creation; maintaining direct, and if necessary confidential, contact with the national preventive mechanisms, and offering them training and technical assistance; advising them to evaluate their needs and the means necessary to strengthen the protection of people deprived of their liberty; and making observations and recommendations to Member States so as to strengthen the capacity and mandate of the national preventive mechanisms.

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<sup>53</sup> "Deprivation of liberty" is defined in Article 4.2, for the purposes of the Protocol, in the following terms: "any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority". The express reference to "private" detention institutions must be highlighted, as it serves to deal with the practice followed in some States (which I believe to be dangerous and inadequate for the human rights of prisoners), of "entrusting" these private institutions with the exercise of *penitentiary public power*.

- c) Cooperating for the prevention of torture in general with the relevant United Nations bodies and mechanisms, as well as with international, regional and national institutions and organisations whose objective is to strengthen the protection of people against torture.

In general terms, States Parties are obliged to do whatever necessary for the Subcommittee to adequately complete its mandate. More concretely, they commit (Articles 12 and 14) to receive it in their territory and grant it access<sup>54</sup> to all places of detention and their installations and facilities, and to disclose all information regarding the number of people deprived of their freedom in places of detention, the number of places and their location, and the treatment and conditions of the detention; to allow them the possibility to have private interviews with the persons deprived of their liberty without witnesses, as well as with any other person whom the Subcommittee believes may supply relevant information; to allow them the freedom to choose the places of the visits and the people to be interviewed (anyone providing such information will enjoy special protection in accordance with Article 15); to provide all information requested for the evaluation of the needs and measures which should be taken; to encourage and facilitate contacts between the Subcommittee and the national preventive mechanisms; and, finally, to examine the recommendations of the Subcommittee and engage in dialogue with it regarding possible measures for implementation.

The Subcommittee is not a subsidiary body of the Committee Against Torture as it has its own treaty of creation. However, many doubts came about during the process of the negotiation of the optional protocol from the perspective that its approval would come about in detriment to the relevance and functions of the Committee. Some of the provisions of the Protocol deal with the relationship between the Subcommittee and the Committee, without undermining the basic independence of the former in the performance of its tasks. Thus it is established that the Subcommittee and the Committee will hold their periods of sessions simultaneously at least once a year (Article 10.3); that the Subcommittee will present an annual report on its activities to the

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<sup>54</sup> In accordance with Article 14.2, "objection to a visit to a particular place of detention may be made only on urgent and compelling grounds of national defence, public safety, natural disaster or serious disorder in the place to be visited that temporarily prevent the carrying out of such a visit. The existence of a declared state of emergency as such shall not be invoked by a State party as a reason to object to a visit".

Committee (Article 16.3)<sup>55</sup>; that if a member State refuses to cooperate with the Subcommittee or to take steps to improve the situation in the light of the recommendations of the Subcommittee, the Committee may, at the request of the Subcommittee, “decide by a majority of its members, after the State Party has had an opportunity to make its views known, to make a public statement on the matter or to publish the report of the Subcommittee...” (Article 16.4).

The national *pillar* is designated as “national preventive mechanism” and is made up of one or several visiting bodies set up by each Member State, designated and maintained at a national level, at the latest one year after the entry into force of the Protocol or its ratification or accession (Articles 3 and 17)<sup>56</sup>. The national mechanism will be “independent” and the “mechanisms established by decentralized units may be designated as national preventive mechanisms for the purposes of the present Protocol if they are in conformity with its provisions” (Article 17)<sup>57</sup>. National preventive mechanisms will have *at a minimum* certain “faculties” in accordance with the Protocol (Article 19). These are: the periodical examination of the treatment of people deprived of their freedom in places of detention with the aim of strengthening their protection; to make recommendations to the relevant authorities for the improvement of the treatment and conditions of people deprived of their liberty, and for the prevention of torture and mistreatment, “taking into consideration the relevant norms of the United Nations”; and to submit proposals and observations regarding current legislation or “draft legislation”.

Member States (Article 18) should take the necessary measures to guarantee the functional independence of national mechanisms as well as the independence of their personnel (even affording them privileges and immunities) and to ensure that experts have the required capabilities and professional knowledge, particularly taking into account the need for a “gender balance and the adequate representation of ethnic and minority groups in the country”. Finally, States Parties assume the

<sup>55</sup> The first Annual Report was presented by the Subcommittee to the CAT in the session of May 2008. See CAT/C/40/2, 25 April 2008 (not revised version).

<sup>56</sup> See in general APT: “La sociedad civil y los mecanismos nacionales de prevención bajo el Protocolo Facultativo de la Convención contra la Tortura”, May 2008, available at [www.apr.ch](http://www.apr.ch)

<sup>57</sup> The problems arising from its “federal” structure were mentioned by different States against the appropriateness of the Protocol. Article 17 finds a channel for the solution of thus formulated conflicts of interest, together with Article 29, according to which the provisions of the Protocol “shall extend to all parts of federal States without any limitations or exceptions”.



commitment of adequately funding the national preventive mechanisms for their appropriate functioning.

In addition, in parallel with the obligations *vis-a-vis* the Subcommittee, Member States undertake (Article 20) to grant national preventive mechanisms access to all places of detention and their installations and facilities, and to all information regarding the number of people deprived of their liberty in places of detention, the number of places and their location, and to all information concerning the treatment of those persons and the conditions of their detention; to allow them the possibility of interviewing people deprived of their liberty (without witnesses, personally or with a translator if necessary), or with any other person considered relevant by the national mechanism, as well as allowing them the freedom to select the places they want to visit and the people they want to interview (anyone providing the national mechanism with information will enjoy special protection, as established in Article 21).

States also commit to allowing national preventive mechanisms the right to maintain contact with the Subcommittee, sending them information and meeting with them, and they are under the obligation to examine the recommendations of the national mechanism, and to take part in a dialogue with it regarding possible implementation measures (Article 22), and to publish and disseminate the annual reports of the national preventive mechanisms (Article 23).

## 7. Final considerations

The prevention and eradication of torture and cruel, inhuman or degrading treatment or punishment is an objective of the international community, and a principle of International Human Rights Law. As an essential “piece” of the universal system for the promotion and protection of human rights, the 1984 Convention and its recent Optional Protocol are instruments, together with the indicated regional ones, of great value, whose potential is not fully realised due to the negative attitudes of many States regarding global policies which would reinforce the actions of the international community and its institutions as regards respect of the dignity of all people.

It is true that the United Nations system for the promotion and protection of human rights, especially its conventional dimension, needs to be reformed to rationalise it or make it more effective. It is also true that the functioning of the Committee Against Torture could be improved, even with the current means in place: that is what it is trying to

do right now. But the battle against torture and cruel, inhuman or degrading treatment or punishment deserves much more attention from States whose public and international actions cannot efficiently be replaced either by international organisations or by international civil society and human rights NGOs that play a vital role in the protection of human dignity.

# The Convention on the Rights of the Child

Wouter Vandenhole

**Summary:** 1. Drafting History of the CRC. 2. Normative Provisions. 3. The Optional Protocols: 3.1. The Optional Protocol on the Involvement of Children in Armed Conflict. 3.2. Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography. 4. Monitoring. 5. Towards an Optional Protocol Establishing a Complaints and Inquiry Procedure? 6. Conclusions.

The Convention on the Rights of the Child (hereafter CRC or the Convention), adopted on 20 November 1989<sup>1</sup>, is often considered to be the most successful core UN human rights treaty, for it has been ratified by almost all member states of the UN. It currently has 193 ratifications. Only Somalia and the United States have not yet ratified it. The CRC has some innovative features, such as the explicit attention paid to the rights and responsibilities of parents or other caregivers, and its very comprehensive approach. Implementation however remains a huge challenge. Moreover, monitoring is limited to the reporting procedure and therefore rather weak. The Committee on the Rights of the Child (CRC Committee) faces also a considerable backlog in examining State reports due to the immense success of the CRC and its optional protocols.

In 2000, two substantive optional protocols were adopted, one on the Involvement of Children in Armed Conflict (hereafter OP AC)<sup>2</sup> and one on the Sale of Children, Child Prostitution and Child Pornography (hereafter OP SC)<sup>3</sup>.

In what follows, the drafting history of the CRC is briefly recalled. Next, the substantive provisions of the CRC are introduced. In a third section, the two optional protocols are briefly discussed. Fourthly, mon-

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<sup>1</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, and entered into force on 2 September 1990.

<sup>2</sup> Adopted on 25 May 2000 and entered into force on 12 February 2002. There are currently 120 States Parties.

<sup>3</sup> Adopted on 25 May 2000 and entered into force on 18 January 2002. There are currently 126 States Parties.

itoring of the CRC and its optional protocols by the CRC Committee is explained. Finally, the proposal for a complaints and inquiry procedure is examined.

## 1. Drafting History of the CRC

There are different readings of the drafting history of the CRC. The CRC is sometimes seen as the historic culmination point of a long struggle for recognition of children as full-fledged human beings, as subjects of rights<sup>4</sup>. This is however only part of the story. Alston sheds a rather down-to-earth light from an international relations perspective on how the CRC has benefited from changing international relations, such as the change in American presidency and the collapse of the Berlin Wall and the Eastern Block in 1989<sup>5</sup>. Poland, which submitted a draft convention to the UN Commission on Human Rights in 1978 and belonged to the group of socialist States, wanted to show that human rights initiatives were not a monopoly of Western States, and in particular of the then President of the United States Jimmy Carter<sup>6</sup>. Moreover, it was assumed that a convention on the rights of the child “could justifiably be confined to the economic, social and cultural rights to which the Communist countries wanted to accord priority”<sup>7</sup>. When in a later stage the United States gave up their obstruction and sought to insert civil and political rights, they were less motivated by a desire to accord civil and political rights to children, but rather concerned how they could make the Convention less appealing for Poland and its allies<sup>8</sup>. In early 1989, President Reagan of the USA was succeeded by President George Bush senior, and by the end of 1989, the former Communist countries were eager to show their commitment to a comprehensive human rights package<sup>9</sup>. This made it possible to conclude negotiations without major ideological clashes during the final stages.

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<sup>4</sup> See e.g. VERHELLEN, E.: ‘The Convention on the Rights of the Child’, in WEYTS, A. (ed.): *Understanding Children’s Rights. Collected Papers Presented at the Seventh International Interdisciplinary Course on Children’s Rights*, Ghent, November-December 2004, Ghent, Children’s Rights Centre, pp. 17-20.

<sup>5</sup> ALSTON, PH.: “The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights”, 8 *International Journal of Law and the Family*, 1994, p. 6.

<sup>6</sup> *Ibid.*; LOPATKA, A.: ‘Introduction’, in OHCHR: *Legislative History of the Convention on the Rights of the Child*, United Nations, New York/Geneva, 2007, xxxviii.

<sup>7</sup> ALSTON, *supra* note 5, p. 6.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*, p. 7.

Among the antecedents of the CRC is *inter alia* the Geneva Declaration of the Rights of the Child adopted by the League of Nations – the forerunner of the United Nations – in 1924, which had largely been drafted by the International Save the Children Union. In 1959, the Declaration on the Rights of the Child was adopted by the UN General Assembly. The ILO too did some work on children's rights, in particular in the area of labour rights<sup>10</sup>. In 1978, Poland took the initiative, formally in light of the 20<sup>th</sup> anniversary of the 1959 Declaration on the Rights of the Child and the proclamation of the 1979 as the International Year of the Child, to draft a legally binding Convention on Children's Rights. This initial draft was largely based on the text of the 1959 Declaration<sup>11</sup>. After consultations, it was amended and submitted to the Commission on Human Rights in 1979.

Notwithstanding intentions to have the CRC quickly adopted, it eventually took ten years of negotiations. Initially, negotiations turned out to be very difficult moreover, for there was little time and quite some ideological obstruction, so that progress on the CRC depended on advancement of work on the Convention against Torture, which was of importance to some Western States<sup>12</sup>. Later on, there was more meeting time for the Working Group, and more and broader involvement. As of 1986, UNICEF, which initially showed a total lack of interest<sup>13</sup>, got involved, which also led to more involvement of countries from the South. NGOs were very active during negotiations through the Informal NGO Ad Hoc Group for the Drafting of the CRC<sup>14</sup>.

Contentious issues during the negotiations were first and foremost the definition of the child (when does childhood begins: at conception or at birth?); the right to express views, freedom of expression, religion and thought; adoption; the right to education (i.e. the standard of mandatory primary education free for all as adopted in earlier human rights instruments was believed to be too high for a number of States); and children in armed conflict (at what age should children be permitted to take part in armed conflict?)<sup>15</sup>. The latter is-

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<sup>10</sup> For the minimum age and other ILO Conventions, see <http://www.ilo.org/ilolex/english/convdisp2.htm>.

<sup>11</sup> LOPATKA, *supra* note 6, xxxviii.

<sup>12</sup> CANTWELL, P.: 'The Origins, Development and Significance of the United Nations Convention on the Rights of the Child', in DETRICK, S.: *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"*, Dordrecht/Boston/London, Martinus Nijhoff, 1992, p. 23.

<sup>13</sup> *Ibid.*, p. 21.

<sup>14</sup> LOPATKA, *supra* note 6, xxxix; CANTWELL, *supra* note 12, pp. 24-25.

<sup>15</sup> *Ibid.*, xli; CANTWELL, *supra* note 12, pp. 26-27.

sue was taken up again through the elaboration of an optional protocol (see further).

Two schools of thought or perspectives on children have informed the CRC. On the one hand, there is the view that children need special protection and priority care. That was the almost exclusive theme of the 1924 and 1959 Declarations, which should be understood in light of the two World Wars<sup>16</sup>. On the other hand, there are proponents of recognizing children as autonomous individuals and “fully-fledged beneficiaries of human rights”<sup>17</sup>.

## 2. Normative Provisions<sup>18</sup>

The CRC’s preamble is followed by three parts. Part I contains the definition of the child, general principles and obligations, and a detailed list of specific rights and obligations. Part II deals with the Committee on the Rights of the Child. Part III holds some final provisions on ratification, amendments, reservations, denunciation etc.

The CRC is very comprehensive in scope, and covers civil, political, economic, social and cultural rights. Whereas the way they are listed emphasizes their indivisibility, a reminder and casualty of the Cold War can be found in article 4 CRC, which differentiates the general obligation for the realisation of the rights, limiting it in the case of economic, social and cultural rights to “the maximum extent of their available resources and, where needed, within the framework of international cooperation”<sup>19</sup>.

A very popular categorisation among children’s rights proponents and CRC commentators is the three Ps: rights to *protection*, *provision* and *participation*. The downside of this categorisation is not only that it departs from the one human rights actors are familiar with, but also and more importantly that the term ‘provision rights’ tends to confirm the outdated misunderstanding or misrepresentation that economic and social rights are exclusively about provision. It has meanwhile been widely accepted that the obligations relating to economic, social and cultural rights are to be understood as obligations to respect, to protect

<sup>16</sup> CANTWELL, *supra* note 12, p. 19.

<sup>17</sup> *Ibid.*, p. 27.

<sup>18</sup> For a recent and detailed article by article analysis of all provisions of the CRC and its two optional protocols, see ALEN, A.; VANDE LANOTTE, J.; VERHELLEN, E.; ANG, F.; BERGHMANS, E. and VERHEYDE, M. (eds.): *A Commentary on the United Nations Convention on the Rights of the Child*, Leiden/Boston, Martinus Nijhoff. Unfortunately, this series is not yet complete.

<sup>19</sup> CANTWELL, in DETRICK, p. 27; See also ALSTON, *supra* note 5, p. 7.

and to fulfil, and that the latter obligation consists of sub-obligations to facilitate, to promote and to provide. Only the sub-obligation to fulfil-provide requires considerable mobilisation of resources.

In its reporting guidelines, the CRC Committee has elaborated eight clusters, which group articles according to content and in a logical order:

- i. general measures of implementation (Arts. 4, 42 and 44.6);
- ii. definition of the child (Art. 1);
- iii. general principles (Arts. 2, 3, 6 and 12);
- iv. civil rights and freedoms (Arts. 7, 8, 13-17 and 37 (a));
- v. family environment and alternative care (Arts. 5, 9-11, 18.1 and 2; 19-21, 25.4 and 39);
- vi. basic health and welfare (Arts. 6, 18.3, 23, 24, 26, and 27.1-3);
- vii. education, leisure and cultural activities (Arts. 28, 29 and 31);  
and
- viii. special protection measures (Arts. 22, 30, 32-36, 37 (b)-(d), 38, 39 and 40).

Its earlier general comments can be linked up to one of these eight clusters:

- General Comment No. 2 (2002) on the role of independent national human rights institutions and General Comment No. 5 (2003) on general measures of implementation of the Convention on the Rights of the Child relate to cluster I on general measures of implementation;
- General Comment No. 3 (2003) on HIV/AIDS and the rights of the child and General Comment No. 4 (2003) on adolescent health and development in the context of the Convention on the Rights of the Child pertain to cluster VI on basic health and welfare;
- General Comment No. 1 (2001) on the aims of education relates to cluster VII on education, leisure and cultural activities;
- General Comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin<sup>20</sup>, General Comment No. 9 (2006) on the rights of children with disabilities<sup>21</sup> and General Comment No. 10 (2007) on children's rights in juvenile justice<sup>22</sup> address issues dealt with in cluster VIII on special protection measures.

<sup>20</sup> UN Doc. CRC/C/GC/5.

<sup>21</sup> UN Doc. CRC/C/GC/9.

<sup>22</sup> UN Doc. CRC/C/GC/10.

Some recent general comments have addressed more cross-cutting issues: General Comment No. 7 (2006) dealt with the implementation of child rights in early childhood<sup>23</sup>; and General Comment No. 8 (2006) focuses on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment<sup>24</sup>. The latter is relevant in particular under clusters V, VII and VIII.

In what follows, a short overview of the rights provided by the CRC will be given, with particular focus on the unique features of the CRC, compared to other human rights instruments.

### *General Measures of Implementation (Arts 4, 42 and 46.6)*

The general measures of implementation of the CRC – such as legislation, the establishment of coordinating and monitoring bodies, comprehensive data collection, awareness-raising and training and the development and implementation of appropriate policies, services and programmes – have been spelt out in the CRC Committee's General Comment No. 5. Articles 42 and 44.6 CRC impose obligations of children's rights education for children and adults, and of wide dissemination of the State report. Article 4 CRC, similar to Article 2 ICCPR and ICESCR, contains the overall implementation obligation for States Parties<sup>25</sup>. "The second sentence of Article 4 reflects a realistic acceptance that lack of resources – financial and other resources – can hamper the full implementation of economic, social and cultural rights in some States; this introduces the concept of "progressive realization" of such rights"<sup>26</sup>.

International assistance and co-operation is mentioned in Articles 4, 7.2, 11.2, 17 (b), 21 (e), 22.2, 23.4, 24.4, 27.4, 28.3, 34, 35 and 45 CRC. Sometimes there is clearly no intention to refer to cooperation for *development*, sometimes cooperation for development may or may not be encompassed, and in still other instances most likely cooperation for development is at the core of the reference. To the latter category belong the references to international cooperation in the final but one preambular paragraph<sup>27</sup>, Art. 4 (general obligation), Art. 23.4 (disability), Art. 24.4

<sup>23</sup> UN Doc. CRC/C/GC/7/Rev.1.

<sup>24</sup> UN Doc. CRC/C/GC/8.

<sup>25</sup> RISHMAWI, M.: *Article 4: the Nature of States Parties' Obligations*, in ALEN et al. (eds.): *supra* note 18, 2006.

<sup>26</sup> CRC Committee, General Comment No. 5 on General Measures of Implementation, UN Doc. CRC/GC/2003/5, para. 7.

<sup>27</sup> The final preambular paragraph of the CRC reads: "Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries".



(health) and Art. 28.3 (education). It is contested whether these references amounts to a *legal* obligation to cooperate for development<sup>28</sup>.

### *Definition of the Child*

Article 1 CRC defines a child as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”. So while in principle the upper age limit is fixed on 18, States can stipulate in domestic law that majority is attained earlier. The CRC is the first human rights treaty to set such an upper age limit. It is left open whether childhood begins from the moment of conception or rather from birth, given the sensitivity of the issue of abortion<sup>29</sup>.

### *General Principles*

The CRC is governed by four over-arching general principles, which are explicitly reflected in four provisions: the right to equality and non-discrimination (Art. 2 CRC); the best interests of the child (Art. 3 CRC)<sup>30</sup>; the right to life, survival and development (Art. 6 CRC)<sup>31</sup>; and respect for the views of the child, sometimes also referred to as the right to participation (Art. 12 CRC). These general principles pervade the whole Convention, and are to be taken into account when interpreting a provision in the CRC.

Compared to other non-discrimination clauses, the CRC’s non-discrimination provision is broader in that it also offers protection against discrimination on the basis of status, activities, expressed opinions, or beliefs of a child’s parents, legal guardians or family members. Moreover, it explicitly lists the parent’s or legal guardian’s race, and the children’s ethnic origin and disability as prohibited grounds<sup>32</sup>. The prohibition of dis-

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<sup>28</sup> See for more details e.g. VANDENHOLE, W.: “Economic, Social and Cultural Rights in the CRC: Is There a Legal Obligation to Cooperate Internationally for Development?”, *International Journal of Children’s Rights*, forthcoming.

<sup>29</sup> For more details, see DETRICK, S.: *A Commentary on the United Nations Convention on the Rights of the Child*, The Hague, Martinus Nijhoff, 1999, pp. 51-66.

<sup>30</sup> FREEMAN, M.: *Article 3: the Best Interests of the Child*, in ALEN et al. (eds.): *supra* note 18, 2007.

<sup>31</sup> NOWAK, M.: *Article 6: the Right to Life, Survival and Development*, in ALEN et al. (eds.): *supra* note 18, 2005.

<sup>32</sup> See also VANDENHOLE, W.: *Equality and Non-Discrimination in the View of the UN Human Rights Treaty Bodies*, Antwerp, Intersentia, 2005, pp. 170-172; CRC Committee, General comment No. 9 (2006) on the rights of children with disabilities, UN Doc. CRC/C/GC/9.

crimination in the field of economic, social and cultural rights can be argued not to be limited by Article 4 CRC: it is of immediate effect<sup>33</sup>.

The best interests of the child is a relative new interpretation principle in international law, that was introduced to it by the CRC<sup>34</sup>. Its meaning and application is very problematic. The interests of the child can be understood in different ways: as basic interest, developmental interest or autonomy interest<sup>35</sup>, or also in light of children's needs, potential harm to children or their wishes and feelings<sup>36</sup>. In light of the interdependence and interaction between the different rights in the CRC, it is submitted that the best interests of the child should be understood in light of all other rights and general principles, so that children themselves should have a say in defining what is in their interest. It is noteworthy that the best interests of the child are only 'a primary consideration', not *the* primary or paramount consideration. The best interests of the child are therefore to be balanced with other interests<sup>37</sup>.

The right to life, survival and development is unique in its formulation. Other core human rights treaties protect the right to life only, without mentioning survival and development. The reference to survival was intended to emphasize the positive obligations incumbent on States parties to prolong children's lives. Survival is closely related to a healthy development of children, and thereby introduces obligations of fulfillment<sup>38</sup>. The attention paid to the development of children, to be understood holistically<sup>39</sup>, is closely related to the concept of human development as advocated by the World Health Organization and UNICEF in the 1980s<sup>40</sup>.

Finally, the right to participation is a cluster of rights, with at its core the right to express one's view and the right that that view is being taken into account<sup>41</sup>. The right to express one's views is limited to children who are capable of forming their views, and extends only to matters

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<sup>33</sup> Contra: BESSON, S.: 'The Principle of Non-Discrimination in the Convention on the Rights of the Child', *The International Journal of Children's Rights*, 2005, p. 455.

<sup>34</sup> FREEMAN, *supra* note 30, p. 1.

<sup>35</sup> EEKELAAR, J.: 'The Importance of Thinking That Children Have Rights', *International Journal of Law and the Family*, 1992, pp. 230-231.

<sup>36</sup> FREEMAN, *supra* note 30, p. 31.

<sup>37</sup> *Ibid.*, p. 60.

<sup>38</sup> NOWAK, *supra* note 31, pp. 12-14 and 36-37.

<sup>39</sup> CRC Committee, General Comment No. 5 on General Measures of Implementation, UN Doc. CRC/GC/2003/5, para. 12; CRC Committee, General Comment No. 7 on Implementing Child Rights in Early Childhood, UN Doc. CRC/GC/2005/Rev.1, para. 10.

<sup>40</sup> NOWAK, *supra* note 31, pp. 7 and 14.

<sup>41</sup> ARCHARD, D.: 'Preface', in ANG, F.; BERGHMANS, E.; CATRUSSE, L. *et al.*: *Participation Rights of Children*, Antwerp, Intersentia, 2006, v.

that affect them. The right to have the views expressed taken into account is qualified by references to age and maturity<sup>42</sup>. Quite often, the right to participation is balanced against the best interests of the child<sup>43</sup>.

### *Civil Rights and Freedoms*

Civil rights and freedoms include the right of the child to a name, to acquire a nationality and to know and be cared for by parents (Art. 7)<sup>44</sup>; the right to preservation of identity, including nationality, name and family relations (Art. 8); freedom of expression (Art. 13)<sup>45</sup>; freedom of thought, conscience and religion, with respect for the rights of the parents to provide direction to the child in the exercise of this right in a manner consistent with the evolving capacities of the child (Art. 14)<sup>46</sup>; the right to freedom of association and peaceful assembly (Art. 15); the right to respect for private life, family life, home and correspondence (Art. 16); the obligation to ensure the child's access to information and material from a diversity of sources (Art.17); and the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, and the prohibition of capital punishment and life imprisonment without possibility of release (Art. 37 (a)). Whereas some of these provisions simply repeat some of the generally recognized civil and political rights, others hold new rights or features (in particular Articles 7, 8, 14, 17 and 37(a)).

### *Family Environment and Alternative Care*

It is not surprising that a high number of provisions relate to the family environment and alternative care, as the family is the natural environment for the child to grow up and develop. The following obligations for States and rights of children can be mentioned: the obligation for States to respect the direction and guidance provided by parents and others in the exercise by the child of its rights (Art. 5); the right not

<sup>42</sup> ANG, F.; BERGHMANS, E.; CATTRUISSE, L. *et al.*: *op. cit.*, p. 14.

<sup>43</sup> *Ibid.*, p. 18.

<sup>44</sup> ZIEMELE, I.: *Article 7: the Right to Birth Registration, Name and Nationality, and the Right to Know and Be Cared for by Parents*, in ALEN *et al.* (eds.): *supra* note 18, 2007.

<sup>45</sup> THORGEIRSDOTTIR, H.: *Article 13: the Right to Freedom of Expression*, in ALEN *et al.* (eds.): *supra* note 18, 2006.

<sup>46</sup> BREMS, E.: *Article 14: the Right to Freedom of Thought, Conscience and Religion*, in ALEN *et al.* (eds.): *supra* note 18, 2006.

to be separated from one's parents and the right to retain personal relations and direct contact with both parents (art. 9)<sup>47</sup>; the obligation for States to deal with applications for entering or leaving a State for the purpose of family reunification in a positive manner (Art. 10); the obligation to combat illicit transfer and non-return of children abroad (Art. 11); the obligation to support parents in their child-rearing responsibilities (Arts. 18.1 and 18.2); the obligation to protect the child from all forms of violence, abuse, neglect or exploitation while in the care of parents or others (Art. 19); the right to special protection for children deprived of their family environment (Art. 20)<sup>48</sup>; obligations relating to adoption (Art. 21); the right of children in care to a periodic review of the treatment (Art. 25); the obligation to secure the recovery of maintenance for the child from those having financial responsibility (27.4); and the obligation for States to promote physical and psychological recovery and social reintegration of child victims (Art. 39). Most of these rights of children and obligations for States are unique to the CRC.

### *Basic Health and Welfare*

Quite a number of provisions in the CRC refer to basic health and welfare. In addition to the right to life, survival and development (Art. 6), which is considered to be a general principle, the following rights and obligations can be identified: the right of working parents to benefit from child-care services and facilities (Art. 18.3); rights of disabled children (Art. 23); the right of children to the enjoyment of the highest attainable standard of health and the obligation for States parties to take measures to abolish traditional practices prejudicial to the health of children (Art. 24)<sup>49</sup>; the right to benefit from social security (Art. 26)<sup>50</sup>; and the right to a standard of living adequate for physical, mental, spiritual, moral and social development (Art. 27.1) and the obligation for States to assist parents (Art. 27.3)<sup>51</sup>. The recognition of rights of disabled children in particular was pioneering at the time, and

<sup>47</sup> DOEK, J.: *Article 8: the Right to Preservation of Identity; Article 9: the Right Not to Be Separated from His or Her Parents*, in ALEN et al. (eds.): *supra* note 18, 2006.

<sup>48</sup> CANTWELL, N. and HOLZSCHEITER, A.: *Article 20: Children Deprived of Their Family Environment*, in ALEN et al. (eds.): *supra* note 18, 2008.

<sup>49</sup> EIDE, A. and EIDE, W.B.: *Article 24: the Right to Health*, in ALEN et al. (eds.): *supra* note 18, 2006.

<sup>50</sup> VANDENHOLE, W.: *Article 26: the Right to Benefit from Social Security*, in ALEN et al. (eds.): *supra* note 18, 2007.

<sup>51</sup> EIDE, A.: *Article 27: the Right to an Adequate Standard of Living*, in ALEN et al. (eds.): *supra* note 18, 2006.

only more than 15 years later matched by rights for *all* disabled persons through the adoption of the 2006 Disability Convention.

### *Education, Leisure and Cultural Activities*

Article 28 CRC guarantees the right to education. It is remarkable that the obligation to make primary education compulsory and available free to all has been weakened compared to the 1966 ICESCR. Whereas the obligation of compulsory and free primary obligation under the ICESCR is an immediate one, it is watered down to a progressive one in the CRC. On the other hand, the obligation to take measures to ensure that school discipline is administered in a manner consistent with the child's human dignity is innovative<sup>52</sup>. Art. 29 CRC lists extensively the goals of education, such as the development of the child's personality, of respect for human rights, of respect for one's parents, cultural identity, national values and different civilizations and of respect for the natural environment. Moreover, education should prepare children for "responsible life in a free society". Finally, Article 31 CRC recognizes quite innovatively the right of the child to rest and leisure and to participate freely in cultural life and the arts<sup>53</sup>.

### *Special Protection Measures*

A substantive number of Articles have been grouped by the CRC Committee under the heading of special protection measures. Some pertain to specific groups of children, such as children seeking refugee status (Art. 22), and children belonging to minorities or of indigenous origin (Art. 30). Other provisions hold guarantees for all children against certain risks such as economic exploitation, harmful work, illicit use of narcotic drugs and psychotropic substances, sexual exploitation and abuse<sup>54</sup>, abduction, sale and trade, or any other form of exploitation (Arts. 32-36). States also undertake to respect and to ensure respect for the rules of international humanitarian law in armed conflicts (Art. 38)<sup>55</sup>.

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<sup>52</sup> VERHEYDE, M.: *Article 28: the Right to Education*, in ALEN *et al.* (eds.): *supra* note 18, 2006.

<sup>53</sup> DAVID, P.: *Article 31: the Right to Leisure, Play and Culture*, in ALEN *et al.* (eds.): *supra* note 18, 2006.

<sup>54</sup> MUNTARBHORN, V.: *Article 34: Sexual Exploitation and Sexual Abuse of Children*, in ALEN *et al.* (eds.): *supra* note 18, 2006.

<sup>55</sup> ANG, F.: *Article 38: Children in Armed Conflicts*, in ALEN *et al.* (eds.): *supra* note 18, 2006.

Article 39 imposes the obligation on States to promote physical and psychological recovery and social reintegration of child victims.

Under Article 37 (b) CRC, protection is offered against unlawful or arbitrary detention. Children can only be deprived of their liberty in accordance with the law, as a measure of last resort and for the shortest appropriate period of time. Article 37 (c)-(d) offers guarantees in case of deprivation of liberty<sup>56</sup>. Article 40 addresses the rights of children in conflict with the law. It emphasizes the right of every child to be treated in a sense consistent with the promotion of its sense of dignity and worth, and offers procedural guarantees. Alternatives to judicial proceedings are encouraged. States are also to set a minimum age below which children should be presumed not to have the capacity to infringe the penal law<sup>57</sup>. In its General Comment No. 10, the CRC Committee has indicated that a minimum age of criminal responsibility below the age of 12 years is considered not to be internationally acceptable<sup>58</sup>.

### 3. The Optional Protocols

#### 3.1. *The Optional Protocol on the Involvement of Children in Armed Conflict*

The Optional Protocol on the Involvement of Children in Armed Conflict (OP AC), adopted in 2000, elaborates on issues addressed in Articles 38-39 CRC, for which some States, non-governmental organizations and the CRC Committee wished firmer standards. In particular, the minimum age for *compulsory* recruitment and *direct* participation in hostilities was raised from 15 in the CRC to 18 years in the OP AC. The obligation on States is rather weak, as they only commit to taking all *feasible* measures to ensure that minus 18 year olds do not take direct part in hostilities. The meaning of direct participation in hostilities is unclear. Moreover, the possibility of voluntary recruitment of children is explicitly left open in Article 3 OP AC.

States are to submit a binding declaration though on the minimum age at which they will allow voluntary recruitment (Article 3.2 OP AC). Article 4 OP AC contains a moral obligation for armed groups that are

<sup>56</sup> SCHABAS, W. and SAX, H.: *Article 37: Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty*, in ALEN *et al.* (eds.): *supra* note 18, 2006.

<sup>57</sup> VAN BUEREN, G.: *Article 40: Child Criminal Justice*, in ALEN *et al.* (eds.): *supra* note 18, 2006.

<sup>58</sup> General Comment No. 10 (2007) on children's rights in juvenile justice, UN Doc. CRC/C/GC/10, para. 32.

distinct from the armed forces of a State not to recruit or use in hostilities persons under the age of 18. Art. 6(3) OP AC addresses the issue of demobilization, rehabilitation and reintegration of child soldiers<sup>59</sup>.

Guidelines regarding initial reports under the optional protocol on the involvement of children in armed conflict were adopted in October 2001, and revised in September 2007<sup>60</sup>.

### 3.2. *Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography*

The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (OP SC) was also adopted on 25 May 2000. The OP SC strengthens *inter alia* Article 34 CRC, in which States Parties undertake to protect children from all forms of sexual exploitation and sexual abuse, and Article 35 CRC, in which States Parties commit to taking all appropriate measures to prevent the abduction of, sale of or traffic in children. Article 3 of the OP SC lists which activities and acts are as a minimum to be criminalised. An important feature is that a degree of universal jurisdiction is foreseen: States may establish jurisdiction over offences when the perpetrator or victim are nationals, and is obliged to do so if the perpetrator is on its territory (Art. 4). Special protection is to be offered to child victims throughout the criminal justice process (Art. 8).

The guidelines regarding initial reports under the optional protocol on the sale of children, child prostitution and child pornography were adopted in February 2002, and revised in September 2006<sup>61</sup>.

## 4. **Monitoring**<sup>62</sup>

The legal basis of the CRC Committee can be found in Part II of the CRC, and in particular in Article 43.1 CRC, which reads:

<sup>59</sup> For an in-depth discussion, although a little bit dated, see VANDEWIELE, T.: "Optional Protocol: The Involvement of Children in Armed Conflict", in ALEN *et al.* (eds.): *supra* note 18, 2006.

<sup>60</sup> UN Doc. CRC/OP/AC/1 and CRC/OP/AC/2.

<sup>61</sup> UN Doc. CRC/OP/SA/1 and CRC/OP/SA/2.

<sup>62</sup> This part draws on VANDENHOLE, W.: *The Procedures Before the UN Human Rights Treaty Bodies: Convergence or Divergence?*, Antwerp, Intersentia, 2004, but has been updated when necessary. See also VERHEYDE, M. and GOEDERTIER, G.: *Article 43-45: the UN Committee on the Rights of the Child*, in ALEN *et al.* (eds.): *supra* note 18, 2006.

“For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided”.

The CRC Committee’s provisional Rules of Procedure were last amended in 2005<sup>63</sup>.

### *Composition*

Article 43.2 CRC reads:

“The Committee shall consist of eighteen experts of high moral standing and recognized competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems”.

The CRC Committee initially counted 10 members<sup>64</sup>. An amendment to Article 43.2 CRC raised the number of Committee members to 18 in 2002, this is the same number as in the majority of the other treaty bodies. This amendment was justified by the rapid increase in workload of the Committee, given the high number of States parties and the entry into force of two optional protocols to the CRC.

Members of the Committee are nominated by the States parties to the CRC<sup>65</sup>, and elected by the meeting of States parties. Every two years, States parties hold a regular meeting of States parties in February in New York<sup>66</sup>. In case of an early replacement, a new expert is to be appointed by the same State, subject to approval by the Committee<sup>67</sup>.

Committee members are elected for a term of four years. The principle of partial renewal implies that every two years, the term of nine members expires. There is a relatively high turnover in membership.

Since 1995, the CRC Committee has met three times a year for sessions of three working weeks<sup>68</sup>. An additional week is held after each

<sup>63</sup> UN Doc. CRC/C/4/Rev.1.

<sup>64</sup> Art. 43.2 CRC.

<sup>65</sup> Article 43.3 CRC.

<sup>66</sup> See e.g. UN Doc. CRC/SP/34.

<sup>67</sup> Article 43.7 CRC.

<sup>68</sup> CONNORS, J.: ‘An Analysis and Evaluation of the System of State Reporting’, in BAYESKY, A.F. (ed.): *The UN Human Rights Treaty System in the 21<sup>st</sup> Century*, The Hague, Kluwer Law International, 2000, pp. 12 and 45.



session in preparation of the following session for the pre-sessional working group (which is a working group of the whole). The Committee always meets in Geneva. For some time, the Committee met in two parallel chambers in order to be able to cope with its workload.

Decision-making takes place by consensus<sup>69</sup>. All meetings are in principle held in public<sup>70</sup>.

Article 45 CRC provides for the possibility of representation and the conveyance of information (expert advice or reports) for the specialized agencies, UNICEF and other UN organs. Given its expertise, cooperation with the United Nations Children's Fund is most obvious. No formal linkages exist with special rapporteurs, but cooperation is sought, e.g. with the Special Rapporteur on the Sale of Children<sup>71</sup>. Linkages exist also with "technical assistance and advice bodies" such as the OHCHR and the UN Crime Prevention and Criminal Justice Division<sup>72</sup>.

The CRC and the 2006 Disabilities Convention are the only conventions that formally recognize cooperation of the Committee with NGOs. By considering them as falling under the expression of "other competent bodies" in Article 45 CRC<sup>73</sup>, NGOs are more or less treated on the same footing as the UN specialised agencies and bodies. The CRC Committee is unique in having the assistance of the NGO Group for the CRC<sup>74</sup>. A strong mutually dependent relationship exists between the CRC Committee and NGOs<sup>75</sup>. The NGO Group has a strong impact on the questions asked and the recommendations made by the Committee<sup>76</sup>. NGOs have been invited to participate in the pre-session-

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<sup>69</sup> See the footnote to Rule 52 RoP: "The members of the Committee expressed the view that its method of work should normally allow for attempts to reach decisions by consensus before voting, provided that the Convention and the rules of procedure were observed".

<sup>70</sup> Rule 32 RoP.

<sup>71</sup> UN Doc. CRC/C/10, 4-5.

<sup>72</sup> KARP, J.: 'Reporting and the Committee on the Rights of the Child', in BAYEFSKY, A.F. (ed.): *The UN Human Rights Treaty System in the 21<sup>st</sup> Century*, The Hague, Kluwer Law International, 2000, p. 43.

<sup>73</sup> See e.g. in Rules 34, 70 and 74 RoP. See also THEYTAZ-BERGMAN, L.: 'State Reporting and the Role of Non-Governmental Organizations', in BAYEFSKY, A.F. (ed.): *The UN Human Rights Treaty System in the 21<sup>st</sup> Century*, The Hague, Kluwer Law International, 2000, pp. 46-47.

<sup>74</sup> KARP, *supra* note 72, pp. 41-42. The NGO Group was initially formed as the Informal Ad Hoc NGO Group for the Drafting of the CRC. More information on the NGO Group for the CRC can *inter alia* be found in THEYTAZ-BERGMAN, L.: 'NGO Group for the Convention on the Rights of the Child', in VERHELLEN, E. (ed.): *Monitoring Children's Rights*, The Hague, Martinus Nijhoff, 1996, p. 537.

<sup>75</sup> *Ibid.*, p. 48.

<sup>76</sup> THEYTAZ-BERGMAN, *supra* note 73, p. 539.

al meetings of the Committee since 1995. Their principal role is to provide the Committee with expert advice and information<sup>77</sup>. Further guidelines were adopted in October 1999 in order to facilitate and encourage the process of written submission of NGO reports and participation of NGOs in the pre-sessional Working Group<sup>78</sup>. A guide for NGO submissions, prepared by the NGO Group for the Convention on the Rights of the Child is equally available<sup>79</sup>.

### *Reporting Procedure*

The reporting procedure under the CRC has two distinctive features. Its general philosophy, more than the reporting procedure under the other human rights treaties, is that reporting is part of a process rather than a formal and isolated activity<sup>80</sup>. Moreover, the explicit recognition of a national dimension to the international reporting process is rather innovative. The CRC Committee asks in its lists of issues and during the dialogue systematically about cooperation of national NGOs in preparing the report<sup>81</sup>.

Guidelines for initial reporting can be found in the *General Guidelines regarding the form and content of initial reports to be submitted by States parties under article 44, para. 1 (a) of the Convention*, which were adopted in 1991<sup>82</sup>. The *General Guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, para. 1 (b) of the Convention* were first adopted in 1996, and replaced in 2005<sup>83</sup>. The guidelines for periodic reports are very detailed. Instead of the more usual article-by-article approach, a thematic or cluster approach is taken<sup>84</sup>. Particular emphasis is put on follow-up to suggestions and recommendations made by the Committee in rela-

<sup>77</sup> UN Doc. CRC/C/38, paras. 262-264. See also KARP, *supra* note 72, p. 42 and THEYTAZ-BERGMAN, *supra* note 73, pp. 53 and following.

<sup>78</sup> UN Doc. CRC/C/90, Annex VIII, also available at <http://www2.ohchr.org/english/bodies/crc/partners.htm>.

<sup>79</sup> THEYTAZ-BERGMAN, L.: *A Guide for Non-Governmental Organizations Reporting to the Committee on the Rights of the Child*, NGO Group for the Convention on the Rights of the Child, 2006, available at <http://www2.ohchr.org/english/bodies/crc/partners.htm>.

<sup>80</sup> LANSDOWN, G.: 'The Reporting Process under the Convention on the Rights of the Child', in ALSTON, PH. and CRAWFORD, J. (eds.): *The Future of the UN Human Rights Treaty Monitoring*, Cambridge, Cambridge University Press, 2000, p. 114; KARP, *supra* note 72, pp. 36-37.

<sup>81</sup> THEYTAZ-BERGMAN, *supra* note 73, pp. 51 and 53.

<sup>82</sup> See UN Doc. CRC/C/5.

<sup>83</sup> UN Doc. CRC/C/58/Rev.1.

<sup>84</sup> See *supra* under structure of the CRC.

tion to the previous report<sup>85</sup>. A recommendation was adopted in 2002, in which States were requested to submit concise, analytical and on key implementation issues focused periodic reports, which should not exceed 120 standard pages. This maximum page limit is now indicated in the final paragraph of each set of concluding observations, even in the case of consolidated reports<sup>86</sup>.

Initial reports are to be submitted two years after the coming into effect of the CRC for the State. Periodic reports are to be submitted every five years<sup>87</sup>. Since 2003, the Committee has started setting the deadline for the submission of the next report in its concluding observations, thereby allowing for combined or consolidated reports under certain circumstances. The same periodicity applies to the reporting under the optional protocols. States which are equally parties to the CRC are to submit a separate initial report under the optional protocols, but can thereafter include information on the implementation of the protocols in their periodic reports on the implementation of the CRC<sup>88</sup>.

Notwithstanding the introduction of temporary remedial measures like the operation in a two chamber system (from October 2005 to June 2006) and the acceptance of consolidated reports, the Committee still runs the risk of building up a considerable backlog in the examination of reports.

Upon receipt of a report, its consideration is prepared by a pre-sessional working group, which meets at the end of each session for one week, with the full Committee ("working group of the whole"). The working group meets in private<sup>89</sup>. On average, three hours are dedicated to the examination of a report. Special emphasis is given to relevant documentation from UN bodies and agencies, other human rights treaty bodies and NGOs. Selected NGOs are invited to participate in the working group<sup>90</sup>. UN bodies and agencies can equally participate<sup>91</sup>. The working group also takes note of additional information submitted by States<sup>92</sup>.

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<sup>85</sup> UN Doc. CRC/C/54, para. 266; reiterated in UN Doc. CRC/C/69, *Conclusion and Recommendation 1 on organization of work*.

<sup>86</sup> See e.g. UN Doc. CRC/C/DOM/CO/2 (2008), para. 91.

<sup>87</sup> Article 44 CRC.

<sup>88</sup> Article 8 OP-AC and Article 12 OP-SC.

<sup>89</sup> UN Doc. CRC/C/33, para. 7 and UN Doc. CRC/C/90, Annex VIII, para. 6.

<sup>90</sup> LANSDOWN, *supra* note 80, p. 119; THEYTAZ-BERGMAN, *supra* note 73, p. 47. This was first introduced in 1995, see UN Doc. CRC/C/38, paras. 262-264.

<sup>91</sup> UN Doc. CRC/C/33, para. 11.

<sup>92</sup> UN Doc. CRC/C/38, para. 16.

The principal purpose of preparing the consideration of reports in a working group is to give advance notice of principal issues<sup>93</sup>. A list of issues, albeit limited to the most significant issues<sup>94</sup>, is therefore drafted by the working group. Written answers have been requested in advance since 1994<sup>95</sup>. Since 1999, a system of country rapporteurs has been reintroduced<sup>96</sup>. Country rapporteurs maintain contact and work closely with the Secretariat; lead the discussion during the pre-sessional working group and the session; finalise the list of issues; and finalise and ensure the quality of the concluding observations and the recommendations<sup>97</sup>.

After preparation in the pre-sessional working group, a State report is examined in plenary meeting. State reports are considered during two meetings of three hours<sup>98</sup>. The presence of a State delegation during the consideration is expected<sup>99</sup>. After a brief introduction, the delegation is asked to provide information on subjects covered by the list of issues, starting with the first cluster of the reporting guidelines<sup>100</sup>. After a discussion and further questions or comments of the Committee members and responses from the delegation, the dialogue moves on to the next cluster<sup>101</sup>. At the end of the examination, the country rapporteur (and possibly other Committee members) summarize their observations on the report and the discussion<sup>102</sup>.

The examination of a report is concluded with the adoption of concluding observations. They are agreed upon in a closed meeting<sup>103</sup>. In the course of the three weeks session, the Committee holds two days (four sessions) in private to discuss and adopt the concluding observations. The concluding observations are made public on the last day of the session, during the adoption of the report<sup>104</sup>. They are published in the sessional report and as a separate UN-document, and can be found in the OHCHR's treaty bodies database<sup>105</sup>. The concluding obser-

<sup>93</sup> UN Doc. CRC/C/33, para. 8.

<sup>94</sup> UN Doc. CRC/C/90, para. 319.

<sup>95</sup> UN Doc. CRC/C/33, para. 12; LANSDOWN, *supra* note 80, p. 119.

<sup>96</sup> UN Doc. CRC/C/87, para. 255; LANSDOWN, *supra* note 80, pp. 123-124.

<sup>97</sup> UN Doc. CRC/C/90, para. 318.

<sup>98</sup> UN Doc. CRC/C/10, para. 40.

<sup>99</sup> Rule 68 RoP.

<sup>100</sup> LANSDOWN, *supra* note 80, p. 123.

<sup>101</sup> UN Doc. CRC/C/33, para. 16.

<sup>102</sup> O'FLAHERTY, M.: *Human Rights and the UN. Practice before the Treaty Bodies*, The Hague, Martinus Nijhoff, 2002 (2<sup>nd</sup> Ed.), p. 166.

<sup>103</sup> UN Doc. CRC/C/33, para. 18.

<sup>104</sup> *Ibid.*, para. 21.

<sup>105</sup> <http://tb.ohchr.org/default.aspx>.

vations reflect the main points of discussion and indicate the issues that require follow-up. The concluding observations on initial reports follow the common structure of concluding observations of other Committees, with an introduction, a section on positive aspects, and one on principal subjects of concern and recommendations<sup>106</sup>. The latter is structured along the eight clusters. The concluding observations can include concrete suggestions and proposals for specific activities to be considered and implemented by the technical assistance and advisory services programme<sup>107</sup>. Additional information may be requested within a certain time-limit<sup>108</sup>. The concluding observations on periodic reports follow a somewhat different structure, due to the succinct and focused nature of these reports (see *supra*). They contain an introduction, a section on follow-up measures undertaken and progress achieved by the State party, and one on principal subjects of concern and recommendations<sup>109</sup>.

The CRC has adopted the practice of rather systematically referring to the concluding observations of other treaty bodies in its own concluding observations, so as to avoid conflicting recommendations or repeating recommendations already made by other Committees<sup>110</sup>.

Although much attention is paid to the implementation of recommendations, the CRC Committee has not established a written follow-up procedure for its concluding observations, nor does it identify priority issues for follow-up in its concluding observations. States are expected to address the concluding observations in a detailed manner in their next report<sup>111</sup>. This is particularly emphasized in the reporting guidelines for periodic reports<sup>112</sup>. The concluding observations on periodic reports contain an explicit section on follow-up measures taken (see *supra*).

If a report does not contain sufficient information, the CRC Committee can request additional information (Rule 69 RoP). Alternatively, it can examine the report and adopt final concluding observations, in which it then requests additional information<sup>113</sup>. In case of overdue reports, reminders are sent by the Secretariat<sup>114</sup>. The CRC Committee al-

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<sup>106</sup> See e.g. UN Doc. CRC/C/15/Add.214.

<sup>107</sup> UN Doc. CRC/C/33, paras. 26-28.

<sup>108</sup> *Ibid.*, para. 20.

<sup>109</sup> See e.g. UN Doc. CRC/C/VEN/CO/2.

<sup>110</sup> UN Doc. A/57/56, para. 22.

<sup>111</sup> UN Doc. CRC/C/33, para. 23.

<sup>112</sup> UN Doc. CRC/C/58, para. 6.

<sup>113</sup> O'FLAHERTY, *supra* note 102, p. 166.

<sup>114</sup> UN Doc. CRC/C/33, para. 30. See also Rule 67, para. 1 RoP.

lows for consolidated reports as an exceptional measure in specific circumstances, upon its own invitation. The main reason is that the Committee wants to avoid a further postponement of the examination of the situation due to the significant backlog it has built up itself.

### *Urgent Action Procedures*

As early as 1992, the CRC Committee discussed urgent action procedures. Urgent action procedures are considered to be part of the reporting procedure<sup>115</sup>. Urgent action procedures are only considered in cases relating to the rights of the child, and when occurring under the jurisdiction of a State party. The situation should be serious, in the sense that there is a risk that further violations occur and that a deterioration of the situation should be prevented<sup>116</sup>. The CRC Committee has used the urgent action procedure only rarely<sup>117</sup>, which has, according to Theytaz-Bergman, "served only the purpose of frustrating NGOs who expect that the Committee will react immediately to the information that has been submitted, only to be met with silence and no reaction from the Committee as to whether the information has been considered or acted upon"<sup>118</sup>. The use of the urgent action procedure has not been reported explicitly in the sessional reports of the CRC Committee.

### *General Comments*

Since the Committee started its practice of issuing general comments in 2001, it has adopted 10 general comments. Two more are under preparation. The adoption of general comments does not find an explicit legal basis in the CRC. Rule 73 RoP however provides:

"1. The Committee may prepare general comments based on the articles and provisions of the Convention with a view to promoting its further implementation and assisting States parties in fulfilling their reporting obligations.

2. The Committee shall include such general comments in its reports to the General Assembly".

General comments are often preceded by a day of general discussion on the issue. In accordance with Rule 75 RoP, the CRC Committee

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<sup>115</sup> UN Doc. CRC/C/10, para. 56.

<sup>116</sup> UN Doc. CRC/C/10, paras. 54-55.

<sup>117</sup> NGO Group for the CRC, *supra* note 79, p. 13.

<sup>118</sup> THEYTAZ-BERGMAN, *supra* note 73, pp. 50-51.

can devote one or more meetings of its regular sessions to a general discussion on a specific Article of the CRC or on a related subject. The aim is to enhance a deeper understanding of the content and implications of the Convention<sup>119</sup>. The days of general discussion are a central feature of the CRC Committee's activities; they usually take place during the September session.

## 5. Towards an Optional Protocol Establishing a Complaints and Inquiry Procedure?

A group of non-governmental organizations has launched a campaign to establish a complaints mechanism to the CRC. Such a procedure would ensure the availability of legal remedies for children at the international level. A draft optional protocol, with a commentary, was circulated in February 2008. The draft optional protocol is based on agreed language for other complaints mechanism, but refers in some provisions explicitly to the well-being and development of children, and to the best interest of children. According to the drafters, these principles necessitate the possibility of collective complaints (along the lines of those existing under the European Social Charter) as well as shorter time-limits for the submission of information by the State concerned. The possibility of opting-out is foreseen with regard to the inquiry procedure, which would allow the Committee to examine reliable allegations of grave or systematic violations.

During its May 2008 session, the Committee welcomed the NGO initiative on a complaints and inquiry procedure. The first step is now for the Human Rights Council to establish a drafting Open-Ended Working Group of States.

## 6. Conclusions

Some proponents of the CRC tend to present it as a univocal, consistent document with a unified philosophy of children's rights<sup>120</sup>. This presentation can be challenged on different counts. First of all, there is a tension between the recognition of children as autonomous actors

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<sup>119</sup> A compilation of the days of general discussion up and until 2000 can be found in UN Doc. CRC/C/DOD/1. An overview can equally be found on <http://www2.ohchr.org/english/bodies/crc/>

<sup>120</sup> ALSTON, *supra* note 5, pp. 2-3.

and legal subjects on the one hand, and the focus on the need for protection because of the particularly vulnerable position of children on the other hand. Secondly, the respective rights and obligations or responsibilities of children, parents, the community, the domestic State and other States are not as clearly delineated as is often suggested<sup>121</sup>. Again, concepts like best interests of the child may assume a very different meaning depending on the social and cultural context in which they are invoked.

Notwithstanding its outstanding ratification record, the CRC does not automatically impact on children's life, for its implementation remains problematic. The challenge is therefore to rather drastically improve its implementation. A complaints and inquiry procedure may well contribute thereto.

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<sup>121</sup> *Ibid.*, p. 3.



# The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

Dirk Vanheule

**Summary:** 1. Introduction. 2. Scope of the Convention. 3. Substantive Provisions. 4. Obligations of States Parties. 5. Derogation and Limitation Clauses. 6. Committee on the Protection of the Rights of All Migrant Workers and Their Family. 7. Reporting Procedure. 8. Inter-State Complaints Procedure. 9. Individual complaints procedure. 10. Conclusions.

## 1. Introduction

On 18 December 1990, the UN General Assembly adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (hereinafter Migrant Workers Convention or Convention). It lasted almost another 13 years, until 1 July 2003, before the Convention came into effect<sup>1</sup>. The Convention belongs to the category of human rights treaties complementary to the ICCPR and ICESCR<sup>2</sup> which have been adopted to accommodate the specific demands of persons who, on account of their vulnerable position in society, need special or additional protection, like victims of racial discrimination<sup>3</sup>, women<sup>4</sup> and children<sup>5</sup>. The Convention extends the development of human rights treaties for special categories of persons, in this case for migrant workers and their families.

The preamble to the Migrant Workers Convention refers to three important goals<sup>6</sup>. The first aim of the founders of the Convention is to

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<sup>1</sup> The International Convention on the Protection of All Migrant Workers and Members of Their Families, adopted by the General Assembly at its 45<sup>th</sup> session on 18 December 1990 (A/RES/45/158).

<sup>2</sup> The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, 16 December 1966.

<sup>3</sup> The International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966.

<sup>4</sup> International Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979.

<sup>5</sup> International Convention on the Rights of the Child, 20 November 1989.

<sup>6</sup> CHOLEWINSKI, R.: *Migrant Workers in International Human Rights Law. Their Protection in Countries of Employment*, Clarendon Press, Oxford, 1997, pp. 145-147.

build on existing international norms and, while recognising the contribution of other international organisations concerned with migration, to improve the situation of migrant workers and their families. A second aim is to emphasise the relationship between the extent of migration and the serious problems that may result for the individuals concerned. Finally, the Convention has been drawn up in order to prevent clandestine migration of workers, even if this means recognition of and respect for the fundamental rights of migrants without legal status.

On account of its ambitious goals, the Convention has expanded into a very comprehensive, varied and complex document. This is immediately evident from the scope of its applicability, which is defined in broad terms both *ratione personae* and *ratione materiae*. The Convention offers protection to various categories of migrant workers, both in a regular and irregular situation with regard to residence and/or employment. These categories are, in the case of some provisions, defined very broadly, while in others more narrowly. The contents extend protection from the more classic civil and political rights and freedoms to the recognition of economic, social and cultural rights. Although a quick first reading of the text might give one the impression that the Convention in all cases treats all migrant workers the same way as the inhabitants of the countries to which they have migrated, reality is in fact far more subtle.

In the eighteen years which have passed since the adoption of the Convention by the General Assembly of the United Nations on 18 December 1990, only 39 States ratified the treaty, among which only two European (Albania and Bosnia Herzegovina) and only one North American country (Mexico)<sup>7</sup>. This small number is in stark contrast to the considerable number of ratifications of other human rights instruments.

That a decision about the ratification of the Convention in almost all western industrialised countries has until now hardly even been put on the agenda might at first glance appear surprising. International in-

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<sup>7</sup> The following countries ratified the Convention: Albania, Algeria, Argentina, Azerbaijan, Belize, Bolivia, Bosnia & Herzegovina, Burkina Faso, Cape Verde, Chile, Colombia, Ecuador, Egypt, El Salvador, Ghana, Guatemala, Guinea, Honduras, Jamaica, Kyrgyzstan, Lesotho, Libyan Arab Jamahiriya, Mali, Mauritania, Mexico, Morocco, Nicaragua, Paraguay, Philippines, Senegal, Seychelles, Sri Lanka, Syria, Peru, Tajikistan, Timor Leste, Turkey, Uganda and Uruguay. In addition, the Convention was signed by 15 more countries: Bangladesh, Benin, Cambodia, Comoros, Congo, Gabon, Guinea-Bissau, Guyana, Indonesia, Liberia, Montenegro, Sao Tome and Principe, Serbia, Sierra Leone and Togo (<http://www.december18.net/web/general/page.php?pageID=79&menuID=36&lang=EN#eleven>).

struments for the protection of workers, including those who are not nationals of the State of employment, are surely not unfamiliar. For instance ILO Conventions nos. 97 and 143, dealing with similar matters, have been ratified on a relatively large scale<sup>8</sup>. Both documents have, moreover, served as sources of inspiration for the drafting of the Convention<sup>9</sup>.

What are the obstacles that stand in the way of the ratification of the Convention? R. Cholewinski gives the following reasons<sup>10</sup>. First, the Convention is a complex and detailed instrument of which the contents are much broader – or at least have been perceived as such – than the rights and freedoms in the more classic human rights treaties that most western countries have already ratified. Secondly, the global increase in the number of human rights instruments has not made it any easier for the Convention, with its substantial contents, to gain acceptance. The many technical questions raised by the provisions of the Convention can lead States to hesitate before acceding to it. A third factor is the lack of publicity surrounding this treaty, which contributes to a number of misconceptions about its precise contents and purpose. In some countries, the willingness to ratify the Convention is, finally, stymied by a number of substantial provisions in the treaty. Countries such as Ger-

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<sup>8</sup> The protection of the interests of migrant workers falls under the mandate of the International Labour Organisation. The ILO Migration for Employment Convention (Revised), 1949 (No. 97) has been ratified by 42 States, among which are a number of western European countries. ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), ratified by 18 countries, contains supplementary provisions on migrations in abusive conditions and the promotion of equality of opportunity and treatment of migrant workers.

<sup>9</sup> See W.R. BÖHNING, "The ILO and the New UN Convention on Migrant Workers: The Past and Future", *IMR* 1991, 698. The developed countries preferred that the ILO should first adapt or broaden existing instruments before drafting a new UN convention. The developing countries, however, preferred a UN instrument, primarily on account of their dissatisfaction with the ILO Convention 143. That Convention placed, in their view, too much emphasis on limiting abuses in migration for purposes of employment that would allegedly cause a flood of money transfers by illegal migrants from developed countries to their home countries. The tripartite decision-making structure within the ILO, in which not only States but also employers and employees are represented, presented more difficulties for the developing countries. Moreover, they do not enjoy the numerical majority in the ILO that they have within the UN. Finally, the ILO has only limited power to take action in fields such as culture, education and political participation. Given that the ILO Convention no. 143 has only limited applicability (frontier workers and the self-employed are, for example, excluded) and is valid only between (the small number of) States who have ratified the Convention, the UN was considered a better forum for negotiating a new Convention on migrant workers' rights.

<sup>10</sup> CHOLEWINSKI, R.: *supra* note 6, pp. 201-202.

many and the United States, for instance, are opposed to ratification because of the Articles in the treaty that explicitly provide for the protection of rights of illegal migrant workers.

Recent studies examining the reasons for the non-ratification particularly in Member States of the European Union show that there is a sense of negative indifference about the Convention, the result of a combination of genuine concerns with simple misunderstandings<sup>11</sup>. In fact, many of the rights may already be enforced either through domestic law or other regional or international instruments<sup>12</sup>. The main reasons appear to be that the existing international human rights instruments render the Convention superfluous, that existing national commitments have the same effect and that the catalogue of rights that the Convention guarantees to irregular migrants is too expansive<sup>13</sup>.

In contrast to the concern of States that ratification may lead to a destabilisation of their immigration and employment policy vis-à-vis foreign nationals, the text of the Convention itself shows that the principle of State sovereignty in regulating migration has been upheld. In this regard Article 79 stipulates that nothing in the Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families. Only concerning other matters related to their legal situation and treatment as migrant workers and members of their families, States Parties are subject to the limitations set forth in the Convention. The extent of these rights does differ, however, dependent on the regularity of the residence of the migrant worker, with undocumented migrant workers and their family members being in a less protected position.

## 2. Scope of the Convention

The Convention is applicable to all migrant workers and members to their families coming from a State of origin without distinction of any kind. Not only does the Convention apply to their position in the

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<sup>11</sup> See MACDONALD, E. and CHOLEWINSKI, R.: *The Migrant Workers Convention in Europe*, UNESCO, Paris, 2007, for a study on France, Germany, Italy, Norway, Poland, Spain and United Kingdom.

<sup>12</sup> See on the Belgian situation VANHEULE, D.; FOBLETS, M.C.; LOONES, S. & BOUCKAERT, S.: "The Significance of the UN Migrant Workers' Convention of 18 December 1990 in the Event of Ratification by Belgium", *EJML* 2004, pp. 285-322.

<sup>13</sup> MACDONALD E. and CHOLEWINSKI, R.: *supra* note 11, p. 89.

State of employment, also the entire migration process is covered: 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 (Article 1)<sup>14</sup>.

The term "migrant worker" refers to 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 (Article 2, 1)<sup>15</sup>. In the determination of the scope, no distinction is made between documented migrant workers, who have been admitted to work in their country of residence, and undocumented workers, who find themselves in an irregular or illegal situation with regard to their right of residence and/or right to work in the country of residence. This status cannot be an element to remove the latter category from the application of the Convention, although it does play a role in the determination of the Convention rights applicable to them. A worker is documented or in a regular situation if he or she is authorized to enter, to stay and to engage in a remunerated activity in the State of employment, pursuant to the law of that State and to international agreements to which that State is a party. Workers not complying with these conditions are considered as non-documented or in an irregular situation (Article 5). This distinction is another indication that the Convention recognizes States' authority to regulate labour migration.

Article 3 excludes a number of categories from the scope of the Convention, either because they are employed by international organisations or agencies or by a State to perform official functions or participate in co-operation programmes. The same goes for investors, students, trainees, seafarers and offshore installation workers not admitted to residence or remunerated activities in the State of employment. Refugees and stateless persons, who benefit from specific rights in the Refugee Convention (1951) and Stateless Persons Convention (1954), equally fall outside the scope of the Convention. Apart from this exclusion, a State ratifying or acceding to the Convention may not exclude

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<sup>14</sup> Apart from the State of origin and the State of employment, the Convention also defines the State of transit as any State through which the person concerned passes on any journey to the State of employment or from the State of employment to the State of origin or the State of habitual residence. See Article 6.

<sup>15</sup> The Convention further distinguishes between "frontier worker", "seasonal worker", "seafarer", "worker on an offshore installation", "itinerant worker", "project-tied worker" and "specified-employment worker" and "self-employed worker" (Article 2, 2). Specific provisions of the Convention may or may not apply to these categories, see *infra* ch. 3.3.

the application of any Part of it or exclude any other particular category of migrant workers from its application (Article 88).

Throughout the Convention the drafters' concern is visible that family life is closely related to labour migration, with migrant workers moving with their family or at a later stage being joined by them, and may even be a determining factor for the well-being and success of this type of migration. The Convention therefore also extends to these family members, namely persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage (Article 4). Dependent children are also family members, as are other dependent persons who are recognized as family members by legislation or applicable agreements between the States concerned.

The maximisation clause in Article 81 guarantees that nothing in the Convention affects more favourable rights or freedoms by virtue of State law or practice or applicable treaty law. Nor can the Convention be interpreted as implying for any State, group or person any right to engage in any activity or perform any act that would impair any of the rights and freedoms as set forth therein. Moreover, the rights provided for may not be renounced and exertion of any form of pressure upon migrant workers with a view to their relinquishing or foregoing of these rights is impermissible, as is the derogation by contract from rights recognized in the Convention (Article 82).

### 3. Substantive Provisions

After the general provision on non-discrimination in Article 7<sup>16</sup>, the Convention enumerates the substantive (human) rights of migrant workers and/or their family members.

A first general observation here is that the formulation of these rights is very different from one right to another. Some provisions of the Convention guarantee, by analogy with the ICCPR, the enjoyment of classical (civil and political) rights and may have a direct effect in the domestic legal order of countries that allow the direct applicability of international law. It may be observed that from this does not necessarily follow that the Convention will give rise to significant expansion of

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<sup>16</sup> The States Parties undertake to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

the existing protection of the rights of migrant workers under international or regional law. Many other provisions of the Convention, especially the articles concerning economic, social and cultural rights or, more generally, the provisions that impose certain positive actions on States Parties, do not have direct effect. Quite a few of these provisions emphasize, moreover, that States have (often considerable) freedom to make policy in these matters, by their use of terms such as “the States may”, “the States Parties consider” or “the States Parties take any measure they deem necessary”.

Secondly, the Convention itself distinguishes between human rights of all migrant workers and members of their families, irrespective of the regular or irregular nature of their status (Part III of the Convention), and other rights of such persons who are documented or in a regular situation (Part IV of the Convention). Additionally, Part V contains provisions applicable to particular categories of migrant workers and members of their families. We will follow this division.

### 3.1. *Human Rights of All Migrant Workers and Their Family Members*

Articles 8 to 35, which constitute Part III of the Convention, enumerate the human rights held by migrant workers and their family members. These include classical human rights, sometimes reformulated or made more specific to the particular situation of migrant workers and their families, and other provisions that particularly apply to situations of international labour migration. Here too, the Convention makes clear that these rights do not entitle migrant workers a right to residence irrespective of the existing laws and regulations in the countries of origin, transit and employment. Under Article 34 migrant workers and the members of their families are obliged to comply with the laws and regulations of any State of transit and the State of employment. They must also respect the cultural identity of the inhabitants of such States. In light of the ongoing debate, especially in Europe, about the claims to regularization of the stay of undocumented migrants who have resided *de facto* in the States of employment, it must be mentioned that nothing in Part III of the Convention is to be interpreted as implying the regularization of the situation of migrant workers or members of their families who are non-documented or in an irregular situation or any right to such regularization (Article 35)<sup>17</sup>.

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<sup>17</sup> In the same sense, Part III does not prejudice the measures intended to ensure sound and equitable conditions for international migration as provided in Part VI of the Convention. See *infra* ch. 4.

As it has been mentioned, the rights in Part III first of all include the classical human rights that can also be found in other international instruments: the right to life (Article 9); the prohibition of torture, cruel, inhuman or degrading treatment or punishment (Article 11); the freedom of thought, conscience and religion (Article 12); the freedom of opinion and expression (Article 13); the protection against interferences or attacks of privacy, family, home, correspondence or other communications, honour and reputation (Article 14); the protection against arbitrary deprivation of property, including the entitlement to fair and adequate compensation in the even of legal expropriation (Article 15); the right to liberty and security of person, including the entitlement to effective protection by the State against infractions on this liberty (Article 16); the right of treatment with humanity and with respect for the inherent dignity of the human person and for their cultural identity in the event of deprivation of liberty (Article 17); the right to a fair trial and accompanying guarantees in criminal cases (Article 18), the substantive protection in criminal law (Article 19)<sup>18</sup> and the right to recognition everywhere as a person before the law (Article 24).

A second category of rights, to which all migrant workers and members of their families are entitled, reveals the concern for the possibly vulnerable situation as a result of migration and of the fact of not having citizenship status. Thereto rights that specifically apply to the situation of these migrants have been included or specifications about the application of general human rights to the particular situation of migrant workers and their family members have been added.

With regard to the *migratory movement* itself, the freedom to leave any State, including the State of origin (Article 8) is quintessential for international migration to take place at all. Further measures accompanying and accommodating migration are the right to consular or diplomatic assistance in the event of detention (Article 16); the separation, as far as practicable, from convicted persons or persons detained pending trial in the case of detention in a State of transit or in a State of employment for violation of provisions relating to migration (Article 17)<sup>19</sup>; the duty to take humanitarian considerations related to the status of a migrant worker, in particular with respect to his or her right of residence or work, into account in imposing a sentence for a criminal offence committed by a migrant worker or a member of his or her family (Article 19); the protection from imprisonment in the mere event

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<sup>18</sup> *Nullum crimen, nulla poena sine praevia lege poenali.*

<sup>19</sup> The costs arising from the detention for the purpose of verifying any infraction of provisions related to migration are waived.



of failure to fulfil a contractual obligation and the prohibition on the loss of the authorization of residence or work permit or expulsion merely on the ground of failure to fulfil an obligation arising out of a work contract unless fulfilment of that obligation constitutes a condition for such authorization or permit (Article 20) and the prohibition for anyone, other than a public official duly authorized by law, to confiscate, destroy or attempt to destroy identity documents, documents authorizing entry to or stay, residence or establishment in the national territory or work permits (Article 21).

On the issue of termination of residence and expulsion, the right to individual examination and the prohibition of collective expulsion are general guarantees (Article 22)<sup>20</sup>. At the procedural level this also includes the right to have the case reviewed by the competent authority<sup>21</sup>, pending which a stay of the decision of expulsion can be sought. If an already executed decision of expulsion is subsequently annulled, the person concerned has the right to seek compensation and the earlier decision shall not be used to prevent him or her from re-entering the State concerned. Expulsion is not only looked at from a State-migrant worker perspective but also from the horizontal perspective of migrant worker-employer: expulsion does not in itself prejudice any rights of a migrant worker or a member of his or her family acquired in accordance with the law of that State, including the right to receive wages and other entitlements due to him or her. To that end the person concerned shall have a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her and any pending liabilities.

Upon the termination of their stay in the State of employment migrant workers and members of their families have the right to transfer earnings, savings and personal effects and belongings (Article 32).

Lastly and recognizing the joint engagement of States of origin and States of employment in dealing with labour migration under the Convention, the right to recourse to the protection and assistance of the consular or diplomatic authorities of the State of origin is guaranteed whenever the rights recognized in the present Convention are impaired. In particular, in case of expulsion, the person concerned shall be

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<sup>20</sup> Implicitly the State's sovereignty in regulating migration, including the ending of legal migration, is recognized. In case of expulsion of a migrant worker or a member of his or her family the costs of expulsion shall not be borne by him or her. The person concerned may be required to pay his or her own travel costs.

<sup>21</sup> Except where a final decision is pronounced by a judicial authority or in the event of compelling reasons of national security.

informed of this right without delay and the authorities of the expelling State shall facilitate the exercise of such right (Article 23).

A third category of general rights focuses on the social and economic conditions of migrant workers and their family members: the prohibition on slavery, servitude or forced and compulsory labour (Article 11); treatment that is not less favourable than that which applies to nationals of the State of employment in respect of remuneration, other conditions of work<sup>22</sup> and employment (Article 25)<sup>23</sup>; the right to participate in and join trade unions and of any other associations with a view to protecting their economic, social, cultural and other interests and to seek their aid and assistance (Article 26); the same treatment, under the conditions set out in the applicable legislation, bilateral and multilateral treaties with respect to social security in the State of employment granted to nationals (Article 27)<sup>24</sup>; the right to receive urgently required medical care on the basis of equality of treatment with nationals of the State concerned and irrespective of the regularity of the stay or employment (Article 28); and the right of information by the State of origin, the State of employment or the State of transit on the rights arising out of the Convention, the conditions of admission, rights and obligations under the law and practice of the State concerned. As appropriate, they shall co-operate with other States concerned (Article 33)<sup>25</sup>.

A fourth and last category of general rights stems from the fact that international labour migration often includes the move of families with minor children. Hence, the Convention also enumerates specific

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<sup>22</sup> Overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and any other conditions of work which, according to national law and practice, are covered by this term.

<sup>23</sup> Minimum age of employment, restriction on home work and any other matters which, according to national law and practice, are considered a term of employment. The equal treatment also plays in horizontal relationships as the Convention holds it unlawful to derogate in private contracts of employment from the principle of equality of treatment. Moreover, States Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle by reason of any irregularity in their stay or employment. In particular, employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of any such irregularity.

<sup>24</sup> Where the applicable legislation does not allow a benefit, the States concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances.

<sup>25</sup> Such adequate information shall be provided upon request, free of charge, and, as far as possible, in a language they are able to understand.

rights with regard to children and family life<sup>26</sup>. Each child of a migrant worker shall have the right to a name, to registration of birth and to a nationality (Article 29) and the basic right of access to education on the basis of equality of treatment with nationals of the State concerned (Article 30). Access to public pre-school educational institutions or schools shall not be refused or limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child's stay in the State of employment (Article 30). Furthermore, States shall ensure respect for the cultural identity of migrant workers and members of their families and shall not prevent them from maintaining their cultural links with their State of origin (Article 31).

### 3.2. *Other rights of migrant workers and members of their families who are documented or in a regular situation*

Part IV contains "other rights" of migrant workers and members of their families who are documented or in a regular situation. As it has already been mentioned, the discretionary power of the States Parties to regulate immigration of and employment by migrant workers and their family workers is unaffected by the Convention<sup>27</sup>. Migrant workers must respect and comply to the laws and regulations and cannot claim a right to regularization of their situation under the rights in Part III of the Convention. However, where regular and documented labour migration exists, the States Parties must observe the rights in Part IV of the Convention, in addition to those set forth in Part III. The rights are often a more detailed version of the rights in Part III.

In order for labour migration to become more efficient, rights relating to *information* and concern for their interests are included: the right to information by the State of origin or the State of employment of all conditions applicable to admission, stay, remunerated activities and competent authorities (Article 37) and the consideration of the establishment of procedures or institutions through which account may be taken, both in States of origin and in States of employment, of special needs, aspirations and obligations of migrant workers and members of their families (Article 42).

<sup>26</sup> See also the attention in the event of deprivation of liberty, to the problems that may be posed for members of his or her family, in particular for spouses and minor children (Article 17).

<sup>27</sup> Although Part VI does prescribe some important general obligations with regard to labour migration policy.

Part IV further recognizes the right to form associations and trade unions in the State of employment for the promotion and protection of economic, social, cultural and other interests (Article 40) and the right to political activities: States of employment shall facilitate, in accordance with their national legislation, the consultation or participation of migrant workers and members of their families in decisions concerning the life and administration of local communities. Migrant workers may enjoy political rights in the State of employment if that State, in the exercise of its sovereignty, grants them such rights (Article 42).

Specifically *in relation to migration*, Part IV recognizes the liberty of movement in the territory of the State of employment and freedom of choice of residence there (Article 39) and the right to temporary absence of migrant workers returning for certain periods to their country of origin. States of employment shall make every effort to authorize migrant workers and members of their families to be temporarily absent without effect upon their authorization to stay or to work (Article 38). The Convention also states that persons who are authorized to engage in remunerated activity shall be issued, where separate authorizations to reside and to engage in employment are required by national legislation, authorization of residence for at least the same period of time as their authorization to engage in remunerated activity (Article 49). When they are allowed freely to choose their remunerated activity, the mere fact of the termination of their remunerated activity prior to the expiration of their work permits shall not lead to them being regarded as in an irregular situation or to the loss of their authorization of residence. This implies that they must be given sufficient time to find alternative remunerated activities. Thereto the authorization of residence cannot be withdrawn at least for a period corresponding to that during which they may be entitled to unemployment benefits. A comparable solution is prescribed for migrant workers who are not permitted freely to choose their remunerated activity: the mere fact of the termination of their remunerated activity prior to the expiration of their work permit will not result in a situation of irregularity or loss of residence status, except where the authorization of residence is expressly dependent upon the specific remunerated activity for which they were admitted. Such migrant workers have the right to seek alternative employment, participation in public work schemes and retraining during the remaining period of their authorization to work, subject to such conditions and limitations as are specified in the authorization to work (Article 51).

Regular migrant workers and members of their families may not be expelled from a State of employment, except for reasons defined in the national legislation of that State, and subject to the safeguards estab-

lished in Part III of the Convention. Expulsion shall not be resorted to for the purpose of depriving a migrant worker or a member of his or her family of the rights arising out of the authorization of residence and the work permit. In considering whether to expel a migrant worker or a member of his or her family, account should be taken of humanitarian considerations and of the length of time that the person concerned has already resided in the State of employment (Article 56).

At the *socio-economic level*, equality of treatment with nationals of the State of employment is guaranteed in relation to access to educational institutions and services, to vocational guidance and placement services, to vocational training and retraining facilities and institutions, to housing, including social housing schemes, and protection against exploitation in respect of rents, to social and health services, to co-operatives and self-managed enterprises and to cultural life (Article 43). They have the right to freely choose their remunerated activity in the State of employment (Article 52), although the States of employment can restrict access to limited categories of employment where this is necessary in the interests of this State or restrict free choice in accordance with the occupational qualifications acquired outside its territory<sup>28</sup>. Further restrictions are possible for migrant workers whose permission to work is limited in time. Free choice can be made dependant on a certain period of lawful residence for the purpose of remunerated activity for a period of maximum two years. For migrant workers who have not yet resided lawfully for employment purposes for a period of maximum five years, access to certain employment can be limited in pursuance of a policy of granting priority to its nationals or to persons who are assimilated to them by virtue of legislation or bilateral or multilateral agreements. Access to self-employment may also be dependant on certain conditions, whereby account must be taken of the period during which the worker has already been lawfully in the State of employment.

Migrant workers shall enjoy equality of treatment with nationals of the State of employment in respect of protection against dismissal, unemployment benefits and access to alternative employment in the event of loss of work or termination of other remunerated activity (Article 54). If a migrant worker claims that the terms of his or her work contract have been violated by his or her employer, he or she has the right to address his or her case to the competent authorities of the State of employment.

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<sup>28</sup> States Parties concerned shall endeavour to provide for recognition of such qualifications.

With regard to *family life*, the Convention recognizes in Article 44 that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. States shall take appropriate measures to ensure the protection of the unity of the families of migrant workers and to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children<sup>29</sup>. Family members enjoy equality of treatment with nationals of that State, under the applicable regulations, in relation to access to educational institutions and services, access to vocational guidance and training institutions and services, to social and health services and to cultural life (Article 45).

Family members may face questions about their fate after their family relationship with the migrant worker comes to an end, in the case of death of the latter or dissolution of marriage. In these circumstances, the State of employment shall favourably consider granting family members of that migrant worker residing in that State on the basis of family reunion an authorization to stay, thereby taking into account the length of time they have already resided in that State. If such authorization is not granted, they must be allowed before departure a reasonable period of time in order to enable them to settle their affairs in the State of employment (Article 50)<sup>30</sup>.

Family members who have themselves an authorization of residence or admission that is without limit of time or is automatically renewable shall be permitted freely to choose their remunerated activity under the same conditions as are applicable to the migrant worker (see also Article 52 of the Convention). If they are not permitted freely to choose their remunerated activity, States Parties shall consider favourably granting them priority in obtaining permission to engage in a remunerated activity over other workers who seek admission to the State of employment, subject to applicable bilateral and multilateral agreements.

Finally, States of employment must pursue a policy, where appropriate in collaboration with the States of origin, aimed at facilitating the integration of children of migrant workers in the local school system, particularly in respect of teaching them the local language. States of employment

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<sup>29</sup> States of employment shall on humanitarian grounds favourably consider granting equal treatment to other family members of migrant workers.

<sup>30</sup> The provisions of Article 50 may not be interpreted as adversely affecting any right to stay and work otherwise granted to such family members by the legislation of the State of employment or by bilateral and multilateral treaties applicable to that State.

shall endeavour to facilitate for the children of migrant workers the teaching of their mother tongue and culture and, in this regard, States of origin shall collaborate whenever appropriate. States of employment may provide special schemes of education in the mother tongue of children of migrant workers, if necessary in collaboration with the States of origin.

The rights also relate to the *financial status* of migrant workers and their family members: exemption from import and export duties and taxes in respect of their personal and household effects and necessary equipment (Article 46); right to transfer earnings and savings, in particular those funds necessary for the support of their families (Article 47); without prejudice to applicable double taxation agreements, waiver of taxes, duties or charges of any description higher or more onerous than those imposed on nationals in similar circumstances in the matter of earnings and entitlement to deductions or exemptions from taxes of any description and to any tax allowances applicable to nationals in similar circumstances, including tax allowances for dependent members of their families (Article 48).

Finally it must be observed that some rights also specifically apply to the *State of origin*. Apart from the right to information in Article 37, the right to participation in public affairs of their State of origin and to vote and to be elected at elections of that State, in accordance with its legislation (Article 41) can be mentioned in this regard.

### 3.3. *Provisions applicable to particular categories of migrant workers and members of their families*

Part V of the Convention applies to particular categories of documented migrant workers and members of their families who enjoy the rights in Part III of the Convention and, with the exception for the modification in Part V of the Convention, the rights set forth in Part IV. It suffices here to indicate that the specifications in Part V (Articles 58 to 63) apply to frontier workers, seasonal workers, itinerant workers, project-tied workers, specified-employment workers and self-employed workers.

## 4. **Obligations of States Parties**

Apart from the specific obligations, stemming from the rights and freedoms enumerated in Parts III to V of the Convention, the States also are under general obligations to promote sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families.

The emphasis of Part VI of the Convention, which elaborates on this obligation of promotion, relates to the establishment of better conditions for international labour migration. Thereto the States shall as appropriate consult and co-operate, not only paying attention to labour needs and resources, but also to the social, economic, cultural and other needs of migrant workers and members of their families involved, as well as to the consequences of such migration for the communities concerned (Article 64). They shall maintain appropriate services to deal with questions concerning international migration and facilitate as appropriate the provision of adequate consular and other services that are necessary to meet the social, cultural and other needs of migrant workers and members of their families (Article 65), restrict the right to undertake operations with a view to the recruitment of workers for employment in another State (Article 66), co-operate as appropriate in the adoption of measures regarding the orderly return of migrant workers and members of their families to the State of origin when they decide to return or their authorization of residence or employment expires or when they are in the State of employment in an irregular situation (Article 67).

The Convention also addresses the issue of illegal migration. States Parties, including States of transit, shall collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation by taking measures against the dissemination of misleading information relating to emigration and immigration, measures to detect and eradicate illegal or clandestine movements of migrant workers and members of their families and to impose effective sanctions on persons, groups or entities which organize, operate or assist in organizing or operating such movements, and measures to impose effective sanctions on persons, groups or entities which use violence, threats or intimidation against migrant workers or members of their families in an irregular situation. States of employment shall take all adequate and effective measures to eliminate employment in their territory of migrant workers in an irregular situation, including, whenever appropriate, sanctions on employers of such workers. The rights of migrant workers vis-à-vis their employer arising from employment shall not be impaired by these measures (Article 68).

In the event of an irregular situation, States Parties must take appropriate measures to ensure that such a situation does not persist (Article 69). The choice of the means to this goal is left to the States. However, whenever they consider the possibility of regularizing the situation of such persons in accordance with applicable national legislation and bilateral or multilateral agreements, appropriate account shall be taken of the circumstances of their entry, the duration of their stay



in the States of employment and other relevant considerations, in particular those relating to their family situation.

States Parties shall take measures not less favourable than those applied to nationals to ensure that working and living conditions of migrant workers and members of their families in a regular situation are in keeping with the standards of fitness, safety, health and principles of human dignity (Article 70).

And in the event of a decease, States Parties shall facilitate, whenever necessary, the repatriation to the State of origin of the bodies of deceased migrant workers or members of their families (Article 71).

States must also undertake to ensure that any person whose rights or freedoms under the Convention are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity (Article 83). Any person seeking such a remedy shall have his or her claim reviewed and decided by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.

The Migrant Workers Convention includes several provisions that refer to the need to take appropriate (legal) measures for the purpose of realising the rights contained in the Convention. The most explicit is Article 84 of the Convention, according to which each State Party undertakes to adopt the legislative and other measures that are necessary to implement the provisions of the present Convention. Articles 82 (States Parties shall take appropriate measures to ensure that the rights provided for in the Convention will not be renounced) and 83 (States Parties undertake to ensure an effective remedy which will be enforced) include a similar statement. From these provisions it can be argued that the Convention provisions that have no direct effect in the internal legal order, nevertheless have a standstill effect which prohibits the diminishing of existing levels of rights protection of migrant workers at the time of ratification<sup>31</sup>.

## 5. Derogation and Limitation Clauses

The Convention is a very detailed instrument. Often from the formulation of the rights themselves, follows the limited applicability. For some rights, a more detailed limitation clause is inserted, whereby only

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<sup>31</sup> VANHEULE, D. *et al.*: *supra* note 12, pp. 291-295.

such limitations as are prescribed by law and are necessary to protect certain goods (public safety, order, health or morals or the fundamental rights and freedoms of others, preventing war or discrimination,...) are permitted: freedom to manifest one's religion or belief (Article 12) and freedom of expression (Article 13).

## **6. Committee on the Protection of the Rights of All Migrant Workers and Members of Their Family**

For the purpose of reviewing the application of the Convention, a Committee on the Protection of the Rights of All Migrant Workers and Members of Their Family has been established (Article 72). The Committee consists of ten members, to be expanded to 14 members after the entry into force of the Convention for the 41<sup>st</sup> State Party. These experts are elected by secret ballot by the States Parties from a list of persons nominated by the States Parties. They serve in their personal capacity for a term of four years<sup>32</sup>. The first meeting of States Parties for the election of the members of the Committee was held on 11 December 2003 and the Committee convened for its inaugural session in March 2004.

## **7. Reporting procedure**

States Parties undertake to submit to the Secretary-General of the United Nations for consideration by the Committee a report on the legislative, judicial, administrative and other measures they have taken to give effect to the provisions of the Convention within one year after the entry into force of the Convention for the State concerned. Thereafter, they will submit this report every five years and whenever the Committee so requests. The reports shall also indicate factors and difficulties which affect the implementation and include information on the characteristics of migration flows. The reports are to be made widely available to the public in the countries concerned (Article 73). Until now, 7 country reports have been considered<sup>33</sup>.

The Committee normally meets annually. It examines the reports and transmits the comments it considers appropriate (Article 74). The

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<sup>32</sup> Bi-annually, half of the members of the Committee are (re-)elected.

<sup>33</sup> Mali, Mexico, Egypt, Ecuador, Bolivia, Syrian Arab Republic and El Salvador. At the April Session 2009, the reports by Azerbaijan and Colombia will be considered.

State Party may submit to the Committee observations thereon. The Secretary-General of the United Nations shall transmit to the Director-General of the International Labour Office copies of the reports submitted by States Parties concerned and information relevant to the consideration of these reports, in order to enable the Office to assist the Committee with the expertise the Office may provide regarding those matters dealt with by the Convention that fall within the sphere of competence of the International Labour Organisation. The Committee shall consider in its deliberations such comments and materials as the Office may provide. The Secretary-General of the United Nations may also, after consultation with the Committee, transmit to other specialized agencies as well as to intergovernmental organizations, copies of such parts of these reports as may fall within their competence. The Committee may invite the specialized agencies and organs of the United Nations, as well as intergovernmental organizations and other concerned bodies to submit, for consideration by the Committee, written information on such matters dealt with in the present Convention as fall within the scope of their activities (Article 74).

## 8. Inter-State Complaints Procedure

The Convention also provides for an inter-State complaints procedure which will come into force when 10 States Parties have made a declaration on the recognition of the competence of the Committee thereto (Article 76)<sup>34</sup>.

States Parties to the Convention may at any time declare that they recognize the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention (Article 75). Such communications may only be submitted by a State Party that has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

If a State Party considers that another State Party is not fulfilling its obligations under the Convention, it may by written communication bring the matter to the attention of that State Party and it may also in-

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<sup>34</sup> A declaration may be withdrawn at any time by notification to the Secretary-General without prejudice to the consideration of any matter that is the subject of a communication already transmitted.

form the Committee of the matter (Article 76). Within three months after the receipt of the communication the receiving State shall afford the State that sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter. If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State. The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. The Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of the respect for the obligations set forth in the present Convention. It holds closed meetings when examining communications. The Committee shall, within twelve months after the date of receipt of notice, submit a report. The report will be confined to a brief statement of the facts and of the solution reached, if a solution is reached. If not, the Committee sets forth the relevant facts concerning the issue between the States Parties concerned.

## 9. Individual complaints procedure

States Parties may at any time declare that they also recognize the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim that their individual rights as established by the Convention have been violated by that State Party. No communication shall be received by the Committee if it concerns a State Party that has not made such a declaration (Article 77). This individual complaints procedure enters into force when ten States Parties to the present Convention have made declarations thereto<sup>35</sup>.

In order for such a communication to be admissible it may not be anonymous nor may it constitute an abuse of the right of submission of such communications or be incompatible with the provisions of the

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<sup>35</sup> A declaration may be withdrawn at any time by notification to the Secretary-General without prejudice to the consideration of any matter that is the subject of a communication already transmitted.

Convention. Communications will not be considered if the same matter has been or is being examined under another procedure of international investigation or settlement. The individual must also have exhausted all available domestic remedies.

The Committee shall bring any communications submitted to it to the attention of the State Party. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State. The Committee will then consider the communication, in a closed meeting, and forward its views to the State Party concerned and to the individual.

## 10. Conclusion

The Migrant Workers Convention is the result of a delicate exercise in balancing the rights and interests of migrant workers, both regular and irregular, against the interests of the countries of employment. It calls for cooperation and puts the finger on the responsibilities of all those involved, be they individuals (workers, their families, employers) or States of origin, transit and employment. Notwithstanding the care and details in the formulation of the rights and obligations, the Convention's popularity appears to be limited to the States of origin for which this instrument contributes to the protection of the rights and interests of their nationals abroad. The absence of interest in the countries of employment remains startling, the more since other (ILO-)Conventions have been ratified and the rights granted in the Convention are often already protected under other domestic, regional or international instruments.

The importance of the recognition of the (human) rights of migrant workers and their family members has been emphasized even more by the creation of the mandate of the *Special Rapporteur on the Human Rights of Migrants* in 1999 by the Commission on Human Rights. The Rapporteur has a mandate to examine ways and means to overcome the obstacles existing to the full and effective protection of the human rights of migrants, including obstacles and difficulties for the return of migrants who are undocumented or in an irregular situation<sup>36</sup>. The

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<sup>36</sup> Resolution 1999/44. The mandate was extended for a further three years by the Commission on Human Rights in 2005 (Res. 2005/47). The Special Rapporteur is, at present, Jorge A. Bustamante (Mexico), who succeeded Gabriela Rodríguez Pizarro (Costa Rica) in 2005.

mandate of the Special Rapporteur covers all countries, irrespective of whether a State has ratified the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families or not.

In this context, the ratification of the Migrant Workers Convention by States of employment will have important social value. It signifies that migrant workers are more than workers and economic production factors. Migrant workers have family and they are all members of society. Consequently, they have rights. The Convention also aims at preventing and eliminating abuses against migrants, in particular those in situations of illegal migration whose rights may be even more in danger during their transit and employment. The prevention of illegal migration may decrease the number of violations of human rights. In general, the Convention can be seen as the most ambitious expression of international concern regarding the problematic situation of foreigners in an irregular situation<sup>37</sup>.

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<sup>37</sup> BOSNIAK, L.S.: "Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention", *IMR* 1991, pp. 737 and 740.

# The United Nations Convention on the Rights of Persons with Disabilities: Process, Substance, and Prospects\*

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**Summary:** 1. Towards a Disability-Specific Human Rights Treaty. 2. An Overview of the Disability-Specific Human Rights Treaty: 2.1. Substantive Articles. 2.2. Implementation and Monitoring Articles. 3. The Disability-Specific Human Rights Treaty as a Vehicle for Social Transformation: 3.1. Triggering Expressive Value. 3.2. Triggering National Action. 3.3. Triggering Social Integration. 4. Conclusion.

The United Nations General Assembly adopted the Convention on the Rights of Persons with Disabilities (CRPD, or Convention)<sup>1</sup> along with its Optional Protocol<sup>2</sup> by general consensus on 13 December 2006<sup>3</sup>. The CRPD opened for signature by States Parties on 30 March 2007, has been signed by more than one hundred and twenty five States<sup>4</sup>. Ratified by twenty States Parties, the Convention is entering into force, with States Parties establishing a treaty monitoring body (Committee)<sup>5</sup> whose

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<sup>1</sup> Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106 (2007) [hereinafter CRPD].

<sup>2</sup> Optional Protocol to the Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106 (2007) [hereinafter Optional Protocol].

<sup>3</sup> See *General Assembly Adopts Groundbreaking Convention, Optional Protocol on Rights of Persons with Disabilities: Delegations, Civil Society Hail First Human Rights Treaty of Twenty-First Century*, GA/105554 (United Nations Department of Public Information 13 December 2006), available online at <<http://www.un.org/News/Press/docs/2006/ga10554.doc.htm>>.

<sup>4</sup> The CRPD text, along with its drafting history, resolutions, and updated list of States Parties is posted on the United Nations Enable website, available online at <<http://www.un.org/esa/socdev/enable/rights/convtexte.htm>>. Readers are encouraged to visit this site to obtain more recent information.

<sup>5</sup> See CRPD, *supra* note 1, at Art. 45(1); *Ibid.* at Art. 45(2); Optional Protocol, *supra* note 2, at Art. 13(1).

jurisprudence will bind States that have ratified the Optional Protocol<sup>6</sup>. The CRPD is the first human rights treaty of the twenty-first century, as well as the first legally enforceable United Nations instrument specifically directed at the rights of persons with disabilities<sup>7</sup>.

This chapter overviews the Convention's adoption, summarizes its substantive content, and assesses its future prospects for bettering the lives of the world's six hundred and fifty million persons with disabilities<sup>8</sup>. Although the CRPD has a remarkably broad transformative potential, we will focus on those areas we feel are most likely to yield immediate results<sup>9</sup>.

## 1. Towards a Disability-Specific Human Rights Treaty

Since its establishment after World War II, and through the end of the last century, the United Nations has promulgated seven core human rights conventions<sup>10</sup>. Each contains legal obligations that can be

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<sup>6</sup> The Optional Protocol required ten State Party ratifications to become operational, see Optional Protocol, *supra* note 2, at Art. 13, a threshold already achieved as of this writing.

<sup>7</sup> See STEIN, M.A.: "Disability Human Rights", 95 *Cal. L. Rev.*, 2007, p. 75.

<sup>8</sup> QUINN, G. & DEGENER, TH.: *Human Rights and Disability: the Current Use and Future Potential of the United Nations Human Rights Instruments in the context of Disability*, 2002, available online at <<http://www.nhri.net/pdf/disability.pdf>>.

<sup>9</sup> For earlier accounts that were drawn upon for this chapter, see LORD, J.E. and STEIN, M.A.: "The Committee on the Rights of Persons with Disabilities", in ALSTON, PH. and MEGRET, F. (eds.): *The United Nations and Human Rights: A Critical Appraisal*, Oxford University Press, Oxford, 2008; LORD, J.E. and STEIN, M.A.: "Future Prospects for the United Nations Convention on the Rights of Persons with Disabilities", in ARNARDOTTIR, O.M. and QUINN, G. (eds.): *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*, Brill, 2008; STEIN, *supra* note 7.

<sup>10</sup> Prior to the adoption of the CRPD, which represents the eighth UN hard law treaty, the core human rights treaties include: International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U. N. GAOR, Supp. No. 16 at 52, U.N. Doc. A/6316 (1966); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (1966); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Annex, Supp. No. 51 at 197, U.N. Doc. A/39/51 (1984); Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1981); International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. GAOR, Supp. No. 14, at 47, U.N. Doc. A/6014 (1966); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, G.A. Res. 45/158 of 18 December 1990; Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 161, U.N. Doc. A/44/49 (1989) [herein-



applied to persons with disabilities, either because they are universal in scope or because they target a characteristic that disabled persons also possess<sup>11</sup>, but were not so used in practice<sup>12</sup>. Central to this difficulty is that existing human rights obligations do not address specific barriers that persons with disabilities face in realizing their human rights, for example, the need for alternative formats to effectively secure equal access to justice<sup>13</sup>.

During the 1970s, forward movement was made in the formulation of international disability-relevant standards, but these efforts did not manifest in legally binding measures. Among the early initiatives were the adoption of the Declaration on the Rights of Mentally Retarded Persons<sup>14</sup> and the Declaration on the Rights of Disabled Persons<sup>15</sup>.

The 1980s witnessed more significant progress with designations of the International Year of the Disabled in 1981<sup>16</sup> and the International

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after CRC]. A ninth core convention has also recently been adopted but not yet entered into force: International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res., 20 December 2007.

<sup>11</sup> The CRC alone among these identity-specific treaties contains a distinct disability-related Article. See CRC, *supra* note 10, at Art. 23, para. 1. (States Parties must recognize the rights of children with disabilities to enjoy “full and decent” lives and participate in their communities). See generally HAMMARBERG, TH.: “The Rights of Disabled Children-The UN Convention on the Rights of the Child”, in DEGNER, TH. and KOSTER-DREESE, Y. (eds.): *Human Rights and Disabled Persons*, Martinus Nijhoff Publishers, Dordrecht, 1995, p. 147 [hereinafter *Human Rights and Disabled Persons*].

<sup>12</sup> Thus, in the decade 1994-2003, seventeen disability-related complaints were asserted under the seven core United Nations instruments, but thirteen were declared inadmissible by their respective monitoring committees. The general comments of the United Nations human rights treaty bodies and other work product may be accessed through the website maintained by the Office of the High Commissioner for Human Rights (OHCHR) website, as well as the Netherlands Institute of Human Rights web page, available online at <<http://www.ohchr.org/english/bodies/>>; <<http://sim.law.uu.nl/sim/Dochome.nsf>>.

<sup>13</sup> See generally QUINN, G.: “The International Covenant on Civil and Political Rights and Disability: A Conceptual Framework”, in *Human Rights and Disabled Persons*, *supra* note 11, p. 69.

<sup>14</sup> Declaration on the Rights of Mentally Retarded Persons, G.A. Res. 2856 (XXVI), at 93, U.N. GAOR, Supp. No. 29, U.N. Doc. A/8429 (Dec. 20, 1971). This document soon came under heavy criticism by the disability community for qualifying the scope of rights for people with intellectual disabilities both in providing that “the mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings” and in terms of its goal for societies which is to promote “their integration as far as possible in normal life”. *Ibid.* at Art. 1; Preml. 5.

<sup>15</sup> Declaration on the Rights of Disabled Persons, G.A. Res. 3447 (XXX), at 88, U.N. GAOR, Supp. No. 34, U.N. Doc. A/10034 (Dec. 9, 1975).

<sup>16</sup> International Year of Disabled Persons, G.A. Res. 36/77, at 176, U.N. GAOR, 36th Sess., Supp. No. 77, U.N. Doc. A/RES/36/77 (Dec. 8, 1981).

Decade of Disabled Persons from 1982-1991<sup>17</sup>. In 1982, the World Programme of Action Concerning Disabled Persons<sup>18</sup> was adopted by the General Assembly as a means of encouraging national level programs to achieve equality for people with disabilities<sup>19</sup>.

In 1993, the General Assembly adopted the United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities<sup>20</sup> as a template for domestic policy-making and international technical and economic cooperation. To facilitate these functions, the Standard Rules established a monitoring mechanism in which a Special Rapporteur reports directly to the Commission on Social Development<sup>21</sup>.

Although commendable for being ahead of their time, these resolutions and declarations are not legally binding<sup>22</sup>. Furthermore, while raising awareness about the human rights of persons with disabilities, they still reflected medical and charity models of disability and were heavily burdened with paternalism<sup>23</sup>. Hence, prior to the CRPD's adoption, the human rights of persons with disabilities were theoretically covered by core human rights treaties and addressed in non-binding initiatives, but were not protected by either. This situation led Special Rapporteur Leandro Despouy to caution that in the absence of specific treaty protection, "persons with disabilities are going to

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<sup>17</sup> Implementation of the World Programme of Action Concerning Disabled Persons, G.A. Res. 37/53, at 186-87, para. 11, U.N. GAOR, 37th Sess., Supp. No. 53, U.N. Doc. A/RES/37/53 (Dec. 3, 1982).

<sup>18</sup> World Programme of Action Concerning Disabled Persons, G.A. Res. 37/52, at 185, U.N. GAOR, 37th Sess., Supp. No. 51, U.N. Doc. A/RES/37/52 (Dec. 3, 1982).

<sup>19</sup> *Idid.*; *id.* at paras. 87-90 (providing, *inter alia*, that "Member States should urgently initiate national long-term programmes to achieve the objectives of the World Programme of Action; such programmes should be an integral component of the nation's general policy for socio-economic development.").

<sup>20</sup> Standard Rules on the Equalization of Opportunities for Persons With Disabilities, G.A. Res. 48/96, at 202, U.N. GAOR, 48th Sess, Supp. No. 49, U.N. Doc. A/RES/48/96 (Dec. 20, 1993).

<sup>21</sup> See generally United Nations Enable, The Special Rapporteur on Disability of the Commission for Social Development, available online at <<http://www.un.org/esa/socdev/enable/rapporteur.htm>>.

<sup>22</sup> The extent to which human rights treaties are enforceable is the subject of heated academic debate. For a harmonizing approach, see GEISINGER, A. and STEIN, M.A.: "A Theory of Expressive International Law", 60 *Vand. L. Rev.*, 2007, p. 77.

<sup>23</sup> See, e.g., Declaration on the Rights of Mentally Retarded Persons, *supra* note 13 at Art. 1; Preamble para. 5 (qualifying the scope of rights for people with intellectual disabilities in providing that "the mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings" and in terms of its goal for societies which is to promote "their integration as far as possible in normal life").

find themselves in a legal disadvantage in relation to other vulnerable groups”<sup>24</sup>.

Acting on previous proposals to address the lack of specific human rights protection for disabled persons, and with especially strong support from Mexico, the General Assembly established an Ad Hoc Committee to consider the feasibility of a disability-specific human rights treaty in December 2001<sup>25</sup>. The Ad Hoc Committee delegated a working group composed of States, non-governmental organizations and national human rights institutions to draft a foundational text<sup>26</sup>. On 16 January 2004, the working group issued draft CRPD articles for consideration beginning with the next (third) Ad Hoc session. On 25 August 2006, at the eighth session, on the last day authorized for negotiating the proposed Convention, the Ad Hoc Committee adopted the CRPD<sup>27</sup>.

## 2. An Overview of the Disability-Specific Human Rights Treaty

The CRPD tracks more contemporary United Nations human rights conventions, especially the Convention on the Rights of the Child (CRC)<sup>28</sup>, in two significant substantive ways. The Convention pursues the central

<sup>24</sup> DESPOUY, L.: *Report on Human Rights and Disabled Persons*, paras. 280-81 (1993), available online at <<http://www.un.org/esa/socdev/enable/dispaperdes0.htm>>.

<sup>25</sup> Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities, G.A. Res. 56/168, U.N. GAOR, 56th Sess., Supp. No. 168, U.N. Doc. A/RES/56/168 (Dec. 19, 2001). A detailed description of the political process behind the United Nations decision to go forward with a disability human rights convention is set forth in the National Council on Disability, Newsroom, *UN Disability Convention-Topics at a Glance: History of the Process*, available online at <[http://www.ncd.gov/newsroom/publications/2003/history\\_process.htm](http://www.ncd.gov/newsroom/publications/2003/history_process.htm)>.

<sup>26</sup> Ad Hoc Comm. on a Comprehensive and Integral International Convention on the Prot. & Promotion of the Rights & Dignity of Persons with Disabilities, Report of the Working Group to the Ad Hoc Committee, U.N. Doc. A/AC.265/2004/WG.1 para. 1 (Jan. 27, 2004). The working group included twelve nongovernmental organizations (“NGOs”). See *id.* at para. 2. The inclusion of NGOs at this stage was unprecedented in the normal course of treaty development at the United Nations, and can be interpreted as acquiescence to NGOs’ assertion of the participatory claim expressed in the mantra: “nothing about us without us”.

<sup>27</sup> The Ad Hoc Committee held eight sessions in total, in addition to the January 2004 Working Group meeting. Documents for all sessions are available online at <<http://www.un.org/esa/socdev/enable/rights/adhoccom.htm>>. The sessions ran from 2002 until August 2006, after which the adopted draft Convention was submitted to a technical drafting committee to be reviewed and “cleaned” and made ready for submission to the entire General Assembly. More on each session of the Ad Hoc Committee sessions is available online at <<http://www.un.org/esa/socdev/enable/rights/adhoccom.htm>>.

<sup>28</sup> See CRC, *supra* note 10.

objective of the human right to development<sup>29</sup> to holistically combine civil and political rights with economic, social, and cultural rights<sup>30</sup>, thereby expressing the notion that human rights are truly “indivisible, interrelated and interconnected”<sup>31</sup>. Additionally, the Convention emulates the CRC insofar as it comprehensively catalogs human rights obligations for a targeted population, in this instance, persons with disabilities.

Notwithstanding a small number of significant divergences, the CRPD’s structure is also akin to that of the CRC<sup>32</sup>. The Convention structure sets forth articles that are introductory<sup>33</sup>, of universal application<sup>34</sup>, spell out substantive rights<sup>35</sup>, and establish implementation and monitoring schemes<sup>36</sup>. It further lays out rules that govern the Convention’s operation<sup>37</sup>. In addition, its Optional Protocol, adopted at the same time as the Convention itself, provides mechanisms for individual and group communications and as well as a procedure of inquiry<sup>38</sup>.

## 2.1. *Substantive Articles*

Article 1 announces that the Convention’s explicit purpose is “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity”<sup>39</sup>. It is notable for a human rights convention to state its purpose in a specific provision<sup>40</sup>. Article 1

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<sup>29</sup> See Declaration on the Right to Development, G.A. Res. 41/128, at 183, Annex, U.N. GAOR, 41st Sess., Supp. No. 53, U.N. Doc. A/RES/41/128 (Dec. 4, 1986); see also World Conference on Human Rights, June 14-25, 1993, Vienna Declaration and Programme of Action, U.N. Doc A/CONF. 157/24, para. 10 (July 12, 1993), available online at <[http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En)> [hereinafter Vienna Declaration] (proclaiming the right to development was “a universal and inalienable right” as well as “an integral part of fundamental human rights”).

<sup>30</sup> See STEIN, *supra* note 7, pp. 94-98; STEIN, M.A. and STEIN, P.J.S.: “Beyond Disability Civil Rights”, 58 *Hastings L.J.*, 2007, pp. 1203, 1212-1214.

<sup>31</sup> Vienna Declaration, *supra* note 29, at para. 63.

<sup>32</sup> For instance, a separate article that announces its purpose, see CRPD, *supra* note 1, at Art. 1, and the absence of a formal explanation of the protected class in the definition article, see *id.* at Art. 2.

<sup>33</sup> See CRPD, *supra* note 1, at preamble, Arts 1-2.

<sup>34</sup> See *id.* at Arts. 3-9.

<sup>35</sup> See *id.* at Arts.10-30.

<sup>36</sup> See *id.* at Arts.31-40.

<sup>37</sup> See *id.* at Arts.41-50.

<sup>38</sup> See Optional Protocol, *supra* note 2.

<sup>39</sup> CRPD, *supra* note 1, at Art. 1.

<sup>40</sup> Provisions stating the purpose of the treaty are a common feature of international environmental and other types of international agreements, but not human rights con-

also conceives of disability as including, but not limited to “long-term physical, mental, intellectual or sensory impairments”<sup>41</sup>. The Convention categorically affirms the social model of disability by describing it as a condition arising from “interaction with various barriers may hinder their full and effective participation in society on an equal basis with others” instead of inherent limitations<sup>42</sup>.

Article 2 does not directly define “disability”<sup>43</sup>. The CRPD instead reiterates the social construction of disability of Article 1 in the Preamble<sup>44</sup>. Article 2 defines the terms “communication,” “language,” and “universal design” expansively<sup>45</sup> and also broadly approached two disability-specific terms that are central to interpretation of disability-specific non-discrimination. Thus, discrimination “on the basis of disability” encompasses “any distinction, exclusion or restriction on the basis of disability” that “has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms” and extends to “all forms of discrimination, including denial of reasonable accommodation”<sup>46</sup>. Article 2 similarly defines the notion of reasonable accommodation as a

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ventions. See e.g., United Nations Framework Convention on Climate Change, 9 May 1992, entered into force 24 March 1994, reprinted in 31 *I.L.M.* 849, 1992, at Art. 4(1)(i).

<sup>41</sup> CRPD, *supra* note 1, at Art. 1.

<sup>42</sup> See *id.*, at Art. 1. Because these conceptual norms are set forth in the purpose article, it follows that States cannot enter permissible reservations to the normative contents of this article. See Vienna Convention on the Law of Treaties, G.A. Res. 2166 (XXI) of 5 December 1966 and 2287 (XXII) of 6 December 1967, 1150 U.N.T.S. 331, at Art. 19 (prohibiting a State from entering a reservation to a treaty, *inter alia*, where the “reservation is incompatible with the object and purpose of the treaty”).

<sup>43</sup> The same holds true for the European Union’s employment discrimination directive. See Council of Europe Directive Establishing a Framework for Equal Treatment in Employment and Occupation, 200/78/EC (27 November, 2000) [hereinafter EU Framework Directive].

<sup>44</sup> See CRPD, *supra* note 1, at preambular para. (e) (“Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others”) (emphasis in original).

<sup>45</sup> See *id.* at Art. 2 (defining communication to include “languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology”); *id.* (defining language to include “spoken and signed languages and other forms of non spoken languages”); *id.* (defining universal design as “the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design” and not to “exclude assistive devices for particular groups of persons with disabilities where this is needed”).

<sup>46</sup> *Idid.*

“necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden” that ensures disabled persons “the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”<sup>47</sup>.

Article 3 catalogs the Convention’s general principles, among which are respect for individual dignity, autonomy, and independence; respect for difference and acceptance of disability as human diversity; non-discrimination; equal opportunity; complete and meaningful participation; accessibility; sexual equality; respect for children’s rights and support of their evolving capabilities<sup>48</sup>. The inclusion of a general principles Article is an innovation that will serve to guide the interpretation of the entire text of the treaty<sup>49</sup>.

Article 4 methodically enunciates general obligations of States Parties to undertake measures that will ensure the promotion and full realization of all human rights and fundamental freedoms under the CRPD for all persons with disabilities, while also prohibiting any form of discrimination in their attainment<sup>50</sup>. States Parties must progressively take measures to realize economic, social and cultural rights to the maximum extent of their available resources<sup>51</sup>.

Article 5 requires States Parties ensure the equality of persons with disabilities in their societies while also prohibiting all types of discrimina-

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<sup>47</sup> *Idid.*

<sup>48</sup> See *id.* at Art. 3 (a); *id.* at Art. 3(d); *id.* at 3(b); *id.* at 3(e); *id.* at 3(c); *id.* at 3(f); *id.* at 3(g); *id.* at 3(h).

<sup>49</sup> It should be noted that the CRPD is the first human rights convention to include a provision outlining general principles.

<sup>50</sup> See *id.* at Art. 4; *id.* at Art. 4(1).

<sup>51</sup> See *id.* at Art. 4(2). Specifically, Article 4 enumerates the obligations of States Parties to: adopt legislative, administrative and other measures to implement the Convention, *id.* at Art. 4(1)(a); abolish or amend existing laws, regulations, customs and practices that discriminate against persons with disabilities, *id.* at Art. 4(1)(c); adopt an inclusive approach to protect and promote the rights of persons with disabilities in all policies and programmes, *id.* at Art. 4(1)(c); refrain from conduct violative of the Convention and ensure that the public sector respects the rights of persons with disabilities, *id.* at Art. 4(1)(d); take measures to abolish disability discrimination by persons, organizations or private enterprises, *id.* at Art. 4(1)(e); undertake research and development of accessible goods, services and technology for persons with disabilities and to promote others to undertake such research, *id.* at Arts. 4(1)(f) & (g); provide accessible information about assistive technology to persons with disabilities, *id.* at Art. 4(1)(h); promote professional and staff training on Convention rights for those working with persons with disabilities on the Convention, *id.* at Art. 4(1)(i); and (ix) consult with and involve persons with disabilities in developing and implementing legislation and policies and in decision-making processes concerning rights under the CRPD, *id.* at Art. 4(3).

tion “on the basis of disability”<sup>52</sup>. In doing so, the CRPD requires States Parties recognition “that all persons are equal before and under the law” and therefore entitled “to the equal protection and equal benefit of the law” free of any discrimination<sup>53</sup>. States Parties also must “prohibit all discrimination on the basis of disability,” ensure that persons with disabilities have “equal and effective legal protection” against all manner of discrimination<sup>54</sup>, and “take all appropriate steps to ensure that reasonable accommodation is provided”<sup>55</sup>. The Convention also stipulates that specific measures required to “achieve de facto equality of persons with disabilities” may not be deemed discriminatory<sup>56</sup>.

Following Article 5 are thematic articles of general application to be horizontally integrated across the CRPD. These include specific Articles on the rights of women with disabilities<sup>57</sup> and children with disabilities<sup>58</sup> (Other individuals with disabilities subject to multiple forms of discrimination are acknowledged in the Preamble)<sup>59</sup>. Article 8 targets the underlying attitudinal causes of disability-based discrimination by requiring States Parties to raise public awareness, and provides a list of illustrative measures<sup>60</sup>. Last, Article 9 seeks to dismantle barriers erected because of discriminatory attitudes by promoting physical, technological, information, communication, economic and social accessibility<sup>61</sup> in the public and private spheres<sup>62</sup>.

Because the Convention is a comprehensive human rights treaty, its substantive articles run the gamut of life activities in clarifying, within a disability-specific context, human rights to which all persons are enti-

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<sup>52</sup> *Idid.* at Art. 5. For a discussion of the three main normative theories of equality (and by implication, non-discrimination) that are applied to the disability context, see QUINN and DEGENER, *supra* note 8, pp. 16-18. For different conceptions of disability-based equality within the context of the Americans with Disabilities Act, see SILVERS, A. *et al.* (eds.): *Disability, Difference, Discrimination: Perspectives on Justice in Bioethics and Public Policy*, Rowman and Littlefield 1998.

<sup>53</sup> CRPD, *supra* note 1, at Art. 5(1).

<sup>54</sup> See *id.* at Art. 5(2).

<sup>55</sup> *Idid.* at Art. 5(3).

<sup>56</sup> See *id.* at Art. 5(4).

<sup>57</sup> See CRPD, *supra* note 1, at Art. 6.

<sup>58</sup> See *id.* at Art. 7.

<sup>59</sup> “Concerned about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status.” *Idid.* at Preamble (p) (emphasis in original).

<sup>60</sup> *Idid.* at Art. 8(1).

<sup>61</sup> See *id.* at Art. 9.

<sup>62</sup> See *id.* at Art. 9(1).

tled. These elemental protections include fundamental freedoms such as the right to life<sup>63</sup>, freedom from torture<sup>64</sup>, the right to education<sup>65</sup>, employment<sup>66</sup>, political participation<sup>67</sup>, legal capacity<sup>68</sup>, access to justice<sup>69</sup>, freedom of expression and opinion<sup>70</sup>, privacy<sup>71</sup>, participation in cultural life, sports and recreation<sup>72</sup>, respect for home and family<sup>73</sup>, personal integrity<sup>74</sup>, liberty of movement and nationality<sup>75</sup>, liberty and security of the person<sup>76</sup>, and adequate standard of living<sup>77</sup>. As an aside, although several articles might seem to embody newly created rights, in fact they were included in order to direct the means by which other Convention rights are realized<sup>78</sup>. For example, the articles on living independently<sup>79</sup>, personal mobility<sup>80</sup>, and habilitation and rehabilitation<sup>81</sup> are central if other more historically recognized human rights (like employment) are to be achieved<sup>82</sup>.

## 2.2. *Implementation and Monitoring Articles*

Ten subsequent Articles set forth implementation and monitoring measures<sup>83</sup>, as does the Optional Protocol<sup>84</sup>. These include the collection of disability-related data to counter the traditional dearth of comparative information that impedes rights realization<sup>85</sup>. A separate CRPD

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<sup>63</sup> See CRPD, *supra* note 1, at Art. 10.

<sup>64</sup> See *id.* at Art. 15.

<sup>65</sup> See *id.* at Art. 24.

<sup>66</sup> See *id.* at Art. 27.

<sup>67</sup> See *id.* at Art. 29.

<sup>68</sup> See *id.* at Art. 12.

<sup>69</sup> See *id.* at Art. 13.

<sup>70</sup> See *id.* at Art. 21.

<sup>71</sup> See *id.* at Art. 22.

<sup>72</sup> See *id.* at Art. 30.

<sup>73</sup> See *id.* at Art. 23.

<sup>74</sup> See *id.* at Art. 17.

<sup>75</sup> See *id.* at Art. 18.

<sup>76</sup> See *id.* at Art. 14.

<sup>77</sup> See *id.* at Art. 28.

<sup>78</sup> See United Nations Department of Economic and Social Affairs, Convention on the Rights of Persons with Disabilities: Why a Convention?, available online at <<http://www.un.org/disabilities/convention/questions.shtml#one>>.

<sup>79</sup> See CRPD, *supra* note 1, at Art. 19.

<sup>80</sup> See *id.* at Art. 20.

<sup>81</sup> See *id.* at Art. 26.

<sup>82</sup> See generally STEIN and STEIN, *supra* note 30.

<sup>83</sup> See CRPD, *supra* note 1, at Arts. 31-40.

<sup>84</sup> See Optional Protocol, *supra* note 2.

<sup>85</sup> See CRPD, *supra* note 1, at Art. 31.



provision on international cooperation recognizes that partnerships with other States, relevant international and regional organizations, and civil society support national level implementation of State Party obligations<sup>86</sup>. Notably, Article 32 makes it clear that all these collaborative efforts, including international development programmes (which have historically excluded a disability dimension), should be fully inclusive of persons with disabilities and accessible<sup>87</sup>.

Article 33 seeks to ensure effective implementation at the national level by requiring States to designate one or more focal points within their governments for implementing the CRP<sup>88</sup>, and urges States to consider creating or designating a coordination mechanism, again within government, to further implement across government sectors<sup>89</sup>. It also requires States Parties to establish and/or support one or more independent mechanisms separate from government to “promote, protect and monitor” the Convention’s implementation<sup>90</sup>. Last, Article 33 mandates that persons with disabilities and their representative organizations must be “involved and participate fully in the monitoring process”<sup>91</sup>.

When the Committee is established, it will be constituted by twelve experts<sup>92</sup>. The individual criteria for Committee membership are experts with high moral standing whose competence and experience are recognized, and who will serve in their individual capacity<sup>93</sup>. States Parties are encouraged to consult closely with and actively involve persons with disabilities<sup>94</sup> in nominating their own nationals for Committee election at the Conference of States Parties meetings<sup>95</sup>, and to give “due consideration” for representation by persons with disabilities on the monitoring body<sup>96</sup>. The Committee will establish its own procedural

<sup>86</sup> See *id.* at Art. 32.

<sup>87</sup> See *id.* at Art. 32(1)(a). For a comprehensive treatment, see LORD, J.E. and GUERNSEY, K.N.: *Convention Document Working Group Draft Text Commentary: A Legal Commentary on the Draft Convention Text Produced by the Working Group for the UN Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities* (March 2004).

<sup>88</sup> See CRPD, *supra* note 1, at Art. 33(1).

<sup>89</sup> See *id.*

<sup>90</sup> *Idid.* at Art. 33(2).

<sup>91</sup> *Idid.* at Art. 33(3).

<sup>92</sup> See *id.* at Art 34(2). Following an additional sixty ratifications, Committee membership can attain a maximum number of eighteen experts. See *id.* at 34(2).

<sup>93</sup> See *id.* at Art 34(3).

<sup>94</sup> See *id.*; *id.* at Art. 4(3).

<sup>95</sup> See *id.* at Art 34(5).

<sup>96</sup> See *id.* at Art. 34(3).

rules<sup>97</sup>, consistent with other treaty bodies<sup>98</sup>, and convene its initial meeting<sup>99</sup>. These provisions are substantially similar to those governing existing treaty monitoring bodies.

The Committee's mandate in the context of disability likewise parallels that of existing human rights treaty monitoring bodies<sup>100</sup>. It is tasked with ensuring that the Convention's stated purpose "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity"<sup>101</sup> manifests itself in reality. As with established human rights committees, the Committee is empowered to pursue its agenda by monitoring reports of States Parties<sup>102</sup>, assessing information and shadow reports provided by NGOs and other interested non-state actors<sup>103</sup>, issuing general comments and recommendations, and transmitting a biennial report to the General Assembly<sup>104</sup>. Especially innovative for human rights treaties are provisions allowing the Committee to receive collective complaints<sup>105</sup>, elicit the expertise and input of NGOs<sup>106</sup> and UN specialized agencies and organs<sup>107</sup>, conduct proactive inquiries<sup>108</sup>, and enact procedures to better manage reporting deadlines<sup>109</sup>.

The Committee is authorized to accept and deliberate individual and group complaints and communications regarding alleged violations of

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<sup>97</sup> *Idid.* at Art. 34(10).

<sup>98</sup> See, e.g., CRC, *supra* note 5 at Art. 43(8). The OHCHR has noted the drawbacks associated with the ad hoc development of rules of procedures amongst the various treaty bodies that had led to variations in practice that can be confusing to States and other actors within the system and that some level of coordination could enhance working methods and coherency of the system. OHCHR Monitoring Overview, *supra* note 6 at p. 15, para. 44.

<sup>99</sup> *Idid.* at Art. 34(11).

<sup>100</sup> See especially CRC, *supra* note 5, at Arts. 43-45.

<sup>101</sup> See CRPD, *supra* note 1, at Art. 1.

<sup>102</sup> See *id.* at Arts. 35-37.

<sup>103</sup> See *id.* at Art. 38(b).

<sup>104</sup> See *id.* at Art. 39.

<sup>105</sup> See *id.* at Art. 1(1).

<sup>106</sup> See CRPD, *supra* note 1 at Art. 4(3) (making consultations with disabled persons and their representative organizations a general obligation); *id.* at Art. 33(3) (requiring States Parties to include civil society in the monitoring process at the national level); *id.* at Arts. 34(3) and 35(4) (calling on States Parties to consider consultations with NGOs in the formulation of Committee member nominations as well as in the preparation of reports).

<sup>107</sup> See *id.* at Art. 38(a).

<sup>108</sup> See Optional Protocol, *supra* note 2, at Art. 6.

<sup>109</sup> See *id.* at Art. 15 (4).

the CRPD<sup>110</sup> asserted against States Parties to the Optional Protocol<sup>111</sup>; these may also be submitted on behalf of aggrieved individuals<sup>112</sup>. Otherwise, the admissibility of communications mirrors that of other international complaints procedures<sup>113</sup>. The Committee may at any time after receiving a communication but before determining its merits, request a State Party to adopt sufficient interim measures “to avoid possible irreparable damage” to the alleged victims of its actions<sup>114</sup>. Such action does not imply the ultimate admissibility or merits of the given communication<sup>115</sup>. Communications procedures are confidential and issued recommendations are not enforceable<sup>116</sup>.

CRPD Article 40 provides for a periodic meeting of States Parties to assess implementation and is thus unique for core human rights conventions<sup>117</sup>. The Conferences of States Parties are meant to facilitate implementation of the Convention by drawing together a wide range of actors, including States Parties, relevant United Nations agencies, DPOs, NGOs, and others to provide a forum for discussion and reflection on how to best operationalize the Convention<sup>118</sup>.

The CRPD’s Optional Protocol includes a procedure of inquiry<sup>119</sup> similar to that of some human rights monitoring systems to allow human rights monitoring systems to initiate investigations regarding egregious or systematic human rights violations<sup>120</sup>. In such cases, the Committee shall call on that State Party to collaborate in an investigation and submit its observations<sup>121</sup> for review<sup>122</sup>. The Committee may choose to authorize one or more of its members to conduct an inquiry and report “urgently” to the Committee<sup>123</sup>. The findings of any such inquiry are sent to the State Party, along with any Committee comments or recommendations<sup>124</sup>, following which that State Party may

<sup>110</sup> See *id.* at Art. 1(1).

<sup>111</sup> See *id.* at Art. 1(2).

<sup>112</sup> See *id.* at Art. 1(1).

<sup>113</sup> See *id.* at Art. 2(a)-(f).

<sup>114</sup> See *id.* at Art. 4(1).

<sup>115</sup> See *id.* at Art. 4(2).

<sup>116</sup> See CRPD, *supra* note 1, at Art. 5.

<sup>117</sup> See *id.* at Art. 40.

<sup>118</sup> See *id.*

<sup>119</sup> See Optional Protocol, *supra* note 2, at Art. 6.

<sup>120</sup> See, e.g., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 10, at Art. 20.

<sup>121</sup> See Optional Protocol, *supra* note 2, at Art. 6(1).

<sup>122</sup> See *id.* at Art. 6(2).

<sup>123</sup> See *id.* at Art. 6(2).

<sup>124</sup> See *id.* at Art. 6(3).

respond within six months<sup>125</sup>. The procedure is confidential and so entirely closed, with written findings that are not made public<sup>126</sup>. The CRPD may solicit the State Party after six months to appraise it of what measures it assumed in reply to the inquiry<sup>127</sup>.

The final provisions of the Convention govern its operation, including the CRPD's entry into force, amendments, and the official languages in which the Convention is considered authentic<sup>128</sup>.

### 3. The Disability-Specific Human Rights Treaty as a Vehicle for Social Transformation

Although the CRPD has enormous potential for transforming the lives of the six hundred and fifty million individuals with disabilities worldwide, we focus on three areas in which the Convention will likely have the most immediate impact. These are the expressive value of disability-based human rights recognition; the dynamic of States Parties reflecting on previously neglected disability laws and policies; and the impetus towards social integration of persons with disabilities fostered by the CRPD's inclusive development mandate.

#### 3.1. *Triggering Expressive Value*

The Convention has expressive value because it signals the global community's recognition that persons with disabilities have equal dignity, autonomy, and worth<sup>129</sup>. Expressive law explores the process whereby legal instruments affect preferences and behavior by altering social perceptions and conventions<sup>130</sup>.

Using these criteria to analyze the CRPD suggests that the treaty can precipitate belief changes by providing information to societies about the rights of persons with disabilities<sup>131</sup>. As such, its potential for altering so-

<sup>125</sup> *Idid.* at Art. 6(4).

<sup>126</sup> *Idid.* at Art. 6(5).

<sup>127</sup> *Idid.* at Art. 7(2).

<sup>128</sup> See CRPD, *supra* note 1, at Arts. 41-50.

<sup>129</sup> For a literature review of expressive law, see STEIN, M.A.: "Under the Empirical Radar: An Initial Expressive Law Analysis of the ADA", 90 *U. Va. L. Rev.*, 2004, p. 1151.

<sup>130</sup> See generally GEISINGER, A.: "A Belief Change Theory of Expressive Law", 88 *Iowa L. Rev.*, 2002, p. 35.

<sup>131</sup> For an account of the expressive law value of human rights treaties, see GEISINGER and STEIN, *supra* note 22; GEISINGER, A. and STEIN, M.A.: "Rational Choice, Reputation, and Human Rights Treaties", 106 *U. Mich. L. Rev.*, 2008.

cial mores may be fully realized through the Convention's provisions supporting its use as an educational tool<sup>132</sup>. In this respect, the CRPD's narrative regarding the unnecessary and amenable nature of the historical exclusion of persons with disabilities across societies can serve a vital function beyond the particular implementation of its substantive obligations in law and policy<sup>133</sup>.

The expressive methodology relates well to the understanding in constructivist scholarship of "deeply social" actors whose identities are shaped by institutionalized norms, values, and ideas of their social environments<sup>134</sup>. In combination, these notions comprehend the Convention as a process through which actor identities and interests are shaped and reconstituted<sup>135</sup>. Viewed this way, the CRPD is an instrument that recasts disability as a social construction, and accordingly enunciates disability-specific protections to enable disabled persons to fully enjoy their human rights<sup>136</sup>.

Such an understanding of disability rights is in sharp contrast to prior human rights instruments. Lacking the social model of disability,

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<sup>132</sup> See, e.g., CRPD, *supra* note 1, Art. 8 (requiring States Parties "to adopt immediate, effective and appropriate measures...[t]o raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities..."). In this regard, the tools of human rights education may assume an important role in fostering the expressive value of the CRPD. See, e.g., LORD, J.E. *et al.*: *Human Rights. YES!*, 2007, available online at <<http://www1.umn.edu/humanrts/edumat/hreduseries/TB6/>>.

<sup>133</sup> *Idid.* at preambular para. k (expressing concern that "persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world").

<sup>134</sup> International legal scholars, going back to Hugo Grotius, have long understood the international system as a social system. GROTIUS, H.: *De Jure Belli ac Pacis: Libre Tres*, 1625, in SCOTT, J.B. (ed.): *Classics of International Law*, Oxford University Press, 1925. Moreover, the view of law as a social process is the particular foundation upon which the highly influential New Haven School of international law rests. See, e.g. McDUGAL, M. and FELICIANO, F.: *Law and Minimum World Public Order. The Legal Regulation of International Coercion*, Yale University Press, 1961; LASSWELL, H. and McDUGAL, M.: *Jurisprudence for a Free Society*, New Haven Studies, 1992.

<sup>135</sup> On the understanding of international law as a process, see especially HIGGINS, R.: *Problems and Process: International Law and how we use it*, Oxford University Press, Oxford, 1994.

<sup>136</sup> See WENDT, A.: "Constructing International Politics", 20 *Int'l. Security* 71, 1995, 73 (positing that systems of shared ideas, beliefs and values work to influence social and political action within and across multilateral law-making processes); REUS-SMIT, CH.: "Constructivism", in BURCHILL, S. *et al.*: *Theories of International Relations*, Palgrave, Basingtoke, 2001, pp. 209 and 218 (noting that "[i]nstitutionalized norms and ideas... condition what actors consider necessary and possible, both in practical and ethical terms").

previous core treaties failed to connect the realization of rights with those barriers experienced by persons with disabilities in their communities. This is true in the core human rights conventions as set forth in Part I, and also for other United Nations instruments, including the Charter of the United Nations<sup>137</sup> and the Universal Declaration of Human Rights<sup>138</sup>. The same may be said of the otherwise commendable United Nations Millennium Development Goals (MDGs) aimed at helping citizens in the world's poorest countries to achieve a better life by the year 2015<sup>139</sup>. For although the central aims of this program are inextricably linked to disability<sup>140</sup> by targeting poverty alleviation<sup>141</sup>, increased health status<sup>142</sup>, and improved education<sup>143</sup>, the MDGs do not reference disability and do not animate the connections between disability and poverty.

The General Assembly's adoption by consensus of the CRPD, along with the subsequent signature and ratification of the Convention by

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<sup>137</sup> See, e.g., United Nations Charter, at Art. 1(3). (expressing a core purpose of the UN to "achieve international cooperation in solving problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion").

<sup>138</sup> See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A (III), Arts. 1-2, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 12, 1948) (proclaiming that "all human beings are born free and equal in dignity and rights" and are "entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status").

<sup>139</sup> The Millennium Development Goals (MDGs) were derived from the Millennium Declaration, adopted at the conference which has since become the centerpiece for achievement the goals of the Declaration. See *UN Millennium Declaration*, UN G.A. Res. 55/2 (2000), available online at <http://www.unmillenniumproject.org/documents/ares552e.pdf>. The official UN website for the MDGs sets forth all eight MDGs as derived from the Millennium Declaration and identifies key targets and benchmarks, along with successes and is available online at: <http://www.un.org/millenniumgoals/> [hereinafter MDGs].

<sup>140</sup> For a discussion of the MDGs and their implicit, but unstated, link to disability issues, see LORD, J.E. and GUERNSEY, K.: *Inclusive Development and the Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities* (IDDC Task Group in the UN Convention, January 2005), available online at: <http://www.un.org/esa/socdev/enable/rights/ahc5docs/ahc5iddc.doc>.

<sup>141</sup> See MDGs, *supra* note 100, at Millennium Development Goal 1 (calling for the eradication of extreme poverty and hunger by 2015).

<sup>142</sup> See *id.* at Millennium Development Goal 6 (calling for efforts to combat HIV/AIDS, malaria and other diseases).

<sup>143</sup> See *id.* at Millennium Development Goal 2 (calling for the achievement of universal primary education).

States Parties, sends a signal that the international community recognizes the place of disability within the human rights canon<sup>144</sup>.

### 3.2. *Triggering National Action*

The CRPD will also trigger national level engagement with disability law and policy among States Parties (and one might argue non-States Parties due to the impact of customary international law)<sup>145</sup>. Some forty nations have systemic disability rights laws<sup>146</sup>, many of which are outdated or of questionable utility<sup>147</sup>. Consequently, the vast majority of States need to develop or substantially reform their domestic legal and social policies regarding persons with disabilities<sup>148</sup>. Given this worldwide underdevelopment of disability laws and policies, the Convention will incent law making and law reform at an unprecedented level in modern human rights practice. It likewise presents considerable challenges for effective national-level implementation.

State engagement with its own domestic-level disability laws and policies will necessarily manifest on at least three interrelated levels. To begin with, each State must decide whether it will ratify the CRPD, and

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<sup>144</sup> See *Lauding Disability Convention as "Dawn of a New Era," UN urges Speedy Ratification* (UN Press Release 13 Dec. 2006), available online at <http://www.un.org/apps/news/story.asp?NewsID=20975&Cr=disab> (summarizing statements made on the adoption of the Convention and heralding its significance for persons with disabilities and for the development of international human rights law).

<sup>145</sup> The essence of this argument is that States that do not enter into international treaties nonetheless can become bound by the precepts of those instruments when they reflect a codification of customary international law or where they, over time, acquire such status. See SOHN, L.B.: "The New International Law: Protection of the Rights of Individuals Rather than States", 32 *Am. U.L. Rev.* 1, 1982, pp. 16-17.

<sup>146</sup> DEGENER, TH. and QUINN, G.: "A Survey of International, Comparative and Regional Disability Law Reform", in BRESLIN, M.L. and YEE, S. (eds.): *Disability Rights Law and Policy: International and National Perspectives*, Transnational Publishers, 2002, p. 3, provides a catalogue.

<sup>147</sup> "Unfortunately, the continuing economic inequities and social exclusion of disabled persons worldwide severely calls into doubt the efficacy of these efforts. It also begs the question of whether any country adequately protects their disabled citizens". STEIN and STEIN: *supra* note 30, at 1203.

<sup>148</sup> To illustrate, Morocco has no comprehensive disability law, and legislation dating to 1982 applies only to a limited number of rights in respect of persons with visual impairments, but not to persons with other types of disabilities. The Convention process, in which the Moroccan government and NGOs played major roles, has promoted national-level planning and prompted national-level legislative reform to remedy major gaps. See Secrétariat a'Etat Chargé de la Famille, de l'Enfance et des Personnes Handicapées, *Programme National de Réadaptation a Base Communautaire au Profit des Personnes Handicapées 2006-2008* (2006).

then adjust its own national level schemes (including the designation of focal points for monitoring and implementation)<sup>149</sup> accordingly<sup>150</sup>; fine-tune its national framework and then ratify<sup>151</sup>; or adopt some transitional measure<sup>152</sup>. Next, each State must assess its individual socio-legal circumstances and determine how to most expediently balance antidiscrimination prohibitions with equality measures<sup>153</sup>. Last, each State must resolve unsettled interpretations of existing disability-related principles (for instance, access to justice)<sup>154</sup> and also grapple with Conven-

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<sup>149</sup> See CRPD, *supra* note 1, at Art. 33(1) (obligating States Parties to “designate one or more focal points within government” for “matters relating to the implementation of the Convention”); Art. 33(2) (requiring States Parties to “maintain, strengthen, designate or establish” one or more independent mechanisms to “promote, protect and monitor implementation” of the CRPD); and Art. 33(1) (further requiring States to “give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels”).

<sup>150</sup> Thus, Jamaica, the first State to ratify the Convention, has not acted to align its domestic legal framework with the Convention and remains a disability rights violator in a number of other areas. See US Department of State, Bureau of Democracy, Human Rights, and Labor Country Reports on Human Rights Practices (Washington, DC, March 6, 2007), available online at <<http://www.state.gov/g/drl/rls/hrrpt/2006/78897.htm>>.

<sup>151</sup> New Zealand, a leading country in the treaty negotiations, has some notably progressive domestic disability practices, but its legal framework remains underdeveloped in the comprehensive sense mandated by the Convention. See MOONEY COTTER, A.-M.: *This Ability: An International Legal Analysis of Disability Discrimination*, Ashgate, 2007, pp. 100-120.

<sup>152</sup> Mexico’s Senate, for example, ratified the CRPD but made a declaration that it would not apply Article 12 because its domestic law on legal capacity exceeded the Convention’s requirements. After well-publicized statements by two experts, the Senate acquiesced to reconsider its position. See D’ARTIGUES, K.: “México, Farol de la Calle, Oscuridad en Casa?”, *El Universal*, 26 October 2007, at A19 (describing the critiques offered by Professors Gerard Quinn and Michael Stein to the General Assembly of Human Rights Institutions of the Americas).

<sup>153</sup> Take, for example, the EU Framework Directive, *supra* note 41, prohibiting discrimination in employment on the basis of disability. The Directive requires individual employers to take “appropriate measures” to provide reasonable accommodations. However, it is neutral as to whether Member States may support disabled employment through “specific measures” (i.e., equity modifiers). *Idid.* at Article 7. An undetermined issue is how Member States with pre-existing programs – such as the employment quota system operated in Germany – will respond to the Directive’s purely antidiscrimination mandate. The same dynamic is at play in Japan, where the government is under pressure by disability rights groups to supplement or supplant the existing quota system with anti-discrimination laws.

<sup>154</sup> See, e.g., *Tennessee v. Lane*, 541 U.S. 509 (2004) (holding that one particular individual had a right to physically access one particular court, but leaving open the question of whether any other persons with disabilities could gain relief when denied access to other justice elements, for example, as witnesses or jurors).



tion rights not previously endorsed in domestic law (such as a right to mobility)<sup>155</sup>.

As noted by the President of the General Assembly on the day of the CRPD's adoption, the treaty's consensus acceptance "is a great opportunity to celebrate the emergence of comprehensive guidelines the world so urgently needs"<sup>156</sup>. Thus, the CRPD is likely to prompt unprecedented national-level action in the form of law and policy transformation on disability rights.

### 3.3. *Triggering Social Integration*

Perhaps most immediately, the CRPD can trigger the social integration of persons with disabilities into their societies through its inclusive development mandate<sup>157</sup>. Current development practices by and large exclude people with disabilities<sup>158</sup>, and thereby increase already wide equity gaps between disabled and mainstream populations<sup>159</sup>.

The CRPD creates a framework for international cooperation to be implemented in accordance with its general principles. In requiring that technical assistance, development aid, and humanitarian efforts by States Parties conform with the Convention's general principles, inclu-

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<sup>155</sup> CRPD, *supra* note 1, at Art. 20 (providing that "States Parties shall take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities").

<sup>156</sup> Statement by H.E. Sheikha Haya Rashed Al Khalifa, President of the United Nations General Assembly, at the Adoption of the Convention on the Rights of Persons with Disabilities (13 December 2006), available online at <<http://www.un.org/ga/president/61/statements/statement20061213.shtml>>.

<sup>157</sup> See CRPD, *supra* note 1 at Art. 32 (1)-(a) (providing that States Parties "undertake appropriate and effective measures" in making sure that "international cooperation, including international development programmes, is inclusive of and accessible to persons with disabilities").

<sup>158</sup> See ALBERT, B.: *Is Disability Really on the Development Agenda?: A Review of Official Disability Policies of the Major Governmental and International Development Agencies*, 7 September 2004, available online at <[http://www.disabilitykar.net/pdfs/disability\\_on\\_the\\_agenda.pdf](http://www.disabilitykar.net/pdfs/disability_on_the_agenda.pdf)> (detailing the historical disregard of inclusive development practice among donor governments in their development assistance programming). See also WILSON, A.T.: "The Effectiveness of International Development Assistance from American Organizations to Deaf Communities in Jamaica", 150 *Am. Annals of the Deaf*, 2005, pp. 292 and 298 (describing how USAID, in working "on behalf" of deaf-based development, did not work in conjunction with the local deaf community).

<sup>159</sup> See generally *British Council of Disabled People's International Committee Improving DFID's Engagement with the UK Disability Movement*, report prepared for the Department for International Development, 4 March 2005, available online at <<http://www.dfid.gov.uk/pubs/files/bcdop-dfid-disability.pdf>>.

sive development aid can improve the accessibility in developing countries of the physically constructed environment, as well as to the policies and procedures that aid-sponsored programs support.

Trenchantly, increasing social participation helps make persons with disabilities more visible<sup>160</sup> and facilitates their enjoyment of other fundamental rights<sup>161</sup>. The CRPD's provisions can therefore lessen the identity of persons with disabilities as "other"<sup>162</sup>, promote greater familiarity with the group<sup>163</sup>, and manifest closer in reality the Vienna Declaration's often repeated refrain that human rights are "indivisible, interrelated and interconnected"<sup>164</sup>.

#### 4. Conclusion

This chapter overviewed the Convention's background, summarized its substantive content, and considered three of the more immediate ways that the CRPD may positively impact the lives of persons with disabilities worldwide. The areas we identified as potential catalysts for social transformation are the Convention's ability to trigger expressive value, prompt national level action, and advance the social integration of persons with disabilities in society through its disability-inclusive development mandate.

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<sup>160</sup> "People with disabilities were often virtually invisible citizens of many societies," and "have been marginalized in nearly all cultures throughout history". QUINN and DEGENER: *supra* note 8, p. 23. See also WEBER, M.C.: *Disability Harassment*, New York University Press, 2007, p. 6 ("Lack of daily contact at a level of true equality with persons with disabilities promotes and constantly reinforces stereotypes").

<sup>161</sup> NATIONAL COUNCIL ON DISABILITY: *The Impact of the Americans with Disabilities Act: Assessing the Progress toward achieving the goals of the ADA* (26 July 2007), available online at: <[http://www.ncd.gov/newsroom/publications/2007/pdf/ada\\_impact\\_07-26-07.pdf](http://www.ncd.gov/newsroom/publications/2007/pdf/ada_impact_07-26-07.pdf)>.

<sup>162</sup> This is a standard sociological argument. The classic treatment is GOFFMAN, E.: *Stigma: Notes on the Management of Spoiled Identity*, 1963, p. 5 (asserting that stigma manifests when "we believe the person with a stigma is not quite human").

<sup>163</sup> For an argument on this ground in favor of employing greater numbers of persons with psycho-social disabilities, see WATERSTONE, M.E. and STEIN, M.A.: "Disabling Prejudice", 102 *NW. U. L. Rev.*, 2008.

<sup>164</sup> Vienna Declaration, *supra* note 29 at para. 63.

# The International Convention for the Protection of All Persons from Enforced Disappearance

Elisenda Calvet Martínez

**Summary:** 1. Introduction. 2. The right not to be subjected to enforced disappearance. 3. Definition of enforced disappearances. 4. Enforced disappearance as a crime against humanity. 5. Obligations of States Parties. 6. The rights of victims. 7. Protection of children. 8. Monitoring provisions: the creation of the Committee on Enforced Disappearances. 9. Conclusion.

## 1. Introduction

The phenomenon of enforced disappearances, often associated to dictatorial regimes of Latin America in the 1970s and 1980s, has become a global problem which does not respond to a specific region, and occurs in a more complex context like international or non international armed conflicts, internal violence, humanitarian crisis and violations of human rights. This is the case of States like Colombia, Nepal, Russian Federation and Sudan, where disappearances are directly related with the resolution of internal conflicts<sup>1</sup>. The “War on Terror” has also led to the disappearance of persons who have been detained by the authorities in secret detention centers or sent to other countries where they are submitted to a more aggressive interrogatory<sup>2</sup>.

During the Second World War enforced disappearances were already committed by the Germans through the “Nacht und Nebel” De-

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<sup>1</sup> Commission on Human Rights, *Civil and Political Rights, including the questions of: disappearances and summary executions, Report of the Working Group on Enforced or Involuntary Disappearances*, E/CN.4/2006/56, 27 December 2005.

<sup>2</sup> The Parliamentary Assembly of the Council of Europe has denounced that “thus, across the world, the United States has progressively woven a clandestine “spiderweb” of disappearances, secret detentions and unlawful inter-State transfers, often encompassing countries notorious for their use of torture. Hundreds of persons have become entrapped in this web, in some cases merely suspected of sympathizing with a presumed terrorist organization”, Resolution 1507, *Alleged secret detentions and unlawful inter-State transfers of detainees involving Council of Europe member States*, 27 June 2006, para. 5.

cree (*Night and Fog*) issued by Marshal Wilhelm Keitel on 7 September 1941, following Adolf Hitler's guidelines. The persons detained under this Decree were transferred from the occupied territories to the Reich and could not have any contact with the outside world, causing tremendous anguish and suffering to their families<sup>3</sup>.

However, disappearances didn't draw the attention of the international community until 1978, when the General Assembly of United Nations referred to this issue "deeply concerned by reports from various parts of the world relating to enforced or involuntary disappearances of persons as a result of excesses on the part of law enforcement or security authorities or similar organizations, often while such persons are subject to detention or imprisonment, as well as of unlawful actions or widespread violence [...]" and requested the Commission on Human Rights "to consider the question of disappeared persons with a view to making appropriate recommendations"<sup>4</sup>.

In 1980, the Commission on Human Rights established the Working Group on Enforced or Involuntary Disappearances (WGEID)<sup>5</sup> for a period of one year to "examine questions relevant to enforced or involuntary disappearances of persons"<sup>6</sup>. Its humanitarian mandate is assisting families to enquire and clarify the fate and whereabouts of the missing relatives who, having disappeared, are placed outside the law. The WGEID acts mainly as a channel of communication between families and the Governments concerned in order to ensure that the cases brought to the Working Group are investigated by the authorities with the intention of clarifying the whereabouts of the disappeared persons<sup>7</sup>. Since its creation, the WGEID has transmitted more than 50.000 individual cases to Governments of more than 90 countries<sup>8</sup>.

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<sup>3</sup> This decree was applied to Norway, The Netherlands, Belgium and France. See "Nazi Conspiracy and Aggression", Vol.2, Chap.XVI, Part. 4, The Avalon Project at Yale Law School.

<sup>4</sup> General Assembly of United Nations, Resolution 47/133, 18 December 1992.

<sup>5</sup> Established by Resolution 20 (XXXVI) of 29 February 1980 of the Commission on Human Rights, the Working Group on Enforced or Involuntary Disappearances has been the first United Nations human rights thematic mechanism with a global mandate.

<sup>6</sup> The mandate of the Working Group has been renovated since 1980 by the Commission on Human Rights. The Human Rights Council decided "(...) to extend the mandate of the Working Group for a further period of three years (...)", A/HRC/7/I.30, 25 March 2008.

<sup>7</sup> WGEID, *Revised methods of work of the Working Group*, 14 November, 2001, para. 3.

<sup>8</sup> Commission on Human Rights, *Civil and Political Rights, including the questions of: disappearances and summary executions, Report of the Working Group on Enforced or Involuntary Disappearances*, E/CN.4/2006/56, 27 December 2005.

In situations of armed conflict, the Geneva Conventions of 1949 and its Additional Protocols of 1977 do not explicitly prohibit enforced disappearances, but contain different measures in order to prevent or halt disappearances of persons in a situation of violence, especially those rules related to prisoners of war and common Article 3 of the Geneva Conventions. However, in customary humanitarian law, the ICRC has considered that enforced disappearances are prohibited both in international and internal armed conflict and that each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate<sup>9</sup>.

The Rome Statute of the International Criminal Court (ICC) of 1998 has established that the widespread and systematic practice of enforced disappearances constitute a crime against humanity<sup>10</sup>, becoming the first international treaty of international criminal law to include this crime, strengthening the protection of persons from enforced disappearances. The codification of this crime will contribute to prosecute the authors who often benefit from amnesty laws, as impunity is one of the main causes of enforced disappearances.

The crime of enforced disappearances undermines core human rights and the most fundamental freedoms enshrined in diverse international human rights instruments, like the Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights of 1966 (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (Convention against Torture) or the European Convention on Human Rights of 1950.

Due to the extreme seriousness of enforced disappearances, where victims often are exposed to torture and extrajudicial killings, the protection of persons from this offence has been set in three specific human rights instruments: the Declaration on the Protection of all Persons from Enforced Disappearances (UN Declaration) adopted in 1992<sup>11</sup>, becoming the first instrument at the universal level protecting persons from enforced disappearances, although not legally binding. Later on, in 1994, within the Organization of American States (OAS), the Inter-American Convention on Forced Disappearances of Persons (Inter-American

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<sup>9</sup> HENCKAERTS, J-M and DOSWALD-BECK, L.: *Customary International Humanitarian Law*, Volume I: Rules, ICRC, Cambridge University Press, Cambridge, 2005, pp. 340-343, 421-427.

<sup>10</sup> UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, A/CONF.183/9, 17 July 1998, Article 7.1.i).

<sup>11</sup> *Supra* note 4.

Convention)<sup>12</sup> became the first legally binding instrument at the regional level.

The International Convention for the Protection of all Persons from Enforced Disappearances (UN Convention) adopted in 2006 by the General Assembly<sup>13</sup> is the first legally binding instrument at universal level on enforced disappearances. It constitutes a major step forward because it goes far beyond the other instruments mentioned above and merges in one treaty aspects of international humanitarian law, international criminal law and international human rights law, strengthening the protection of persons from enforced disappearances in all circumstances. It is a milestone for the civil society which has been demanding an international treaty for the protection of persons from enforced disappearances for more than 25 years<sup>14</sup>.

The UN Convention is divided into a Preamble and three Parts: Part I (Articles 1 to 25) contains the substantive provisions and focuses on the individual criminal responsibility of the perpetrators of enforced disappearance as well as on the obligations of States to prevent such crimes; Part II (Articles 26 to 36) contains the international monitoring provisions, i.e. the establishment of the Committee against Enforced Disappearances; and Part III (Articles 37 to 45) includes the final clauses about the entry in force of the instrument and its applicability without prejudice to the provisions of international humanitarian law or of those which are more conducive to the protection of all persons from enforced disappearances.

## 2. The right not to be subjected to enforced disappearance

Before the adoption of the UN Convention, enforced disappearances were considered an offence to human dignity that constitutes a multiple and continued violation of non-derogable human rights like the

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<sup>12</sup> Inter-American Convention on Forced Disappearances of Persons, adopted at Belém do Pará, Brazil, 9 June 1994 and ratified by 13 States: Argentina, Bolivia, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, Uruguay and Venezuela (Date of consultation: 8 January 2008).

<sup>13</sup> Human Rights Council, resolution 1/1, 29 June 2006. General Assembly of United Nations, resolution 61/177, 82 plenary meeting, 20 December 2006. Open to signature and ratification at Paris, 7 February 2007. Status: not yet in force. Signatories: 73 States, Parties: 4, UN Doc. A/61/488 (Date of consultation: 1 June 2008).

<sup>14</sup> One of the first drafts for an International Convention on disappearances was elaborated in 1981 by the Paris Bar Association: *Le refus de l'oubli: la politique de disparition forcée de personnes*, Colloque de Paris Janvier-Février 1981, Ed. Berger-Levrault, Paris, 1982.

right to life, the right not to be subjected to torture and the right to liberty and security of the person.

The Inter-American Court of Human Rights (IACHR) has been the first tribunal defining enforced disappearances as a multiple violation of human rights at the *Velásquez Rodríguez case* (1988) in the absence of legally binding instruments at the international level protecting persons against enforced disappearances at that time<sup>15</sup>. Later, the UN Declaration included in Article 1.2 a non-exhaustive list of rights frequently violated in enforced disappearances cases, showing the complexity of this crime:

“Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life”<sup>16</sup>.

In this regard, the Inter-American Convention describes in its Preamble that “disappearance of persons violates numerous non-derogable and essential human rights enshrined in the American Convention on Human Rights, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights”.

The reason why enforced disappearances has been defined as a multiple violation of human rights is because before the UN Convention there was not a “right not to be subjected to enforced disappearance”, and it had to be built from the violation of different fundamental rights established by other human rights instruments, like the ICCPR. The UN Convention represents a major step forward to protecting persons against forced disappearances recognizing the right not to be submitted to enforced disappearance in all circumstances. As Article 1 states:

1. “No one shall be subjected to enforced disappearance.

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<sup>15</sup> IACHR, see among others, *Velásquez Rodríguez vs. Honduras Case*, judgment 29 July 1988, para. 155; *Godínez Cruz vs. Honduras Case*, judgment 20 January 1989, para. 163; *Bámaca Velásquez vs. Guatemala Case*, judgment 25 November 2000, para. 128.

<sup>16</sup> During the elaboration of the Declaration, there was a broad consensus in including a non-exhaustive list of rights violated by disappearances. BRODY, R.: “Commentary on the draft UN Declaration on the protection of all persons from enforced disappearances”, *Netherlands Human Rights Quarterly*, no. 4, 1990, p. 387.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance".

Echoing the absolute prohibition against torture, the UN Convention envisages no derogation from this precept. This has been a permanent demand from civil society in order to strengthen the protection of all persons from enforced disappearances.

In 2001, the Human Rights Committee (HRC) in its General Comment on "States of emergency (Article 4)" examined the conditions in which States can derogate, suspend or limit some fundamental rights covered by the ICCPR, and also explained which provisions have to be considered non-derogable, although they are not included explicitly in Article 4 paragraph 2: "the prohibition against taking of hostages, abductions or unacknowledged detention are not subjected to derogation. The absolute nature of these provisions, even in times of emergency, is justified by their status as norms of general international law"<sup>17</sup>.

The prohibition of enforced disappearances in all times has been included in the UN Convention as an independent right which improves the protection of persons against this crime. States Parties will have the obligation to adjust their domestic legislation to prevent enforced disappearances and to be able to punish the perpetrators of this crime which often benefit from amnesty laws. So, the right not to be submitted to enforced disappearance has become part of the core of non-derogable rights, which have to be respected and guaranteed in all circumstances, especially in situations of internal strife.

### 3. Definition of enforced disappearances

The definition of enforced disappearances has been an issue of permanent discussion and evolution since this phenomenon began to concern the international community. Nigel Rodley finds that "the hallmark of the *Disappearance* is that the capture and detention of a prisoner remain unacknowledged by the official authorities whose agents have been directly or indirectly responsible for it. [...] cases in which a person's detention between his arrest and his death is not ac-

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<sup>17</sup> HRC, General Comment no. 29, *States of Emergency (Article 4)*, CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 13.



counted for and his family has not known his whereabouts, do fall within its terms of reference"<sup>18</sup>.

The UN Convention defines enforced disappearance in Article 2 as "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law".

From this definition we can discern three elements that identify enforced disappearances:

1. The arrest, detention, transfer or any other form of deprivation of liberty against the will of the person concerned;
2. Perpetrated by Government agents, organized groups or individuals acting in the name of the Government or with its direct or indirect support, authorization or acquiescence;
3. Refusal to acknowledge the deprivation of liberty or the concealment of the fate or whereabouts of the disappeared person, placing such person outside the law.

The third element of enforced disappearance is the refusal to reveal any kind of information by the authorities regarding the person deprived from liberty. The fact that the victim is "placed outside the law" because he or she is not "officially detained" and cannot bring up any remedy or claim for *habeas corpus*, can be seen as a consequence or as a fourth element of enforced disappearance. The WGEID, in its general comment on the definition of enforced disappearance, establishes that it won't require that the information reported by a source about an enforced disappearance demonstrate or presume the intention of the author to place the victim outside the protection of the law<sup>19</sup>.

During the elaboration of the UN Convention, some delegations stated that every criminal offence needs to have an element of intent and that was the reason why the intention to remove the person outside the law should be included in the definition of enforced disappearance. In international criminal law, the Rome Statute of the ICC requires, among other elements, that enforced disappearance was committed "with the intention of removing [the victims] outside the

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<sup>18</sup> RODLEY, N. S.: "UN Action Procedures Against "disappearances". Summary of Arbitrary Executions, and Torture", *Human Rights Quarterly*, Vol. 8, no. 4, 1986, p. 703.

<sup>19</sup> WGEID, *General Comment on the definition of enforced disappearances*, 81<sup>st</sup> session, 15-21 March 2007.

law". Nevertheless, some part of the doctrine considers that requiring this element of intent would make it more difficult to prove the authorship of these acts, restrain the concept of enforced disappearance and mean a step backwards regarding the protection of victims<sup>20</sup>.

Some delegations were against adding this fourth element arguing that it was a definition of a violation of human rights and not of criminal law, and that the element of intentionality was implicit in the definition, since it's hard to believe that someone can perpetrate these acts of enforced disappearance without intention.

In order to reach consensus, the Chairman-rapporteur Mr. Kessedjian suggested removing the word "así" from "sustrayéndola así de la protección de la ley" in the Spanish and French version, leaving the English version as it was. The text "which place such person outside the protection of law" would make for "constructive ambiguity"<sup>21</sup> on the question of whether removal from the protection of the law was a consequence or part of the definition of enforced disappearance, leaving to States the discretion to interpret it as a part of the third element or a fourth element. This proposal did not convince all the delegations but was adopted in the final wording<sup>22</sup>.

Regarding the second element of the definition of enforced disappearance, the discussion was set on whether non-State actors or a political organization can also be considered as actors or perpetrators of enforced disappearances. Taking into account that in situations of violence there are organized groups (like *guerrillas*, forces of "self-defence", etc.) that are *de facto* the authorities who have control over a territory and its population, it would be desirable to include them also in the definition of enforced disappearance in order to better protect the victims<sup>23</sup>.

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<sup>20</sup> United Nations Commission on Human Rights, *Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances*, E/CN.4/2002/71, 8 January 2002, para. 74.

<sup>21</sup> Human Rights Commission, *Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*, Chairperson-rapporteur Mr. Bernard Kessedjian, E/CN.4/2005/66, 10 March 2005, para.23.

<sup>22</sup> The United States and India, in their General Statements in *Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*, Chairperson-rapporteur Mr. Bernard Kessedjian, E/CN.4/2006/57, 2 February 2006, expressed their regret on the fact that the element of intentionality was not included in the definition of enforced disappearance.

<sup>23</sup> In this regard see, among others: the Rome Statue of the International Criminal Court, Art. 7.1.i) which considers that enforced disappearance "[...] means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence

The WGEID does not share this position though, and for the purpose of its work, only deals with enforced disappearances when perpetrated “by State actors or by private individuals or organized groups (i.e. paramilitary groups) acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government”<sup>24</sup>.

The lack of consensus to include non-State actors in the definition of enforced disappearance ended up with the adoption of Article 3 of the UN Convention, which obliges States Parties to adopt the necessary measures to investigate and sanction the persons or groups of persons responsible for similar acts of enforced disappearance. Namely,

“each State Party shall take appropriate measures to investigate acts defined in Article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice”. Consequently, it was considered that enforced disappearances, in a strict sense, can only be committed by State agents, while the ones committed by non-State actors are “similar acts” or of a different nature of the acts of Article 2 of the UN Convention.

From the protection of victim’s point of view, a broad definition including State agents and non-State agents is more appropriate<sup>25</sup>, because the suffering and anguish of victims of enforced disappearance are the same in both cases. States are no longer the only subjects of international law and political organizations can have a lot of power and influence in this field<sup>26</sup>. Furthermore, in situations of armed conflict, in-

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of a State or a *political organization* [...]”[emphasis added]; Parliamentary Assembly of Council of Europe, *Enforced Disappearances*, Report to Committee on Legal Affairs and Human Rights, Rapporteur: Mr. Christos Pourgourides, Doc. 10679, 19 September 2005, *Enforced disappearances*, Resolution 1463, 3 October 2005; United Nations Commission on Human Rights, *Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances*, E/CN.4/2002/71, 8 January 2002, para.73.

<sup>24</sup> WGEID, *General comment on the definition of enforced disappearances*, 81st session, 15-21 March 2007, para.1.

<sup>25</sup> In this sense, SCOVAZZI, T. and CITRONI, G.: *The struggle against Enforced Disappearances and the 2007 United Nations Convention*, Martinus Nijhoff Publishers, Leiden, 2007, pp. 267-285.

<sup>26</sup> ICRC Annual Report 2006: “The year was also characterized by the continuing rise in influence of non-State actors, whose role has sparked much debate in recent years. While they have long been a feature of internal conflicts, non-State actors tended in the past to be limited in number in any given context and to take the form of guerrillas or national liberation movements engaged in classic insurrection-type hostilities. Over the past year, however, the trend in several conflict zones has been for non-State actors

ternational or internal, it is hard to know whether the persons or group of persons who commit acts of enforced disappearance do it with or without the authorization of the Government, and there can also be *de facto* authorities, not necessarily recognized by the international community, who are responsible for these acts.

#### 4. Enforced disappearances as a crime against humanity

The extreme seriousness and widespread practice of enforced disappearances in many countries around the world has led the international community to qualify it as a crime against humanity. Nevertheless, this issue has been the object of debate and discussion during the elaboration of the different international instruments of protection of persons from enforced disappearances. Considering enforced disappearances as a crime against humanity is very important for the juridical consequences it entails like: universal jurisdiction, no subjection to a statute of limitations and no admission of amnesty laws.

The consideration of enforced disappearance as a crime against humanity appears for the first time in a draft for an International Convention for disappearances elaborated by the Paris Bar Association in 1981. In its Article 2.2 "the States parties affirm that the practice of forced or involuntary disappearance of persons constitutes a crime against humanity"<sup>27</sup>. In 1983, the General Assembly of the OAS, aware of the gravity of this phenomenon in Latin America, declared that "the practice of enforced disappearance of persons in America is an affront to the conscience of the Hemisphere and constitutes a crime against humanity"<sup>28</sup>.

Besides the gravity of the phenomenon of enforced disappearances, the UN Declaration only states in its Preamble that the practice of enforced disappearances "is of the nature of" a crime against humanity, not being clear in terms of its juridical consequences<sup>29</sup>:

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to regularly fragment into different sub-factions under new commands or into loosely organized entities. Some assumed transnational proportions, coming into confrontation with certain States at a global level".

<sup>27</sup> *Le refus de l'oubli: la politique de disparition forcée de personnes*, Colloque de Paris Janvier-Février 1981, Ed. Berger-Levrault, Collection «mondes en devenir», Série «points chauds», Paris, 1982.

<sup>28</sup> OAS General Assembly, AG/RES.666 (XIII-0/83), 18 November 1983; AG/RES.742 (XIV-0/84), 17 November 1984.

<sup>29</sup> TAYLER, W.: "Background to the Elaboration of the Draft International Convention for the Protection of All Persons from Enforced Disappearance", *International Law Commission Review*, 2001, no. 62-63, p. 69.

"[...] Considering that enforced disappearances undermines the deepest values of any society committed to respect for the rule of law, human rights and fundamental freedoms, and that the systematic practice of such acts is *of the nature of* a crime against humanity [...]"

In this matter, the Inter-American Convention considers that "the systematic practice of the forced disappearance of persons constitutes a crime against humanity" only in its Preamble. There was not enough consensus to include the crime as a separate provision, as proposed by the Inter-American Commission of Human Rights in its draft of the Convention<sup>30</sup>.

In 1996, the International Law Commission (ILC) of the United Nations considered forced disappearances of persons as a crime against humanity in Article 18 (i) of the Draft Code of Crimes against Peace and Security of Mankind<sup>31</sup>. For the ILC a crime against humanity means "any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group".

The ILC stresses that the incorporation of enforced disappearances as a crime against humanity in the Code (and not in the previous version of it in 1954) responds to the following reason: "although this type of criminal conduct is a relatively recent phenomenon, the Code proposes its inclusion as a crime against humanity because of its extreme cruelty and gravity".

Two years later, the Rome Statute of the ICC, inspired by the Code of Crimes against Peace and Security of Mankind, established enforced disappearances as a crime against humanity in its Article 7.1.i):

"For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: [...]

(i) Enforced disappearance of persons;

[...]

Enforced disappearance of persons means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal

<sup>30</sup> Inter-American Commission on Human Rights, "Draft Inter-American Convention on the forced disappearance of persons", *Annual Report*, 1987-88.

<sup>31</sup> International Law Commission, *Draft Code of Crimes against Peace and Security of Mankind*, 48<sup>th</sup> session, Yearbook of the International Law Commission, 1996, vol. II, Part Two.

to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time"<sup>32</sup>.

The Rome Statute has become the first international treaty of international criminal law to include enforced disappearances as a crime against humanity. In its definition of the crime, the Statute considers that non-State actors can also perpetrate the crime and requires the intention of removing the disappeared person outside the law for a prolonged period of time. Although this definition is stricter than the one contained in the UN Convention and other human rights instruments, it represents a step forward to strengthening the protection of persons from enforced disappearances when committed in a widespread or systematic manner.

The UN Convention, inspired by international criminal law, has incorporated enforced disappearances as a crime against humanity not only in its Preamble but also in its Article 5 which states that "the widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law".

During the elaboration of the draft of the UN Convention, the United States delegation suggested removing this provision because they considered that its content was not operative and had to be included in the Preamble instead. It could be interpreted as creating an obligation for States to codify the widespread and systematic practice of enforced disappearance as a crime against humanity in their criminal domestic law<sup>33</sup>.

The reference to the "applicable international law" in Article 5 means that the crime of enforced disappearance complies with the existent international law related to crimes against humanity and does not weaken it but rather seeks to preserve it. Some delegations asked

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<sup>32</sup> For the interpretation of the crime of enforced disappearance see "Elements of crimes", adopted by the Preparatory Commission for the ICC, ICC-ASP/1/3, 9 September 2000, pp. 126-127. See also DÖRMANN, K.: "Preparatory Commission for the International Criminal Court: the elements of war crimes", *International Review of the Red Cross*, No. 839, pp. 771-795.

<sup>33</sup> Commission on Human Rights, *Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*, Chairperson-rapporteur Mr. Bernard Kessedjian, E/CN.4/2006/57, 2 February 2006, para. 104.

to include in the text a reference to the Rome Statute of the ICC, however, other delegations opposed this measure because not all States are part of the ICC. The Chairman of the intersessional Working Group to elaborate a draft legally binding of a Convention on enforced disappearances considered that Article 5 does not create any additional obligation to States to accede to particular instruments (like the Rome Statute) or amend their domestic law<sup>34</sup>.

The incorporation of enforced disappearances as a crime against humanity in the UN Convention as a separate provision, and not only in its Preamble, is an example of how international criminal law exercises an important influence on international human rights law. The UN Convention follows the trend of international law of punishing crimes committed as a widespread or systematic practice, like enforced disappearances, with the legal consequences that it entails.

## 5. Obligations of States Parties

The UN Convention provides different obligations of States Parties in order to prevent enforced disappearances, by ensuring it constitutes an offence under their domestic law, establishing their competence to exercise jurisdiction over this crime, cooperating with other States, investigating the fate and whereabouts of the disappeared person, prosecuting and punishing the perpetrators of enforced disappearances and assuring the victims have the right to obtain reparation.

*Autonomous offence.* States should incorporate enforced disappearance as an autonomous and separate offence under their domestic law. It is not sufficient for States to refer to preexistent offences like enforced deprivation of liberty, torture, intimidation, etc., because enforced disappearances is a complex and unique crime and cannot be regarded as a sum of acts which constitute a multiple violation of human rights. The WGEID considers that the following three cumulative minimum elements should be contained in any definition<sup>35</sup>:

- (a) Deprivation of liberty against the will of the person concerned;
- (b) Involvement of governmental officials, at least indirectly by acquiescence;

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<sup>34</sup> *Ibidem*, para. 106.

<sup>35</sup> WGEID, *General Comment on Article 4 of the Declaration*, Report 1995, E/CN.4/1996/38. The UN Declaration, in its Article 4, considers that all acts of enforced disappearances "shall be offences under criminal law punishable by appropriate penalties which shall take into account their extreme seriousness".

(c) Refusal to disclose the fate and whereabouts of the person concerned.

In this sense, the UN Convention establishes in Article 4 that “each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law”, inviting States “to grasp the specificity and complexity of the offence of enforced disappearance, which may not be reduced to a combination of discrete actions”<sup>36</sup>. During the elaboration of the UN Convention, some delegations considered that States Parties should not be obliged to ensure enforced disappearances as a separate offence under its criminal domestic law, but simply pursue the authors of acts of enforced disappearance, stating that adapting domestic criminal law is quite complex in federal systems<sup>37</sup>.

The obligation of States Parties to ensure that acts of enforced disappearance constitute a separate offence under their domestic law is not new, as the UN Declaration of 1992 already envisaged a similar provision, but not many States have proceeded to comply with it<sup>38</sup>. This goes in detriment of more effective criminal punishment of those responsible for acts of enforced disappearances and of establishing statutes of limitations or extradition regimes.

*Superior orders.* The UN Convention provides in Article 6.1 that States Parties shall take the necessary measures to hold criminally responsible the person who commits, orders, is an accomplice to or participates in acts of enforced disappearances, but also the superior who fails to take all necessary and reasonable measures within his or her power to prevent or repress the commission of acts of enforced disappearance by his or her subordinates. In order not to lower military com-

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<sup>36</sup> Commission on Human Rights, *Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*, Chairperson-rapporteur Mr. Bernard Kessedjian, E/CN.4/2004/59, 23 February 2004, p. 9.

<sup>37</sup> “Article 4 should not be read to require our various domestic legal systems to enact an autonomous offence of enforced disappearance, which is unnecessary and, from a practical standpoint, extremely burdensome and unworkable in the United States”, General Statement of United States in Commission on Human Rights, *Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*, Chairperson-rapporteur Mr. Bernard Kessedjian, E/CN.4/2006/57, 2 February 2006, p. 49.

<sup>38</sup> In a comparative study about the treatment of enforced disappearances in domestic criminal law, the WGEID, based on a preliminary analysis, observes that outside Latin America, very few countries have incorporated enforced disappearance as a specific offence, *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/4/41, 25 January 2007, p. 14.



mander's responsibility as contemplated in international law, Article 6.1.c refers to "the higher standards of responsibility applicable under relevant international law to a military commander or to a person effectively acting as a military commander", like Article 28 of the Rome Statute<sup>39</sup>.

In Article 6.2, the UN Convention, as well as the UN Declaration<sup>40</sup> and the Inter-American Convention<sup>41</sup>, does not accept due obedience to superior orders to justify enforced disappearances: "no order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance".

*Penalties.* Due to the extreme seriousness of enforced disappearance, it is important to impose appropriate punishment proportionate with its gravity. The UN Convention, like the UN Declaration and the Inter-American Convention<sup>42</sup>, provides, in Article 7, mitigating circumstances when persons involved in the commission of enforced disappearances contribute in clarifying the fate of the disappeared person or bringing the victim alive or helping to identify the perpetrators.

In addition, Article 7.2.b) contains a provision of aggravating circumstances in a non-exhaustive list which makes special reference to vulnerable persons: "Without prejudice to other criminal procedures, aggravating circumstances, in particular in the event of the death of the disappeared person or the commission of an enforced disappearance in respect of pregnant women, minors, persons with disabilities or other particularly vulnerable persons".

*Statute of limitations.* As a safeguard of impunity, those responsible for acts of enforced disappearances have to be brought to justice within a restrictive approach to statutory limitations. The application of rules

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<sup>39</sup> Article 28: "[...] a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where: (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution".

<sup>40</sup> Article 6: "No order or instruction of any public authority, civilian, military or other, may be invoked to justify an enforced disappearance. Any person receiving such an order or instruction shall have the right and duty not to obey it [...]".

<sup>41</sup> Article VIII: "The defense of due obedience to superior orders or instructions that stipulate, authorize, or encourage forced disappearance shall not be admitted. All persons who receive such orders have the right and duty not to obey them [...]".

<sup>42</sup> Article 4.2 of the UN Declaration and Article III of the Inter-American Convention.

of domestic law relating to the period of limitation for ordinary crimes to war crimes and crimes against humanity prevents the prosecution and punishment of persons responsible for those crimes<sup>43</sup>. In this sense, the Parliamentary Assembly of the Council of Europe recommended that the new International Convention on enforced disappearances contain a provision declaring the non-application of statutory limitation periods to enforced disappearances<sup>44</sup>.

Enforced disappearance shall be considered a continuing violation by States "as long as the perpetrators continue to conceal the fate and whereabouts of persons who have disappeared and these facts remain unclarified"<sup>45</sup>. The continuing nature of this offence is crucial for establishing the responsibilities of the authorities and is a way to prevent perpetrators of these criminal acts from taking advantage of statutes of limitations<sup>46</sup>.

The UN Convention, taking into account the continuous nature of this offence, provides the following relating to statutory limitations of enforced disappearances:

"Without prejudice to Article 5,

1. A State Party which applies a statute of limitations in respect of enforced disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceedings:

- (a) Is of long duration and is proportionate to the extreme seriousness of this offence;
- (b) Commences from the moment when the offence of enforced disappearance ceases, taking into account its continuous nature.

2. Each State Party shall guarantee the right of victims of enforced disappearance to an effective remedy during the term of limitation".

The expression "without prejudice to Article 5" refers to a widespread or systematic practice of enforced disappearance which constitutes a crime against humanity and, subsequently, it cannot be subject to statutory limitations. As regards the other acts of enforced disappearances, statute of limitations can apply but always taking into ac-

<sup>43</sup> Convention on the Non-Applicability of Statutory Limitations on War Crimes and Crimes against Humanity, 26 November 1968.

<sup>44</sup> Parliamentary Assembly of Council of Europe, Resolution 1436 (2005), *Enforced disappearances*, 3 October 2005. See also *Enforced disappearances*, Report to Committee on Legal Affairs and Human Rights, Rapporteur: Mr. Christos Pourgourides, Doc. 10679, 19 September 2005.

<sup>45</sup> UN Declaration, Article 17.1.

<sup>46</sup> WGEID, *General Comment on Article 17 of the Declaration*, Report E/CN.4/2001/68, 18 December 2000.

count the extreme seriousness of this offence, as long as the term of limitation begins from the cessation of enforced disappearance. The offence ceases when the fate of the disappeared person has been clarified. While the perpetrators keep concealing the fate and whereabouts of the disappeared persons, there is a continuing offence.

The UN Declaration establishes in Article 17.2 the possibility of “suspending” the term of limitation of acts of enforced disappearances when “the remedies provided for in Article 2 of the International Covenant on Civil and Political Rights are no longer effective” until these remedies are re-established<sup>47</sup>. This power to “suspend” is not contained in the Inter-American Convention, but instead, the UN Convention refers to the obligation of the States Parties to ensure victims an effective remedy. So, Article 8.2 of the UN Convention can be interpreted as meaning that the term of limitation is “suspended” as long as the victim of enforced disappearances does not have an effective remedy<sup>48</sup>.

Despite the fact that the UN Convention recognizes the continuous nature of enforced disappearances, the competence *ratione temporis* of the monitoring body is reduced “solely in respect of enforced disappearances which commenced *after* the entry in force of this Convention”<sup>49</sup>. If a State becomes a Party after the entry in force of the Convention, “the obligations of that State *vis-à-vis* the Committee shall relate only to enforced disappearances which commenced after the entry in force of this convention for the State concerned”<sup>50</sup>. In my opinion, this provision can be interpreted as meaning that although the recognition of the Committee on Enforced Disappearances can be done any time afterwards the ratification of the Convention regarding individual and inter-State communications<sup>51</sup>, it does not prevent the monitoring body from having competence over enforced disappearances commenced after the entry in force of the instrument for the State concerned but before the recognition of the monitoring body’s competence, as long as the fate and whereabouts of the disappeared person have not been clarified.

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<sup>47</sup> The ICCPR, 16 December 1966, provides in Article 2.3.a) that each State Party shall ensure that “any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”.

<sup>48</sup> SCOVAZZI, Tullio and CITRONI, Gabriella, *The struggle against Enforced Disappearances and the 2007 United Nations Convention*, Martinus Nijhoff Publishers, Leiden, 2007, p. 309.

<sup>49</sup> Article 35.1, emphasis added.

<sup>50</sup> Article 35.2.

<sup>51</sup> Articles 31 and 32.

The delegations of Argentina, Chile and Italy<sup>52</sup> emphasized, however, that, as enforced disappearance constituted a continuous crime, they intended to make an interpretative declaration, when ratifying the instrument, whereby certain rights and obligations, such as the right to truth, justice and reparation and those relating to the disappearance of children, would be extended to enforced disappearances which had commenced before the instrument had entered into force but which had not been clarified<sup>53</sup>.

*Jurisdiction.* Articles 9, 10 and 11 of the UN Convention refer to the jurisdiction of domestic courts, derived mainly from Articles 5, 6 and 7 of the Convention against Torture, specifying the circumstances in which States must establish jurisdiction in respect of enforced disappearances. Namely, Article 9.1 provides that

“Each State Party shall take the necessary measures to establish its competence to exercise jurisdiction over the offence of enforced disappearance:

- (a) When the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
- (b) When the alleged offender is one of its nationals;
- (c) When the disappeared person is one of its nationals and the State Party considers it appropriate”.

The principle of universal jurisdiction allows States to claim criminal jurisdiction over persons whose alleged crimes were committed outside their territory, regardless of nationality or any other relation with the prosecuting country. The most serious offences in international law, like war crimes, crimes against humanity or genocide are subject to universal jurisdiction. In practice, States are very reticent to bring to justice the authors of these crimes, often committed by Heads of States or agents acting under its authorization, consent or acquiescence, in their domestic courts<sup>54</sup>.

Manfred Nowak, in its report of 2002, considered that universal jurisdiction should be applied to any act of enforced disappearance “since the protection of international criminal law will only apply in ex-

<sup>52</sup> Argentina has ratified the UN Convention on 14 December 2007 without incorporating any interpretative declaration. Chile and Italy only have signed the Convention.

<sup>53</sup> Commission on Human Rights, *Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*, Chairperson-rapporteur Mr. Bernard Kessedjian, E/CN.4/2006/57, 2 February 2006, p. 15.

<sup>54</sup> CASSESE, A.: *International Criminal Law*, Oxford University Press, New York, 2003, pp. 284-291.

ceptional cases, universal jurisdiction in clearly defined individual cases of enforced disappearance, with appropriate punishment, will constitute the most effective measure to deter the practice of enforced disappearance in the future"<sup>55</sup>.

Mr. Pougourides expressed, in his report before the Committee on Legal Affairs and Human Rights of the Council of Europe, the difficulty of bringing to justice the persons responsible for enforced disappearances in Belarus: while the International Criminal Court has competence in cases of widespread practice of enforced disappearances, the tribunals of Belgium, Spain and United Kingdom are in a position to accept extraterritorial jurisdiction in cases of genocide or torture, this is not the case of enforced disappearances on a scale not amounting to genocide<sup>56</sup>. Although the UN Convention does not establish a universal jurisdiction of this serious crime of enforced disappearances, the principle of "quasi-universal jurisdiction" was broadly accepted during the elaboration of the treaty<sup>57</sup>.

Concerning the detention of a suspect of alleged crimes of enforced disappearances, Article 10 of the UN Convention provides that "[...] any State in whose territory a person suspected of having committed an offence of enforced disappearance is present shall take him or her into custody or take such other legal measures as are necessary to ensure his or her presence [...]" and "[...] shall immediately carry out a preliminary inquiry or investigations to establish the facts [...]".

Based on the principle of *aut dere aut iudicare*, Article 11 of the UN Convention provides that if a State Party does not extradite the person alleged to have committed an offence of enforced disappearance to another State or surrender him or her to an international criminal court

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<sup>55</sup> Commission on Human Rights, *Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances*, E/CN.4/2002/71, 8 January 2002, p. 39.

<sup>56</sup> Investigation on a four high-profile disappearances: Yuri Zakharenko, former Minister of the Interior (disappeared on 7 May 1999), Victor Gonchar, former Vice-President of the Parliament of Belarus (disappeared on 16 September 1999), Anatoly Krasovski, businessman (disappeared with Mr. Gonchar) and Dmitri Zavadski, cameraman for the Russian TV channel ORT (disappeared on 7 July 2000), Parliamentary Assembly of Council of Europe, *Enforced Disappearances*, Report to Committee on Legal Affairs and Human Rights, Rapporteur: Mr. Christos Pourgourides, Doc. 10679, 19 September 2005, *Enforced disappearances*, Resolution 1463, 3 October 2005, para. 17.

<sup>57</sup> Commission on Human Rights, *Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*, Chairperson-rapporteur Mr. Bernard Kessedjian, E/CN.4/2004/59, 23 February 2004, para. 82.

whose jurisdiction has recognized, then it has to submit the case to its competent authorities for prosecution. Article 11.3 adds a stipulation that “any person tried for an offence of enforced disappearance shall benefit from a fair trial before a competent, independent and impartial court or tribunal established by the law”.

From the abovementioned, together with Article 9.3 which states that “this Convention does not exclude any additional criminal jurisdiction exercised in accordance with national law”, one can deduce that the UN Convention leaves the door open to military tribunals, which are often criticized for not being sufficiently impartial and independent to judge grave violations of human rights. Their lack of impartiality often results in impunity of the authors of such crimes<sup>58</sup>. While the UN Convention does not exclude the military jurisdiction, the UN Declaration and the Inter-American Convention<sup>59</sup> are very strict on this issue and provide that the authors of enforced disappearance can only be tried by competent ordinary courts in each State and not by other special tribunals, particularly military jurisdictions.

*International cooperation.* Concerning extradition between States, the UN Convention provides in Article 13<sup>60</sup> that the offence of enforced disappearance shall not be regarded as a political offence or an ordinary offence inspired by political reasons. A request for extradition based on such offence should not be refused on these grounds only. In existing or future treaties between States on extradition, the UN Convention stipulates that “the offence of enforced disappearances shall be deemed to be included as an extraditable offence” or use the UN Convention as a legal basis for extradition in respect of the offence of enforced disappearance. Article 13.7 refers to the possibility of States to deny a request of extradition if it has substantial grounds to believe that the request has been made based on discrimination on the grounds of that persons’ sex, race, religion, nationality, ethnic origin, political opinions or membership of a particular social group.

Concerning international cooperation, Article 14 of the UN Convention provides legal assistance between States Parties regarding criminal prosecutions brought in respect of an offence of enforced disappearance. This assistance should be subjected to the rules of their domestic law, including the reasons which a State may refuse to grant

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<sup>58</sup> BRODY, R. and GONZÁLEZ, F.: “Nunca más: an analysis of international instruments on disappearances”, *Human Rights Quarterly*, Vol. 19, no. 2, 1997, p. 393.

<sup>59</sup> Article 16 of the UN Declaration and Article IX of the Inter-American Convention.

<sup>60</sup> Article V of the Inter-American Convention establishes similar provisions as the UN Convention, while the UN Declaration does not even mention it.

mutual legal assistance (i.e. public order, sovereignty, security). The obligation of cooperation between States has a humanitarian character in Article 15 which establishes that "States shall afford one another the greatest measure of mutual assistance with a view to assisting victims of enforced disappearances, and searching for, locating and releasing disappeared persons and, in the event of death, in exhumating and identifying them and returning their remains". This provision constitutes an important complement to the strict judicial assistance between States and encourages other types of collaboration between them in searching missing persons.

*Prevention.* Probably, one of the major steps of the UN Convention is all the measures established to prevent enforced disappearances like the prohibition of secret detentions, the obligation of States to have a register of persons deprived of liberty and the education and training of law enforcement personnel who may be involved in the custody of persons deprived of liberty, among others.

Article 16 of the UN Convention, almost identically worded as Article 3 of the Convention against Torture, and Article 8 of the UN Declaration, establish the principle of *non-refoulement* which prohibits a State to expel, return, surrender or extradite a person to another State where "there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance". The competent authorities shall take into account the existence of a consistent pattern of gross and flagrant violations of human rights and international humanitarian law. The reference to "serious violations of international humanitarian law" is new in an international instrument, since neither the UN Declaration nor the Convention against Torture mention it.

Every enforced disappearance involves a deprivation of liberty, in whatever form, in which the fundamental rights and judicial guaranties of the detained person are being removed. A secret detention constitutes a violation of the right to personal liberty and security itself, because the State has the obligation to have official places of detention with a register of the persons detained and, in case of international armed conflict, permit the entrance of the ICRC delegates<sup>61</sup>.

The UN Convention, based on Article 10 of the UN Declaration, provides that "no one shall be held in secret detention" and therefore prohibits any form of *incommunicado* detention. For that, the UN Con-

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<sup>61</sup> Article 126, III Geneva Convention of 12 August 1949 relative to the treatment of Prisoners of War.

vention details concrete legislative measures that States should undertake to prevent secret detentions like the obligation to guarantee that any person deprived of liberty shall be authorized to communicate with the outside world (his or her family, counsel, etc.); the obligation to guarantee access by the competent authorities and institutions to places where persons are deprived of liberty; and, last but not least, the obligation to guarantee that any person with a legitimate interest in all circumstances is entitled to bring an *habeas corpus* remedy before a court in order for it to decide without delay on the lawfulness of the deprivation of liberty.

Article 17.3 stipulates that States shall ensure an up-dated official register of the persons deprived of liberty which shall contain specific information available to any judicial or other competent authority or institution authorized, like the identity of the person detained, the time, date and place of detention, the authority that ordered the deprivation of liberty, etc. This detailed provision containing the measures which States should take related to persons deprived of liberty constitutes a significant mechanism to prevent enforced disappearances which practically leaves no discretion to States and allows any relative or person with a legitimate interest to access to a minimum of information about the detention of the person. Despite all mechanisms and provisions to prevent arbitrary detentions, reality shows that secret detention centers and *incommunicado* detentions still occur around the world. In situations of international or internal armed conflict the tasks of humanitarian organizations, like the ICRC, contribute to preventing enforced disappearances through visits to all detention centers and a register of the persons deprived of liberty by the Parties in conflict.

The UN Convention also provides in Article 21, as a mechanism of prevention of enforced disappearances, the obligation of the States Parties to “ensure that persons deprived of liberty are released in a manner permitting reliable verification that they have actually been released” and to “assure the physical integrity of such persons and their ability to exercise fully their rights at the time of release”. The importance of certifying that the person deprived of liberty has been released is to make sure the State has acted in accordance with the law and that the detained person has been truly released and not transferred to another detention facility or been “disappeared” or killed “extrajudicially”.

States also have the obligation, under Article 22 of the UN Convention, to take the necessary measures in order to prevent and sanction certain behaviors related to registers, remedies and the refusal to give information. These conducts can be delaying or obstructing remedies brought to justice like the *habeas corpus* or any other prompt and ef-



fective remedy, as well as the “failure to record the deprivation of liberty of any person, or the recording of any information which the official responsible for the official register knew or should have known to be inaccurate”.

Concerning training, Article 23 of the UN Convention establishes that States “shall ensure that the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty includes the necessary education and information regarding the relevant provisions of this Convention”. This obligation of education is important in order to prevent the involvement of agents of the State in crimes of enforced disappearance.

## 6. The rights of victims

The victim of enforced disappearance is not only the person deprived of liberty but also his or her relatives. The uncertainty regarding the whereabouts of the missing person and the fear that he or she might have been submitted to torture or inhuman treatment or even been executed, causes anguish and suffering to the family and relatives. This pain and torment has been considered by the international case-law<sup>62</sup> as constituting an inhuman and degrading treatment, expanding the notion of victim to the relatives of the disappeared person. This definition of victim has been recently incorporated in the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims), adopted by the General Assembly of United Nations in 2006, which provide that “the term *victim* also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization”<sup>63</sup>.

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<sup>62</sup> HRC, *Almeida de Quinteros vs. Uruguay*, Communication 107/1981, 21 July, 1983, para. 14. IACHR, *Blake vs. Guatemala*, judgement, 24 January 1998, opinion judge Cançado Trindade, para. 38; *Bámaca vs. Guatemala*, judgement, 25 November 2000, para. 155. ECHR, *Kurt vs. Turkey*, judgment, 25 May, 1998, para. 134; *Çakıcı vs. Turkey*, judgment, 8 July 1999, para. 98; *Timurtas vs. Turkey*, judgment, 13 June 2000, para. 90.

<sup>63</sup> General Assembly of United Nations, Resolution 60/147, 21 March 2006, Principle V.

The Parliamentary Assembly of the Council of Europe, in Resolution 1436 (2005) and Recommendation 1719 (2005)<sup>64</sup>, considered that the new international convention of enforced disappearances should recognize family members of the disappeared person as independent victims of enforced disappearance granted with their proper rights. Mr. Pourgourides, in his report on enforced disappearances, pointed out that "often, the disappeared persons are killed immediately, but their spouses, children or parents continue to live for many years in a situation of extreme anguish and stress, torn between hope and despair. They must therefore also be considered as victims of the crime of enforced disappearance"<sup>65</sup>.

The UN Convention provides a broad definition of victim in Article 24.1, which gives discretion to States Parties to designate the beneficiaries of potential reparations and remedies, without making an explicit reference to family members or close persons, namely "for the purpose of this Convention, "victim" means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance". Determining who is the victim is important because it grants the right to know the truth, a right to an effective remedy to clarify the fate and whereabouts of the disappeared person and a right to a reparation and compensation for the harm suffered. The option of the UN Convention to establish that the victim can be any individual who has suffered a direct harm as a consequence of an enforced disappearance is very protective and can be applied not only to family members of the disappeared person, but also to lawyers, witnesses and all persons who are being menaced for investigating the whereabouts of the disappeared person.

*The right to an effective remedy.* One of the main traits of enforced disappearances is that the family members of the disappeared person cannot find out the fate and whereabouts of the missing person and remedies become ineffective, because the State concerned refuses to give information about the fate and whereabouts of the disappeared person. The UN Convention, inspired by Article 12 and 13 of the Convention against Torture, establishes in Article 12 the right of the victims to an effective remedy followed by an obligation of the State to promote an impartial investigation if there are reasonable grounds for be-

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<sup>64</sup> Council of Europe, Parliamentary Assembly, *Enforced disappearances*, resolution 1463, 3 October 2005, para. 8 and 10.2; *Enforced disappearances*, Recommendation 1719, 3 October 2005, para. 2.2.

<sup>65</sup> Council of Europe, Parliamentary Assembly, *Enforced disappearances*, Report to Committee on Legal Affairs and Human Rights, Rapporteur: Mr. Christos Pourgourides, Doc. 10679, 19 September 2005, para. 3.

lieving that a person has been subjected to enforced disappearance. According to the abovementioned provision,

“[...] any individual who alleges that a person has been subjected to enforced disappearance has the right to report the facts to the competent authorities which shall examine the allegation promptly and impartially, and, where necessary, undertake without delay a thorough and impartial investigation”.

The UN Convention provides that States Parties have the obligation to protect the witnesses and relatives of the disappeared person against ill-treatment or intimidation as a consequence of the complaint or evidence given. Where there are reasonable grounds for believing that a person has been subjected to enforced disappearance, the competent authorities “shall undertake an investigation, even if there has been no formal complaint”.

In this provision, the UN Convention goes beyond the Convention against Torture and establishes that in order to make effective this investigation, the State Party has to ensure that the competent authorities have the necessary power and resources to conduct the investigation and have access to information and to any detention places where there are reasonable grounds to believe that the disappeared person may be present. Besides that, States Parties also have to take the necessary measures to prevent and sanction acts that hinder the conduct of the investigation, in particular, persons who may be suspected of being involved in the offence of enforced disappearances should not be in a position to influence the progress of the investigation.

*The right to access information.* In connection with the right to a remedy of Article 12.1, the UN Convention provides that the States Parties shall guarantee to any person with a legitimate interest access to information of a person deprived of liberty and to ensure that this person has “the right to a prompt and effective judicial remedy as a means of obtaining without delay the information referred to in Article 18 paragraph 1. This right to a remedy may not be suspended or restricted in any circumstances”. Article 18 paragraph 1 establishes that States should at least guarantee access to the following information:

- (a) “The authority that ordered the deprivation of liberty;
- (b) The date, time and place where the person was deprived of liberty and admitted to the place of deprivation of liberty;
- (c) The authority responsible for supervising the deprivation of liberty;
- (d) The whereabouts of the person deprived of liberty, including, in the event of a transfer to another place of deprivation of liberty, the destination and the authority responsible for the transfer;

- (e) The date, time and place of release;
- (f) Elements relating to the state of health of the person deprived of liberty;
- (g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains".

This guarantee of access to information provided in Article 18 of the UN Convention is limited by the protection of personal information (Article 19) and restricted "[...] on an exceptional basis, where strictly necessary and where provided for by law, and if the transmission of the information would adversely affect the privacy or safety of the person, hinder a criminal investigation..." (Article 20). During the elaboration of the UN Convention, some delegations considered that protecting certain rights which can be violated by enforced disappearances, such as the right to life, physical integrity and liberty, was more important than protecting privacy<sup>66</sup>. In this sense, Article 19 could undermine protection against enforced disappearance.

*The right to know the truth.* The right to access information is complemented by the right to know the truth, often related to situations of gross violations of human rights and grave breaches of international humanitarian law. This need to know what has happened, who are the authors and their motives, can be claimed by the victims themselves, by their relatives, and even by the entire people before the authorities responsible for the respect and guarantee of the fundamental rights and freedoms of people under its jurisdiction. Before the UN Convention only international humanitarian law had an explicit reference to the right to know in situations of international armed conflict. The inclusion of this right in the UN Convention means the recognition of the right to know also in times of non-international armed conflict or situations of internal violence.

The right to know the truth has been defined by the Commission on Human Rights as "an inalienable and autonomous right, linked to the duty and obligation of the State to protect and guarantee human rights, to conduct effective investigations and to guarantee effective remedy and reparations. This right is closely linked with other rights and has both an individual and a societal dimension and should be considered as a non-derogable right and not be subject to limitations"<sup>67</sup>. In cases of

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<sup>66</sup> Commission on Human Rights, *Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*, Chairperson-rapporteur Mr. Bernard Kessedjian, E/CN.4/2004/59, 23 February 2004, para. 125.

<sup>67</sup> Commission on Human Rights, *Study on the right to the truth*, Report of the office of the High Commissioner for Human Rights, E/CN.4/2006/91, 8 January 2006.

enforced disappearances and extrajudicial executions the right to the truth has a special relevance: the knowledge of the fate and whereabouts of the disappeared person.

The Human Rights Chamber for Bosnia and Herzegovina<sup>68</sup> has recognized, in cases of missing persons as a result of the armed conflict in the Balkans, the right of families of disappeared persons to know the truth about the fate and whereabouts of their missing loved ones. The Chamber has considered that the State has violated the right to be free from inhuman and degrading treatment when it fails to inform the victims about the truth of the fate and whereabouts of their missing loved ones<sup>69</sup>.

In international human rights law, although the ICCPR has no reference to the right to know the truth, the Human Rights Committee (HRC) has considered in *Almeida de Quinteros v. Uruguay Case* that “the author has the right to know what has happened to her daughter”<sup>70</sup>. Subsequently, the HRC has developed the right to know the truth establishing that the State should take all pertinent measures to avoid cases of impunity and to allow the victims of human rights to find out the truth not only about those facts, but also about who are the perpetrators and to obtain an appropriate reparation<sup>71</sup>.

In this regard, the IACHR in its first case of enforced disappearance stated that the right to know the truth of the family of the victim is a “fair expectation” that the State must comply with until it has been

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<sup>68</sup> Established by the “Agreements on Human Rights”, annex 6 to the General Framework Agreement for Peace of Dayton of 21 November 1995, signed by the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska. The Human Rights Chamber for Bosnia and Herzegovina has a mixed composition (8 judges appointed by the Council of Europe, 4 by the Federation of Bosnia and Herzegovina and 2 by the Republika Srpska) and has jurisdiction over grave or systematic violations of human rights from the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. For more information: DECAUX, Emmanuel, “La Chambre des droits de l’homme pour la Bosnie-Herzegovine”, *Revue Trimestrielle des Droits de l’Homme*, 2000, pp. 709-728, and <http://www.hrc.ba/>.

<sup>69</sup> Human Rights Chamber for Bosnia and Herzegovina, see among others, *Srebrenica Cases v. Republika of Srpska*, 49 applications, decision on admissibility and merits, 7 March 2003, paras. 185-191; *Huskovic and others v. Federation of Bosnia and Herzegovina*, Cases no. CH/02/12551 *et al.*, Decision on admissibility and merits, 22 December 2003, paras. 78-85; *Malkic and others v. Republika Srpska*, Cases no. CH/02/9358 *et al.*, Decision on admissibility and merits, 22 December 2003, paras. 95-99; *Mujic and others v. Republika Srpska*, Cases no. CH/02/10235, Decision on admissibility and merits, 22 December 2003, paras. 66-70.

<sup>70</sup> HRC, *Almeida de Quinteros v. Uruguay*, Communication 107/1981, para. 14.

<sup>71</sup> Suggestions and recommendations, Concluding observations of the Human Rights Committee to Guatemala, CCPR/C/79/Add.63, 3 April 1996.

clarified the fate of the missing person<sup>72</sup>. The right to know the truth becomes an obligation of the State to investigate the facts and to identify the perpetrators of enforced disappearances<sup>73</sup>, in addition to having to ensure the victims and their families the access to justice and the right to have an effective remedy<sup>74</sup>.

Despite the recognition of the right to know the truth by the case law, neither the 1992 UN Declaration nor the 1994 Inter-American Convention on enforced disappearances make a reference to this right. This legal gap has been filled out by the UN Convention, which makes a specific reference to the right to know the truth in its Article 24.2:

“Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared persons. Each State Party shall take appropriate measures in this regard”.

The inclusion of this right in the UN Convention, both in its Preamble and in its substantive part, was subject to debate and discussion: while some delegations considered important to guarantee this right in times of peace, other doubted the existence of this right and proposed only to announce the obligation of the State to inform of the circumstances of the disappearance and the fate of the missing persons<sup>75</sup>.

Before the adoption of the UN Convention, only in times of international or internal armed conflict the victims of enforced disappearances could claim the right to know the truth recognized by conventional and customary humanitarian law. The influence of these rules has made possible to include the right to know the truth in a human rights instrument, like the UN Convention, applicable at all circumstances, even in times of internal violence or state of emergency. This is a step forward to considering the right to know the truth a universal right of any victim, not only of enforced disappearance but also of any grave violation of human rights or humanitarian law.

*The right to reparation.* Victims of enforced disappearance have the right to adequate, effective and prompt reparation for the harm suf-

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<sup>72</sup> IACHR, *Velásquez Rodríguez v. Honduras Case*, Judgment of 29 July 1988, para. 181.

<sup>73</sup> IACHR, *Castillo Páez v. Peru Case*, Judgment of 3 November 1997, para. 90.

<sup>74</sup> IACHR, *Bámaca Velásquez v. Guatemala Case*, judgment of 25 November 2000, para. 201.

<sup>75</sup> Commission on Human Rights, *Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*, Chairperson-rapporteur Mr. Bernard Kessedjian, E/CN.4/2005/66, 10 March 2005, para. 14.

ferred, which should go beyond monetary compensation and include rehabilitation, satisfaction and guarantees of non-repetition. States should provide reparation to victims of acts or omissions which can be attributed to the State and constitute an offence of enforced disappearance.

The HRC has established as reparation of victims of enforced disappearance and their relatives the obligation of the State to investigate what happened to the missing person; bring to justice the responsible of his or her death, disappearance or abuse; pay an adequate compensation to the victim submitted to enforced disappearance and his or her relatives and ensure that this violations will not occur in the future<sup>76</sup>.

The UN Declaration establishes in Article 19<sup>77</sup> the right to adequate reparation and compensation for victims of enforced disappearance, including a complete rehabilitation. The redress has to be proportional to the gravity of the violation and has to take into account the duration of the disappearance of the person, the detention conditions of the victim, the harm suffered by the family during the time of disappearance, etc. The rehabilitation should include medical and psychological care for any physical or mental harm, guarantees of non-repetition, legal and social assistance, restoration of personal liberty, family life, citizenship, employment and property, the chance to return to one's place of residence and other forms of restitution, satisfactions and reparation which can remove the consequences of an enforced disappearance<sup>78</sup>.

The Inter-American Convention does not contain any provision that refers to the right of victims of enforced disappearance to obtain a reparation; however, the IACHR has developed, through its case law, novel forms of reparation that go beyond just compensation under the American Convention on Human Rights<sup>79</sup>. Noteworthy "other forms of repara-

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<sup>76</sup> HRC, *Bleier vs. Uruguay*, Communication 30/1978, 29 March 1982, para. 15; *Almeida de Quinteros vs. Uruguay*, Communication 107/1981, 21 July 1983, para. 16; *Mojica vs. Dominican Republic*, Communication 449/1991, 10 august 1994, para.7.

<sup>77</sup> UN Declaration, Article 19: "The victims of acts of enforced disappearance and their family shall obtain redress and shall have the right to adequate compensation, including the means for as complete a rehabilitation as possible. In the event of the death of the victim as a result of an act of enforced disappearance, their dependents shall also be entitled to compensation".

<sup>78</sup> WGEID, *General Comment on Article 19 of the Declaration*, Annual Report 1997, E/CN.4/1998/43, 12 January 1998.

<sup>79</sup> American Convention on Human Rights, Article 63.1: "If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party".

tion" like the obligation of the State to ensure that enforced disappearance constitutes an offence under its domestic law; the obligation to investigate, identify and sanction those responsible for the acts; the publication of the judgment in the Official Gazette or give the name of the victim to an educational center, street or square<sup>80</sup>.

Unlike the IACHR, the European Court of Human Rights only establishes compensation for material or moral damage or costs of the legal assistance as reparation for victims of enforced disappearance, but does not establish other forms of reparation which are aimed to redress the harm suffered by the victims and to prevent this kind of violations in the future<sup>81</sup>.

The case law of the Human Rights Chamber for Bosnia and Herzegovina, in addition to require the State to inform about the fate and whereabouts of the disappeared persons, investigate the facts and bring the responsible before justice, has considered it more appropriate to make a collective compensation which will benefit all the family members of the persons missing. The Chamber considers that the main worry and objective of the relatives is to know what has happened and find the disappeared persons, so the Chamber has considered more relevant to oblige the State concerned to give money to institutions charged with finding the missing persons or recovering the memory of the victims<sup>82</sup>. While uncertainty about the whereabouts of the disappeared person causes much anguish and suffering to the families, and the collective compensation seeks to redress in some way the harm of the relatives, it is also important that they receive individual compensation for material and moral damage<sup>83</sup>.

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<sup>80</sup> IACHR, *Trujillo Orozca vs. Bolivia*, reparations and judgment, 27 February 2002, para. 77; *Castillo Páez vs. Perú*, reparations and judgement, 27 November 1998, para. 122; *Goiburú and others vs. Paraguay*, judgment 22 September 2006.

<sup>81</sup> ECHR, see among others: *Çakici vs. Turkey*, application no. 23657/94, judgment 8 July 1999, para. 127; *Çiçek vs. Turkey*, application no. 25704/94, judgment 27 February 2001, para. 200; *Baysayeva vs. Russia*, application 74237/01, judgment 5 April 2007, para. 175; *Akhmadova and Sadulayeva vs. Russia*, application no. 40464/02, judgment 10 May 2007, para. 143.

<sup>82</sup> The Human Rights Chamber for Bosnia and Herzegovina, in *Srebrenica Cases v. Republika of Srpska*, 49 applications, 7 March 2003, condemned the Republika of Srpska to make a collective compensation to the Foundation of the Srebrenica-Potocari Memorial and Cemetery, para. 217; in *Smajic, Cosic, Dzafic c. Republika Srpska*, Cases no. CH/02/8879-8883, CH/02/9384 y 9386, 5 December 2003, the collective compensation was for the Institute for Missing Persons, para. 103.

<sup>83</sup> Between 1992 and 1995, more than 20.000 persons disappeared in Bosnia and Herzegovina, the majority of them Muslims, leaving women without the main family income, assuming a new family and social duties, etc.



The UN Convention, inspired by the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims*, establishes in Article 24.4 that “each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation”. This right to reparation covers material and moral damage and other forms of redress like restitution, rehabilitation, satisfaction, including restoration of dignity and reputation, together with guarantees of non-repetition. The UN Convention also provides in Article 24.2 that States Parties “shall take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains”.

The provision contained in Article 24.6 of the UN Convention regarding reparation is new and does not appear in any other international instrument on enforced disappearances. It extends the reparation to social welfare, financial matters, family law and property rights which can be affected in case of enforced disappearances, especially when family members lose their principal income and their family life is broken, etc... According to Article 24.6,

“Without prejudice to the obligation to continue the investigation until the fate of the disappeared person has been clarified, each State Party shall take the appropriate steps with regard to the legal situation of disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, family law and property rights”.

Due to the seriousness of the offence of enforced disappearance, a compensation for material and moral damages is not sufficient. Victims also need the recognition by the State authorities of their responsibility; the adoption of legal measures to incorporate the crime of enforced disappearance in their domestic law as an autonomous offence; an effective investigation of the facts and identification and sanction of the authors; the education of the law enforcement personnel about this offence and to put the name of the victims of enforced disappearances to public spaces so that everyone does not forget the facts and as a way to prevent them in the future.

## 7. Protection of children

The issue of children subjected to enforced disappearance, or whose parents are victims of enforced disappearance or children born during the captivity of a mother subjected to enforced disappearance is

hard to understand and address because we are talking about children who were mostly given up for adoption, whose adoptive parents were even themselves captors or torturers causing the forced disappearance of the natural parents.

What would be the grounds to separate a boy or a girl from their parents? On one hand, to increase the suffering of the mother, not as a supplementary means of repression but for punishing her for being a real or potential "political opponent", in the eyes of the repressors. On the other hand, in the case of Argentina, General Ramón Juan Alberto Camps, Chief of Police of the province of Buenos Aires between 1976 and 1983, summarized it with the following sentence: "the subversive parents educate their children for the subversion. We have to prevent it"<sup>84</sup>. Those responsible for the "dirty war" feared that the children of disappeared parents would grow hating the Argentinean Army, and when grown, would also become subversive elements.

The seriousness of this phenomenon is that children were the direct victims of enforced disappearance. Missing children were common during the military dictatorship in Argentina between 1976 and 1983, and a study from by the Inter-American Commission on Human Rights stated that around 250 children would have been victims of enforced disappearance during that period<sup>85</sup>.

The Convention on the Rights of Child establishes that every child has the right from birth to a name, the right to know his or her parents and be cared for by them (Article 7). The Convention also provides that States undertake to respect "the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference" (Article 8.1) and that States "shall ensure that a child shall not be separated from his or her parents against their will [...]" (Article 9.1).

The enforced disappearance of children does not respect any of these provisions because separates boys and girls from their biological parents against their will, their identity is denied when the documents of adoption and birth are falsified, and constitutes an illicit interfer-

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<sup>84</sup> "Disparus: Rapport à la Commission Indépendante sur les questions humanitaires internationales", Berger-Levrault, Nancy, 1986, p. 29.

<sup>85</sup> The Mothers of Plaza de Mayo documented 208 cases and the National Commission about missing persons in Argentina received documentation of 43 cases, without taking into account those cases which were not included in those lists, "Estudio sobre la situación de los hijos menores de personas desaparecidas que fueron separados de sus padres y son reclamados por miembros de sus legítimas familias", *Informe Anual*, 1987-88, Cap. V.

ence to family life which stays broken forever. Meanwhile, the grandparents desperately search for the whereabouts of these children during many years before the refusal of the authorities to give information about it.

The ICCPR provides in Article 24 that States should take specific measures of protection in case of children and recognizes that every child has the right to a name and to acquire a nationality. Therefore, in the *Celis Laureano vs. Peru Case*, the HRC considered that the State had not taken the adequate measures to protect Mrs. Laureano from enforced disappearance taking into account that she was a minor<sup>86</sup>.

The UN Declaration requires States to prevent and sanction the abduction of children as a consequence of enforced disappearance in Article 20<sup>87</sup>. Considering the need to best protect the interests of the child, the UN Declaration establishes that States should have a system of revision of adoption originated in enforced disappearance, annulling the adoption if necessary. Article 20.3 considers that the abduction of children of parents subjected to enforced disappearance and the act of altering or suppressing documents attesting to their true identity "shall constitute an extremely serious offence, which shall be punished as such".

Instead, the Inter-American Convention only refers to inter-State cooperation in the "search for, identification, location, and return of minors who have been removed to another State or detained therein as a consequence of the forced disappearance of their parents or guardians" in Article XII, but does not mention any measure that States should take at the national level.

The UN Convention is the first legally binding instrument of universal scope which addresses the question of enforced disappearances of children. Article 25 can be divided in five points:

- The prevention and sanction of the abduction of children subjected to enforced disappearance, or whose parents are subjected to enforced disappearance or born during the captivity of their mother subjected to enforced disappearance, as well as the falsification, concealment or destruction of the documents of the true identity of the minor.

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<sup>86</sup> HRC, *Celis Laurano vs. Peru*, Communication 540/1993, 16 April 1996, para. 8.7.

<sup>87</sup> Article 20.1: "States shall prevent and suppress the abduction of children of parents subjected to enforced disappearance and of children born during their mother's enforced disappearance, and shall devote their efforts to the search for and identification of such children and to the restitution of the children to their families of origin".

- The search and identification of these minors, who should be returned to their family of origin when possible.
- International cooperation between States for searching, identifying and locating these children.
- The review of the adoption procedures and where appropriate proceed to the annulations of them in case of being originated or related to an enforced disappearance.
- In all cases, the need to take into account the best interest of the child and the opinion freely expressed by the minor as a general principle applying to the entire provision<sup>88</sup>.

The WGEID considers that the UN Convention provides an appropriate remedy to end up with enforced disappearances of children<sup>89</sup>, preventing and sanctioning the abduction of children whose parents are victims of enforced disappearance or born during the captivity of their mother subjected to enforced disappearance, together with the effort to establish their identity, returning the minors to their family of origin and the possibility of annulling the adoption which has arisen from an enforced disappearance, taking always into account the best interest of the children.

## 8. Monitoring provisions

The form of the instrument and the future monitoring body on enforced disappearances was a matter of great debate during the elaboration of the treaty, and different alternatives were proposed. The first option, supported by Canada, USA, Germany, Russia, China, Egypt and Iran, was to draw up an additional protocol to the ICCPR and entrusting the HRC the role of monitoring its implementation<sup>90</sup>. It was argued

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<sup>88</sup> Based on Article 12.1 of the Convention on the Rights of the Child which establishes that "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child".

<sup>89</sup> Commission on Human Rights, *Report of the Working Group on Enforced or Involuntary Disappearances*, E/CN.4/2001/68, 18 December 2000, annex III; *Report of the Working Group on Enforced or Involuntary Disappearances*, E/CN.4/2002/79, 18 January 2002, para. 364.

<sup>90</sup> This option was also defended by the United Nations expert Manfred Nowak in his report before the Commission on Human Rights, *Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary*

that it would make no sense to create another treaty body while the trend in the human rights system was to merge all the existing treaty bodies in one. Besides that, the HRC had years of experience dealing with cases on enforced disappearance since this offence violates numerous provisions of the Covenant, and the increasing number of monitoring bodies could bring problems regarding consistency of jurisprudence.

The second option was to draw up an autonomous convention and set up a new and independent monitoring committee, supported mainly by the Latin American group together with Spain and Italy. The arguments for this proposal were that the HRC already overworked and would hardly cope with novel functions as proposed in the new instrument, which combined humanitarian, preventive and legal functions. It would probably be needed to increase the number of members of the HRC from 18 to 23 or to create a subcommittee charged with the monitoring of the protocol. The solution involving the HRC might entail revision of the Covenant, which would considerably delay the entry into force of the instrument. Besides, the estimated cost of the two options had no significant difference, so it was more a matter of political will. Establishing a new committee would definitely send a strong message to the international community about the seriousness of enforced disappearance and the relevance of adopting a new instrument to protect all persons from this crime.

The third option was the compromise solution which consisted in establishing an independent committee and making a provision for the Conference of States Parties to meet several years after the instrument came into force and settle the matter in the light of how the reform of merging all treaty monitoring bodies into one was progressing within the United Nations system<sup>91</sup>. Instead of a revision clause, which could

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*disappearances*, E/CN.4/2002/71, 8 January 2002. The WGEID stated it preferred the monitoring tasks to be assigned to one of the existing treaty monitoring bodies like the Committee against Torture or the Human Rights Committee, E/CN.4/2001/68, annex III.

<sup>91</sup> The delegation of Spain proposed the following text: "The Conference of States Parties shall meet not less than four years and not more than six years after the entry into force of [this instrument] to evaluate the functioning of the Committee and, in accordance with the arrangements set out in Article 34.6, to consider its future - without ruling out any eventuality - and to assess the implementation of [this instrument] by means of the procedures set out in Article 26.2 ff", Commission on Human Rights, *Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*, Chairperson-rapporteur Mr. Bernard Kessedjian, E/CN.4/2006/57, 2 February 2006, para. 72.

be interpreted as creating a “provisional” monitoring body and weaken it, Article 27 of the UN Convention establishes that the Conference of States Parties will meet between four and six years after the entry in force of the instrument, to evaluate the functioning of the Committee and whether it is appropriate to transfer to another body the monitoring of the Convention. This new clause made possible to reach consensus and set up a new and independent monitoring body.

Regarding the structure of the new Committee on Enforced Disappearance (CED), Article 26 of the UN Convention establishes that it will consist of ten experts, instead of 5 which was the initial proposal, in order to better ensure geographical distribution. These experts, elected by States Parties, will serve in their personal capacity, be independent and impartial, with relevant legal experience and taking into account gender balance.

The UN Convention provides in Article 28 that the CED will cooperate with all relevant organs, offices and agencies of the United Nations, as well as with other treaty bodies, in particular the HRC, in order to be consistent with its recommendations and observations. The Committee should also take into account other special procedures and institutions working for the protection of enforced disappearances. A specific reference to the WGEID as a special procedure was not included because of its uncertain future (being its mandate renewed every three years).

The functions of the CED can be divided in five: State reports, individual and inter-State communications, urgent procedure, visits *in situ* and referral to the General Assembly of United Nations of widespread or systematic practice of enforced disappearances.

Concerning State reports, Article 29 of the UN Convention provides that States Parties shall submit to the CED a report on the measures taken to give effect to the provisions of the Convention within two years after the entry into force of the Convention for the State concerned. Apparently, it looks like States Parties only have to submit the report once, but Article 29.4 establishes that “the Committee may also request States Parties to provide additional information on the implementation of this Convention”. Although the words “at any time” contained in the draft of the Convention were removed, it was considered that the idea remained implicit<sup>92</sup>.

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<sup>92</sup> Commission on Human Rights, *Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*, Chairperson-rapporteur Mr. Bernard Kessedjian, E/CN.4/2006/57, 2 February 2006, para. 39.

Like other human rights instruments, the UN Convention has the competence to receive individual (Article 31) or inter-State communications (Article 32). Both competences are optional and can be recognized by the State Party at the time of ratification of the Convention or any time afterwards. Concerning individual complaints, Article 31 establishes that the Committee can consider communications from or on behalf of individuals subject to its jurisdiction claiming to be victims of enforced disappearance. The CED can request interim measures when necessary in order to avoid irreparable harm and preserve evidence of the enforced disappearance.

The urgent procedure, contained in Article 30 of the UN Convention, is a novel provision and unprecedented in treaty monitoring bodies. This humanitarian mechanism provides that

“a request that a disappeared person should be sought and found may be submitted to the Committee, as a matter of urgency, by relatives of the disappeared person or their legal representatives, their counsel or any person authorized by them, as well as by any other person having a legitimate interest”.

The CED can request the State Party concerned to provide information on the situation of the persons sought, within a time limit set by the Committee. The CED may transmit recommendations to the State Party, asking the State to take all necessary measures, including interim measures, to locate and protect the persons concerned, and to inform within a specific period of time on measures taken, taking into account the urgency of the situation. The person submitting the urgent action request should be informed by the CED of its recommendations and of the information provided to it by the State Party. Article 30.4 establishes that “the Committee shall continue its efforts to work with the State Party concerned for as long as the fate of the person sought remains unresolved [...]”. Some delegations requested the inclusion of the condition that domestic remedies must have been exhausted, but it was considered incompatible with the concept of urgency and not necessary within a non-judicial procedure with mainly humanitarian aims.

Article 33 of the UN Convention provides visits *in situ* when the CED receives reliable information indicating that a State Party is seriously violating the provisions of the Convention. Before undertaking the visit, the CED needs the authorization of the State concerned, indicating the composition of the delegation and its purpose. After the visit, the Committee has to communicate the State concerned the observations and recommendations adopted. This provision has no reference

to widespread or systematic practice of enforced disappearance because is considered a preventive function.

Finally, Article 34 allows the CED to refer to the General Assembly of the United Nations, through the Secretary-General, a situation of widespread or systematic enforced disappearance practiced in a State Party:

“if the Committee receives information which appears to it to contain well-founded indications that enforced disappearance is being practiced on a widespread or systematic basis in the territory under the jurisdiction of a State Party, it may, after seeking from the State Party concerned all relevant information on the situation, urgently bring the matter to the attention of the General Assembly of the United Nations, through the Secretary-General of the United Nations”.

This provision is in line with the current developments within the United Nations, which tend to focus on the cross-cutting nature of the human rights in the different organs and to increase the scope for urgent action<sup>93</sup>, and is inspired by Article VIII of the Convention on Genocide<sup>94</sup>.

Some delegations stressed the possible overlap of functions between the monitoring body and the WGEID, in particular regarding the urgent procedure, visits *in situ* and individual communications. However, it was considered that both mechanisms were complementary because the mandate of the WGEID is universal, covers all Member States of the United Nations, as well as all cases of enforced disappearances with no time limit of retroactivity, while the new CED will only have competence with respect of States Parties of the UN Convention and over enforced disappearances commenced after the entry into force of the instrument.

The CED has competence over enforced disappearances commenced after the entry into force of the UN Convention (Article 35) and has to submit an annual report on its activities under the Convention to the States Parties and to the General Assembly of the United Nations (Article 36).

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<sup>93</sup> Commission on Human Rights, *Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*, Chairperson-rapporteur Mr. Bernard Kessedjian, E/CN.4/2006/57, 2 February 2006, para. 61.

<sup>94</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, Article VIII: “Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III”.



## 9. Conclusion

The recognition of the right not to be subjected to enforced disappearance and the right to know the truth, considering the widespread and systematic practice of enforced disappearance as a crime against humanity, and the creation of an independent monitoring body with humanitarian and preventive functions, are some of the major steps forwards provided by the International Convention for the Protection of All Persons from Enforced Disappearances. This new instrument will entry in force after the twentieth ratification and will protect persons of enforced disappearances at all circumstances, regardless of an armed conflict or a situation of internal violence, and hopefully will contribute to end up with the impunity of the authors of this serious crime.



EXTRA-CONVENTIONAL PROTECTION  
OF HUMAN RIGHTS



# Extra-conventional protection of human rights<sup>1</sup>

José Luis Gómez del Prado

**Summary:** Introduction 1. United Nations Human Rights Special Procedures: 1.1. Special Procedures Independent Experts 1.2. Structural elements and historical evolution: 1.2.1. The Human Rights Commission. 1.2.2. The Human Rights Council. 1.3. The Confidential Complaint Procedure. 1.4. The Public Special Procedures: 1.4.1. Geographic mandates. 1.4.2. Thematic mandates. 1.5. Functioning of the system: 1.5.1. Alleged human rights violations. 1.5.2. Field missions. 1.5.3. Non-State actors. 1.5.4. Urgent actions. 1.5.5. Double standards and political selectivity of countries in responding to human rights situations. 1.5.6. Participation of the Special Procedures at the UN Security Council. 1.5.7. Use of the Press and Mass media. 2. Coordination. 3. Concluding Observations.

“To investigate specific country situations and review new and critical issues, the Organization relies upon a range of rapporteurs, high-level representatives and working groups that are collectively known as the human rights special procedures. These procedures are vital instruments and, over the years, have helped to advance the cause of human rights”.

Kofi Annan<sup>2</sup>

## Introduction

For the victims of human rights abuses the UN Programme of Human Rights has constituted, since its inception, a symbol of hope. It has been seen as a last resort for the Organization to become the voice of the voiceless. Unfortunately, during the greatest part of the Cold War the United Nations remained deaf and mute to the grave human rights violations occurring in the world. In 1947, one year after its creation,

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<sup>1</sup> The UN terminology used for this type of protection is known as Special Procedures.

<sup>2</sup> “Strengthening the United Nations: an agenda for further change”, Report of the Secretary-General, United Nations document A/57/387, paragraph 55.

confronted to the overwhelming flow of allegations from victims and non-governmental organizations, the UN Commission of Human Rights<sup>3</sup> declared itself incompetent to adopt any measure regarding any type of complaint concerning human rights. It refused to deal with individual petitions. Instead, the Commission confined itself to promotional activities providing guidelines to be followed by the Secretariat. Member States, advocating the principle of national sovereignty, declared themselves against whatever measure which could have been taken in regard with those allegations as well as to the fact that the United Nations could acknowledge receipt of the communications reaching it.

For sixty years since the UN Commission on Human Rights was established in 1946 till the General Assembly decided, in 2006<sup>4</sup>, to terminate that body and replace it by the Human Rights Council, the Commission has been the principal United Nations organ responsible for elaborating norms, promoting and protecting human rights.

In the course of those past sixty years, Governments have reluctantly agreed to the need of establishing an international system of human rights protection<sup>5</sup>. They opted, nonetheless, for the longest and most complex course: a conventional protection system of human rights. By adopting such a path national authorities were assured that for a substantive number of years the international community would not be able to interfere in the human rights domestic treatment governments provided to the individuals living under their jurisdiction.

In order to build such an international system a long process has been necessary. As a first stage, long political negotiations in order to elaborate and translate human rights norms into declarations which later on could become international treaties to be signed and ratified by States. Once again long political negotiations have taken place before the adoption of such treaties. Moreover, the system offers in most cases the possibility for States Parties to introduce reservations which weaken the application of a given international instrument. As a second stage the creation of treaty-bodies responsible for monitoring the application of the provisions of the international human rights treaties.

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<sup>3</sup> Commission on Human Rights, Report of its First Session, UN document E/259.

<sup>4</sup> United Nations, General Assembly resolution 60/251 "Human Rights Council".

<sup>5</sup> The "no power to act doctrine" of the Commission on Human Rights seems to have been the result of an agreement between the two major powers (USA-USSR) during the Cold War period which gave preference to a slow motion process allowing the drafting (1946-1966) of the two International Covenants on Human Rights.

Additionally, in a number of cases, the establishment of optional quasi-judicial procedures to consider individual complaints.

The international system of conventional mechanisms is slow and leaves outside its scope not only a number of States which are not parties to the two Covenants and other international conventions but also types of violations which have not been foreseen in those instruments. Moreover, the optional quasi-judicial procedures, in addition of being voluntarily, are not foreseen in all the international human rights treaties. The conventional mechanisms constitute a limited and imperfect system which improves progressively throughout the years but which still has a long way to go before it becomes truly universal<sup>6</sup>.

It was only in 2006 that the UN Member States accepted to submit themselves, without duplicating the work of the treaty bodies, to *"a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States"*<sup>7</sup>.

## 1. United Nations Human Rights Special Procedures

The credibility of the human rights programme and the UN action depends on the capacity of the Organization in investigating efficiently victims' complaints and responding to their demands for humanitarian assistance. Moreover, the programme should function as a reliable early warning system enabling the United Nations to respond quickly to emergency situations. Above all, it should stop and prevent human rights violations to continue. With the aim to alleviating expeditiously the suffering of the victims and in order to rehabilitate the credibility which the UN had lost during its first twenty years of existence, the Organization has developed a system of *Special Procedures*, the general name by which are known the mechanisms which were established by the Commission on Human Rights and have been assumed by the Human Rights Council to address either specific country situations or thematic issues in all parts of the world.

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<sup>6</sup> During the last 25 years of the XXth century, between 1975 and 2000, for example, the UN Office of the High Commissioner for Human Rights received over 400.000 individual complaints which were dealt with under the framework of special procedures or extra-conventional mechanisms. During this same period of time only some 800 individual complaints were considered under the framework of conventional mechanisms.

<sup>7</sup> United Nations General Assembly resolution 60/251.

The special procedures mechanisms till 2006, when the new UN Human Rights Council started functioning, have been subsidiary bodies of the UN Commission on Human Rights with the capability of fact finding<sup>8</sup>. The special procedures have been transferred to the new Council, which has received from the General Assembly the mandate to “review and, where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain a system of special procedures, expert advice and a complaint procedure”. During 2007 and 2008<sup>9</sup>, the Council has conducted the review and rationalization of the 38 special procedures mandates. It has also established a mechanism which allows “for substantive interaction with special procedures and mechanisms”.

### 1.1. *Special Procedures Independent Experts*

Special procedures collect and analyze information with regard to a given situation or issue of grave human rights violations. These UN subsidiary bodies are integrated by international prominent independent experts, recognized by their impartiality, independence and competence in the subject. Such subsidiary bodies may be unipersonal (special rapporteur, representative, envoy, expert<sup>10</sup> etc...) or collective (working group or *ad hoc* committee, integrated each of them by five experts). As defined by the mandate holders themselves, “the hallmarks of the special procedures system are its independence, impartiality and objectivity. Its ability to monitor the situation in any country of the world in relation to the specific mandate established by States within the framework of the Commission on Human Rights till 2006 and since then by the Human Rights Council ensures that it plays a crucial role within the overall United Nations human rights system. It is uniquely placed to act as an early warning system in relation to situations involving serious

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<sup>8</sup> The terms “instruments”, “procedures”, “mechanisms” and “mandates” are synonyms and have the same connotation. In the present article they are used indistinctly.

<sup>9</sup> In the course of 2008, the Human Rights Council reviewed the following mandates: Sale of children, child prostitution and child pornography; Situation in Democratic People’s Republic of Korea; Human Rights Defenders; Freedom of opinion and expression; Minority issues; Effects of economic reform policies and foreign debt; Situation in Myanmar; Violence against women; Disappearances; Use of Mercenaries; International solidarity; Racism; Situation in the Democratic Republic of the Congo; Situation in Somalia; Right to health; Toxic wastes.

<sup>10</sup> The UN Human Rights Council decided, in 2008, to change some titles. The title of the Representative of the Secretary-General for Human Rights Defenders was changed to “special rapporteur”.



human rights violations. It is, thus, essential that the special procedures be accorded full and free access to all countries"<sup>11</sup>.

These special rapporteurs, representatives, envoys, experts are individuals of recognized international standing in the field of human rights. Their impartiality, independence and competence have increasingly been manifested in the course of the years. If at the beginning of the creation of the special procedures the choice of the Commission was to appoint diplomats, the emphasis nowadays is to assign the mandates, more and more, to academics, lawyers, representatives of civil society and former and current NGOs' activists, university professors of social and political sciences as well as public international law professors and human rights experts. It has been increasingly pointed out that the independence and impartiality of mandate holders are incompatible with the appointment of individuals holding positions within the executive or the legislative branches of their Governments.

Mandate-holders serve in their personal capacity for a maximum period of six years during which they do not receive salaries or compensation for their work. The information they collect has allowed UN monitoring organs, such as the Commission on Human Rights, the Economic and Social Council, the General Assembly, in a number of cases the Security Council, and now the Human Rights Council to examine allegations of human rights violations, consider a given situation or phenomenon and adopt the necessary measures outside of the strictly conventional system.

For many years the UN practice has not prevented an expert to serve in two different extraconventional mandates nor to a member of a treaty-body to be appointed as special rapporteur of an extraconventional mechanism. R. Garreton was appointed Special Rapporteur on Zaire/Congo while serving as a member of the Working Group on Arbitrary Detention. A member of the Committee against Torture, A. Movramatis, was appointed Special Rapporteur on Iraq. However, this is not anymore the case. In 2006, the Human Rights Council engaged in an institution building process<sup>12</sup> which with respect to the human rights special procedures, in addition of reviewing, rationalization and improvement of the mandates, established the criteria for the selection and appointment of mandate holders.

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<sup>11</sup> Report of the twelfth meeting of special rapporteurs/representatives, independent experts and chairpersons of working groups of special procedures of the Commission on Human Rights and of the advisory service programme, United Nations document, E/CN.4/2006/4.

<sup>12</sup> United Nations, Human Rights Council resolution 5/1, Institution building of the Human Rights Council.

In order to nominate, select and appoint mandate holders, it has to be taken into account his/her: expertise; experience in the field of the mandate; independence; impartiality; personal integrity; and objectivity. In addition, due consideration is also given to gender balance and equitable geographic representation, as well as to an appropriate representation of different legal systems. Candidates may be presented by: (a) Governments; (b) Regional Groups operating within the United Nations human rights system; (c) international organizations or their offices such as the Office of the High Commissioner for Human Rights; (d) non-governmental organizations; (e) other human rights bodies; as well as by individuals.

The tenure of mandate holder, whether thematic or geographic, cannot be longer than six years (two terms of three years for thematic mandates). As has been pointed out, mandate holders are not able anymore to accumulate two human rights functions. They act in their personal capacity and shall be excluded if they hold decision-making positions in Government or in any other organization or entity which may give rise to a conflict of interest with the responsibilities inherent to the mandate. Within the Council a Consultative Group<sup>13</sup> is established to propose to the President, at least one month before the beginning of the session in which the Council has to consider the selection of mandate holders, a list of candidates who possess the highest qualifications for the mandates in question and meet the general criteria and particular requirements. The members of the Consultative Group are appointed by the different Regional Groups. They serve in their personal capacity and are assisted by the Office of the High Commissioner for Human Rights.

Recommendations to the President are public and substantiated. The Consultative Group should take into account, as appropriate, the views of stakeholders, including the current or outgoing mandate-holders, in determining the necessary expertise, experience, skills, and other relevant requirements for each mandate. On the basis of the recommendations of the Consultative Group and following broad consultations, in particular through the regional coordinators, the President of the Council identifies an appropriate candidate for each vacancy. The President presents to member States and observers a list of candidates to be proposed at least two weeks prior to the beginning of the session in which the Council has to consider the appointments. If necessary, the President conducts further consultations to ensure the endorse-

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<sup>13</sup> In 2008, the members of the Consultative Group were the representatives of Algeria, Chile, Pakistan, Russia and Switzerland.

ment of the proposed candidates. The appointment of the special procedures mandate-holders is completed upon the subsequent approval of the Council. Mandate holders are appointed before the end of a given session<sup>14</sup>.

At its seventh session, in April 2008, the Human Rights Council appointed for the first time 16 new mandate holders<sup>15</sup> for 14 special procedures<sup>16</sup>. Since this was the first time the Human Rights Council appointed mandate-holders under the new procedures adopted by the Council, it is interesting to briefly summarize some of the views expressed in the general debate indicating that the procedures of the new Human Rights Council are diversely interpreted by the stakeholders. Algeria, Egypt, Pakistan and India asked the President to clarify his position on the renewal of mandate holders who had exceeded 3 years tenure but had not yet reached the maximum of 6 years. Algeria requested that those mandates be included in the list of vacancies for ap-

<sup>14</sup> United Nations, Human Rights Council resolution 5/1, Institution building of the Human Rights Council.

<sup>15</sup> The new mandate holders were given till 1 May 2008 to confirm their acceptance and formally take up their functions.

<sup>16</sup> *Thematic mandates*: Working Group on African Descent (member for Latin America/Caribbean region): Mr. Milton Nettleford (Jamaica); Working Group on Arbitrary Detention (members for African, Eastern European and Latin America/Caribbean regions): Mr. El Hadji Malick Sow (Senegal), Mr. Aslan Abashidze (Russia), Mr. Roberto Garretón (Chile); Special Rapporteur on the sale of children, child prostitution and child pornography: Ms. Najat M'jid Maala (Morocco); Working Group on Enforced or Involuntary Disappearances: Mr. Jeremy Sarkin (South Africa); Independent Expert on the effects of economic reform policies and foreign debt on the full enjoyment of human rights, particularly economic, social and cultural rights: Mr. Cephas Lumina (Zambia); Special Rapporteur on the right to food: Mr. Olivier de Schutter (Belgium); Special Rapporteur on the right to adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context: Ms. Raquel Rolnik (Brazil); Special Rapporteur on the situation of human rights defenders: Ms. Margaret Sekaggya (Uganda), a resolution extending the former mandate of the Special Representative of the Secretary-General for a period of three years as a Special Rapporteur was adopted without a vote; Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people: Mr. James Anaya (USA); Independent Expert on the question of human rights and extreme poverty: Ms. Maria Magdalena Sepulveda (Chile); Special Rapporteur on contemporary forms of slavery, including its causes and consequences: Ms. Gulnara Shahinian (Armenia). A new mandate established by the Council. *Country mandates*: Special Rapporteur on the situation of human rights in Myanmar: Mr. Tomas Ojea Quintana (Argentina); Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967: Mr. Richard Falk (USA); Independent Expert on the situation of human rights in Somalia: Mr. Shamsul Bari (Bangladesh); A draft resolution extending the mandate, whose mandate holder was previously an Independent Expert appointed by the Secretary-General, by one year, was adopted by the Council without a vote.

pointments to be considered in June 2008. In principle, mandates whose mandate holders have completed their first term of three years should not be subject to reappointment, in accordance with resolution 5/1 which states that a mandate-holder's tenure in a given function, whether a thematic or country mandate, will be no longer than six years (two terms of three years for thematic mandate-holders).

Algeria, Pakistan and the Russian Federation called for clarification of the terms of reference of the Consultative Group. Pakistan said that the rules of procedure of the Council should apply to the Consultative Group. The current selection procedure might need to be reconsidered with a view to holding elections. The Russian Federation was concerned that following the President's request, the Consultative Group submitted more names, listed according to preference, but that the President did not follow these suggestions; not all candidates had the full support of all regional groups. Switzerland recalled the advisory status of the Consultative Group.

Brazil (on behalf of GRULAC), Ecuador, Uruguay, Chile and Bolivia regretted that an Ecuadorian candidate who was on the previous list of the President for the mandate on human rights defenders had been excluded from the final list without further consultation. Turkey asked for broader consultations on the selection of mandate holders. China (on behalf of the Asian Group), regretted that the principle of equitable geographic distribution had not been respected and asked that Asian candidates be considered in the future. Chile recalled that this principle should be respected taking into consideration the geographical balance of the system overall. Canada, Israel and the United States expressed concern regarding the selection of the candidate for the mandate on the occupied Palestinian territories. Amnesty International highlighted that the Consultative Group should consult with stakeholders, in particular the current and outgoing mandate holders, and that the Consultative Group should substantiate its recommendations.

The Council has also established and adopted a Code of Conduct for mandate holders of UN human rights special procedures. This issue has been one of the most contentious in the new process established by the Human Rights Council. The first drafts prepared by Member States were considered unacceptable by the mandate holders of the special procedures. A dialogue followed between the Human Rights Council and the Coordination Committee of special procedures whereby it was possible for mandate holders to provide alternative drafting to the Code. The final version of the Code of Conduct has taken into account their views and can be considered as a moderate text dealing, among others, with principles of conduct, and accountability of man-

date holders, prerogatives, privileges and immunities, communications with governments, field visits, allegations and urgent appeals and sources of information<sup>17</sup>. The Code of Conduct was adopted in spite of the fact that a UN document regulates the rights and duties, among others, of special procedures mandate-holders<sup>18</sup>. In accordance with the Code of Conduct, *"in the fulfillment of their mandate, mandate-holders are accountable to the Council"*.

In order to save their independence and avoid situations which may request mandate-holders to respond directly to the Human Rights Council, the Coordination Committee<sup>19</sup> of the Special Procedures has adopted an Internal Advisory Procedure to Review Practices and Working Methods. This Procedure is based on the principle that self regulation is crucial to the coherence and viability of a system premised upon independence. This Procedure provides a standing mechanism for consideration of the practices and working methods of the special procedures. It seeks to seize the earliest opportunity to take action when issues are raised regarding how mandate-holders have met agreed upon standards in the performance of their duties. If a complaint is made against a mandate-holder the Coordination Committee can be seized. Where the Coordination Committee finds that the conduct of the mandate-holder threatens the integrity of the system of special procedures, the Coordination Committee will: (a) inform and provide additional guidance to the mandate-holder; (b) submit its findings to the President of the Human Rights Council, and (c) the Chair of the Coordination Committee will report to the President of the Human Rights Council on the action taken.

The special procedures is relatively recent and in continuous evolution. It covers all UN Member States. The fact finding methodology utilized by these mechanisms aims at verifying that a given situation conforms or violates the human rights norms established by the international community. The Universal Declaration of Human Rights is the fundamental instrument on which the extraconventional mechanisms rely to ap-

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<sup>17</sup> United Nations, Human Rights Council resolution 5/2, Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council. It should be noted that a Draft Manual of UN Special Procedures which accumulates the experience gained, has been elaborated throughout the years.

<sup>18</sup> United Nations Document ST/SGB/2002/9, "Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission".

<sup>19</sup> The Special Procedures mandate-holders meet annually in Geneva to coordinate their work. In 2005, in view of the transformation which was taken place with the main UN human rights organs, mandate-holders decided to set up a Coordination Committee which would act as a legitimate interlocutor with the new Human Rights Council.

praise to what extent human rights norms have been violated. However, in analyzing the situation in a given country, these bodies take into account all the international human rights treaties the given State has adhered to as well as other pertinent international instruments.

Until the establishment of the Human Rights Council in 2006, the system of extra-conventional mechanisms was fundamentally based on resolutions 1503 and 1235 (both of the Economic and Social Council), the thematic procedures of the Commission and the UN advisory services programme. In addition to the public special procedures, the Human Rights Council has established a *complaint procedure* "to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances". The Human Rights Council's complaint procedure, which is confidential, is based on Economic and Social Council resolution 1503 (XLVIII) of 27 May 1970 as revised by resolution 2000/3 of 19 June 2000.

In opposition to the mechanisms established under international human rights treaties, the special procedures result from resolutions of UN organs. In this article, we shall limit ourselves to the procedures which were set in motion by the UN Commission on Human Rights, assumed by the Human Rights Council, and considered annually since 2006 by the latter organ. The reason for this is obvious. Different UN organs may at a given point in time establish an extraconventional mechanism to investigate a given situation. This has been the case by the Security Council in relation with former Yugoslavia or Rwanda; or the peace operations regarding a given country established by the Security Council or the General Assembly. UN Specialized Agencies, such as the International Labour Organization or UNESCO, may as well establish those mechanisms at a given time finding the basis for it in their respective Constitutions which have created these organizations.

Nonetheless, those extra-conventional instruments created by other UN organs or Specialized Agencies do not constitute, as is the case for the ones established by the UN Commission on Human Rights and the Human Rights Council, a structural permanent system of special procedures recognized by the UN system. In addition, one of the most important functions of the extraconventional mechanisms is to make up for shortfalls of the conventional system of human rights protection. For these reasons we shall limit ourselves to the UN human rights special procedures. It is also worth noting that the UN Human Rights Council and the High Commissioner for Human Rights both carry out responsibilities under the two systems of international protection: the conventional and the extraconventional.

The special procedures or human rights extra-conventional mechanisms (including the confidential complaint procedure) may be classified into two main categories: *geographic mandates* which examine the situation in a given country (either through a confidential or a public procedure); *thematic mandates* which consider global issues or phenomena or specific groups of the population all over the world such as torture, arbitrary detention, education or indigenous peoples and migrant workers (only under the public procedure). In turn, the thematic mandates may be grouped as follows: (i) economic, social, cultural and solidarity rights; (ii) civil and political rights, and (iii) human rights of specific groups of the population.

Since its creation in 1994, the UN Office of the High Commissioner for Human Rights fulfils an important role in coordinating the special procedures system. In addition, the High Commissioner implements a number of protection mandates of the system. The Office of the High Commissioner for Human Rights provides these mechanisms with basic personnel and logistical assistance to support them in the discharge of their mandates.

It should be pointed out here that, in the past, both the Secretary-General and the High Commissioner for Human Rights have received mandates from the UN Human Rights Commission which, if *strictu sensu* cannot be classified as special procedures, they complement the system of special procedures. The Secretary-General has been entrusted with human rights situations in the past, such as Poland, Bougainville (Papua New Guinea) and Cyprus. The High Commissioner for Human Rights has been entrusted with the situation of human rights in Colombia, Nepal, Sierra Leone and Timor Leste. Both the Secretary-General and the High Commissioner have been informing the Commission, in the past, and the Human Rights Council since 2006 on such situations<sup>20</sup>.

The Secretary-General and the High Commissioner constitute an alternative between the confidential complaint procedure and the public procedure of a special rapporteur or independent expert which the Commission had exploited in the past when it deemed necessary, as has been the case of Sierra Leone<sup>21</sup>, or in the framework of the UN Ad-

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<sup>20</sup> In 2005 there were 27 thematic mandates and 14 country mandates integrated by independent experts.

<sup>21</sup> In its resolution 1999/1, the Commission decided at its fiftyfifth session to discontinue consideration of the human rights situation in Sierra Leone under Economic and Social Council resolution 1503 (XLVIII) and to take up consideration of the matter under the public procedure provided for by Commission resolution 8 (XXIII) of 16 March 1967 and Economic and Social Council resolution 1235 (XLII) of 6 June 1967, under the agen-

visory Services Programme in the context of geographic mandates of experts nominated directly by the Secretary-General as are the cases of Cambodia, Haiti, Liberia and Somalia to mention some. It should also be pointed out that the public procedure of special rapporteurs overlaps into the UN Advisory Services Programme by requesting the Secretary-General to nominate an independent expert on each occasion the Commission has considered that to impose a special rapporteur to a given country was a too severe sanction when there had been signs of change by the national authorities towards a democratic process.

The High Commissioner for Human Rights has also been utilized by the Commission as an additional mechanism of information and fact-finding. The best example to illustrate this point has been the case of Occupied Palestine. In 2000, the Commission decided to request to Mary Robinson, the then High Commissioner, to carry out an *in situ* mission to Occupied Palestine to inform the Commission on the prevailing human rights situation. The request was made despite the fact that there was already a Special Rapporteur informing the Commission annually about the human rights situation in Occupied Palestine.

Another example that may also serve to illustrate this viewpoint concerns the situation of human rights in the Republic of Chechnya (Russia). In 1996 the Commission, taking into account the prevailing human rights situation there, decided to request the Secretary-General to report to it. The report of the Secretary-General was submitted to the Commission in 1997. That report has been one of the few UN public documents describing what was going on in Chechnya<sup>22</sup>. The Commission attempted to debate the situation of human rights in Chechnya in public but the Russian Federation managed to block any proposal.

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da item entitled "Question of the violation of human rights and fundamental freedoms in any part of the world". The Commission requested the United Nations High Commissioner for Human Rights to apprise the Commission at its fiftysixth session of the reports of the Secretary-General about violations of human rights and international humanitarian law in Sierra Leone, including, to the extent possible, references contained in reports submitted to the Commission on Human Rights. Since 2000, the Commission has examined the reports of the High Commissioner. In 2002 the High Commissioner presented her report on Sierra Leone under document E/CN.4/2002/37. Since then she continued to submit, as requested, annual reports to the Commission. Her last report on Sierra Leone was presented in 2005 under document E/CN.4/2005/113.

<sup>22</sup> In order to describe the human rights situation in the Republic of Chechnya (Russia) the Secretary-General collected all available information throughout the United Nations programmes and bodies, its specialized agencies, the Organization for Security and Cooperation in Europe, the International Committee of the Red Cross, non-governmental organizations as well as the information furnished by the government of Russia, UN document, E/CN.4/1997/10.



The last attempt was in 2004, when a draft resolution on the situation of Chechnya was defeated in a roll-call vote.

In 2008, the Human Rights Council dealt with 40 mandates (39 public and 1 confidential) which formed the system of human rights special procedures on which the United Nations bases itself in order to apply and monitor the international human rights norms embodied in the Universal Declaration of Human Rights as well as relevant UN human rights treaties, declarations and other international instruments. The forty mandates were the following:

- A. *Geographic mandates relating to a specific country: (i) Under the confidential complaint procedure: Turkmenistan; (ii) Under the public procedure: Burundi, Cambodia, Democratic Republic of the Congo<sup>23</sup>, Democratic People's Republic of Korea, Haiti, Liberia, Myanmar, Palestinian occupied territories, Somalia, and Sudan.*
- B. *Thematic mandates dealing with global issues under the public procedure: (i) Economic, social, cultural and solidarity rights: Illicit dumping of toxics, Effects of economic reform policies, Extreme poverty, Transnational corporations, International solidarity, Right to education, Right to housing, Right to food, Right to health. (ii) Civil and political rights: Summary executions, Torture, Freedom of religion, Freedom of opinion and expression, Racism, Independence of judges and lawyers, Protection of human rights while countering terrorism. (iii) Human rights of specific groups of the population: Enforced disappearances, Arbitrary detention, Sale of children, Violence against women, Use of Mercenaries, Human trafficking, Internally displaced persons, Migrants, Indigenous peoples, Minorities, People of African descent, Human rights defenders, Contemporary forms of slavery<sup>24</sup>.*

## 1.2. *Structural elements and historical evolution*

### 1.2.1. THE COMMISSION ON HUMAN RIGHTS

From 1946 when it was established to 2006 when it was dissolved, the UN Commission on Human Rights has met annually in Geneva from March to April for a period of six weeks. During these 60 years

<sup>23</sup> The mandate of the Democratic Republic of the Congo was discontinued by the Human Rights Council at its Seventh Session in March 2008.

<sup>24</sup> On 28 September 2007 by resolution 6/14, the Council decided to appoint a Special Rapporteur on contemporary forms of slavery.

the Commission has been the UN organ which has set standards to govern the conduct of States, but it has also acted as a forum where countries large and small, non-governmental groups and human rights defenders from around the world were able to voice their concerns.

The Commission was composed of 53 States Members of the United Nations<sup>25</sup>. Over 3,000 delegates from member and observer States and from non-governmental organizations participated at its sessions. During its regular annual session, the Commission adopted some hundred resolutions, decisions and Chairperson's statements on matters of relevance to individuals in all regions and all types of circumstances. These resolutions and decisions were adopted by the simple majority of the 53 members of the Commission (the only ones with the right to vote). A number of the resolutions and decisions established the subsidiary bodies of the extra-conventional mechanisms: the *special procedures*. The mandates, competencies, sources of information to be used, objectives the reports should aim at, length of the mandate etc... were all spelled out in those resolutions. The Economic and Social Council (ECOSOC) in turn had to endorse the Commission's resolutions, in particular in order to approve the expenditures incurred by the mandates of the subsidiary bodies.

The resolutions adopted by the UN Commission and ECOSOC constituted the juridical basis permitting the creation of fact-finding subsidiary extraconventional bodies. In establishing such subsidiary bodies the aim of the Commission was to assist in better fulfilling the objectives and principles of the UN Charter. At the same time Member States of the Organization, pursuant to Article 55 of the Charter, must cooperate with the United Nations in order to attain such objectives and adhere to its principles among which the "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

In pursuance to their respective mandates the independent experts of the special procedures presented every year reports to the Commission on Human Rights regarding specific countries or issues. On these occasions, the Commission decided whether it was necessary to broaden the mandates, to change or to terminate them. The Commission examined and discussed the reports of the special procedures under all the substantive items of its agenda.

Members of the Commission, observer States, and intergovernmental as well as non-governmental organizations with consultative

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<sup>25</sup> The geographical distribution of the 53 States members of the Commission is as follows: Africa (15); Asia (12); Western Europe and other countries (10); Eastern Europe (5); Latin America and Caribbean (11).

status with the United Nations could intervene in the discussions regarding given human rights situations. NGOs often provided the testimony of victims of human rights violations in addition of presenting written and oral information. Formal and informal consultations and negotiations followed these discussions regarding the language and terminology which would be used in the elaboration of the draft resolutions to be adopted by the Commission. The text of these resolutions constituted the recommendations the international community addressed to a given government (or to deal with a particular world issue) to improve a specific human rights situation. Draft resolutions were in general approved by consensus without a vote. In many cases, however, a vote was needed and often a roll-call vote. In the cases where a resolution had been adopted with a vote the moral sanction was even greater due to the fact that the interested government had not showed any disposition to cooperate with the Commission.

The place in the Commission's agenda under which the special procedures were considered was related to the type of phenomenon the subsidiary body had to study and monitor. But it was also in relation to the type of message the Commission wished to send to the international community. A hierarchy was, thus, established which started at the top with the mandates that were considered under the most important items in terms of the gravity of human rights violations (items 9, 10 and 11) down at the bottom to the items that dealt with issues of human rights promotion and advisory services and technical cooperation (items 17 and 19) going through items such as colonial, alien or foreign occupation and the right to development (political items which were dealt with at the beginning of the work of the Commission as a concession to Third World countries) and items relating to the human rights of specific groups of the population.

The case of Colombia, which was examined under a procedural item 3 dealing with the organization of the work of the session, was not unique and is of special interest. The situation of human rights in Colombia in the new Human Rights Council is considered under agenda item 2 dealing with the Annual report of the UN High Commissioner for Human Rights. At the time of the Commission this represented a concession to some reluctant States to cooperate and debate their situations in public, particularly under an agenda item which would indicate grave violations. The Colombian Government would have never accepted to discuss the report of the High Commissioner on the situation in that country under a substantive item touching grave violations of human rights. The agenda item dealing with the organization of the work of the session did not evoke a situation of mass and grave viola-

tions and this is the reason why it had been accepted by the Colombian authorities. In the past, under such item 3, other grave situations of human rights had also been dealt with such as those occurring in Burundi, Chechnya (Russia), Guatemala, Somalia, Sudan and Togo.

A hierarchy existed as well in the designation of the mandate holder of a special procedure. In establishing a subsidiary extra-conventional body, the Commission could nominate or request the Secretary-General to nominate a special rapporteur, a representative, an envoy, a working group, or an expert. The nomination of a mandate holder was made by the Chairperson of the Commission after consultations with its Bureau<sup>26</sup>. In general, the designation of a special rapporteur of the Commission together with the consideration of his(her) report under item 9 of the agenda (geographic mandates) implied the greatest sanction to a given country. A sanction less severe resulted when the mandate holder was an envoy, representative or expert and even less severe when was nominated by the Secretary-General and not by the Commission. In theory, the most favorable reports for a given country under scrutiny were supposed to be those emanating from experts nominated by the Secretary-General in order to assist a Government (item 19) coming out from a period of grave human rights violations and entering into the consolidation of a democratic process.

On the other hand, one could also expect that the reports of special rapporteurs established under item 9 of the Commission's agenda would convey the strongest criticism to the authorities of a State committing or permitting by omission grave human rights violations. Those theoretic criteria, however, had nothing to do with the personality of the mandate holder who disposed of a great liberty to elaborate his/her report in accordance with his/her appreciation and evaluation of the situation on the basis of the information that had been gathered. Thus, for instance, there have been reports written by the Special Rapporteur on Guatemala (those of Lord Colville), nominated by the Commission, which were very favorable to the Government of Guatemala and widely criticized by human rights non-governmental organizations. Conversely, the reports of the expert (Mónica Pinto) on Guatemala, nominated by the Secretary-General in order to facilitate advisory services and assistance to the authorities of that country, constituted a very objective analysis of what was going on in Guatemala, a strong criticism to the Government and were always well received and endorsed by the

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<sup>26</sup> For the selection and appointment of mandate holders of the human rights special procedures of the Human Rights Council see *supra*.

Guatemalan civil society<sup>27</sup>. Both experts examined the same situation, but each of them through a prism of different personal values.

At this juncture, it is worth underlining that some mandates such as Haiti and Equatorial Guinea, following the political pressures under given circumstances at the moment when the Commission was in the process of adopting the decision to assign a mandate, have seen the appointment of a special rapporteur, then that of an expert to come back to a rapporteur, and finalized with an expert. Equatorial Guinea, for example, had a special rapporteur in 1979 and 1980, then an expert to provide assistance to the Government from 1981 to 1993. The mandate was transformed in that of a special rapporteur from 1993 to 2001 to finalize with an expert in 2002. All this was carried out independently of the human rights situation in the country which had not ameliorated in the course of those 23 years.

In general, for a given mandate the Commission appointed an independent expert from other region and preferably from a country which had hardly any links (political, economic, financial, commercial etc...) with the country in question. The mandate holders had themselves emphasized that there should not be any links between a given region and any particular mandate. However, this has not always been the case. The United Kingdom was extremely active in the nomination by the Commission of the Special Rapporteur on Guatemala. The reason behind such interest may be attributed to the conflict prevailing at the time between Guatemala and Belize, a former UK colony<sup>28</sup>. Another example that may be cited is that French experts have regularly been assigned to carry out the mandate on Haiti, a former French colony<sup>29</sup>.

### 1.2.2. THE HUMAN RIGHTS COUNCIL

As has been pointed out, the reports of the special procedures constituted the main elements for the Commission on Human Rights to consider human rights situations and issues in different parts of the world. In the new Human Rights Council the situation is different on

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<sup>27</sup> The same judgement could be applied to the Independent expert on the situation of human rights in Afghanistan, Professor Cherif Bassiouni. Apparently, his independent views were not appreciated by the United States and some members of the Commission, who managed to terminate his mandate in 2005.

<sup>28</sup> For the appointment of Lord Colville as Special Rapporteur on Guatemala see GUEST, I.: *Behind the Disappearances: Argentina's dirty war against human rights and the United Nations*, University of Pennsylvania Press, 1990.

<sup>29</sup> The present expert L. Joinet is a French national but two others French experts were already assigned with the Haiti mandate in the past.

various accounts. Firstly, the Office of the High Commissioner has increasingly been given more mandates to study and report on a number of issues and human rights situations. Under agenda item 3 of the new Human Rights Council, the High Commissioner presents her annual report as well as reports of her Office and of the Secretary-General. Out of 45 reports the High Commissioner presented in 2008, seven were dealing with specific country situations (Afghanistan, Colombia, Cyprus, Democratic People's Republic of Korea, Cambodia, Sierra Leone and Nepal) and over 20 with civil, political, economic, social and cultural human rights issues.

The second and more fundamental development with the new Human Rights Council has been the adoption of a new mechanism, the *universal periodic review*, which permits the new organ to consider the human rights situation in each of the 192 Member States of the United Nations. The Council has adopted a periodicity procedure whereby every four years it will be in a position to have examined the situation worldwide. The Council has started to consider during a four year term periodicity the situation in the 192 Member States. In 2008, it started to examine by groups of three, each one comprising 16 individual countries<sup>30</sup>, reports dealing with the situation in 48 countries. If the Council keeps this periodicity, the situation of each of the 48 countries considered in 2008 will be reviewed next time in 2012<sup>31</sup>.

The special procedure mechanism will continue to be a substantial part in the evaluation by the Human Rights Council of human rights situations and phenomena. However, the mechanism of the universal periodic review of the human rights situation in the 192 Member States of the United Nations will undoubtedly affect the special procedures. The reports of the special procedures will serve to a large extent as reference material for the documents to be elaborated for the universal periodic review of countries. The universal periodic review is based on three types of documents: (a) a 20 page national report prepared by the State concerned; (b) a 10 page compilation prepared by the Office of the High Commissioner for Human Rights of the information contained in the reports of treaty-bodies, special procedures, including observations and comments by the State concerned, and other relevant official UN

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<sup>30</sup> The first group of 16 countries in 2008 comprised: Bahrain, Ecuador, Tunisia, Morocco, Indonesia, Finland, United Kingdom, India, Brazil, Philippines, Algeria, Poland, Netherlands, South Africa, Czech Republic and Argentina.

<sup>31</sup> A similar mechanism was introduced in the 1950s by the UN Commission on Human Rights after the adoption of the Universal Declaration of Human Rights, but it did not work then.

documents; (c) a 10 page summary, prepared by the Office of the High Commissioner for Human Rights, of additional, credible and reliable information provided by other relevant stakeholders. This will have to be taken into account by special procedures mandate holders when they draft their respective reports. The universal periodic review is going to affect the presentation of their reports, particularly summaries and recommendations since the shorter, the more perceptible and remarkable they are, the more chances they will have to be included in the 10 page summary prepared by the Secretariat.

The Human Rights Council has followed the same pattern than the Commission on Human Rights. The reports presented by the mandate-holders of the special procedures are, thus, considered under different agenda item as follows: *Item 3, Promotion and protection of all human rights (a) Economic, social and cultural rights including the right to development* (right to food, right to health, right to housing, right to education, effects of economic reform policies, extreme poverty, dumping of toxic wastes); *(b) Civil and political rights* (enforced disappearances, summary executions, torture, freedom of religion, freedom of opinion and expression, independence of judges and lawyers); *(c) Rights of peoples and specific groups and individuals* (violence against women, sale of children, migrants, minorities, human rights defenders, indigenous peoples, internally displaced persons); *(e) Interaction of human rights and thematic issues* (use of mercenaries, trafficking in persons, international solidarity, contemporary forms of slavery, transnational corporations, protection of human rights while countering terrorism). *Item 4, Human rights situations that require the Council's attention*<sup>32</sup> (Myanmar, Democratic People's Republic of Korea, Sudan). *Item 7, Human rights situation in Palestine and other occupied Arab territories. Item 8, Racism, racial discrimination, xenophobia and related forms of intolerance* (racism, people of African descent). *Item 10, Technical Assistance and capacity building* (Democratic Republic of the Congo, Somalia, Cambodia, Liberia, Haiti).

### 1.3. The Confidential Complaint Procedure

The complaint procedure established by the Human Rights Council is based on Economic and Social Council resolution 1503 (XLVIII) of 27 May 1970 as revised by resolution 2000/3 of 19 June 2000. It addresses consistent patterns of gross and reliably attested violations of

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<sup>32</sup> The most serious human rights situation, with the exception of Palestine which has its own agenda item, are considered by the Council under item 4 which has replaced agenda item 9 of the Commission.

all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances. According to the Council, this procedure has retained its confidential nature with a view to enhancing cooperation with the State concerned.

This confidential procedure, the oldest human rights complaint mechanism in the United Nations, has influenced the system of extra-conventional instruments at its outset between 1970 and 1980, in a phase which preceded the adoption of the specific geographic country mandates under the public procedure. All the countries which at a given point were assigned under the public procedure to a subsidiary body had been previously been scrutinized under the 1503 confidential procedure. Such were the cases for Afghanistan, Bolivia, Chile, Equatorial Guinea, El Salvador, Guatemala and Iran.

The new confidential complaint procedure of the Human Rights Council allows the United Nations to continue to receive and examine individual human rights complaints. Any individual or group claiming to be the victim of such human rights violations may submit a complaint, as may any other person or group with direct and reliable knowledge of such violations. When an NGO submits a complaint, it must be acting in good faith and in accordance with recognized principles of human rights. The organization should base the allegation on reliable direct evidence of the situation it is describing. However, the complaints are not examined individually but to the extent they configure a *situation* that appears to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms in a given country or region. The new complaint procedure, as was the case with the 1503 confidential procedure, follows several phases within an annual cycle between the sessions of the Human Rights Council.

Two distinct working groups deal with the complaints: the Working Group on Communications and the Working Group on Situations. They examine the communications and bring to the attention of the Council consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms. These two Working Groups work, to the greatest possible extent, on the basis of consensus. In the absence of consensus, decisions are taken by simple majority of the votes. They may establish their own rules of procedure.

The members of the Working Group on Communications are five members of the Human Rights Council Advisory Committee<sup>33</sup> (which

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<sup>33</sup> At the time of writing this article the Council's Advisory Committee had yet to be elected and set up. The Advisory Committee of the Human Rights Council is the body which has to nominate the five members of the Group on Communications.



replaces the Sub-Commission on Human Rights) designated for three years. This Group decides on the admissibility of a communication and assess the merits of the allegations of violations, including whether the communication alone or in combination with other communications appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms.

The Chairperson of the Working Group on Communications is requested, together with the Secretariat, to undertake an initial screening of communications received, based on the admissibility criteria, before transmitting them to the States concerned. Manifestly ill-founded or anonymous communications are screened out by the Chairperson and are therefore not transmitted to the State concerned. In a perspective of accountability and transparency, the Chairperson of the Working Group on Communications provides all its members with a list of all communications rejected after initial screening. This list should indicate the grounds of all decisions resulting in the rejection of a communication. All other communications, which have not been screened out, are transmitted to the State concerned, so as to obtain the views of the latter on the allegations of violations.

The Group on Communications has to decide what communications may be accepted for examination on the basis of the following criteria: (a) the allegation is not manifestly politically motivated and its object is consistent with the Charter of the United Nations, the Universal Declaration of Human Rights and other applicable instruments in the field of human rights law; (b) it gives a factual description of the alleged violations, including the rights which are alleged to be violated; (c) its language is not abusive. However, such a communication may be considered if it meets the other criteria for admissibility after deletion of the abusive language; (d) it is submitted by a person or a group of persons claiming to be the victims of violations of human rights and fundamental freedoms, or by any person or group of persons, including non-governmental organizations, acting in good faith in accordance with the principles of human rights, not resorting to politically motivated stands contrary to the provisions of the Charter of the United Nations and claiming to have direct and reliable knowledge of the violations concerned. Nonetheless, reliably attested communications shall not be inadmissible solely because the knowledge of the individual authors is second-hand, provided that they are accompanied by clear evidence; (e) it is not exclusively based on reports disseminated by mass media; (f) it does not refer to a case that appears to reveal a consistent pattern of gross and reliably attested violations of human rights already being dealt with by a special procedure, a treaty body or other United Nations or similar regional complaints proce-

dures in the field of human rights; (g) domestic remedies must have been exhausted, unless it appears that such remedies would be ineffective or unreasonably prolonged. National human rights institutions, established and operating under the Principles Relating to the Status of National Institutions (the Paris Principles), in particular in regard to quasi-judicial competence, may serve as effective means of addressing individual human rights violations.

The Working Group on Communications decides on the admissibility of a communication and assesses the merits of the allegations of violations, including whether the communication alone or in combination with other communications appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms. The Working Group on Communications provides the Working Group on Situations with a file containing all admissible communications as well as recommendations thereon. When the Working Group on Communications requires further consideration or additional information, it may keep a case under review until its next session and request such information from the State concerned. The Working Group on Communications may decide to dismiss a case. All decisions of the Working Group on Communications shall be based on a rigorous application of the admissibility criteria and duly justified.

As with the Working Group on Communications, the proceedings of the Working Group on Situations are confidential and based on written material only, so that neither Governments nor complainants appear before it. Governments are advised of the decisions of the Working Group, including any recommendations made to the Commission. Members of the Working Group on Situations are appointed by each Regional Group of States of the Council. They serve in their personal capacity.

The Working Group on Situations is requested, on the basis of the information and recommendations provided by the Working Group on Communications, to present the Council with a report on consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms and to make recommendations to the Council on the course of action to take, normally in the form of a draft resolution or decision with respect to the situations referred to it. When the Working Group on Situations requires further consideration or additional information, its members may keep a case under review until its next session.

Both Working Groups meet at least twice a year for five working days each session, in order to examine the communications received, including replies of States thereon, and the situations of which the Council is already seized under the complaint procedure.

The State concerned must cooperate with the complaint procedure and make every effort to provide substantive replies in one of the United Nations official languages to any of the requests of the Working Groups or the Council. The State concerned has also to make every effort to provide a reply not later than three months after the request has been made. If necessary, this deadline may however be extended at the request of the State concerned. The Secretariat is requested to make the confidential files available to all members of the Council, at least two weeks in advance, so as to allow sufficient time for the consideration of the files.

The Council considers consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms brought to its attention by the Working Group on Situations as frequently as needed, but at least once a year. The reports of the Working Group on Situations referred to the Council are examined in a confidential manner, unless the Council decides otherwise.

The Council has the following options when situations come before it; it may:

- (a) Discontinue it, considering the situation when further consideration or action is not warranted<sup>34</sup>;
- (b) Keep the situation under review and request the State concerned to provide further information within a reasonable period of time<sup>35</sup>;
- (c) Keep the situation under review and appoint an independent and highly qualified expert to monitor the situation and report back to the Council<sup>36</sup>;
- (d) Discontinue reviewing the matter under the confidential complaint procedure in order to take up public consideration of the same<sup>37</sup>;
- (e) Recommend to OHCHR to provide technical cooperation, capacity building assistance or advisory services to the State concerned.

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<sup>34</sup> The Commission had taken such decision regarding Mozambique, Gabon, Japan, Malaysia, Pakistan and Venezuela.

<sup>35</sup> This had been the decision taken by the Commission regarding East Germany, Argentina, Indonesia, The Philippines and Turkey

<sup>36</sup> At the time, the Commission had requested the Secretary-General to offer his good offices with the governments of Ethiopia, Equatorial Guinea, Haiti, Paraguay and Uruguay.

<sup>37</sup> The Commission took that option regarding Afghanistan, Bolivia, Chile, Equatorial Guinea, El Salvador, Guatemala, Haiti, Iraq, Iran and Zaire.

The Commission on Human Rights, in the course of 30 years (1974-2004), examined the human rights situation in 84 countries under the old 1503 confidential procedure. The geographical distribution was as follows: Africa (27), Asia (28), Eastern Europe (10), Latin America and Caribbean (15) and Western European and other countries (4). Table 1 provides additional information on the countries examined under the old 1503 confidential procedure.

**Table 1**

Countries examined under the 1503 Confidential Procedure during the period 1974-2004

Africa	Asia	Eastern European countries	Latin America and Caribbean	Western European and other countries
Benin	Afghanistan	Albania	Antigua/Barbuda	Germany
Bostwana	Bahrain	Armenia	Argentina	Portugal
Burundi	Brunei/Durassalam	Azerbaijan	Bolivia	United Kingdom
Central African Republic	Myanmar	Czech Republic	Brazil	United States
Chad	Indonesia	Estonia	Chile	
Democratic Republic of Congo	Iran	German Democratic Republic	El Salvador	
Djibouti	Iraq	Latvia	Grenade	
Equatorial Guinea	Israel	Lithuania	Guatemala	
Ethiopia	Japan	Moldova	Guyana	
Gabon	Cambodia	Slovenia	Haiti	
Gambia	Republic of Korea		Honduras	
Kenya	Kuwait		Paraguay	
Liberia	Kyrgyzstan		Peru	
Malawi	Lao Peoples Republic		Uruguay	
Maldives	Lebanon		Venezuela	
Mali	Malaysia			
Mozambique	Nepal			
Nigeria	Pakistan			
Popular Republic of the Congo	Philippines			
Rwanda	Saudi Arabia			
Sierra Leone	Syria			
Somalia	Thailand			
Sudan	Turkey			
Togo	United Arab Emirates			
Tanzania	Uzbekistan			
Uganda	Viet-Nam			
Zambia	Yemen			
Zimbabwe				

The practice shows that for some countries such as Haiti, Myanmar, Paraguay, The Philippines, and Uzbekistan, the Commission resorted to nominate special representatives or independent experts to deal with the situation. In other cases, such as Uruguay, the Commission requested the Secretary-General to have direct contacts with the authorities and exert his "good offices" in order to obtain additional information.

Recently, at the request of the Governments concerned, the documentation examined by the Commission on Human Rights under the confidential 1503 procedure in relation to the situation of human rights in the following countries, was made public: Argentina, examined between 1980 and 1985; Uruguay, examined between 1978 and 1985; Paraguay, examined between 1978 and 1990.

Historically the 1503 confidential procedure represented, when it was established, a considerable advance in the protection of human rights. For the first time a mandate permitted an international permanent mechanism to examine individual complaints, in spite of the fact that the procedure was incomplete and had a number of limitations due to its confidential character and the strong criteria of admissibility. However, governments soon started to utilize this confidential procedure while at the same time they continued to violate human rights. Theo van Boven, while he was responsible of the UN Division of Human Rights, did not hesitate to raise the question as to whether certain procedures were not in "danger of becoming screens of confidentiality to prevent cases discussed thereunder from being aired in public"<sup>38</sup>.

As the public procedure was set in motion, one could have thought that the confidential procedure had no reason to continue and that it could very well be replaced. However, for obvious political reasons States prefer the confidential procedure, which offers them more guarantees throughout all the phases of the inquiry. Also, at the time of the revision of the 1503 confidential procedure, in 1999 in order to enhance the effectiveness of the work of the Commission, many voices advocated for the suppression of the confidential procedure. Nevertheless, the confidential procedure remained with some improvements. The upgrading of the Commission to a Human Rights Council provided yet another excellent occasion for discontinuing the 1503 confidential procedure. Instead, it made some changes and renamed it the Complaint Procedure.

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<sup>38</sup> VAN BOVEN, TH.: *People Matter: Views on International Human Rights Policy*, Meulenhoff, Amsterdam, 1982.

## 1.4. *The Public Special Procedures*

### 1.4.1. GEOGRAPHIC MANDATES

By 1967, the Commission on Human Rights had behind it more than twenty years of work but had not yet been able to set up a protection mechanism enabling the UN to receive and examine individual complaints alleging human rights violations publicly. The adoption of Economic and Social Council resolution 1235 (XLII) establishing for the first time a public procedure permitted to fill up this important gap. Already in 1963, the General Assembly had set up a mandate of a group of independent experts on South Viet-Nam led by the then Chairman of the Commission in order to investigate the discriminations and persecutions the Buddhist community was suffering. Within this context, one may say that the mandate on South Viet-Nam is a precursor to the public procedure triggered off by 1235 resolution.

Economic and Social Council resolution 1235 (XLII) was the reply of the international community to the problem posed by the individual complaints which arrived to the United Nations regarding issues such as *apartheid* and racial discrimination in Rhodesia and South Africa which could not be treated anymore in a confidential manner<sup>39</sup>.

Under this resolution, the Commission on Human Rights and its Sub-Commission<sup>40</sup> were authorized to examine the information contained in the lists elaborated by the Secretary-General, in accordance with ECOSOC resolution 728 (XXVIII), relating to gross violations of human rights and fundamental freedoms, such as the policy of *apartheid* carried out in South Africa.

The getting under way of resolution 1235 coincided with the process of decolonization and the arrival to the United Nations of recently independent countries from Africa and Asia. The membership of the Commission on Human Rights itself had been reshaped in 1966. Until

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<sup>39</sup> It is in the context of decolonization that the Commission on Human Rights started to recover its authority regarding human rights violations. In fact, it was the Committee on Decolonization established by General Assembly resolution 1514 (XV) who exhorted the Commission on Human Rights in 1965 to consider individual petitions concerning human rights violations in the territories under Portuguese administration as well as in South Africa, and South Rhodesia. ECOSOC would in March 1966 authorize the Commission to consider as a matter of urgency and importance the question of "human rights violations and fundamental freedoms... in all countries" (ECOSOC resolution 1102 (XL)).

<sup>40</sup> Following the changes introduced in 2000, the Sub-Commission could not examine anymore human rights violations occurring in a given country except under the 1503 confidential procedure.

then the Western European and other countries had a comfortable majority among its 21 members. With the new membership introduced in 1966 the Commission was enlarged to 32 members, 20 of which were representatives of the former African and Asian colonies. No sooner their independence obtained than these countries gave the highest priority and concerns to the human rights situation in Southern Africa and in the Palestinian occupied territories by Israel. The new members were determined to empower the Commission with matters of racism and racial discrimination giving higher priority to the extraconventional mechanisms of the Commission than to the conventional instruments which were still being elaborated. Both issues would become permanent items of the Commission's agenda. The first mandates to be adopted by the United Nations were the Group of Experts for Southern Africa and the Special Committee to investigate Israeli Practices Affecting the Human Rights of Palestinians and Other Arab Peoples in Occupied Territories.

The decisive argument leading to the creation of the two subsidiary bodies was the relation between the grave human rights violations in these two regions and the fact that such situations represented a threat to peace and international security.

At its beginning, the new public procedure was narrowly connected to matters of colonization. The Commission, thus, limited itself to examine situations of human rights violations in Southern Africa and in the Arab Territories Occupied by Israel. In 1975, a qualitative change intervened. The public procedure was then utilized by the Commission to establish new mandates in order to examine situations in Latin America, African, Asian and Eastern European countries. Under the public procedure the Commission considered the situation in some 36 countries and regions (mandates assigned to the Secretary-General and the High Commissioner have been taken into consideration). However, this figure does not even correspond to half of the 84 countries that have been examined under the 1503 confidential procedure as shown in Table 1 above.

In 1975, a decisive threshold was crossed when a special procedures mandate was established to investigate the human rights situation in Chile after the coup d'état and the overthrow of the constitutionally elected Government of Salvador Allende. Following a recommendation of the Sub-Commission shocked by the crimes, enforced disappearances, arbitrary detention and other grave violations perpetrated by the new authoritarian regime, the Commission decided to establish a working group to investigate the situation in Chile. In 1978 a special rapporteur replaced the working group. The mandate was carried out till 1990, at which time the Commission terminated the mandate as Chile

had constitutionally elected a new Government and entered into a democratic process.

The new impetus attained with the development of the Chile mandate completely transformed the special procedures public mechanism. As a matter of fact, in doing so the Commission became aware that the public mechanism allowed investigating human rights situations all over the world. A perspective that was unimaginable in the initial framework of that procedure. Following the mandate on Chile, special procedures mechanisms were set up to consider human rights situations in Cyprus, Equatorial Guinea, Bolivia, El Salvador, Poland, Guatemala, Iran, Afghanistan, Cuba, Haiti, Romania, Occupied Kuwait, Iraq, Former-Yugoslavia, Myanmar, Sudan, Occupied Palestine, Cambodia, Bougainville (Papua New Guinea), Zaire/Congo, Somalia, Rwanda, Burundi, Colombia, Chechnya (Russia), Timor Leste, Nigeria, Sierra Leone, Liberia, Belarus, North Korea, Chad and Nepal.

Four different types of situations have been identified within which the geographic subsidiary bodies were mandated to monitor: (a) illegal occupation, situations which amount to a breach of Article 2.4 of the UN Charter; (b) internal armed conflicts; (c) transitional situations which include those arising after changes leading to a democracy after years of military rule; (d) normal situations in which the root causes of gross human rights violations are to be ascribed to factors which are intrinsic to the policy and culture of a given State<sup>41</sup>.

Although the character of those mandates was essentially humanitarian, a sanction was imposed by the international community each time a country mandate was created. Most government perceived them as an accusation and tried to avoid them. Those mandates constituted a means in the hands of the international community allowing to help people suffering grave human rights violations and try to find an urgent solution to those crisis. At the same time the international community could justify the withdrawal of economic aid by the fact that a given country had been imposed a human rights special procedure by the UN Commission on Human Rights.

Those procedures were conceived at its beginning not to take care of individual situations but to deal with global situations of grave and massive human rights violations. However, as those mechanisms were set in motion and started to investigate given situations a conceptual separation was made as to how to apply the 1503 confidential proce-

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<sup>41</sup> NIFOSI, I.: *The UN Special Procedures in the Field of Human Rights*, Intersentia, Antwerp, 2005.



ture (global situations) and the 1235 public procedure (which was taking care of both concrete cases through the individual and urgent actions as well as of global situations).

During the Commission on Human Rights, as it is now the case since the Human Rights Council was established, the public special procedure differs in many aspects from the confidential procedure, in particular:

- It is public. Their reports are widely distributed and examined (by the Commission on Human Rights at the time), by the Human Rights Council at present, the General Assembly or both in open and public sessions;
- The admissibility criteria are very flexible. It is not necessary, for instance, to have used and have exhausted all domestic remedies. It corresponds to the relevant special procedure mandate holder to establish the pertinent criteria as well as its internal rules of procedures to fulfil the mandate;
- The sources of information that the mandate-holders established under the public procedure may consult are more diverse and ample than the ones of the confidential procedure;
- The consent of the interested State, compulsory for the confidential procedure, is not needed. It is true that it is always desirable in order to obtain a better cooperation to have the consent of a given government, but it is not essential.
- The geographic mandates of the public procedures mechanism are temporary mandates which were generally renewed every year by the Commission. The Human Rights Council appoints geographic mandate-holders for three years and may renew them once for other three years.

At the time of the Commission not only the 53 States members of the Commission could participate in the debates but also all UN Member States in their quality of observers, the intergovernmental and the non-governmental organizations with a special status with UN. This is now the case with the Human Rights Council, though the rules have become much stricter regarding the time of interventions. The participation of civil society through NGOs has been of vital importance. It has permitted not only to provide publicly relevant information concerning what was going on at a given point in time in a specific country, but has also allowed to bring to Geneva victims of human rights violations to testify before the Commission.

Summarizing, one may state that with the public procedure the Commission equipped itself with an efficient mechanism to protect human rights on the basis of the reports prepared by the geographical

special procedures of investigation. As it has been already pointed out such bodies could be established without the consent of the interested State. The sources of information are not limited and the geographical mandates may interview witnesses as well as victims and consult official governmental documents without applying narrow criteria of admissibility to exhaust the domestic remedies.

The confidential procedure and the public procedure share some common elements such as the sending of allegations of violations to the respective governments to enable them to make the relevant observations; the visits *in situ* in order to better evaluate a given situation; the interviewing of the victims and witnesses, or the sending of humanitarian individual and urgent actions.

**Example of a subsidiary organ established  
under a special procedure geographic mandate: Afghanistan**

Since 1982, the situation of human rights in Afghanistan has been under review at the Commission on Human Rights. In 2003, the Commission established a new mandate whereby it requested the Secretary-General to appoint an independent expert. Since his appointment, the independent expert has conducted two missions to Afghanistan, conducted extensive research and engaged in a broad array of consultations.

In his last report<sup>42</sup> the expert indicated that Afghanistan was currently engaged in a complex process of national reconstruction and development following more than 23 years of sustained and highly destructive conflict within a general context of extreme poverty, limited resources and stagnated development. The initial phase of democratic transition was coming to a close with significant advances in nation-building, a new constitution, presidential elections, and establishment of a national human rights institution, upcoming parliamentary elections, and a growing overall sense of State legitimacy. However, the long-term success of the country's political transition, he pointed out, required significant and immediate attention to the rule of law, justice and human rights in order to assist Afghan society in processing claims and disputes, addressing past atrocities, preventing future violations, and enabling the State to consolidate its role as the primary guarantor of security, stability and fundamental rights.

The independent expert welcomed progress made in the protection of human rights and the development of national capacity as well as the commitment of the Government to implement policies that respect human rights norms, despite limited resources. However, he indicated an array of continuing violations including: repressive acts by factional commanders; ar-

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<sup>42</sup> United Nations document, E/CN.4/2005/122.

bitrary arrest and other violations by State security forces, including intelligence entities; unregulated activities of private security contractors; severe threats to human rights posed by the expanding illegal drug industry; sub-standard conditions in prisons; egregious violations of women's rights by the State and as related to an array of social practices; abuses linked to customary law decisions; violations of children's rights; inadequate attention to the disabled; land claims and other issues faced by returning refugees and internally displaced persons; and arbitrary arrest, illegal detentions and abuses committed by the United States-led Coalition forces.

The independent expert drew attention to a number of pressing human rights issues that demand the immediate attention of the Government and the international community, including: (a) The continued power and influence of factional commanders<sup>43</sup> involved in illegal land seizures, extortion and intimidation; (b) Arbitrary arrest and routine violations of the administration of justice by the Afghan National Police (ANP); (c) The absence of due process in the arrest and detention of persons and the use of torture by various government intelligence entities, including those associated with the National Security Directorate, the Ministry of Defence and the Ministry of the Interior; (d) Unregulated activities of private security contractors who have been associated with a variety of human rights violations; (e) Severe threats to national security and the protection and promotion of human rights posed by the rapidly expanding illegal drug industry, which fuels corruption and provides significant economic power to factional commanders and others; (f) Conditions in prisons, particularly with regard to women and children, which violate the United Nations Standard Minimum Rules for the Treatment of Prisoners and other human rights instruments. While some improvements had been made at Pol-e Charkhi since his last visit, other detention facilities displayed appalling conditions that demanded immediate attention; (g) Egregious violations of women's human rights including improper arrest and detention, violations of due process rights, severe limitations on women's access to justice, and high levels of violence against women, especially domestic violence; (h) Elements of customary law that represent human rights violations, including the continued practise of private detentions as punishment for women and the transfer of women through forced marriages as compensation for killings; (i) Trafficking in children, abusive child labour and other violations of children's human rights; (j) Inadequate attention, services, and rights for the disabled; (k) Problems faced by returning refugees and internally displaced persons related to land claims, institutional corruption, abuse and violence, often at the hands of factional commanders; (l) Actions by United States-led Coalition forces that

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<sup>43</sup> "Factional commanders" refers to individuals who retain command and control over irregular forces that vary in size, strength and relation to ethnic and/or tribal systems, and continue to engage in violent activities that threaten or challenge the legal rule of the State.

appear to be unregulated by a Status of Forces Agreement (SOFA), including arbitrary detentions under conditions commonly described as constituting gross violations of human rights law and grave breaches of international humanitarian law.

Regarding this last issue the independent expert had received reports of serious violations by the Coalition forces from victims, AIHRC, NGOs and others. These acts included forced entry into homes, arrest and detention of nationals and foreigners without legal authority or judicial review, sometimes for extended periods of time, forced nudity, hooding and sensory deprivation, sleep and food deprivation, forced squatting and standing for long periods of time in stress positions, sexual abuse, beatings, torture, and use of force resulting in death. While it was difficult to confirm many of these allegations, a number of incidents had been publicly reported. Of particular significance were the cases of eight prisoners who had died while in United States custody in Afghanistan<sup>44</sup>. The independent expert highlighted the importance of immediately investigating these and other cases. Coalition forces - and, reportedly, PSC - detained individuals at American bases at Bagram, Kandahar and outposts, and were believed to hold individuals at a number of additional undisclosed locations. International NGOs estimated that over 1,000 individuals had been detained, often after being arrested with excessive or indiscriminate force. Detention conditions were reported as below human rights standards set by the Geneva Conventions and the United Nations. While the International Committee of the Red Cross (ICRC) visits detainees at Bagram and Kandahar, they do not have access to individuals held at other locations. An internal Pentagon investigation of detentions in Afghanistan, conducted by Brig. Gen. Charles H. Jacoby, had been completed but the report remained classified, unlike similar reports on abuses in Iraq<sup>45</sup>. The independent expert had received accounts of actions that fall under the internationally accepted definition of torture. For example, a district governor from Paktia province who was assisting the Coalition forces was arrested, gagged, hooded and taken to a base in Urgan, where he was beaten, forced to stand in a stress position for a prolonged period of time, exposed to the cold, and denied food and water. He also reported the torture and sexual abuse of up to 20 other persons. When his identity was confirmed five days later, he was released, although the fate of the other detainees remained unclear. An in-

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<sup>44</sup> See *"Enduring Freedom": Abuses by US Forces in Afghanistan*, Human Rights Watch, March 2004; "An Open Letter to US Secretary of Defense Donald Rumsfeld" by Human Rights Watch, 13 December 2004; "US Investigates 8 Afghan Prison Deaths", released by the Associated Press on 13 December 2004.

<sup>45</sup> Accounts in the press and by victims corroborate the common use of excessive force by United States forces at different locations, suggesting that techniques used in Afghanistan are related to general patterns of abuse developed for the "war on terrorism", used in Iraq and Guantanamo Bay and linked to the abuse scandal at the Abu Ghraib prison. Available United States Government reports have confirmed serious violations, most recently in the report by Vice Admiral Albert Church III.

investigation by the Criminal Investigative Command led to a classified report obtained by a newspaper in the United States that recommended that 28 personnel be prosecuted in connection with the deaths of detainees held by United States forces. However, to the date of his report, prosecutions had been limited, raising questions about the interest of United States officials in investigating and prosecuting these cases.

The independent expert also expressed serious concerns about the alleged transfer of some prisoners from Guantanamo Bay to Afghanistan as well as the process of informal rendition, whereby detainees were transferred to third-party countries where they are subjected to abuse and torture in clear violation of international human rights and humanitarian law. The Coalition forces' use of distinct units that answer to different command and control structures was dangerously permeating the Afghan military and security organizations and remained a source of serious human rights violations. In general, the Coalition forces' practice of placing themselves above and beyond the reach of the law must come to an end.

Finally, in his report, the Independent expert made a number of recommendations regarding: Security; Poppy cultivation and drug trafficking; Social and economic issues; The justice system; Women and children; Land and housing; Education; Strengthening civil society; Elections; National human rights institutions; Transitional or post-conflict justice; Coalition forces.

#### 1.4.2. THEMATIC MANDATES

With the establishment of a subsidiary body responsible to investigate the phenomenon of enforced disappearances, the system of special procedures equipped itself with new mechanisms enabling to inquire about human rights violations with a thematic focus. These mechanisms solely investigate a given phenomenon or type of violation. Contrary to the geographic mandates which deal with all types of human rights violations in a given country or region, the thematic mandates do not limit themselves to a specific country or region but encompass all countries and territories for a given type of human rights violation. The first thematic mandate was created in 1980 in order to investigate the phenomenon of enforced or involuntarily disappearances in the world. The decision of the Commission to create such mandate was determined by a series of political circumstances which are worth mentioning.

Indeed, in the course of the 1970's the practice of enforced disappearances was systematically utilized by the Latin American military regimes in place. This practice has been the cause of thousands of enforced disappearances first in Guatemala, then in Southern America, particularly in Argentina, Chile, Paraguay and Uruguay. At the end of the decade, the United Nations tried to establish a mandate which would have dealt with the human rights violations in Argentina. However, the Commission was confronted with a political coalition set up by the Argentinean authorities and integrated by the United States, the Soviet Union and its allies. At the time, Argentina was the first supplier of wheat to the Soviet Union. Faced to such a political blockage which managed to prevent the creation of a geographical mandate to investigate the situation in Argentina, the Commission on Human Rights opened a new avenue and invented what in the future would be known as the thematic procedures<sup>46</sup>.

At the outset, the fundamental aim of the mandate was to handle globally the question of enforced disappearances. But, as the mandate was being implemented, it started to deal not only with the phenomenon as such but with individual cases within a humanitarian perspective. This innovation was going to be followed by all the subsequent thematic mandates set up by the Commission.

The Working Group on Enforced Disappearance innovated and paved the way for other geographic and thematic mandates, such as summary executions, torture, arbitrary detention etc..., to consider individual cases. Since then the Commission on Human Rights expressly authorized some mandates such as the Working Group on Arbitrary Detention or the Special Rapporteur on the Independence of Judges and Lawyers to consider and redress individual cases of human rights abuses. Within this context, the mandate-holders contact the authorities of the concerned country in order to find a solution to the human rights violation which is being or has already been committed. In the case of an enforced disappearance, in order to find the location where the person in question is. If the person is being tortured, in order to end such cruel treatment.

The thematic mandates neither prejudice nor condemn the action of a given government: they limit themselves to request information with a view to solving a humanitarian problem. By assuming humanitarian competences in the individual cases they handle, these mandates combine

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<sup>46</sup> For a good grasp and understanding about the informal functioning of the UN Commission on Human Rights in the coulisses behind the scene, see the fascinating book by GUEST, I.: *Behind Disappearances...*, *op. cit.*

both the promotional and protection dimensions of human rights. It should be mentioned, nevertheless, that not all the thematic mandates take care of individual cases. Some thematic mandates such as the one of the Representative of the Secretary-General on Internally Displaced Persons pays only attention to the phenomenon of displacement of persons within one given country or region without accepting individual cases or sending urgent actions. The mandate holder considers that his role is to act as a catalyst between the national authorities, the United Nations and the persons who have been internally displaced in the country.

The first thematic instruments dealt with violations of *self determination, civil and political rights*. Between 1980 and 2005 subsidiary thematic bodies were established to conduct inquiries about Enforced disappearances (1980), Massive exoduses (1982), Summary executions (1982), Torture (1985), Freedom of religion (1986), Use of Mercenaries (1987), Arbitrary detention (1991), Freedom of expression (1993), Racism (1993), Independence of judges and lawyers (1994), Impunity (2004) and Protection of human rights while countering terrorism (2004).

**Example of a subsidiary body established under a special procedure thematic mandate dealing with civil and political rights:  
The Working Group on Enforced or Involuntary Disappearances**

The Working Group on Enforced disappearances was established in 1980 by Commission resolution 20 (XXXVI). It comprises five members, one for each region, according to the geographical representation of the United Nations. Since its establishment in 1980 till 2002, the Group had received and transmitted to the concerned governments 49.802 cases of disappearances occurred in more than 90 countries. The total number of cases being kept under active consideration, as they have not yet been clarified or discontinued, stand at 41,859 in 74 countries. The countries with more cases of disappearances have been: Iraq (16.514), Sri Lanka (12.297), Argentina (3.455), Guatemala (3.151), Peru (3.006), El Salvador (2.661), Argelia (1.133) and Colombia (1.114).

The Working Group's methods of work were revised in 2001. They are based on its mandate as stipulated originally in the Commission on Human Rights resolution and as developed by the Commission in numerous further resolutions. The parameters of its work are laid down in the Charter of the United Nations, the International Bill of Human Rights, Economic and Social Council resolution 1235 (XLI) and the Declaration on the Protection of All Persons from Enforced or Involuntary Disappearance, adopted by the General Assembly in its resolution 47/133 of 18 December 1992.

*Definition.* As stated in the preamble of the Declaration, enforced disappearances occur when persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branch-

es or levels of Government or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law. Enforced disappearance has been defined as a crime against humanity in Article 7 (1) (i) of the Rome Statute of the International Criminal Court.

With regard to this last point it is interesting to note the information submitted by the Spanish "*Asociación para la Recuperación de la Memoria Histórica*" on behalf of families of Republican soldiers disappeared during the Spanish Civil War (1936-1939) to the Working Group. The Asociación estimated that more than 30.000 persons of the Republican side continue disappeared. It requested the opening of the common graves of the Civil War. Out of the 65 cases presented, the Working Group selected 25 and finally decided that some cases were admissible<sup>47</sup>.

From 1990 onwards thematic instruments carrying on *specific groups of the population* were being established: Sale of children (1990), Internally displaced persons (1992), Violence against women (1995), Children and armed conflicts (1996), Migrant workers (1999), Human Rights defenders (2000), Indigenous peoples (2001), People of African descent (2002), Human trafficking in women and children (2004) and Minorities (2005). The Human Rights Council established in 2007 the mandate on Contemporary forms of slavery.

**Example of a subsidiary body established under a special procedure thematic mandate relating to specific groups of the population:  
Indigenous issues**

In 1996, the Commission decided that indigenous issues merited to be considered as a special separate item and that from thereon it would examine every year such issues. This decision was the culmination of more than ten years of strenuous efforts carried out by the Working Group on Indigenous Populations of the Sub-Commission, established in 1982 by ECOSOC.

On 28 July 2000, the Economic and Social Council took a historical decision by establishing a Permanent Forum on Indigenous Issues within the

<sup>47</sup> See the articles in *EL PAIS*: "Mil peticiones para que la ONU investigue a los desaparecidos", 1 July 2002, and "El caso de las fosas comunes de la Guerra Civil llega a la ONU: El Grupo sobre Desaparecidos estudia la petición de exhumación" 21 August 2002.



United Nations. The creation of this new organ responded to the need of a permanent mechanism in the UN enabling the permanent coordination among governments, UN and indigenous peoples.

Finally, in 2001 the Commission on Human Rights decided<sup>48</sup> to appoint, for a period of three years, a Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people with the following functions: (a) to gather, request, receive and exchange information and communications from all relevant sources, including Governments, indigenous people themselves and their communities and organizations, on violations of their human rights and fundamental freedoms; (b) to formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the human rights and fundamental freedoms of indigenous people; (c) to work in close relation with other special rapporteurs, special representatives, working groups and independent experts of the Commission on Human Rights and of the Sub-Commission on the Promotion and Protection of Human Rights. Since then his mandate has been renewed and he has presented annually reports to the Commission on Human Rights.

Finally, starting in 1991, thematic instruments handling *economic, social, cultural and solidarity rights* started to be created: Right to property (1991), Illicit dumping of toxics (1995), Right to development (1998), Right to education (1998), Extreme poverty (1998), Structural adjustment/foreign debt (2000), Adequate housing (2000), Right to food (2000), Right to health (2002), Transnational corporations (2005) and International solidarity (2005).

**Example of a subsidiary body established  
under an extraconventional thematic instrument relating to  
economic, social, cultural and solidarity rights: The right to food**

The Commission established the mandate of the Special Rapporteur on the right to food in 2000. Since then he has been submitting annual reports. His fifth report<sup>49</sup> opens with an overview of the current situation of world hunger, reviews the activities carried out and addresses current situations of special concern with regard to the right to food, as well as positive initiatives being taken, including the ground-breaking progress that has been made with the adoption of internationally accepted voluntary guidelines. Finally, the

<sup>48</sup> Resolution 2001/57 of the Commission on Human Rights, approved by consensus without a vote on 24 April 2001.

<sup>49</sup> United Nations document, E/CN.4/2005/47.

report explores the emerging issue of “extraterritorial” responsibilities in relation to the right to food. Two addenda to his report inform on the realization of the right to food in Ethiopia and in Mongolia.

The shocking news, he points out, is that hunger has continued to increase again. In its 2004 report, the Food and Agriculture Organization of the United Nations (FAO) reports that hunger has increased to 852 million gravely undernourished children, women and men, compared to 842 million in 2003, despite already warning of a “setback in the war against hunger”. It is an outrage, he says, that more than 6 million small children are killed by hunger-related diseases every year, in a world that is wealthier than ever before and that already produces enough food to feed the world’s population. The Special Rapporteur is gravely concerned at persistent, man-made violations of the right to food that continue across the world. Current situations of special concern include the Darfur region of the Sudan, the situation in the Democratic People’s Republic of Korea, in Iraq and in the Occupied Palestine. He is also concerned about widespread hunger and loss of livelihoods caused by natural disasters and the failures to respond fully to the need for aid in situations such as the locust infestations across West Africa.

As part of his mandate to examine “emerging issues” with respect to the right to food, the Special Rapporteur examines current discussions that push the limits of human rights beyond their traditional boundaries towards recognizing “extraterritorial” responsibilities to the right to food. Within this context he points out that the gradual emergence of a single integrated world market, the progressive globalization of most commercial, economic and social relations between peoples and the simultaneous emergence of private transnational corporations that often have greater economic and financial power than many States, particularly in the South, means that new issues have to be addressed that challenge the traditional territorial boundaries of human rights. The Special Rapporteur identifies three new issues currently being discussed. The first is the human rights responsibilities of non-State actors, such as transnational corporations. The second is examining the human rights responsibilities of multilateral inter-State organizations such as IMF, the World Bank and WTO. The third is the issue of extraterritorial obligations - which refers to the human rights obligations of Governments towards people living outside of its own territory.

Table 2 below shows the evolution of the public special procedures both geographic and thematic. As pointed out previously, the adoption of extraconventional mechanisms reflects the priority accorded by the United Nations to the civil and political rights during the first years. Mandates on economic, social and cultural rights were adopted at a later stage, in spite of the sustained proclamation of the indivisibility and interdependence of all human rights. The first thematic special procedure adopted by the UN Commission on Human Rights, as has been pointed out, dealt with enforced disappearances.

**Table 2**  
UN Special Public Procedures in 2008

Year	<i>Geographic</i>	<i>Thematic</i> Civil, political, rights & fundamental freedoms	<i>Thematic</i> Economic, social, cultural and solidarity rights	<i>Thematic</i> Specific groups of the population
1963	VietNam*			
1967	Southern Africa*			
1968	Special Ctte on Israeli Practices			
1975	Cyprus Chile*			
1979	Equatorial Guinea*			
1980		Disappearances		
1981	El Salvador* Bolivia*			
1982	Poland* Guatemala*	Summary executions Mass exoduses		
1984	Iran* Afghanistan*			
1985		Torture		
1986		Freedom of religion		
1987		Mercenaries*		
1988	Cuba*			
1989	Romania*			
1990	Haiti			Sale of children
1991	Occupied Kuwait* Iraq*	Arbitrary detention	Right to property*	
1992	Myanmar Former Yugoslavia*			Internally displaced
1993	Sudan Cambodia Palestine occupied territories	Freedom of expression Racism		
1994	Zaire/Congo Somalia Bouganville* Rwanda*	Independence of judges & lawyers		

Year	Geographic	Thematic Civil, political, rights & fundamental freedoms	Thematic Economic, social, cultural and solidarity rights	Thematic Specific groups of the population
1995	Burundi		Illicit dumping of toxics	Violence against women
1996	Chechnya*			Children and armed conflicts
1997	Colombia Timor Leste* Nigeria*			
1998			Right to development Education Extreme poverty	
1999				Migrants
2000	Sierra Leone		Structural adjustment/ foreign debt Housing Food	Human Rights Defenders
2001				Indigenous peoples
2002			Health	People of African descent
2003	Liberia			
2004	Belarus*, North Korea, Chad*, Nepal	Impunity, Countering Terrorism		Human trafficking in woman & children
2005		Working Group on use of mercenaries	Transnational corporations, International solidarity	Minorities
2007				Contemporary forms of slavery

\* Mandates terminated.

### 1.5. *Functioning of the system*

The special procedures instruments constitute an open system in constant innovation and adaptation to new international political situations. Faced against a given situation of human rights violations in a specific country, the system has a number of alternatives, including to: (a) examine the situation under the confidential procedure; (b) continue

with the confidential procedure if there is not a possibility to consider the situation under the public one. And under the confidential procedure choose the “good offices” of the Secretary-General or nominate a special envoy or expert; (c) designate a representative either of the Commission or of the Secretary-General in the case a special rapporteur of the Commission cannot be appointed under the public procedure for a given country. And, if such action is impossible, assign the mandate to the High Commissioner or charge an independent expert with a mandate under the Advisory Services and Technical Cooperation approach with a view to assist the authorities of the country; and finally, (d) as a last resort, the Commission may establish a thematic mandate for a given human rights phenomenon which would encompass all countries of the world. Such was the case with the Working Group on Enforced Disappearances, the first such thematic mandate. Faced against the impossibility of sanctioning Argentina with the establishment of a specific country mandate, the Commission created a thematic mandate which would deal with the phenomenon occurring not only in Argentina but anywhere in the world.

The methods of work of the special procedures cannot follow the stringent investigation rules of the domestic judicial investigations. If they had to do so the special procedures would be unable to adapt to a variety of situations and circumstances as well as to the susceptibilities and resistances of the States being investigated. For these reasons, it is necessary to have a wide range of procedures which can respond to a variety of situations. This spectrum may go from the “quasi-judicial” inquiries of the Working Group on Arbitrary Detention to those demanding only a minimum of formal rules such as the “direct contacts” or “good offices”. The independent experts themselves have emphasized the necessity of maintaining the “specificities of each mandate”. They have highlighted that, as independent mechanisms, they were “the owners of their methods of work”<sup>50</sup>.

### 1.5.1. ALLEGED HUMAN RIGHTS VIOLATIONS

Upon receipt of a human rights allegation, mandate holders under one of the geographic or thematic public mandates determine whether the information it contains is *relevant* to their respective mandates and determine whether the allegation is *trustworthy*. The

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<sup>50</sup> UN High Commissioner for Human Rights and follow-up to the World Conference on Human Rights: Effective Functioning of Human Rights Mechanisms, United Nations document, E/CN.4/2005/5.

sources of information of mandate holders include non-governmental organizations, alleged victims of human rights abuses, victims, relatives and witnesses, governments and inter-governmental organizations. The source cannot be anonymous and the human rights allegation must be submitted in writing with the identity of the sender and contact details. Before launching an action with the Government concerned the Office of the High Commissioner for Human Rights must check the source and its reliability within the UN system and its field offices as well as with outside relevant and credible sources. In dealing with governments and other sources, and bearing in mind that the issues are often highly sensitive, mandate holders are inspired by the principles of discretion, transparency and even-handedness. Equal opportunity to comment is provided to both the source of information and the Government against whom an allegation is made.

An allegation must contain the full name of the victim (or as much information as possible to enable the identification of the victims), or the name of the community, age, sex, place of residence or origin; circumstances involved, including date and place of the incident (approximate if exact data is not available); alleged perpetrators; suspected motive, contextual information if needed; where relevant, steps taken at national level (e.g. has police been contacted, involvement of other national authorities, position, if any, of the Government) or international level. It should be noted that, unlike the communication procedures under the various human rights treaties or the confidential complaint procedure, the exhaustion of domestic remedies is not required. In any communication with a Government, unless it is requested otherwise, the identity of the source is kept confidential, in order to protect it from possible reprisals.

Once the requisites have been met, the credibility of the allegation checked, a summary of the allegation is made and a note is drafted and sent for action to the Government<sup>51</sup> concerned from the Office of the High Commissioner on behalf of the mandate holder who requests the Government information regarding the following questions:

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<sup>51</sup> The normal channel of communication with governments is the Permanent Representative to the Office of the United Nations normally in Geneva or, in the absence of such representation, at the United Nations Headquarters in New York. Mandate holders may contact permanent representatives of States whenever they deem it necessary. The regular way of communication between a mandate holder and a Government is in writing through the UN Secretariat, but oral consultations may also be held, when this is deemed appropriate.

- Whether the facts alleged in the summary of the case are accurate. If not, details of the inquiries carried out should be provided to refute these allegations;
- In the case of death, the cause mentioned in the death certificate, and whether an autopsy has been conducted and by whom with a complete copy of the autopsy report ;
- Whether a complaint, formal or informal, has been made on behalf of the victim. If so, who made the complaint and what is the relation of the complainant to the victim? To whom was the complaint made? What action was undertaken upon receipt of the complaint and by whom?
- Which is the authority responsible for investigating the allegations? Which is the authority responsible for prosecuting the perpetrators?
- Whether there are any inquiries or judicial or other procedures in connection with the case under way. If so, details of their progress to date and the timetable envisaged for their conclusion are requested to be provided. If such inquiries or procedures have been completed, details of the conclusions reached should be provided and copies of any relevant documents attached. Whether these conclusions are definitive.
- Whether the person alleged to have carried out the violation has been identified. To which unit or branch of the police, security forces, armed forces or groups cooperating with them does he/she belong?
- Whether penal or disciplinary sanctions have been imposed on the alleged perpetrators. If so, details of the procedure followed to ascertain the penal or disciplinary responsibility of the perpetrators before imposing such penalties. If no sanctions have been imposed, why not?
- If no inquiries have been undertaken, why not? If the inquiries undertaken were inconclusive, why so?
- Whether any compensation has been provided to the family of the victim. If so, details are to be provided including the type and the amount of the compensation involved. If no compensation has been provided, why not?
- Any other relevant information or observation concerning the case.

Once the reply of the concerned government is received by the mandate holder (rapporteur, representative, expert or working group) it is transmitted to the source originating the allegation in order to allow

the victim to make the pertinent observations on the information provided by the government. The observations made by the victim are then sent to the authorities so as to permit the government to comment on the observations made by the victim. All this information is summarized in the public report which the rapporteur or working group submits annually to the Commission on Human Rights.

Up to recently, with the exception of the mandate on Freedom of religion, hardly any records had been kept regarding the follow up of the communications sent to governments. The statistics kept under the mandate on Freedom of religion indicate the response of governments has varied according to years. The highest number of replies (85%) was obtained in 1994 from 27 governments and the lowest in 2003 (37%) from 24 governments. The average percentage for the period 1994-2004 fluctuates around 50%<sup>52</sup>. Also of interest are the government recipients of such communications from the extraconventional mechanisms. For the first seven months of 2004, the main recipients were: Nepal, China, Colombia, Democratic Republic of the Congo, Sudan, Pakistan, Iran, Russia, Syria and Mexico. During the January-July 2004 period those mandates which sent the highest number of communications were as follows: Freedom of expression, 422 communications covering 1064 individuals; Human Rights defenders, 206 covering 290 individuals; Arbitrary detention, 133 covering 591 individuals; Torture, 322 covering 1231 individuals; Summary executions, 166 covering 715 individuals. This pattern shows the importance of allegations regarding civil and political rights if we compare them with the communications sent by mandate holders of economic, social and cultural rights for the same period, namely: Adequate housing, 2; Education, 1; Health, 24. According to the same statistics, the percentage of the feedback from governments was 22%.

It should be pointed out that presently over 60 per cent of the communications dispatched by the special procedures are joint communications sent by two or more mandate-holders which present an added value to the strength of the communication.

### 1.5.2. FIELD MISSIONS

Field missions are an efficient tool of both the geographic and the thematic mandates. Field mission visits to the concerned countries represent a good opportunity for the special procedures mandate-holders

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<sup>52</sup> Figures provided by OHCHR sources.



to better grasp and understand, through dialogue with the national authorities and civil society and the gathering of information, the prevalent situation as well as the underlying causes of human rights violations. They constitute a basic element of the monitoring activities of the special procedures mechanisms. These visits are conducted in a spirit of cooperation between the government and the mandate-holders who indicate every year to a large number of governments their interest to conduct a visit to their respective countries. The visits cannot be carried out till a formal invitation of the interested government has been received. A balance is, thus, struck between the States' obligations set forth in Articles 55 and 56 of the UN Charter to guarantee the enjoyment of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion, and Article 2.7 concerning the respect of States' sovereignty. Under the 1946 UN Convention on the Immunities and Privileges, special rapporteurs/representatives/experts of the Commission on Human Rights are accorded as experts performing a mission for the United Nations *such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including time spent on journeys in connection with their missions. In particular: (...); (b) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations*<sup>53</sup>.

Those guarantees are of particular importance since the UN human rights experts may be sued by a given government or a commercial company as has been the case with the former Malaysian expert on the Independence of judges and lawyers, Dato Param Cumaraswamy, who was sued in Malaysian Courts for damages amounting to USD 12 million. In his case, a UN organ (ECOSOC) had to request the Advisory Opinion of the International Court of Justice which concluded that Mr. Cumaraswamy *must be regarded as an expert on mission within the meaning of the Convention* and that Malaysia had the obligation to inform the Malaysian Courts of the decision.

Pursuant to these principles, the special procedures mandate holders conduct every year field missions to an increasing number of countries which consent to such fact-finding visits. However, a visit "*in situ*"

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<sup>53</sup> See the relevant paragraphs above regarding the Code of Conduct adopted by the Human Rights Council.

of a special procedure requires a number of desiderata. Once the consent has been given, the national authorities of the concerned country must also provide the appropriate measures so that the visit can be conducted<sup>54</sup>.

During fact-finding missions, special procedures mandate-holders of the Human Rights Council, as well as United Nations staff accompanying them, should be given in particular the following guarantees and facilities by the Government that invited them to visit its country: (a) Freedom of movement, including facilitation of transportation, in particular to restricted areas; (b) Freedom of inquiry, in particular as regards: (i) Access to all prisons, detention centres and places of interrogation; (ii) contacts with central and local authorities of all branches of government; (iii) Contacts with representatives of non-governmental organizations, other private institutions and the media; (iv) Confidential and unsupervised contacts with witnesses and other private persons, including persons deprived of their liberty, considered necessary to fulfil the mandate of the independent expert; (v) Full access to all documentary material relevant to the mandate; (c) Assurances of the Government that no person, official or private individual who has been in contact with the special procedures independent experts in relation to the mandate will for this reason suffer threats, harassment or punishment or to be subjected to judicial proceedings; (d) Appropriate security arrangements without, however, restricting the freedom of movement and inquiry referred to above; (e) Extension of the same guarantees and facilities mentioned above to appropriate UN staff assisting the special procedures mandate-holders during and after the visit.

As a means of coordination and cooperation, the special procedures favor in general joint fact-finding missions to a given country comprising various thematic mandates. Field missions are a catalyst in raising awareness in civil society among NGOs, churches, political parties, national human rights institutions, academic circles and the media. The implementation of the recommendations elaborated in the reports of the mandate holders which, in the past, were endorsed by the UN Commission on Human Rights and presently by the Human Rights Council, with

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<sup>54</sup> Sometimes it is extremely difficult to obtain the formal consent of the government. The visit of the Working Group on Arbitrary Detention to Australia, for example, which was initiated in 1998 in order to examine the question of the administrative detention of asylum seekers, could not be carried out till May 2002. In 2000, the Australian Government cancelled the programme visit. It also raised a number of objections to the 2002 visit. See UN document E/CN.4/2002/77.

the exception of some countries such as Chile and Bhutan, are often deceiving<sup>55</sup>. One should not forget, however, that very often the field missions conducted by the independent experts take place in extremely difficult situations like Afghanistan, Rwanda, Burundi, Democratic Republic of the Congo and Haiti for mentioning just a few. The likelihood to implement the recommendations elaborated by the mandate holders (geographic or thematic) after the mission to ameliorate the situation are extremely low despite the fact that the description of the human rights situation in the country constitute a valuable tool for the UN and the international community to lead their action. In this connection, it should be underlined that a number of field mission reports of experts contained valuable indicators for early warning. One could cite reports such as the one of the Special Rapporteur on summary executions regarding the situation in Rwanda before the 1994 genocide had started<sup>56</sup>; that of the Special Rapporteur in Burundi concerning mass executions; the one of the Special Rapporteur on former Yugoslavia regarding the need to create and protect militarily and effectively UN safe havens such as Srebrenica which was left unprotected causing a genocide that led the Special Rapporteur to resign; or that of the Special Rapporteur on Zaire about the threat of the Congolese Banyabulenges to start a civil war in the Eastern region of the country.

Geographic mandates can do the follow-up to their recommendations every year the mandate continues. For the thematic mechanisms this is extremely difficult taking into account that their mandates cover a large part if not most countries of the world. However, some thematic subsidiary bodies have developed follow-up *in situ* missions to concerned countries after a reasonable period of time.

### 1.5.3. NON-STATE ACTORS

Under international law, the State is deemed to be legally responsible for any violations of human rights committed under its jurisdiction, whether by its agents or by non-State entities or by private entities such as national liberation movements. Contacts with non-State entities are sometimes useful for the purpose of ascertaining the truth or otherwise of allegations that these entities are victims but also perpetrators of violations. However, any such relation must be subject to some precautions such as avoiding giving them a clandestine character

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<sup>55</sup> It should also be taken into account that the follow-up dimension of the special procedures has been introduced very late and not by all the procedures.

<sup>56</sup> UN Doc. E/CN.4/1994/7/Add.1.

by organizing the contacts preferably abroad, before or after the mission. The situation may be different when the mission takes place in a country where a peace process is under way or where parts of the national territory are under *de facto* control by non-State entities. The context of such meetings and the conditions in which they are held should ensure that the presence of the mandate holder would not be understood as (a) endorsement of any international representative character claimed by the private entity, and (b) subject of controversy initiated by victims' associations. This has been the traditional approach for mandates relating to civil and political rights.

However, with the new mandates on economic, social, cultural and solidarity rights new avenues in international human rights law are being explored. The attention of the reader is drawn to the arguments developed by the Special Rapporteur on the Right to food who is breaking new ground regarding the responsibility of three types of non-State actors: (a) private transnational corporations; (b) multilateral organizations such as IMF, World Bank or WTO, and (c) extraterritorial obligations of States with regard to human rights. Depending on the situation, and on the mandate holder's own approach to public relations, a press conference at the appropriate moment may be advisable. In most cases it is useful to issue at least a brief press release through the Media Information Officer of the Office of the High Commissioner on the eve of the mission providing essential information on the mandate, the mandate holder and the objectives of the mission. These press releases are published both in Geneva and New York and in the country to be visited. While in certain instances wide press coverage of the mission is the most effective way of raising awareness of the human rights concerns in the country, in other instances it may be advisable to retain a low profile during the mission, in particular where political sensitivities are running high.

#### 1.5.4. URGENT ACTIONS

The urgent action is a procedure set up and used in particular, but not exclusively, by the thematic mandates (geographic mandates also resort to this type of action) in order to protect victims of human rights violations.

This procedure is the response of one or several special procedures mandate-holders to a serious situation of allegations of violations (enforced disappearance, death threats, intimidation, arbitrary detention, torture, etc ...) to the most fundamental human rights. An urgent action is launched whenever a case brought to the attention of the Office

of the High Commissioner indicates that the facts are sufficiently reliable to fear for the life or the physical and mental integrity of an individual. The main aim of the urgent action is to protect the victim and stop, if possible, the violation. This type of protection by the extra-conventional mechanisms has been compared to a sort of "*international habeas corpus*".

The means of communication employed is the dispatch of an urgent communication to the Minister of Foreign Affairs of the State in question requesting his/her government to adopt the appropriate measures in order to guarantee the right to life and the physical and mental integrity of the concerned person. These actions are of a humanitarian character and do not prejudice the assessment the mandate-holder will make of the case at a later stage. Mandate-holders, through the Office of the High Commissioner, contact the national authorities urgently to inform them, in the case they were not already aware, and request them concrete details about the case in question. The fact that this urgent procedure operates within the United Nations emphasizes the moral pressure of the international community on governments since they have to justify what is going on in their own country<sup>57</sup>.

On some occasions, Rapporteurs or Working Groups may request a given government to stop the *refoulement* of an individual when there are grounds to fear that the person may be prosecuted, arrested, tortured or executed if (s)he is sent back to his country of origin (for questions which do not relate to common crimes).

The last years have witnessed an increase in the use of urgent actions after the period of inactivity which followed the moving of the Office of the High Commissioner from Palais des Nations to its new headquarters in Palais Wilson. Lately, a Quick Response Desk has been created to coordinate the dispatching of allegation letters and urgent actions. This Desk coordinates, in particular, joint urgent actions to be sent to the concerned governments from different mandates instead of separate ones on the same case. Owing to the fact that joint urgent actions bear the signature of several independent experts of internationally recognized impartiality, the impact is greater than when the urgent action is only sent on behalf of one extra-conventional mechanism. In addition, this system facilitates the work of the government.

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<sup>57</sup> In 2001, for instance, the Working Group on Arbitrary Detention alone transmitted 79 urgent actions concerning 897 persons to 40 different governments.

The dispatching of urgent actions and allegation letters has improved following the establishment of this coordinating desk in the Office of the High Commissioner. A thematic database has also been introduced to keep records of the communications sent which provides statistics on trends of each mandate, the number of individuals covered, the number of countries to which communications have been sent, the countries with the highest number of communications and the replies received from Governments. For the period January-July 2004, for example, over 500 urgent communications were sent to governments of which 369 were joint communications of various mandates. Nonetheless, some important problems still remain and there is still room for amelioration. One of them is the question of the follow up to the urgent action. It seems that there is some confusion among the human rights officers working at the Human Rights Field Presences, and the geographic and thematic procedures officers at headquarters as to who is responsible for the follow up with the national authorities. Another problem is due to the success of the urgent actions procedure itself. Indeed, one may deplore in a number of cases the indiscriminate use of the urgent action procedure. Knowing the favorable impact urgent actions have on donors, some junior human rights officers have not hesitated to increase the dispatching of urgent actions in order to increase the statistics with a view to obtaining more extrabudgetary resources. In a number of cases this is done for cases where the information should have been more carefully scrutinized and more caution should have been observed.

#### 1.5.5. DOUBLE STANDARDS AND POLITICAL SELECTIVITY OF COUNTRIES IN RESPONDING TO HUMAN RIGHTS SITUATIONS

At present, and taken into account those assigned to the High Commissioner and the Secretary-General, there are 14 geographic mandates under the public procedure, but only 4 under an item which requires the attention of the Human Rights Council. The other ten are considered under advisory services (6) and the High Commissioner (4). Since the system is in operation some 36 countries have been examined under the geographic public procedure: 11 in Africa, 13 in Asia, 5 in Eastern Europe and 7 in Latin America and the Caribbean. This does not even correspond to half of the 84 countries considered under the confidential procedure. However, one has to take into account that some of the thematic extraconventional instruments such as Summary executions, Enforced disappearances, Torture, Freedom of expression,

Independence of judges and lawyers or Human rights defenders make reference in their general reports to a large number of countries violating specific human rights.

The difference between the number of countries considered under the confidential and the public procedure stems from the difficulty the international community is confronted to impose a geographic mandate to a given country under the public procedure. This sort of immunity comes from the system itself which serves to denounce violations occurring in certain countries but at the same time protects from a sanction some given countries with strong political allies. The system operates in several stages as a sieve which excludes consideration of given country situations.

Under each of these stages, the recriminated States are offered an occasion to show their good will to improve the human rights situation and have the opportunity to make the necessary political contacts with other governments to assist them so that they do not go to the following stage. This sieve eliminates the great powers, some of them permanent members of the UN Security Council: China, France, Russia, UK and USA but also countries such as Germany and Japan. In addition, some others have a sort of immunity and it is extremely difficult if not impossible to impose to them a human rights mandate. At the same time, regional powers such as India, Mexico, Egypt, Saudi Arabia, Algeria, Brazil, Argentina, and till recently Nigeria, owing to their geopolitical position and economic weight also benefit a certain degree of immunity. This is not the case for a number of small and medium size countries with much less weight than that of the regional powers such as Guatemala, El Salvador, Bolivia, Myanmar, Belarus. The ideals of Dag Hammarskjöld that the UN should be an Organization well suited to protecting medium and small countries in a world dominated by big and strong countries and economic interests is still far to be realized.

Within this context it is worth mentioning the case of Cuba. Owing to the obstinacy and political willingness of United States, Cuba is a country to which the Commission has succeeded to impose a geographic mandate. The United States and their allies have also worked hard in order to impose a mandate on countries such as Iraq and Afghanistan when these countries were out of their control. Afghanistan has had a mandate since 1982 and Iraq since Saddam Hussein did not behave in accordance with US views and invaded Kuwait. However, since the Coalition led by United States occupies these two countries they have managed to terminate both mandates: Iraq in 2004 and more recently Afghanistan in 2005.

However, from an objective point of view one cannot infer that the human rights situation has improved in these two countries. The reports of the independent experts on Afghanistan and Iraq stand there to prove that such is not the case. In this connection, the reader is invited to go back to the excerpts of the report on Afghanistan of the Independent expert, Cherif Bassiouni, submitted to the Commission on Human Rights in 2005 which is reproduced previously in this article as an example of a geographic mandate. In his report, the Independent expert was extremely critical of the United States' policy on detainees. In an article of the BBC<sup>58</sup>, the Independent expert on Afghanistan said that there had been an intensive lobbying campaign by US officials in Geneva and that the UN Commission possibly bowed to US pressure for US support or concessions on other issues. He was quoted as saying that "the hawks in the administration...simply do not want anybody to look into the way people are being detained in Afghanistan by US forces".

Under the public procedure, the Commission decided by simple majority on the establishment of a mandate and the creation of a subsidiary body of investigation. In doing so, the Commission expressed a sanction against a given State (when a geographic mandate was created). The sanction was even greater when the resolution could not be adopted by consensus with the agreement of the concerned State and the Commission had to vote. This was the case for Equatorial Guinea, El Salvador, Guatemala, Iran, Afghanistan etc...The question of double standards was then posed. A number of countries did not find enough political support and they were condemned when the vote took place whereas others having even more catastrophic situations avoided to be sanctioned. This situation weakened terribly the credibility of the UN Commission on Human Rights. It was one of the main reasons to discontinue the Commission and for the creation of the new organ, the Human Rights Council.

The Human Rights Council in order to avoid this situation has established the *Universal Periodic Review*, a mechanism which foresees the examination of the human rights situation in the 192 Member States of the United Nations in a four year-cycle.

Kofi Annan, the former UN Secretary-General, said that the creation of the Council, would accord human rights a more authoritative position, corresponding to the primacy of human rights in the Charter of the United Nations. Those elected to the Council should undertake

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<sup>58</sup> BBC, article by O'TOOLE, P.: "Ex-Afghan rights chief attacks US", 30 May 2005.



to abide by the highest human rights standards<sup>59</sup>. The new Human Rights Council would also have to preserve the independent role of the special procedures and continue the practice of the Commission regarding access for non-governmental organizations.

To these criteria, the High Commissioner for Human Rights added that *country scrutiny be exercised through a system of peer review (...) whereby all States submit to a review of law and practice concerning their human rights obligations*. In order to obtain results, *a fair and transparent method should have to be developed to compile information upon which to base the peer review*<sup>60</sup>. The universal peer review has become the Universal Periodic Review. This mechanism has only been put in motion in 2008. The first four year cycle will be completed in 2011; it is therefore too early to be able to make a judgement or an assessment of the new universal mechanism.

It should also be mentioned that the regional or interregional solidarity, such as that of Muslim countries, constituted another important key element in avoiding to be condemned by a UN resolution in matters of human rights. Finally, behind this dynamic were the interests of the States. When the time for the voting arrived, Governments exchanged their support in order not to be sanctioned by the Commission with a specific geographic mandate. The voting of the sessions of the Commission is very illustrative in this regard. In 2002, for example, a core of some 20 countries<sup>61</sup> prevented that draft resolutions which would have created mandates for Chechnya (Russia) and Zimbabwe be approved. The same core of countries functioned to terminate the mandate on Iran and to weaken the mandate on Equatorial Guinea. This is not unique; on the contrary, every session of the Commission witnessed the same type of situation. In 2004, a draft resolution was defeated again by a roll-call vote which would have imposed a mandate on the situation in Chechnya. Also in 2004, two different non-actions motions were adopted to stop the creation of mandates on the human rights situation in China and in Zimbabwe.

Regarding the defeated resolutions on the human rights situation in Chechnya in roll-call votes, their contents were to establish an in-

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<sup>59</sup> *In Larger Freedom*, Report of the Secretary-General, United Nations document A/59/2005.

<sup>60</sup> "Plan of Action submitted by the UN High Commissioner for Human Rights: Protection and Empowerment", UN document A/59/2005/Add.3, May 2005.

<sup>61</sup> Algeria, Bahrain, China, Cuba, Russia, India, Indonesia, Libya, Malaysia, Nigeria, Pakistan, Syria, Democratic Republic of the Congo, Saudi Arabia, Senegal, Sudan, Togo, Venezuela, Viet Nam and Zambia

dependent commission to investigate the allegations of human rights violations in Chechnya and facilitate free access to all detention centres to humanitarian organizations, in particular the International Red Cross Committee. With regard to Zimbabwe the “non-action” motion stopped the consideration of a draft resolution which would have requested, among other things, to the Special rapporteurs on torture, summary executions, freedom of opinion, independence of judges and lawyers and violence against women as well as the Representative of the Secretary-General on human rights defenders to conduct field missions in Zimbabwe with a view to examining the complaints of human rights violations in that country. The “non-action” motion was a procedural tactic deployed by some governments to halt action on specific countries and avoid consideration of draft resolutions. In addition to Zimbabwe, the “non-action” motion was utilized by China and Sudan.

Concerning the weakening of the mandate on Equatorial Guinea which until then had been considered under item 9 of the Commission’s agenda, the Special Rapporteur, Gustavo Gallón, said in a press conference that the mandate had been changed following the new composition of the Commission and not because the human rights situation in the country had improved. He added that there was an agreement among the African representatives members of the Commission against all the extraconventional instruments in general but more particularly against the geographic mandates with respect to Africa. In the voting which had allowed to pass Equatorial Guinea from item 9 (Violations of human rights and fundamental freedoms in any part of the world) to item 19 (Advisory services and technical cooperation) by 32 in favor, 1 against and 20 abstentions, all the 15 African members of the Commission voted for the change as well as all the other countries which constitute the hard core of the Commission. The Special rapporteur on Equatorial Guinea emphasized that an agreement had been concluded between Nigeria and Equatorial Guinea regarding the dispute that opposed these two countries on the question of the exploitation of oil in the region which was before the International Court of Justice with the involvement of American oil companies exploiting the oil of the region and of Equatorial Guinea. Moreover, he underlined that oil companies increasingly influenced the work of the UN Commission on Human Rights.

In 2005 the only proposed text to be rejected by a roll-call vote during the session of the Commission on Human Rights was the draft resolution submitted by Cuba on the question of detainees in the area

of the United States naval base in Guantanamo. If approved, the resolution would have requested the Government of the United States to authorize an impartial and independent fact-finding mission by the relevant special procedures of the Commission on the situation of detainees at its naval base in Guantanamo. States members of the European Union in the Commission on Human Rights voted against the proposal even though the text followed very closely other texts already adopted in European institutions<sup>62</sup>. It should also be noted that the request put forward by Cuba was along the lines of the request made by a number of special procedures subsidiary bodies which had been endorsed by all the mandate holders of the special procedures at their annual meeting in 2004. In this connection, the reader's attention is drawn to the section on counter terrorism of this same article below.

#### 1.5.6. PARTICIPATION OF THE SPECIAL PROCEDURES AT THE UN SECURITY COUNCIL

For many years Permanent Members of the Security Council were opposed to debate issues of human rights abuses and make a link between egregious human rights violations as a threat to international peace and security. However, following the grave situation of human rights violations in former Yugoslavia, the Secretary-General was requested to transmit to the Security Council the reports of the Special Rapporteur of the Commission, T. Mazowiecki, on the prevailing human rights situation in the region. More recently, in accordance with the *Arria Formula*<sup>63</sup>, mandate holders of the extraconventional mechanisms who are neither State representatives nor UN high ranking officials may provide if the Council so decides oral and written information and enter into a dialogue with its members. The Special Rapporteur on the situation of human rights in the Democratic Republic of the Congo (Roberto Garretón) and the Special Rapporteur on the human rights situation in Burundi (Keita-Bocoum), among others, have been invited to communicate to the members of the Coun-

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<sup>62</sup> The European Union, who has traditionally opposed the use of "non-action" motions, considered in 2004 using an equivalent procedural device, an "adjournment of debate" had Cuba insisted to pursue its resolution on prisoners held by USA in Guantanamo. AI Index: IOR 40/008/2005.

<sup>63</sup> This procedure was introduced by a Venezuelan representative and was consolidated in the early nineties. It allows a member of the Security Council to request the holding of a special meeting to exchange points of view with a prestigious and eminent expert or institution. UN Doc. E/CN.4/2001/40/Add.1, Report of the Special Rapporteur on his mission carried out in March 2001.

cil their observations and conclusions after having carried out their respective field missions. In addition, at present the High Commissioner on Human Rights informs regularly members of the Security Council on specific issues and human rights situations of the interest of the Council.

Moreover, before planning and initiating UN peace operations it has been recommended that, when relevant, the special procedures mandate-holders be consulted and that a human rights component be part of the UN peace operations. It should be noted that Kofi Annan, the former Secretary-General, had regularly consulted the High Commissioner on Human Rights on these issues within the framework of his approach of the work of the Organization. The report that the Secretary-General presented to the General Assembly in 1997 on the structuring of the Secretariat, for instance, already pointed out that *"human rights are fundamental for the promotion of peace and security, for economic prosperity and social equity"*. The report contained a decision allowing the Office of the High Commissioner to participate regularly in each of the phases of the activities of the Organization regarding present or potential conflicts comprising a human rights dimension<sup>64</sup>. It had also been recommended that the reports of the special procedures should be facilitated to the Security Council. This innovative cooperation between the High Commissioner and the special procedures mechanisms on the one hand and the Security Council on the other represent a formidable step forward in the integration of the human rights dimension into the global UN strategy on international peace and security.

#### 1.5.7. USE OF THE PRESS AND MASS MEDIA

Following the terrorist attacks of 11 September 2001 in New York and Washington, many democratic governments have followed the path of the United States and adopted a series of measures against terrorism which limit the enjoyment of human rights and fundamental freedoms. As pointed out by I. Ramonet<sup>65</sup>, encouraged by the example of these democratic governments, the most repressive ones, such as Colombia, Indonesia, China, Myanmar, Uzbekistan, Pakistan, Turkey, Egypt, Jordan and many others have taken this opportunity to hurry up and follow the trend adopting antiterrorist measures to sub-

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<sup>64</sup> United Nations document A/51/950, "Renewing the United Nations: a programme of reform", Report of the Secretary-General.

<sup>65</sup> RAMONET, I.: "Antiterrorisme", *Le Monde diplomatique*, Mars 2004.

jugate any form of opposition which these governments label as terrorism.

In his article, I. Ramonet stated that Western democracies by tradition have not been very responsive to violations of economic, social and cultural rights. The great democracies have always considered the defense of civil and political rights as a major priority. The danger with the present antiterrorist obsession is whether it may not lead our democracies away from such fundamental requirement. The question may be raised as to whether our democracies are not committing suicide by adopting emergency measures and consolidating the police at the core of the system. For the war against terror not only foreshadows more limitations to individual freedoms for the sake of security but provides more resources to military methods, insisting in the obsession to fight the symptoms but forgetting the causes, continuing, thus, its pursuit of past mistakes<sup>66</sup>.

A number of special procedures mandate-holders have been confronted with this new situation. They have been in contact unsuccessfully with governments where grave human rights abuses have occurred due to counter terrorist measures. Frustrated by the lack of response from national authorities, a number of mandate-holders decided to resort to the press.

The mass media is a valuable means widely used by the mandate holders of the extraconventional instruments not only in relation with their field missions but also when they are unable to visit a given country or region owing to the resistances and political unwillingness of some governments. This has been the case with the United States in relation with measures which the authorities have been taken to counter terrorism without regard to the human rights violations that have resulted. In this connection, various mandate holders held a press conference in Geneva, on 23 June 2005, with regard to the unwillingness of the USA authorities to cooperate with UN extraconventional instruments concerning prisoners held at Guantanamo Bay and other military bases.

Four Special Procedures Independent Experts<sup>67</sup> of the then UN Commission on Human Rights, with the endorsement of all the other

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<sup>66</sup> NÚÑEZ, J.A.: "Londres (7-J) y Madrid (11-M) bajo el prisma del terrorismo internacional", IECAH, 25 July 2005.

<sup>67</sup> Another independent expert, the Special Rapporteur on Freedom of Religion and Belief, joined on 24 June 2005 the other independent experts. She had also expressed to the United States Government the wish to visit the detention facilities of Guantanamo Bay naval base.

Special Rapporteurs/representatives, independent experts and chairpersons of the working groups of the Special Procedures, issued a statement for the international press gathered at Geneva.

The statement pointed out that on the first anniversary of the request made by all Independent Experts at their 2004 Annual Meeting, they deeply regretted that the Government of the United States had still not invited them to visit those persons arrested, detained or tried on grounds of alleged terrorism or other violations in Iraq, Afghanistan, or the Guantánamo Bay naval base.

The request for a visit was made following the negative response to the demand by the Working Group on Arbitrary detention in January 2002 to visit Guantanamo Bay and the United States and the lack of a response to the joint request made by the Special Rapporteurs on Torture and Health in January 2004 to visit Guantanamo Bay. Such requests were based on information, from reliable sources, of serious allegations of torture, cruel, inhuman and degrading treatment of detainees, arbitrary detention, violations of their right to health and their due process rights. Many of these allegations had come to light through declassified Government documents.

The purpose of the visit of the UN Independent Experts would be to examine objectively the allegations first-hand and ascertain whether international human rights standards that are applicable in these particular circumstances were being upheld with respect to those detained persons.

In their opinion the Independent Experts had given ample time to the United States Government to consider their request and had made themselves available for any needed consultations. In this regard, they noted with appreciation the high-level meeting organized during the sixty-first session of the Commission on Human Rights to discuss the purpose and terms of reference for the visit. Nevertheless, the lack of a definitive answer despite repeated requests suggested that the United States was not willing to cooperate with the United Nations human rights machinery on this issue. This was particularly surprising in the light of one of the recommendations made by the Government of United States in a recent position paper entitled "Enhancing and Strengthening the Effectiveness of the Special Procedures of the Commission on Human Rights", which said that "*States should consider [country visits] requests seriously and in the spirit of cooperation with Special Procedures, and should respond in a timely manner*".

It was the conviction of the UN Independent Experts that no Member State of the United Nations was above international human rights law. Due to the seriousness of the allegations, the lack of cooperation

and given the responsibilities to their respective mandates, they could jointly conduct an investigation based on all credible sources regarding the situation of the detainees in Guantanamo Bay. In the meantime, should the Government of the United States extend a visit to Guantánamo Bay the Independent Experts would welcome this development. They would incorporate the findings from their mission into their investigations.

The contents of the press conference which was held by the UN Independent Experts was widely broadcast by the international media. The BBC titled this event *"US 'stalling UN Guantanamo visit: Investigators from the United Nations have accused the US of stalling over their repeated requests to visit detainees at Guantanamo Bay"*. BBC reported that the UN said it had evidence that torture had taken place at the prison amid reports that 520 inmates have had mental breakdowns. It quoted the UN Special Rapporteur on Torture, Manfred Nowak, pointing out that he had been given access to many countries, among them, some with very poor human rights records. More openness had been expected from the U.S.A.: *"We are very disappointed that a country that always was very positive about high human rights standards and which is also reminding other States that they should actually co-operate fully with the special mechanisms of the UN Commission on Human Rights itself is not living up to these standards,"* Nowak said.

The Department of Defense told BBC News the UN request was being considered. Another source added that *"as for the request to visit with detainees, the ICRC [International Committee of the Red Cross] already performs this important role"*. However, it should be noted that, contrary to UN special procedures, ICRC's reports are confidential. ICRC does not publish the findings of its visits.

## 2. Coordination

The question of coordinating the activities of the special procedures, first of all among themselves and subsequently with the treaty-bodies and the relevant UN Departments and programmes such as the Department of Peace-keeping Operations, the Department of Political Affairs, UNDP, or the Office of the Coordinator for Humanitarian Affairs, has been a vital task recognized already by the World Conference on Human Rights in 1993.

In this regard it is worth noting that the Conference declared that the special procedures mechanisms should be enabled to harmonize and rationalize their work by means of periodic meetings. It is the same

World Conference that recommended to the General Assembly establishing a High Commissioner for Human Rights. The Conference took such action taking into consideration that UN human rights organs needed to improve their coordination, efficiency and effectiveness. In fact, two of the main responsibilities of the High Commissioner are precisely to coordinate human rights promotion and protection activities throughout the United Nations system and rationalize, adapt, strengthen and streamline the United Nations human rights machinery.

Within this context it should be recalled that the special procedures are based on the UN Charter and that they are integrated by independent experts who do not receive any honoraries but carry out the UN mandates on a *pro bono* voluntary basis. They only use temporarily the UN premises during the time they are meeting in Geneva to write their reports or make the necessary contacts. Even if the mandate-holders may launch initiatives for a better coordination, it falls to the High Commissioner and to her Office the responsibility for the day to day coordinating activities of the special procedures and for convening annual meetings at Geneva of the special procedures mandate-holders as well as with the conventional system of treaty bodies, UN Departments and programmes, the *Ad hoc* International Tribunals on former Yugoslavia and Rwanda<sup>68</sup> and the International Criminal Court as necessary and by making the appropriate follow-up.

The Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights on 25 June 1993 underlined the importance of preserving and strengthening the system of special procedures and specified that the procedures and mechanisms should be enabled to harmonize and rationalize their work through periodic meetings.

Since 1994 the Office of the High Commissioner organizes an annual meeting of special rapporteurs, representatives, experts and chairpersons of working groups. The question of lack of cooperation and support from Governments to the special procedures has been raised regularly at those meetings. Another question posed by the independent experts periodically has been the scarcity of resources allocated to

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<sup>68</sup> Human rights monitors of the Office of the High Commissioner for Human Rights under the relevant mandates of the Special Rapporteurs and the Security Council Commissions of experts respectively on former Yugoslavia and Rwanda gathered first hand information on human rights violations committed. This information was transmitted to the *Ad hoc* Tribunals. It seems, however, that the tribunals had to carry out additional research in order to comply with the requisites of a criminal inquiry to be presented before a court.



mandate-holders. This last problem was outspokenly emphasized in particular by the former Special Rapporteur on the Right to Education, Katarina Tomasevski, in several of her reports<sup>69</sup>.

At their 2005 annual meeting, the interest of mandate holders of the special procedures had focused mainly on the problems posed by the follow-up. At that meeting they defined what they considered as follow-up: "a variety of measures taken to encourage, facilitate and monitor the implementation of recommendations by any of the special procedures"<sup>70</sup>. After what, they envisaged the different scenarios and contexts under which the approach could differ. For instance Governments may not respond to requests for invitations from a thematic procedure or those who have already extended a standing invitation may not respond favorably to a request for a visit. In order to devise specific follow-up measures, they envisaged interaction with a number of partners such as: Governments; the Office of the High Commissioner for Human Rights; the United Nations system; national human rights institutions; parliaments; civil society organizations; intergovernmental financial institutions such as the World Bank, IMF and WTO; and donors in case of mandates with a strong focus on technical cooperation.

They agreed that, in order to facilitate follow-up measures, recommendations should be concrete, indicating priorities, acknowledging the financial implications; pointing out whether the implementation of the recommendation requires only Government action or involves a wider political reform process, and specifying where implementation might involve external partners. Mandate holders also envisaged for follow-up purposes to send a questionnaire to relevant partners in the

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<sup>69</sup> Already in her first report she pointed out to the miniscule support given to her by the Office of the High Commissioner which consisted of about 10 per cent of a full-time equivalent of one junior human rights officer and an annual budget which effectively allowed only one mission every second year. Report of the Special Rapporteur on the Right to Education, United Nations document, E/CN.4/2001/52, paragraph 2. And subsequently to the inadequate servicing by the OHCHR, Report of the Special Rapporteur on the Right to Education, United Nations document, E/CN.4/2002/60, paragraph 2. In her last two reports to the Commission she underlined that she had had to invest an immense amount of time and her own funds to carry out her mandate. Since the conditions had worsened in 2004 she had submitted a complaint to the OHCHR and therefore recommended to the Commission not to renew her mandate, Report of the Special Rapporteur on the Right to Education United Nations documents, E/CN.4/2003/9, paragraph 1 and E/CN.4/2004/45.

<sup>70</sup> Report of the twelfth meeting of special rapporteurs/representatives, independent experts and chairpersons of working groups of special procedures of the Commission on Human Rights and of the advisory service programme, United Nations document, E/CN.4/2006/4.

countries concerned. The inputs received would constitute the basis of a report on follow-up.

They also indicated that the High Commissioner and her Deputy could play an important role in the follow-up of the recommendations contained in their respective reports by: (a) organizing regular meetings with the Governments concerned in order to promote follow-up to specific recommendations; (b) raising the question of recommendations in the course of official country visits; and (c) organizing workshops to follow-up on recommendations by special procedures and identifying obstacles thereto.

More recently, the annual meeting of independent experts has tackled the question of the unprecedented level of criticism concerning several issues of the work of the extraconventional mechanisms which had been raised by Member States<sup>71</sup>. In the meeting the independent experts had had with the Chairperson and other representatives of the Expanded Bureau of the Commission it was pointed out to them the importance of "*confirming their observations to their mandates and of ensuring that the information contained in their respective reports was well-grounded in fact, not opinion*"<sup>72</sup>. Another of the criticism raised relates to the different methods of work of the mandate holders. In this connection, the independent experts themselves have developed a Manual for mandate holders and the Office of the High Commissioner set up Guiding Principles on the relationship between the extraconventional mechanisms and OHCHR which have been requested to be updated. The independent experts, on their part, have once more reiterated their position that there should be no interferences of any kind or any clearance procedures at the UN regarding the sending of communications to Governments, the issuing of press releases on situations of concern and the holding of press briefings which were essential to their independence. In addition, they encouraged the Commission to be more vocal in its support for the extraconventional mechanisms and to be more active with respect to follow-up and in seeking the cooperation of, and the issuance of standing invitations by Member States. They also reiterated to the Expanded Bureau of the Commission their concern that the procedure for appointing new mandate-holders had become less transparent and more politicized recently<sup>73</sup>.

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<sup>71</sup> UN High Commissioner for Human Rights and follow-up to the World Conference on Human Rights: Effective Functioning of Human Rights Mechanisms, United Nations document, E/CN.4/2005/5.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

Within this overall context, one cannot underestimate the UN bureaucratic problems and to a certain extent the difficulties inside the Office of the High Commissioner itself as well as with the field presences to coordinate the activities of the extraconventional mechanisms that have been scattered in several branches of the Office. One of the main objectives of Louise Arbour, during her mandate as High Commissioner, has been to use the centrality of the Human Rights Field Presences of her Office to enhance to the maximum extent the protection of human rights as well as the coordination with other UN Departments and programmes to ensure that international human rights standards were implemented at the country level following up the recommendations of the human rights treaty bodies as well as the special procedures mechanisms<sup>74</sup>.

In this regard, it may be recalled that the past history of the Human Rights Field Presences reflects a political split in the field of human rights introduced by General Assembly resolution 926 (X) of 14 December 1955 in which the Assembly established the UN Programme of Advisory Services in the field of Human Rights. Such programme, moved by the United States, aimed at abandoning the first initiatives that were taking place at the time for a monitoring human rights system. It concentrated uniquely on human rights promotional activities providing governments with advisory services and human rights capacity building. When thirty years later the negotiations started with national authorities for the establishment of human rights field presences in different countries the promotional aspect was much more attractive than the protection component which concentrates in monitoring human rights situations in order to assess whether there have been violations and breaches of the human rights instruments. This situation explains that in the terms of reference of a number of memoranda of understanding between the Office of the High Commissioner and concerned countries where the human rights field presences are established, the promotional activities (carrot) are more favoured than the protection activities (stick). In a number of cases a balance of both has been struck, such as for the human rights field presences in Burundi, Cambodia, Democratic Republic of Congo. The recommendations of the special procedures which have visited a given country should be an indispensable element to be taken into account in the daily work of the field presences.

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<sup>74</sup> Statement of the High Commissioner to the 2004 Heads of Field Presences Meeting Protecting Human Rights (22 November 2004).

The determination of Louise Arbour to direct the work of the Human Rights Field Presences to issues related with the *“lack of compliance with respect to international human rights norms such as impunity for major human rights violations, including war crimes against humanity”* was marked by the involvement of her Office in carrying two Commissions of Inquiry, one in Côte d’Ivoire and the other one, set up under Chapter VII resolution of the Security Council, on Darfur (Sudan).

The fourteenth annual meeting of special rapporteurs/representatives, experts and chairpersons of working groups of the special procedures of the Human Rights Council was held in Geneva from 18 to 22 June 2007.

During the meeting, mandate-holders focused their discussions on the outcome of the institution-building process of the Human Rights Council. They welcomed the improvements to the human rights system brought about by the institution-building process, in particular the Universal Periodic Review (UPR) mechanism. Concerning UPR, the importance of the participation of civil society and human rights mechanisms in the process was described as crucial for its effectiveness.

The desirability of engaging actively in the implementation of the Code of Conduct adopted by the Council in its resolution 5/2 was highlighted by many. Mandate-holders decided to request the Coordination Committee to draft and present at its fifteenth meeting an appropriate procedure by which the Code of Conduct and other relevant documents, including the Manual, could be best implemented. They also decided that, in the meantime, the Committee would give appropriate consideration to any matter concerning the working methods of mandate-holders brought to its attention.

When discussing approaches to thematic and country situations, mandate-holders stressed the need to strengthen coordination between geographic and thematic mandates. The need to look at complementarities within the entire system, including treaty bodies and country engagement strategies of the Office of the United Nations High Commissioner for Human Rights (OHCHR), was mentioned. Participants discussed cooperation with regional mechanisms, including good practices. It was suggested that representatives of key regional mechanisms should be invited to participate in future annual meetings, and that ways to ensure more regular mandate-holder participation in meetings of regional organizations should be explored. Enhanced institutional arrangements for the exchange of information between regional organizations and OHCHR were considered necessary. Participants also discussed their engagement with United Nations country teams, in-

cluding how special procedures could better influence the programming process and the national development process. It was stressed how UPR implied a new collective responsibility for the United Nations system in the field of human rights. Participants welcomed the efforts of OHCHR to ensure enhanced integration of their work into country analysis and programming. It was stressed that training and awareness-raising of country teams were essential in order to achieve enhanced synergies. The need to think about ways to strengthen follow-up by country teams to special procedures recommendations was highlighted. During the joint meeting with chairpersons of treaty bodies, participants exchanged views on UPR. Participants stressed that it could offer a political forum to follow up their work. The challenge was to see to what extent special procedures and treaty bodies should tailor their activities in order to have an impact on the UPR process. Participants also addressed the issue of non-cooperation with the UPR system, and the ways and means through which this could be addressed<sup>75</sup>.

### 3. Concluding Observations

The UN system of human rights extraconventional instruments has been progressively set up in the course of the last thirty years as a last resort for victims of human rights abuses. The system has also been a response to palliate shortages, gaps and lack of effective procedures of the conventional system. With the creation of the thematic subsidiary bodies, the extraconventional instruments comprise at present most, though not all, of the civil, political, economic, social and cultural rights proclaimed in the Universal Declaration of Human Rights. The establishment of thematic mandates has seen a decrease in the number of geographic mandates. The main reason being the easier acceptance by States of thematic procedures dealing with human rights abuses globally. However, it should be emphasized that most thematic mandates have developed visits "*in situ*" to countries with grave problems of human rights violations for specific rights. A country report is, thus, published for each of these field missions under a large number of the thematic mandates on a given issue (torture, arbitrary detention, freedom of expression, disappearances, right to food, right to education, dumping of illicit toxics, migrants, indigenous peoples etc...). Every year some

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<sup>75</sup> Report of the fourteenth meeting of special rapporteurs/representatives, independent experts and chairpersons of working groups, United Nations Document A/HRC/7/29.

40 country reports were submitted to the Commission on Human Rights under the thematic mandates<sup>76</sup>. This approach largely compensated the lack of more geographic mandates.

In 2007, special procedures mandate-holders conducted 62 fact-finding missions in 51 countries. They submitted 135 reports to the Human Rights Council: 67 annual reports and 48 reports related to the country missions they had undertaken. In addition, there were also 20 reports which were submitted to the General Assembly. In the course of the year, they sent a total of 1003 communications to 128 governments covering some 2294 individual cases. Thirty two percent of these communications were replied by the national authorities. Mandate holders held a large number of press conferences and issued 200 press releases, 75 of which relating to country missions, the other 125 were on particular human rights concerned serious issues or situations<sup>77</sup>.

Up to 2008, when the universal periodic review established by the Human Rights Council was set in motion, the special procedures constituted the most universal monitoring system of human rights violations. Moreover, the system has been a strong inducement for States to ratify the UN conventional instruments of human rights. The extraconventional instruments system occupies a zone where the political and moral pressure of public opinion must act upon, much more than for the conventional instrument system which aims more at obtaining legal and juridical results. As all UN decisions, except those adopted by the Security Council, the recommendations of the extraconventional subsidiary bodies, which are endorsed by the UN Human Rights Council (before by the Commission on Human Rights), lack the enforcement element for their domestic implementation. As it has been described by a human rights expert, the extraconventional instruments system is something more than a "whimper" of the international community but less than a "roar" capable of threatening the States perpetrators<sup>78</sup>.

However, for the victims of human rights abuses the UN extra conventional instruments has represented not only a hope but in many of

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<sup>76</sup> In 2005, the following reports on country visits by thematic mandates were submitted to the Commission: Algeria, Belarus, Bosnia-Herzegovina, Brazil (2), Canada, China, Colombia (2), Côte d'Ivoire (2), Ethiopia, Ecuador, Georgia, Guatemala (2), Honduras, Iran, Italy (2), Kazakhstan, Kenya, Mongolia, Mozambique, Nepal, Nicaragua, Nigeria, Paraguay, Peru, Romania, Serbia-Montenegro, Sudan (3), Turkey (2) and Occupied Palestine.

<sup>77</sup> United Nations Office of the High Commissioner for Human Rights, "Facts and Figures 2007".

<sup>78</sup> FARER, T.: "The United Nations and Human Rights: More than a Whimper less than a Roar", *Human Rights Quarterly*, Vol. 9, 1987.

the situations the unique monitoring mechanism capable of inquiring about the behavior of the national authorities of their respective countries. Contrary to the conventional instruments, the UN extraconventional mechanisms have had a very unstable basis. This situation stems from the international relations States develop and reach among themselves at a given point in time. Being established by UN resolutions and not by an international treaty, the extraconventional instruments have been more exposed than the conventional ones to the dialectical relations which operate at the international level since the creation of the United Nations.

On the one hand such relation comprises the governments which are generally very vigorous defenders of their national sovereignty. Governments are unlikely to be in favor of the observance by the international community of the promotion and respect of human rights and fundamental freedoms since they consider this as an interference in their domestic affairs. On the other hand, we find public opinion and the activists of civil society promoting the universalization of human rights and defenders of efficient UN monitoring mechanisms capable to watch the respect of human rights as well as the follow up of human rights situations all over the world.

Each of the special procedures instruments established by the United Nations has been the result to a great extent of the moral pressure exerted by public opinion on their respective governments and at the international level. This has been done within a context of political negotiations which may vary according to a given international situation. The human rights priorities are dictated by the vision States may have at a specific moment of the place human rights occupy in international relations as well as to the possible exploitation some States may make for their own interests. The priorities accorded in the past by the Commission on Human Rights and presently by the Human Rights Council to the special procedures instruments have been determined by these concerns.

It must be recognized that up to the present time since the first extraconventional instruments were established the trend has always been on the increase. There have been, nonetheless, difficult periods during the Cold War or when reactionary U.S. governments occupy the White House exerting strong pressure in order to destroy or weaken the system. During such periods, even if the pressure has not succeeded in annihilating the special procedures subsidiary bodies, they have resulted in weakening them and in hampering their work by cutting financial and human resources. The difficulties found at present by the extraconventional mechanisms seem to stem not only from authoritari-

an regimes from Third World countries but also, to a certain extent, from Western European democratic States which up to recently were the strongest supporters of the special procedures system.

An academic research study<sup>79</sup> has identified the following six innovative indicators of UN special procedures bearing a positive impact to varying degrees in the international protection of human rights abuses: (a) the right for the UN Commission on Human Rights to monitor country situations through the geographic and thematic mandates; (b) the consolidation of the individual right to petition the UN; (c) the contribution to a better definition of a number of Public International Law norms; (d) the contribution for early warning and ascertaining extremely dangerous human rights situations; (e) the impact on country situations prior to *in situ* missions of the extraconventional subsidiary bodies enabling the mobilization of civil society, academic circles, the church and the media; (f) the impact on country situations through the *in situ* missions of the extraconventional subsidiary bodies, the elaboration of their recommendations and the follow up carried out by the national authorities.

The special procedures have contributed to the progress of International Human Rights Law in several ways. Firstly, they have assisted in developing it by monitoring the implementation of human rights *soft law* such as the UN Declaration of Enforced Disappearances by the Working Group on Enforced disappearances, the UN Declaration on Extreme Poverty by the Special Rapporteur on Extreme poverty or the UN Standard Minimum Rules for the Treatment of Prisoners and many other UN instruments by various extra conventional subsidiary bodies such as the Working Group on Arbitrary detention, the Special Rapporteur on Torture or still the geographic mandate holders. The special procedures have also been very active in advocating for the drafting of new human rights instruments such as the draft convention on enforced disappearances. Moreover, the special procedures have broadened the scope of human rights standards with authoritative interpretations such as the one made of the right to life by the Special Rapporteur on Summary executions or the interpretation about the norm of the prohibition of torture and cruel, inhuman and degrading treatment or punishment by the Special Rapporteur on Torture.

The importance of the system of extraconventional instruments has now been duly recognized since they constitute a vital element in the application of international human rights standards. However, as point-

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<sup>79</sup> Nifosi, I.: *op. cit.*



ed out by Amnesty International, the system has been undermined by the failure of many States to cooperate with mandate-holders and implement their recommendations as well as a chronic lack of adequate resources to carry out their activities effectively<sup>80</sup>. The system of special procedures has overcome the fundamental transformation which has seen the termination of the UN Commission on Human Rights and the creation of the new Human Rights Council.

Since the creation of the United Nations in 1945, the international community has struggled to make the protection and promotion of human rights a universal obligatory system. The adoption of the Universal Declaration of Human Rights has been a milestone in this direction. How to make all States to comply with the norms enshrined in the Universal Declaration has been the next phase. At that time the UN Commission on Human Rights had promoted a mechanism of periodic reporting whereby Member States would inform on the progress and difficulties to implement the provisions of the Universal Declaration in their respective countries. Since this voluntary mechanism did not achieve much, the next step adopted by the international community was to set in motion the long process of elaborating and adopting the two Covenants and other human rights treaties which would contain obligatory provisions for the States parties to report periodically. As the process was extremely long, extra conventional mechanisms, the special procedures, had to be adopted to deal with violations of human rights everywhere in the world. The special procedures which were established on an ad hoc basis became a vital system of protection of human rights within the UN, though never completely universal due to the political factors of the world body, complementing thus the conventional human rights system.

Another occasion of having a worldwide description of the human rights situation was with the establishment of the Office of the High Commissioner of Human Rights. Many expected that the Office could elaborate a yearly report which would provide objective and reliable information about the human rights situation in each of the countries of the Organization. That annual report would replace the report that the US State Department issues annually<sup>81</sup> which is criticized for its political bias. The Office of the High Commissioner was neither equipped nor had it the political will to take up that challenge.

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<sup>80</sup> "Meeting the Challenge: Transforming the Commission on Human Rights into a Human Rights Council", Amnesty International Index: IOR 40/008/2005.

<sup>81</sup> The report for 2007 was issued in March 2008. It makes reference to the human rights situation in over 190 countries with the exception of the United States.

With the nascent universal periodic review of the Human Rights Council the special procedures will lose the monopoly of quasi universal monitoring human rights system which it had with the UN Commission on Human Rights. The special procedures in the new context will be both a source of information for the reports to be compiled by the Office of the High Commissioner for Human Rights for the universal periodic review as well as the main source of information for a number of agenda items of the Human Rights Council, even though the emphasis of the new body will be more on cooperation, technical assistance and capacity building and less on monitoring human rights situations.

Part IV

# Human Rights in Europe

The Council of Europe  
The European Union



# THE COUNCIL OF EUROPE



# The European Convention on Human Rights

Juan Antonio Carrillo Salcedo

**Summary:** Introduction. 1. Rights and freedoms recognised. 2. Limitations and restrictions on the enjoyment of recognised human rights. 3. Derogations of obligations by participating States. 4. Limits of the scope of the European system for the protection of human rights: 4.1. Diversity among States Parties to the Convention and in its additional normative protocols; 4.2. Reservations and interpretative declarations. 5. The jurisdictional protection mechanism instituted in the European Convention on Human Rights. 6. The European Court of Human Rights: 6.1. Organisation. 6.2. Active legal standing; inter-State complaints and individual applications. 6.3. Conditions of admissibility. 6.4. Procedure. 7. Effects and execution of European Court of Human Rights' judgments. 8. The European Court of Human Rights' interpretation of the Convention: 8.1. The doctrine of the margin of appreciation of States as a manifestation of the tendency towards judicial self-control. 8.2. Manifestations of the favourable tendency towards the protection of rights and freedoms through an evolving, dynamic, and teleological interpretation of the European Convention on Human Rights. 9. Problems currently facing the European Court of Human Rights and possible remedies: Protocol No. 14. 10. *De lege ferenda* proposals for perfecting the system. 11. Conclusions: the significance of the Convention in the framework of International Human Rights Law.

## Introduction

Signed in Rome on 4 November 1950, and coming into force on 3 September 1953, the Convention for the protection of human rights and fundamental freedoms (hereinafter the European Convention on Human Rights) fixed the principles set out in Article 3 of the Statute of the Council of Europe, which states that every Member State:

"must accept the principles of the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms".

Re-launched on the occasion of two great speeches made by Winston Churchill in Zurich (on 19 September 1946) and London (on 14 May

1947), the International Committee of Movements for the European Unity (the European Movement) called a Congress of Europe, which took place in The Hague from 8 to 10 May 1948. In its Message to Europeans, approved at the final plenary session, the participants declared, among other things, the following:

“2. We desire a Charter of Human Rights guaranteeing liberty of thought, assembly and expression as well as the right to form a political opposition;

“3. We desire a Court of Justice with adequate sanctions for the implementation of this Charter”.

At the suggestion of the Political Committee, the Congress also approved a Resolution in which it showed itself convinced that a Court of Justice should be created before which all citizens would be able to lodge a petition in the case of the violation of their rights. Similarly the Cultural Commission, presided over by the Spaniard Don Salvador de Madariaga, proposed the creation of a Court with the authority to adopt binding decisions which legally obliged States to respect a Declaration of Human Rights.

Dealing with the technical problems brought about by these proposals, it was passed to the legal section of the European Movement, whose leader was the great French jurist Pierre-Henri Teitgen, which was charged with submitting a project. On 12 July 1949, the European Movement submitted to the Committee of Ministers of the Council of Europe a project on the European Convention on Human Rights in which recognised rights were set out and a control mechanism, with the authority to ensure the compliance with obligations of States as regards human rights, was also envisaged. After a complex process the Committee of Ministers decided that the project, eventually adopted in August 1950, should be opened for signature at its session in Rome, where the Convention was signed on 4 November 1950.

As States enthused with the same spirit and in possession of a common heritage of ideals and political traditions for the respect of freedom and the rule of law, Member States of the Council of Europe reaffirmed their adhesion to:

“The spiritual and moral values which are the common heritage of their peoples and the source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy” (third paragraph of the Preamble to the founding Treaty of the Council of Europe).

In this way, the signatory States of the European Convention on Human Rights decisively contributed to the consolidation of a revolu-



tionary idea in international law which, having begun with the proclamation of the intrinsic dignity of all human beings in the United Nations Charter, had been progressively confirmed with the Convention on the Prevention and Punishment of the Crime of Genocide, the Universal Declaration of Human Rights and the Geneva Conventions on International Humanitarian Law; the conviction that all sovereign States have the legal obligation to respect the human rights of those people under their jurisdiction. As well as making more precise the fundamental human rights principles set out in the Statute of the Council of Europe, the Convention transformed many of the principles proclaimed in the Universal Declaration of Human Rights into precise legal obligations.

During the first *travaux préparatoires* of the Convention, the existence of a link became very clear between the Declaration adopted by the General Assembly of the United Nations in 1948 and the European Convention project, to the point where the section dedicated to recognised rights did not define these rights but made them explicit through an express reference to the corresponding provisions of the Universal Declaration, in the following terms: "in conformity with the Article... of the United Nations Declaration." After these *travaux préparatoires*, however, it was considered more in keeping with the nature of an international treaty to autonomously define the rights recognised, and not do this through reference to articles in the Universal Declaration.

Nevertheless, when they came to the production of the Preamble to the Convention, and the decision that the Universal Declaration would form an integral part of it, the writers of the European Convention on Human Rights included three explicit references to the Declaration in the first, second, and fifth paragraphs of the Preamble, as follows:

"Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10 December 1948";

"Considering that this Declaration aims at securing the universal and effective recognition of the rights therein declared";

"Being resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration".

The reference to the "collective enforcement of certain of the rights stated in the Universal Declaration" is important, as the establishment

and putting into practice of a complex institutionalised guarantee mechanism with the aim of ensuring effective respect of obligations assumed by Member States is, without any doubt, the most characteristic and distinctive feature of the European Convention on Human Rights; similarly significant are the words “to take the first steps”, as they make clear that the Convention was not conceived as something definitive, but rather quite the opposite, as a first step and starting point for the progressive development of the international recognition and protection of human rights.

In effect, the Convention was completed with fourteen protocols adopted between 1952 (the first additional protocol) and 2004 (the fourteenth additional protocol, signed on 13 May 2004), which will come into force once it has been ratified by all States which are members of the Convention, currently all the Member States of the Council of Europe. Of these protocols, eight are additional, and, as such, bind only those States which are parties to them. Of these, numbers one, four, six, seven, twelve, and thirteen are normative in character, in the sense that they widen the catalogue of rights recognised in the Convention; protocols nine and ten are not normative in character, as they refer to the guarantee mechanism instituted in 1950. Protocols three, five, eight, eleven, and fourteen refer to the organisation of the guarantee mechanism, and its authority. They are amendment protocols and therefore, unlike additional protocols, require the ratification of all Member States of the Convention, which will be modified after their coming into force. Protocol number eleven, adopted in Strasbourg on 11 May 1994, and coming into force on 1 November 1998, radically modified the guarantee mechanism established in 1950, through the institution of a single body for jurisdictional control, the European Court of Human Rights, which is permanent and of obligatory jurisdiction. This renders the ninth and tenth additional protocols worthless (only the first of these actually ever came into force); their aim was to modify the Convention, as regards who had active legitimacy for lodging demands before the Court (protocol number nine), and with regards the majority required in the Committee of Ministers so that they could adopt a definitive and binding decision regarding whether or not there was a violation of the Convention in those cases where the case was not submitted to the Court (additional protocol No. 10).

The Second Protocol conferred consultative jurisdiction to the Court so that, at the request of the Committee of Ministers of the Council of Europe, it could give advisory opinions on legal issues related to the interpretation of the Convention and its protocols. To date, the Commit-

tee of Ministers has not sought a consultative opinion from the European Court of Human Rights, which should not be seen as particularly strange given that it is not very probable that a political body with the characteristics of the Committee of Ministers should want to consult the Court regarding interpretation of the Convention.

The European Convention on Human Rights and its complementary protocols are restricted multilateral treaties, in the sense that only Member States of the Council of Europe can be parties to the Convention, and only these States can be parties to the additional protocols. After the reforms introduced by the amendments of Protocol No. 11, the European Convention on Human Rights was made up of fifty-nine Articles distributed under three Titles. The first Title (Articles 2 to 18) sets out the catalogue of rights guaranteed; the second Title (Article 19 to 51) regulates the structure and functioning of the European Convention on Human Rights; and the third Title (Articles 52 to 59) includes many different regulations.

## 1. Rights and freedoms recognised

The catalogue of rights guaranteed is very limited; the Convention recognises:

- the right to life (Article 2);
- the right to not be subjected to torture, or inhuman or degrading punishments or treatment (Article 3);
- the right to not be forced into slavery, servitude, or forced labour (Article 4);
- the right to liberty and security of person, and rights as a detainee (Article 5);
- the right to a fair trial and the presumption of innocence (Article 6);
- the right not to be convicted on account of any act or omission which, at the time it was committed, was not a criminal offence according to national or international law, and the right for criminal law not to have retroactive effects (Article 7);
- the right to respect for private and family life (Article 8);
- freedom of thought, conscience and religion (Article 9), of expression and information (Article 10), and of peaceful assembly, and of association, including the right to form and join trade unions (Article 11);
- the right to marry and found a family (Article 12);

- the right for everyone whose rights and freedoms as set forth in the Convention have been violated to an effective remedy before a national authority, including when the violation has been committed by persons acting in an official capacity (Article 13);
- finally, the right to the enjoyment of the rights and freedoms above mentioned without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status (Article 14).

The rights and freedoms recognised in the Convention make two important facts clear: firstly, that the rights and freedoms are set out through indeterminate legal categories, or categories which will become concrete when applied to actual cases; secondly, that the Convention fundamentally protects civil and political rights, although some of them (such as, for example, the right to freedom of syndication) have an indisputable social and economic dimension. This was due to the fact that there was a desire to proceed in stages, first protecting the fundamental rights without which the pluralist systems of democratic States and the rule of law cannot function, apart from the fact that in the Council of Europe, social rights are object of recognition and protection in the European Social Charter (adopted in Turin on 18 October 1961, and which came into force in 1965).

The group of rights recognised in the European Convention on Human Rights is seen as a *minimum*, given that, in accordance with Article 53, none of its regulations should be interpreted in the sense of limiting or endangering human rights and fundamental freedoms which could be recognised under the law of Member States, or under any other human rights treaty to which they are also parties.

The catalogue of human rights recognised in the European Convention on Human Rights has been extended through additional protocols numbers one, four, six, seven, twelve, and thirteen, which have added new rights and freedoms to those recognised in the Convention, with the aim of developing it, and achieving better consistency between the Convention and the International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations in 1966 and coming into force on 23 March 1976, of which the Member States of the Council of Europe are also members.

The First Protocol, adopted in 1952 as an additional Protocol, added some rights which had not been included in the text adopted in 1950. These were: i) the right to peaceful enjoyment of possessions,

through which nobody can be deprived of their property except in the public interest and subject to the conditions provided for by law and by the general principles of international law (Article 1); ii) the right to education, with the State respecting the rights of parents to ensure that such education is in conformity with their convictions (Article 2); and, finally, iii) the obligation of the State to periodically organise free elections (Article 3).

The Fourth additional Protocol prohibits deprivation of liberty on the ground of inability to fulfil a contractual obligation (Article 1), and recognises the right of everyone lawfully within the territory of a Member State to liberty of movement throughout the territory of the State, and to freely choose their residence (Article 2). Finally, Articles 3 and 4 of Protocol No. 4 respectively preclude a State from expelling its own nationals or from refusing them admission to the State, and prohibit the collective expulsion of foreigners. This last regulation brings about political and legal difficulties considering the current situation of migratory flows towards Europe and explains the reluctance of some States to be bound by it. Thus Spain signed the Fourth Protocol on 23 February 1978 but has still not ratified it and, as such, is not a party to it. Nevertheless, and in accordance with what is set out in Article 18 of the Vienna Convention on the Law of Treaties of 23 May 1969, it has the obligation to refrain from acts which would defeat the object and purpose of Protocol No. 4.

The Sixth Protocol establishes the abolition of the death penalty and sets out in Article 1 that nobody can be condemned to such penalty or executed. In this way, Protocol No. 6 complements Article 2 of the Convention, as the right to life recognised in it leaves outside its sphere of influence the execution of a sentence pronounced by a court which, in the case of a crime for which death penalty is provided by law, imposes such a punishment. However, Article 2 of the Sixth Protocol allows Member States to impose the death penalty, in accordance with their legislation, for acts committed in time of war or of imminent threat of war.

The Seventh Protocol, adopted on 22 November 1984, expands the catalogue of rights and freedoms recognised in the system of the European Convention on Human Rights by prohibiting the arbitrary expulsion of foreigners, recognising new procedural guarantees (such as the right to appeal against a penal sentence, the right to obtain State compensation when a sentence is annulled or a pardon is given as a result of a miscarriage of justice, and the principle of *non bis in idem*), and proclaiming the principle of legal equality of spouses as regards civil rights and responsibilities.

Finally, two other additional Protocols, numbers twelve and thirteen, which have not yet come into force, complete the catalogue of rights recognised. The Council of Europe opened for signature the Twelfth Protocol on 4 November 2000 in Rome at the ceremonies commemorating fifty years since the signature of the European Convention on Human Rights. It sets out in its first Article a general prohibition of discrimination, in stating that “the enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”. This Protocol fine-tunes the right recognised in Article 14 of the European Convention on Human Rights in which the right to not experience discrimination is not an autonomous right, as it only protects the right not to be discriminated against in the enjoyment of the rights recognised in the Convention.

The thirteenth Protocol, regarding the abolition of the death penalty, was adopted in Vilnius on 5 May 2002. It complements the sixth Protocol, leaving capital punishment abolished in all circumstances, and will come into force when it has been ratified, approved and accepted by ten States which are parties to the European Convention on Human Rights (it entered into force on July 2003).

## **2. Limitations and restrictions on the enjoyment of recognised human rights**

Some of the rights recognised in the European Convention on Human Rights can be object of limitations and restrictions. Such is the case for the rights recognised in Articles 8 to 11 of the Convention: the right to respect for private and family life, home, and correspondence; the right to manifest religion or belief; the right to freedom of assembly, and association, including the right to form and join trade unions. The second paragraphs of these Articles foresee, in effect, that the exercise of these rights can be limited, although they will not be able to be the object of restrictions other than those which, prescribed by law, are deemed necessary in a democratic society for the achievement of one or some of the following legitimate aims: national security, public safety, prevention of disorder or crime, protection of health or morals, or protection of the rights and freedoms of others.

Article 2 of the fourth Protocol, for its part, admits that the right to freedom of movement recognised therein can be the object of restric-

tions foreseen in the law when they constitute measures necessary in a democratic society in the interest of national security or public safety, for the maintenance of public order, for the prevention of crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.

In the same way, the right to freedom of movement within the territory of a State and to freely choose residence may be subject, in particular areas, to restrictions which, prescribed by law, are justified by the public interest in a democratic society.

In addition, Article 18 of the Convention sets out in a general way that the restrictions which could be imposed on the rights and freedoms recognised cannot be applied for any purpose other than those for which they have been prescribed. There are, therefore, limitations on the exercise of the rights and freedoms recognised in the Convention, but they must be foreseen in the law, be in response to a legitimate final objective, and be necessary in a democratic society.

The notion of “necessary in a democratic society” is one of the indeterminate legal concepts which appear in the European Convention on Human Rights. The definition in a particular case of what is necessary in a democratic society is, obviously, difficult, as it deals with a vague and abstract legal concept; nevertheless, as has been stated by Daniel I. García San José, the jurisprudence of the European Court of Human Rights has defined a criterion for the interpretation of this notion, having repeatedly signalled that interferences in the enjoyment of a right (i.e. its limitations and restrictions) must be proportional, as the Convention is characterised by its concern for balance between individual rights and general interests.

So, for example, in its judgment of 9 December 1994, recounted in *López Ostra v. Spain* (a case in which the applicant alleged a violation of her right to respect for her home, recognised in Article 8 of the Convention, due to smells, noises, and contaminating smoke released by a liquid and chemical waste management plant), the Court came to the conclusion that Article 8 of the Convention was applicable, and had been violated because the State in question:

“... did not succeed in striking a fair balance between the interest of the town’s economic well-being – that of having a waste-treatment plant – and the applicant’s effective enjoyment of her right to respect for her home and her private and family life” (paragraph 58 of the decision).

### 3. Derogations of obligations by participating States

Article 15 of the European Convention on Human Rights sets out that in time of war or any other public emergency threatening the life of the nation, Member States will be able to derogate from their obligations under the Convention. Such derogations, however, should only be adopted in strict accordance with the exigencies of the situation, and provided that they are not inconsistent with other obligations under international law. Any State exercising this right to derogation will keep the Secretary General of the Council of Europe fully informed of the measures taken, the reasons that inspired them, and of the date when they will cease to be in force and the provisions of the Convention will again apply.

Therefore, the option for derogation is not totally discretionary, nor is it exclusively entrusted to the unilateral and subjective appraisal of the Member State. Apart from the obligation to inform the Secretary General of the Council of Europe, the European Court of Human Rights has the authority to consider and decide whether, in a given case, the derogation was demanded by the situation and whether it contravened other obligations under international law legally binding on the State in question.

Thus, in its judgment of 18 January 1978, recounted in the inter-State complaint *Ireland v. United Kingdom of Great Britain and Northern Ireland*, the Court recognised that it falls to the State to determine whether there is a public emergency threatening the life of the nation; and, in the case of an affirmative answer, how far it is necessary to go in attempting to overcome the emergency; on this issue, section one of Article 15 leaves the State with a wide margin of appreciation. But the Court adds that States “do not enjoy an unlimited power in this respect (...). The domestic margin of appreciation is thus accompanied by a European supervision” (paragraph 207 of the judgment).

However, even when Article 15 is applicable, no derogation is permitted from Article 2, except in respect of deaths resulting from lawful acts of war, nor from Articles 3, 4 (1) and 7. Therefore, the right to life, freedom from torture or inhuman or degrading treatment, freedom from slavery and servitude, and the right to be protected against the retroactivity of criminal law do not admit any exception or derogation, and are guaranteed by imperative norms.

These are absolute rights, thus as regards the prohibition of torture, the European Court of Human Rights stated in its judgment of 28 July 1999 (*Selmouni v. France*, in which the Court considered that



the physical and mental violence committed against the applicant's person caused severe pain and suffering and was particularly serious and cruel, and that such a conduct should be regarded as acts of torture for the purposes of Article 3 of the Convention) that Article 3 enshrines one of the most fundamental values of democratic societies, and that:

“Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 (2) even in the event of a public emergency threatening the life of the nation” (paragraph 95 of the judgment of 28 July 1999, see the following judgments: *Ireland v. United Kingdom* of 18 January 1978; *Soering v. United Kingdom* of 7 July 1989; and *Chahal v. United Kingdom* of 15 November 1996).

Article 15 of the Convention proves the existence of a European public order regarding human rights, as, in establishing limits to the States' right to derogate the legal obligations they have assumed, the European Convention on Human Rights made concrete and positive the notion of *ius cogens* in international human rights law.

#### **4. Limits of the scope of the European system for the protection of human rights**

The existence of this European public order does not, however, mean that the Convention's system constitutes a European human rights *ius commune*, as, in the legal framework made up by the European Convention on Human Rights and its additional normative Protocols, factors of fragmentation and relativism which cannot be ignored are at work, and limit its operation and effect.

The European system for the protection of human rights has, in effect, been created through treaties (i.e. through voluntary agreements between States) with the result that the role of the consent of sovereign States conditions the achievement of this group of legal obligations; firstly because of the fact that although all Member States of the Council of Europe are bound by the European Convention on Human Rights, not all Member States are bound by the different normative Protocols which have extended the list of recognised rights and freedoms; and secondly because when signing the Convention or one

of its normative Protocols, or when depositing its instruments of ratification, States can make reservations or interpretative declarations which exclude, or subjectively interpret, the legal obligations undertaken by Member States. All these assumptions constitute undeniable manifestations of relativism and fragmentation, which cannot be ignored, and which limit the scope of the European Convention on Human Rights' system, despite the Convention's undeniable constitutional and European public order dimension of human rights.

#### 4.1. *Diversity among States Parties to the Convention and to its Additional Normative Protocols*

Not all States which are parties to the Convention are legally bound by the different normative Protocols with the result that the system as a whole does not operate in a homogenous way due to the fact that States have not taken on the same legal obligations.

All this means that the Convention's system is not a homogenous legal unit which binds all the Member States of the Council of Europe equally, as the number of States participating in the various legal instruments is not the same as that of those in the system as a whole, a characteristic which, without doubt, represents a factor of heterogeneity and fragmentation which limits the scope of the European *ius commune* of human rights.

An enormously positive step has been made in the past few years as all member States of the Council of Europe are now parties of the European Convention on Human Rights and all States wishing to be members are obliged to sign the Convention at the time they join the Council of Europe, and to ratify it as soon as possible. The aim of the Convention therefore is to legally bind the group of States which are members of the Council of Europe, which can undoubtedly be seen as a step towards progress if compared with the States' discretion at the beginning of the system; at that time the Member States of the Council of Europe were not legally bound to be parties of the European Convention on Human Rights. A true European *ius commune* of human rights will not however exist until all Member States of the Council of Europe become, in turn, parties to the Convention and to all the normative Protocols which have been developed through the progressive extension of the rights protected.

#### 4.2. *Reservations and interpretative declarations*

The heterogeneity referred to above is equally evident in the possibility of all Member States to make reservations and interpretative dec-

larations regarding a particular section of the Convention due to the fact that a law in force within their territory is not in conformity with the aforementioned provision.

In effect, the European Convention on Human Rights, albeit within the procedural and substantive limits established in its Article 57 (in accordance with which, for example, reservations of a general character are not permitted), allows Member States to make reservations which introduce factors of relativism, despite the fact that it is a Convention which, unlike the more 'classic' treaties, exceeds the sphere of mere reciprocity between States and creates objective obligations which benefit from collective guarantees.

Reservations and interpretative declarations lodged by States Parties are, however, subject to the control of the European Court of Human Rights, with the result that the decision as to whether or not they are valid, as well as their interpretation, escapes the individual, subjective, and unilateral appreciation of States. On this matter the European Court of Human Rights resolutely affirmed in its decision of 29 April 1988, in the *Belilos vs. Switzerland* case, that the silence of the depositary and the Member States does not deprive the Convention institutions of the power to make their own assessment concerning the validity of a reservation. In its judgment the Court declared invalid a Swiss reservation as it considered it to be contrary to the Convention, clearly confirming that the jurisdictional control body set up by the European Convention on Human Rights has the competence to determine whether a reservation is valid or not.

If the Court decides that a reservation is invalid it will not therefore have legal effects and the State which made the reservation will remain bound by the conventional law which it was attempting to avoid by lodging a reservation when ratifying the Convention or of one of its Protocols.

In this way the European Court of Human Rights has been able to limit the potentially devastating effects of State subjectivism. Nevertheless, the aforementioned factors of fragmentation and heterogeneity, and especially the possibility for States to lodge interpretative declarations and reservations – so difficult to justify when dealing with conventions protecting human rights – sometimes cause complex legal problems and, in any case, are surprising in a system which was conceived as a manifestation of a European public order for the protection of fundamental rights and freedoms. The worrying effect of reservations explains the fact that they are not admissible in Protocols No. 6 and 7, which deal with the abolition of the death penalty; both, in effect, state that no reservation to any of their provisions will

be accepted, thus anticipating what, in my opinion, would be desirable for the future as regards the European Convention on Human Rights and all its Protocols; the non-admission of reservations, through which all Member States of the Council of Europe could be bound by a common normative framework.

## **5. The mechanism of jurisdictional protection instituted in the European Convention on Human Rights**

When it was adopted in 1950 the most characteristic and significant feature of the European Convention on Human Rights consisted in establishing a complex institutionalised mechanism of jurisdictional guarantees, made up of two bodies; the European Commission of Human Rights and the European Court of Human Rights.

In the project of the European Convention on Human Rights which the European Movement submitted to the Committee of Ministers of the Council of Europe, there was a proposal for the existence of two bodies: a Court and a Commission. The final aim of the proposal was to deal with the concerns that the Court would be swamped under an avalanche of futile litigations and the risk that it could be used for political purposes, hence the demand that petitioners should have to previously send their complaints to the Commission, which would act as a filter.

The debates which took place in the heart of the Council of Europe, and led to the adoption of the Convention, confirmed that these fears were deeply felt, and the negotiators chose a guarantee mechanism comprising three bodies: the European Commission of Human Rights, the European Court of Human Rights, and the Committee of Ministers of the Council of Europe.

The creation of a European Commission of Human Rights was not a controversial issue at the time of the drafting of the Convention; however, there were many who were opposed to the creation of a Court because they considered that such a body did not respond to a real need among the Member States of the Council of Europe. The final result was a compromise, based on a tripartite structure for the jurisdictional guarantee mechanism: the Commission, the Court and, as a result of the facultative nature of the jurisdiction of the latter, the Committee of Ministers of the Council of Europe.

The Commission could deal with the applications by a Member State against another State Party to the Convention, or receive complaints from individuals. In the first case, its competence was obligato-

ry; in the second, however, it was facultative or optional. The Commission was charged with deciding on the admissibility of the applications, establishing the facts, contributing to possible amicable settlements and, if necessary, expressing its opinion as to whether there was a breach of the Convention, an opinion which the Commission would refer to the Committee of Ministers of the Council of Europe.

The Court was charged with the task of taking a definitive and binding decision regarding the affairs submitted by the Commission or by a Member State interested in the case, either due to its position as the plaintiff State or to its position as the respondent State before the Commission, or because of being the State whose national is the applicant.

In cases which could not be referred to the Court because the respondent State had not accepted its jurisdiction, as well as in other cases where the Commission or the Member State did not refer the case to the Court, the Committee of Ministers of the Council of Europe would have quasi-judicial capacity for the adoption of a definitive and binding resolution regarding whether or not there was a violation of the Convention which could be attributed to the State which had been accused before the Commission by another Member State of the Convention, or by an individual who found him or herself under its jurisdiction, if the State concerned had accepted the authority of the Commission to receive the applications of individuals.

The facultative character of the Court's jurisdiction explains the anomalous presence of a political body, the Committee of Ministers of the Council of Europe. This Committee has the authority to decide whether in a case previously examined by the Commission there was a violation of the Convention by the accused State. In any case, the jurisdictional guarantee mechanism set up in 1950 operated on the basis of applications, and not *ex officio*, and it required the intervention of two bodies: the Commission and the Court, or the Commission and the Committee of Ministers if the case had not been referred to the European Court of Human Rights by those who had the legitimate power to do this (the Commission and the State or States involved in the case).

Despite its deficiencies (the optional character of the authority of the Commission to receive the applications of individuals; the optional nature of the Court's jurisdiction; the possible intervention of an inter-governmental political body for cases which were not referred to the Court; the lack of active legal standing for the individual before the European Court of Human Rights), and the undeniable complexity of the guarantee mechanism set up in 1950, the European Convention

on Human Rights introduced significant innovations in international law.

Firstly, it set up a collective guarantee system, through which a Member State could present an international complaint before a body of obligatory authority, the European Commission of Human Rights, against another Member State, although the victims of the alleged violation might not be nationals of the applicant State; this meant that the nationality requirement of the complaint was overcome.

Secondly, and despite the facultative character of the Commission's competence for dealing with the applications of individuals, the mere admission of this possibility in 1950 constituted another rupture in traditional international law, as it allowed that a person, a non-governmental organisation, or a group of individuals, could directly bring a complaint against a State, even if it was their own, before an independent and impartial international body, the European Commission of Human Rights. The significance of this important innovation in international law was, however, limited; on the one hand, because it did not institute a system of *actio popularis* due to the fact that the individual applicant had to have been a victim of the alleged violation; on the other hand, because the competence of the Commission to receive applications from individuals was accepted by States as an optional capacity.

Thirdly, and finally, a Court was set up charged with pronouncing definitive and binding judgments regarding cases which were referred to it either by the Commission or by a Member State involved in the case, which was also a progressive step, despite the voluntary nature of the jurisdiction of the Court; it could only deal with the cases in which the respondent State had declared that it recognised the jurisdiction of the Court as fully obligatory.

However, States safeguarded some of their sovereign authority and retained much of their unwillingness to be controlled by an independent and impartial guarantee mechanism: the first is evident in the facultative character of the competence of the Commission to receive the applications of individuals and the optional nature of the jurisdiction of the Court; the second is obvious both in the anomaly of the eventual intervention of a body of a political nature, the Committee of Ministers of the Council of Europe, in the functioning of a jurisdictional guarantee mechanism, and in the establishment of a system of double instance, in which respondent States had two opportunities to oppose an accusation: first before the Commission, and then before the Court or before the Committee of Ministers if the case was not taken to the Court.

This protection mechanism turned out to be difficult, slow, and unsatisfactory: difficult, firstly, because of the intervention of two bodies, the Commission and the Court, or the Commission and the Committee of Ministers if the case was not referred to the Court; secondly, slow, which brought about the paradoxical situation whereby, ostensibly, a right recognised in the Convention could not be protected: that of the administration of justice within a reasonable timeframe; finally, and most importantly, unsatisfactory for individuals who alleged that they had been victims of the violation of one of the recognised rights: above all because they could only have active legal standing before the Commission, but not before the Court, which meant that the European system of protection did not fully respect one of the fundamental rights recognised therein: that of having access to an independent and impartial tribunal; also, because the lack of active legal standing of individuals before the Court could lead to a case being decided by a political body, the Committee of Ministers of the Council of Europe, and not by an impartial and independent judicial body.

In practice, however, the evolution of the system was very different to what had been foreseen in 1950: in effect, all the Member States ended up accepting both the competence of the Commission to receive the applications of individuals and the jurisdiction of the Court, which meant that most cases were resolved by the Court and not by the Committee of Ministers. Thus the Court ended up becoming the mainstay of the guarantee mechanism, thereby confirming the distinctive characteristics of the human rights protection system set up in the European Convention on Human Rights: its jurisdictional nature.

The progressive increase in awareness of this distinctive characteristic, as well as the deficiencies in the guarantee mechanism set up in 1950, explains why both in the academic sphere as well as in the heart of the bodies of the Council of Europe, the need to significantly revise the guarantee system was frequently repeated with the knowledge that partial and fragmentary solutions would not suffice.

The principal proposals for reform were as follows:

1. That the Commission and the Court become permanent bodies.
2. That the Commission become a first-instance court, and the Court be used for appeals.
3. To set up a single Court with the authority to decide regarding both the admissibility of the application, as well as the merits of the complaint.

The third of these proposals was the one that was taken into consideration by the Parliamentary Assembly of the Council of Europe and

was accepted in the Vienna Declaration of the Heads of State and Government of the Member States of the Council of Europe (9 October 1993). In this Declaration it was furthermore stated that States which were candidates for membership of the Council of Europe had the obligation to sign and ratify the European Convention on Human Rights. From this moment on it was clear that the reform of the system was oriented towards a Convention to which all Member States of the Council of Europe would be parties, and of which a permanent Court, with obligatory jurisdiction and decisive authority, would be the only jurisdictional guarantee body.

On 11 May 1994 a new protocol was adopted and opened for signature, Protocol No. 11, which significantly modified the guarantee mechanism set up in 1950 by setting up a single control body, the European Court of Human Rights; a permanent court of obligatory jurisdiction, before which, under the same conditions as States, individuals have active legal standing for filing complaints once the available domestic remedies have been exhausted, with the result that an independent and impartial judicial body will decide, through a binding judgment, whether or not there has been a violation of one of the rights set forth in the Convention or its normative Protocols.

When the amendments of Protocol No. 11 came into force an important step was taken towards perfecting the European human rights protection system due to the fact that, as Ángel Sánchez Legido stated, from then on a permanent Court with obligatory jurisdiction, before which individuals have active legal standing to lodge complaints in the same conditions as States, is the only competent body to decide whether or not there has been a violation of recognised rights in a particular case.

## 6. The European Court of Human Rights

In examining the issues below, the normative reference will be that of Protocol No. 11, which came into force on 1 November 1998.

### 6.1. Organisation

The Court, whose seat is in Strasbourg, is permanent, and is made up of a number of judges equal to that of the number of Contracting States, namely the Member States of the Council of Europe. The wide composition of the Court has the benefit, in very sensitive political or social cases, of avoiding the impression that the judgments of a



Court, with a limited composition, could be seen as coming from a “foreign court”, not acquainted with the historical and social background of the State concerned. In addition, the high number of judges allows the Sections of the Court to work in Chambers, which facilitates the consideration of the high number of cases which must be resolved.

The judges are elected by the Parliamentary Assembly of the Council of Europe and are chosen from a list of three candidates submitted by each Member State. They should be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurists of recognised competence. They have the duty to be independent and they are not representatives of the State in respect of which they have been chosen and, during their terms of office, may not engage in any activity that is incompatible with the independence, impartiality and availability needed for full-time office. Judges serve for six-year terms and may be re-elected; the term expires when they reach the age of seventy, although they hold office until they are replaced and continue to be in charge of the cases to which they were assigned.

For the examination of cases submitted to it, the Court acts in Committees made up of three judges, in Chambers of seven judges, or in a Grand Chamber of seventeen judges. The Court’s Chambers set up Committees for a fixed period of time. The judges of every Chamber are appointed on the basis of rotation in order to allow all judges to participate as full members. The Grand Chamber is composed of seventeen judges who include the President, Vice-Presidents, the Presidents of the Chambers, and the judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber no judge from the Chamber which rendered the judgment may sit on it, with the exception of the President of the Chamber and the judge who intervened in respect of the State concerned. The Grand Chamber is structured into two geographically balanced formations and attempts to reflect the diverse legal systems of the Member States. Organisational issues are dealt with by the Court in plenary sessions in which all judges participate. The Court has the competence to organise itself and the Plenary Court is competent to elect a President, Vice-presidents, and the Registrar, and to adopt the rules of procedure of the Court. The judge elected in respect of the Member State concerned in a case submitted to the Court will be an *ex officio* member of the Chamber or of the Grand Chamber; in his or her absence, or when they can not intervene, the same State will designate a person to act as judge on an *ad hoc* basis.

## 6.2. *Active legal standing: inter-State complaints and individual applications*

The jurisdiction of the Court extends to all issues relating to the interpretation and application of the Convention and the Protocols thereto which are submitted to it by those with active legal standing.

In accordance with Articles 33 and 34 of the Convention, the following can file applications:

- a) Any Member State which refers to the Court any alleged breach of the provisions of the Convention and the Protocols thereto, and which, in its opinion, can be imputed to another State Party (Article 33 of the Convention);
- b) Any person, non-governmental organisation, or group of individuals claiming to be the victim of a violation of the Convention by one of the Member States (Article 34 of the Convention).

When dealing with inter-State complaints, any Member State, although it may not be that of the nationality of the victims of the alleged violations, can lodge a complaint before the Court. This is evidence of the collective guarantee which characterises the jurisdictional mechanism of the European system for the protection of human rights which overcomes the traditional requirements about the nationality of the complaint as one of the elements needed to establish the international responsibility of a State.

On the other hand, when dealing with the applications of individuals, the Convention has not instituted a type of *actio popularis*, and therefore they are not authorised to lodge an application *in abstracto*, in other words filed for the sole reason that the individual applicant considers an internal law of the State to be contrary to the Convention. Hence the requirement that the individual (natural or legal person) must assert having been victim of a violation of one of the rights protected under the Convention or its Protocols.

On some occasions, however, the Court has been of the opinion that some people could be considered to be victims simply by the existence of a particular law, even if the applicants had not been able to prove that this law had been applied to them. Such was the case in *Klass and others v. Germany*, relating to a German law of 1968 which permitted, albeit only under certain conditions, secret surveillance of correspondence, post and telecommunications without any obligation to inform the person concerned (judgment of 6 September 1978).

The term victim is, in principle, used to refer to the person directly affected by the act or omission considered to violate a right. But the

case law of the Court (and, before Protocol No. 11 came into force, that of the European Commission of Human Rights) has widened the notion of victim to cover not only the direct victim of the alleged violation, but also any indirect victims, or those who can demonstrate the existence of a close link between themselves and the person who has had one of his or her rights violated. The progressive flexibility of the notion of victim through the case law has given active legal standing to an individual who could potentially be a victim of a violation, as occurred in the *Soering v. United Kingdom of Great Britain and Northern Ireland*. In this case the Court had to decide about an application filed by a young German man who claimed that if he were to be extradited from the respondent State to the United States of America, he would be tried and could be sentenced to the death penalty in which case he would have to spend a long time on death row. The applicant had not been extradited and, as a result, was no more than a potential victim of a possible violation of the obligation which, in an indirect manner, was imposed by Article three of the Convention on the United Kingdom.

In its judgment of 7 July 1989, the Court, in a decision written in the conditional, admitted the possibility of Soering being a potential victim and declared that the respondent State would have international responsibility were the applicant to be extradited to the United States of America and condemned to the death penalty there.

### 6.3. *Conditions of admissibility*

The admissibility phase is exceptionally important because in order for the Court to be able to begin a thorough examination of the alleged violations the applicant has to fulfil rigorous requirements; only those cases which fulfil these requirements can be considered. The issue of admissibility is of fundamental importance for the functioning of the system of the European Convention on Human Rights. Hence, Article 35.4 of the Convention establishes that, at any stage of the proceedings, the Court can reject any application it considers to be inadmissible. It therefore constitutes a hurdle that the majority of complaints do not manage to overcome.

As regards the applications of individuals, Article 35 of the Convention sets out that the application must be lodged within six months from the date of the final domestic decision; it cannot be anonymous; nor can it be essentially the same matter that, without dealing with any new facts, has already been examined by the Court or previously submitted to another procedure of international investigation or settlement.

The Court also considers inadmissible any complaint from an individual that is deemed to be incompatible with the provisions the Convention or the Protocols thereto for any of the following reasons:

- a) It alleges the violation of a right which is not one of those protected under the Convention or its Protocols (incompatibility *ratione materiae*);
- b) It invokes a right recognised in a Protocol to which the State concerned is not party (incompatibility *ratione personae*);
- c) It refers to events which have happened outside the jurisdiction of the State concerned (incompatibility *ratione loci*); or
- d) It deals with events prior to the ratification of the Convention or one of its Protocols by the State concerned (incompatibility *ratione temporis*).

*Ratione loci* incompatibility applies when the application refers to events which have taken place outside the jurisdiction of the State concerned as, in accordance with Article 1 of the Convention, Member States are obliged to guarantee the recognised rights for everyone who falls under their jurisdiction.

In the interpretation of the concept of jurisdiction, the Court has repeatedly stated in its case law that this notion is not restricted to the territory over which the State concerned exercises territorial sovereignty. So, in its decision of 10 May 2001, dealing with the inter-State case of *Cyprus v. Turkey*, the Court decided that the responsibility of a Member State can also come about as a consequence of an action which took place in an area that is not national territory, if the State in question exercises effective control over the area. Nevertheless, in the decision of 12 December 2001 (regarding the accusation of Vlastimir and Borka Bankovic and others v. eighteen Member States of the European Convention on Human Rights and members of the Atlantic Alliance regarding the alleged violation of Articles 2, 10 and 13 of the Convention as a result of the bombing carried out by NATO planes against Serbian Radio Television) the Court declared the application inadmissible because the applicants were not under the jurisdiction of the respondent States; this is a criticised and restrictive vision completely opposed to previous decisions.

Similarly, abusive complaints are inadmissible as are those which are manifestly ill-founded. The non-admission of an abusive application allows the Court to avoid being used for purely political purposes. This was a significant fear for the writers of the Convention in 1950, although in practice it has barely caused any problems even though jurisdictional control bodies have preferred to reject "political" complaints

on the basis of legal criteria without declaring their inadmissibility to be due to political intentions.

The inadmissibility of applications which are manifestly ill-founded raises some difficult legal problems. In effect, the Court cannot make a decision regarding issues of admissibility without examining the problem on its merits, despite the fact that it is not a new instance of appeal against the alleged errors of fact or law made by national tribunals, as the function of the European Court of Human Rights consists in examining whether or not there has been a violation of one of the rights recognised in the Convention or in its additional normative Protocols.

It should be recognised, however, that it is not always easy to draw a line between the two functions, just as it is not easy to decide between declaring a complaint to be inadmissible due to it being “manifestly ill-founded” or opting, conversely, for choosing to begin the examination to determine whether or not there was a violation. In these cases, the difference between admissibility and examination of merits is more theoretical than real, because inadmissibility due to a manifest lack of grounds supposes that the Court has made a pronouncement regarding the alleged violation and, as such, on its grounds. On the other hand, it is still strange that on occasions a long and contradictory process takes place only for the Court to finally declare that a complaint is inadmissible due to it being “manifestly” ill-founded.

Finally, appeal to the Court cannot be made unless all existing domestic remedies in the internal legal order of the State concerned have been exhausted, just as this requirement is understood in the light of the generally recognised principles of international law. This requirement, whose aim is to provide States with the opportunity to prevent or amend the alleged violations against them before they are submitted to the European Court of Human Rights (as States do not have to account for their actions before an international body before having previously had the opportunity to correct the situation in their internal legal order), highlights the subsidiary character of the European mechanism for the protection of human rights and fundamental freedoms.

In the system of the European Convention on Human Rights, the need for previous exhaustion of domestic remedies makes more sense than in general international law, as its Article 13 imposes on Member States the obligation to provide effective remedies within their jurisdiction as regards allegations relating to violations of the Convention. This provision is of fundamental importance as it makes clear the duty of States to ensure the fulfilment of the obligations derived from the Convention and its Protocols in their internal legal orders.

However, the obligation of previous exhaustion of internal remedies should not be understood in an absolute and mechanical way, but flexibly and without excessive formality, as the Court has repeatedly held in its case law that the government which maintains that the internal remedies have not been exhausted should prove that these exist both in theory and in practice. Only when this fact has been established will it fall to the applicant to prove that such remedies did not exist or that, even if they did exist, the total passivity of the national authorities or the existence of generalised practices made these ineffective.

#### 6.4. *Procedure*

When an application is submitted a judge is designated as Judge Rapporteur and he or she commits, under the authority of the Court and with the help of the Registrar and the Registry, to prepare the proceedings, enter into contact with the parties and, if the application is declared admissible, carry out the necessary steps for the eventual achievement of a friendly settlement. Inter-State applications are submitted to a Chamber. However applications from individuals are examined by a Committee which will have the Judge Rapporteur in charge as one of its members. The Committee is competent to unanimously declare the inadmissibility of an application, or to strike it out from the Court's list of cases and eliminate it from the day's proceedings where such a decision can be taken without further examination. The declaration of inadmissibility is final and there is no possibility of appeal.

If the Committee does not consider the application to be inadmissible it will be forwarded to a Chamber which will examine both its admissibility and its merits; in principle, the judgments of Chambers regarding admissibility will be adopted separately to the main question, and are final.

The examination regarding the merits of an application will be carried out by a Chamber of seven judges or, under exceptional circumstances, by the Grand Chamber.

In collaboration with the interested parties, the Court will pursue an adversarial examination of the case and, if it deems it necessary, undertake an investigation in order to establish the facts; the States concerned will have to furnish all necessary facilities. At the same time, the Court places itself at the disposal of the parties concerned so as to reach a friendly settlement on the basis of the rights as defined in the Convention and the Protocols thereto. The parties concerned can agree to a friendly settlement at any point in the proceedings; this settlement must be authorised by the Court and will bring proceedings to an end.

The Court will strike the case from the Court's list through a resolution which will be limited to a short explanation of the facts and the solution found.

Before rendering its judgment, and as long as none of the parties to the case objects, the Court can, at any time, *motu proprio*, relinquish jurisdiction in favour of the Grand Chamber; this occurs when cases have significant and specific consequences. This relinquishment of jurisdiction to the Grand Chamber has come from a desire to accelerate the proceedings.

If the Chamber has rendered its judgment, the parties concerned will be able to request a referral of the case to the Grand Chamber for a new examination of the case regarding exceptional circumstances which bring up a serious issue of general importance, or serious questions affecting the interpretation or application of the Convention and the Protocols thereto.

The request of the parties concerned will be examined by a Panel, made up of five judges from the Grand Chamber, who will determine whether the request to reconsider the case should be accepted or not.

When the aforementioned circumstances of general importance or serious questions affecting the interpretation or application of the Convention and its Protocols occur, the aim of these new proceedings before the Grand Chamber is to permit a reconsideration of the more important aspects of the case so as to guarantee the quality and coherence of the Court's case law. It is, therefore, a system with two levels of jurisdiction, as two different bodies within a single Court (a Chamber and a Grand Chamber) have the authority to decide which cases should be referred to the Court.

Although in principle, and hopefully habitually, a Chamber composed of seven judges will definitively resolve those applications declared to be admissible, the judgments of the Chambers will however only be *res judicata*, and as such be final, either when a period of three months has passed since their pronouncement without any request from the parties concerned to refer the case to a wider section of the Court, i.e. the Grand Chamber, or having been requested by any of the parties, when a panel of five Grand Chamber judges considers that the case does not involve those exceptional circumstances which would justify the referral. If the case is referred to the Grand Chamber, then it is up to this body to give a final judgment.

This system, introduced by the Protocol No. 11, has without doubt reinforced the jurisdictional character of the mechanism for the protection of rights and freedoms. But this was only possible thanks to a

solution of compromise, consisting of maintaining the principle of re-examination as a structural element of the new mechanism, permitting cases of special importance to be considered at two instances by two different forms of the Court, the Chambers and the Grand Chamber.

It is undeniable that this solution of compromise brings about problems and is the main technical imperfection of the new system, both because of its complexity and because of the fact that it expresses the wishes of States to be able to rely on a two level jurisdiction. But it was imposed with a compromise in 1994, when Protocol No. 11 was adopted.

On this issue the *Öcalan v. Turkey* case is significant because it makes evident how convenient it is that the Grand Chamber decides when serious questions affecting the interpretation and application of the Convention are at stake. Sentenced to the death penalty, Öcalan lodged a complaint against Turkey before the European Court of Human Rights which came before one of the Chambers of the first section of the Court; the Chamber decided to apply Article 39 of the Rules of Procedure of the Court and asked the government of the State concerned to adopt all means necessary for the non-execution of the sentence, so as to be able to continue with the examination of the admissibility of the application. In September 2001 a delegation from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) visited the applicant's place of detention; a law of August 2002 abolished the death penalty in times of peace and, as a consequence, the Turkish penal Code was modified; the Turkish government alleged before the Court that the execution could no longer take place, as the punishment was commuted to life imprisonment in October 2002. The Chamber pronounced judgment on 12 March 2003 and a few months later, in November 2003, Turkey ratified Protocol No. 6 which prohibits the death penalty in times of peace.

Even so, considering the importance of the legal problems involved, it was deemed useful that the Court, in its Grand Chamber form, should make a pronouncement regarding the interpretation of Article 3 of the Convention (prohibition of torture) in light of Article 2 (the right to not arbitrarily be deprived of life, and the pronouncement of a sentence to capital punishment dictated in a non-equitable process). Like the Chamber, the Grand Chamber found in its judgment on 12 May 2005, by thirteen votes to four, that the plaintiff had not been judged by an independent and impartial tribunal, and that he had had to suffer the threat of the death penalty for more than three years, which was deemed to be inhuman treatment.



## 7. Effects and execution of the European Court of Human Rights' judgements

The Court decides, through a reasoned judgment, whether in the case that has been submitted to it, there was or was not a violation of the Convention which can be attributed to the State concerned. If the judgment does not, in whole or in part, express the unanimous opinion of all the magistrates, any of them is entitled to annex either a separate, concordant, or differing opinion to it.

The judgments of the Court are binding because the States have undertaken to abide by the final judgment of the Court in any case to which they are parties (Article 46.1 of the Convention) and they have, above all, two effects: firstly, the judgment is *res judicata* as regards the State concerned, and secondly that of the interpretation of the case with *erga omnes* effects, as the Court does not only have authority to apply the Convention, but also to interpret it. The consequence of the latter is that the Court's judgments are general in reach and affect all Member States of the Convention; hence national authorities, including judicial authorities, should take the interpretation of the Convention by the Strasbourg Court into consideration in their case law and are legally bound by this interpretation.

If an adequate reparation of the violation is not wholly or in part possible, Article 41 of the Convention establishes the competence of the Court to award compensation, by establishing that the Court will afford, if necessary, just satisfaction for the injured party if it finds that there has been a breach of the Convention, and if the internal law of the State concerned only allows a partial reparation of the consequences of the aforementioned violation.

The judgments of the European Court of Human Rights are declarative but not enforceable by the Court. The declarative nature of the judgments of the European Court of Human Rights brings about a difficult problem; the fact that the Court cannot enforce them does not imply that they lack effect in the legal order of the State declared responsible for a violation of the Convention or the Protocols thereto. In other words, the fact that they cannot be directly executed does not imply that they lack any internal legal effect, and hence the need to establish adequate procedural channels which will allow an effective observance of the judgments of the European Court of Human Rights, as the Court is not competent to make pronouncements regarding the fulfilment and execution of its resolutions. The solution to this legal problem is not easy due to the fact that firstly not all the judgments of the European Court declaring that there was a violation of one or

some of the rights set forth in the Convention have the same nature and the same scope. If it is decided that there was a violation, the Court will declare the international responsibility of the offending State which can be done for many different reasons: sometimes, in effect, the Court declares that in a given case the internal judicial authorities violated the Convention; in other cases, the violation which gave rise to the international responsibility of the State was as a result of an act or omission of domestic administrative bodies; the judgment of the European Court can also be based on an appreciation that the internal regulation applied by the national judge is in itself contrary to the Convention, meaning that the fulfilment of the judgment would require a legal reform.

The greatest legal difficulty in the execution of a Strasbourg Court's judgments occurs when, due to the *res judicata* effects of firm and final judgments, the European Court of Human Rights finds that a violation of the Convention existed as a result of a final judgment previously pronounced by an internal tribunal. Can the decision of an international tribunal be used to call into question the *res judicata* effect of a final judgment pronounced by the judiciary of the offending State, which the European Court of Human Rights has declared responsible for a breach of its conventional obligations? The effects and execution of the judgments of the European Court of Human Rights are not regulated in Spanish law despite the fact that, as a Member State of the Convention, Spain is under the obligation to set up in its legal order the appropriate legal channels for effectively executing the judgments of the European Court of Human Rights, as it has undertaken to abide by the final judgment of the Court in any case where it is party (Article 46.1 of the Convention). The need to regulate the problem of executing the judgments of the European Court of Human Rights in the Spanish legal order was expressly recognised by the Spanish Constitutional Court in its judgment of 16 December 1991 in which it urged public authorities to set up adequate procedural channels regarding the execution of the judgments of the European Court of Human Rights.

In Spanish doctrine, and in the light of the inadequacy of available legal mechanisms, a variety of *de lege ferenda* proposals have been formulated with the aim of resolving the legal problems of the execution of the judgments of the European Court of Human Rights: one of these proposals is in favour of the adoption of an *ad hoc* law, such as the one enacted by Austria in 1963, as the Spanish Constitutional Court expressly suggested in its judgment of 16 December 1991; another, inspired by the techniques used in Norway and Luxembourg,

proposes the introduction of new grounds for lodging a revision appeal in Spanish procedural laws; finally, a third proposes the introduction of a new condition of nullity.

Even taking into account the usefulness of the proposed legislative solutions, I believe the adoption of a new optional protocol is preferable in order to achieve a homogenous solution to a complex and difficult problem, which is not simply technical, but also of the greatest relevance to the effectiveness of the legal protection of rights and freedoms by the European Court of Human Rights. This is not a body for appealing, nor for annulment, nor for the revision of decisions made by domestic judicial authorities, nor does it have the authority to declare as null and void a regulation of internal law or a decision made by the administrative authorities of the State concerned and declared responsible for a violation of the Convention; its competence extends solely to the interpretation and application of the Convention in a given case, with the aim of determining whether the State concerned has fulfilled its obligations and therefore whether the case entails the international responsibility of the offending State. However, the application and interpretation of a treaty for the protection of rights and freedoms falls to the Court, an expression of European *ius commune* rights which are effective and not illusory.

Finally, it should be noted that, given the close links existing between the European Convention on Human Rights and the Council of Europe, the Committee of Ministers of this latter international organisation has the authority to supervise the fulfilment of the Court's judgments in accordance with what is set out in section two of Article 46 of the Convention. This authority for supervision comes from the binding nature of the Court's judgments and has extraordinary legal significance: the presence of an institutionalised mechanism for ensuring that the law is respected.

## **8. The European Court of Human Rights' interpretation of the Convention**

The European Convention on Human Rights is an international treaty and, as such, an agreement between sovereign States. Nevertheless, the specific nature of the Convention as a treaty for the protection of fundamental rights and freedoms takes its application and interpretation by the European Court of Human Rights exempt from the traditional rules regarding the interpretation of treaties codified in the Vienna Convention on the Law of Treaties of 23 May 1969.

The specific nature of treaties for the protection of human rights was stressed by the International Court of Justice in its Advisory Opinion of 28 May 1951, concerning the validity of certain reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, when it stated that in this type of treaties:

“the contracting States do not have any interest of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the Convention. Consequently, in a Convention of this type one cannot speak of [...] the maintenance of a perfect contractual balance between rights and duties” (CIJ, *Recueil* 1951, pp. 23-24).

This explains the fact that, although the European Court of Human Rights has expressly referred to the rules of interpretation set out in Articles 31 to 33 of the Vienna Convention on the Law of Treaties, it has however used criteria for interpretation that respond to the specific nature of the European Convention on Human Rights. Thus, in its judgment of 18 January 1978, in inter-State case of *Ireland v. United Kingdom of Great Britain and Northern Ireland*, the Court held that, unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States, all of whom are members of the Council of Europe, because:

“it creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a collective enforcement” (paragraph 239 of the judgment of 18 January 1978).

This interpretation of the nature and scope of the European Convention on Human Rights has been confirmed in the judgment of 23 March 1995 (*Loizidou v. Turkey* case, preliminary exceptions) in which the Court reiterated the affirmations it had made in its judgment of 18 January 1978, and resolutely held that the Convention “as a treaty for the collective enforcement of human rights and fundamental freedoms”, has a “special character”; “*caractère singulier*” (paragraphs 70 and 71 of the decision).

However, the Court does not forget its nature and is aware that it is not a European constitutional tribunal, but an international tribunal set up as a result of a treaty. And so, in its case law it is possible to distinguish two main directions or tendencies: on the one hand, one that favours the sovereignty of States, which is expressed in a position of self-control regarding the scope of its jurisdiction; on the other hand, a more progressive tendency, towards judicial activism, favouring the protection of rights and freedoms, and therefore tending to restrict the compe-

tences of the Member States of the Convention. The first of these tendencies favours the discretionary power of States; the second, however, deals more with the protection of the individual and the rights which are afforded to him or her through the Convention and the Protocols thereto and, as such, expands the scope of the legal obligations taken on by Member States, even beyond what is set out in the Convention or its Protocols, thereby separating itself from the classic principle of international law according to which the limitations of the sovereignty of State are not presumed.

### 8.1. *The doctrine of the margin of appreciation of States as a manifestation of the tendency towards judicial self-control*

Even though it is a treaty for the protection of individual rights and freedoms, it is undeniable that the European Convention on Human Rights recognises the need to safeguard the general interests of the community.

On this subject the European Court of Human Rights has developed a series of concepts which aim to reconcile the interests of the individual with those of the community and which, in order to reach this conciliatory objective, make clear and confirm an essential characteristic of the Convention: its concern for establishing a balance between individual rights and the general interests of the community. Among these concepts, one has achieved particular importance for the case law of the Strasbourg Court: the national margin of appreciation of States doctrine. From the decision of 7 December 1976, in the *Handyside v. United Kingdom* case (in which the problem of the seizure, in accordance with English law, on obscene publications, of a schoolbook for sexual education, was brought up), the Court has, in effect, recognised that States have a margin of appreciation which is a consequence of the subsidiary character of the protection system instituted in the Convention.

Similarly, and in the context of the limitations of some of the rights recognised and the possible interferences of the authorities into the protected rights, the European Court of Human Rights has admitted that because they are more in touch with the national situation, States have a better knowledge of internal life and its peculiarities than would an international body. Hence in its judgment of 21 February 1990 in the case of *Powell and Rayner v. United Kingdom* (in which the applicants alleged that noise generated by the air traffic of a large airport near to their residence constituted a violation of their right to respect for their private life and their home set forth in Article 8 of the Conven-

tion), the Court held that it is necessary to safeguard the balance which must exist between the legitimate interests of the individual and those which are of the community as a whole, and that in both contexts:

“the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention” (paragraph 41 of the judgment).

The discretionary power of States is variable and depends on the circumstances, issues, and context of each case. This explains why, unlike the judgment referred to above (in which the Court found that no violation of the Convention was attributable to the offending State), in its judgment of 9 December 1994, in the *López Ostra v. Spain* case (a case where the applicant alleged that her right to respect for her home had been violated due to fumes, pestilential smells and contamination coming from a plant for the treatment of liquid and solid waste), the Court considered that there was a violation of Article 8 of the Convention that was attributable to Spain, because the State concerned had not succeeded in:

“striking a fair balance between the interest of the town’s economic well-being - that of having a waste-treatment plant - and the applicant’s effective enjoyment of her right to respect for her home and her private and family life” (paragraph 58 of the decision).

The margin of appreciation is most significantly noticeable in those issues where a European consensus does not exist: such is the case with those issues relating to national security (the *Leander v. Sweden* case, with a judgment adopted on 26 March 1987, relating to access to data placed on a secret police register for assessing the aptitude of a candidate for a job relating to national security and defence), or those cases relating to moral issues (the *Handyside* case, with its judgment of 7 December 1976, mentioned above; the *Müller and others v. Switzerland* case, with its judgment of 24 May 1998, relating to the sentencing of a painter for the exhibition of pictures which were judged to be obscene).

On the other hand, the State margin of appreciation does not exist, or is very reduced, regarding other subjects such as those relating to the administration of justice, where it is easier to verify the existence of a Europe-wide consensus. Thus in the *Sunday Times v. United Kingdom* case, relating to press restrictions concerning publishing information about civil proceedings pending before British courts, the Court decided in its judgment of 16 April 1979 that the interference with the right to freedom of expression, with the aim of safeguarding legal independ-

ence, did not correspond to a pressing social need and that it was neither proportionate nor necessary in a democratic society.

In my opinion, it is necessary to remember that, if exaggerated, the doctrine of the margin of appreciation could call into question the very essence of the European system for the protection of human rights and fundamental freedoms: its constitutional dimension as a European human rights public order. As Marc-André Eissen, former Registrar of the European Court of Human Rights, has very rightly said, the acceptance of the existence of a national margin of appreciation on the part of States constitutes a type of legal self-limitation by the Court, derived from its recognition of the fact that the State concerned has a better knowledge of the internal, social, and legal life, i.e. closer to reality than the Court; but it is one thing to bear in mind this fact, which makes manifest the subsidiary character of the European system for the protection of human rights, and a very different thing to dilute it into an excessive plurality of individual situations.

And hence the importance of the Court being rigorous in exercising its authority to control the margin of appreciation belonging to States, and that an important part of the jurisprudence is stating that the limitations and restrictions of the exercise of the recognised rights cannot jeopardise the substance of the rights guaranteed.

The Court's favourable position towards the reinforcement of the international supervision of the compliance with the obligations derived from the Convention's system on the part the Member States is yet more visible in the tendency which I will discuss below, compared to that of the aforementioned legal self-control. If as regards the latter the Court shows itself to be prudent and, conscious of its limitations, respectful of the role which corresponds to States as regards the regulation of general interests, which can justify the limitation of some individual rights, in the legal tendency which I am going to discuss now, we shall show, by contrast, how the European Court of Human Rights has developed a series of legal concepts which tend to expand the international responsibility of States and, as a result, reinforces the European protection for rights and freedoms.

## 8.2. *Manifestations of the favourable tendency towards the protection of rights and freedoms through an evolving, dynamic, and teleological interpretation of the European Convention on Human Rights*

When interpreting the nature and scope of the Convention the Court has resolutely held that, as mentioned above, unlike classic treaties, the Convention "comprises more than mere reciprocal engage-

ments between contracting States” because, as well as a network of bilateral contractual agreements, it creates “objective obligations which, in the words of the Preamble, benefit from a collective enforcement”, and as such has a “special character” (judgments of 23 March 1995, *Loizidou v. Turkey*, preliminary exceptions, paragraphs 70 and 71, and of 18 January 1978, *Ireland v. United Kingdom of Great Britain and Northern Ireland*, paragraph 239).

Along the same lines, in its judgment of 7 July 1989 in the case of *Soering vs. United Kingdom of Great Britain and Northern Ireland*, the Court held that any interpretation of guaranteed rights “has to be consistent with the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society”, and affirmed that:

“in interpreting the Convention regard must be paid to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms. Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective” (paragraph 87 of the decision).

This concept of the nature of the Convention, in which special emphasis is placed on its constitutional dimension as an international legal instrument which embodies a European public order of human rights and fundamental freedoms, justifies the fact that the Court has proceeded to an autonomous interpretation of the legal concepts set out in its provisions and an evolving interpretation of the Convention which has expanded the scope of the international responsibility of the Member States.

In the analysis of this favourable tendency towards the protection of rights and freedoms through an evolving and dynamic interpretation of the Convention and the Protocols thereto, I will examine diverse aspects of the European Court of Human Rights case law which show a position opposed to the doctrine of the margin of appreciation of States.

I will consider, above all, the principle of proportionality as an instrument through which the Court has reinforced European control of the discretionary power of Member States of the Convention. Secondly, I will examine the notion of the positive obligations of Member States. Thirdly, I will analyse the jurisprudential affirmation according to which the rights guaranteed must be analysed as effective rights and not as theoretical or illusory. And finally, I will refer to how the European



Court of Human Rights case law has even included within the scope of the protection system rights which are not expressly recognised in the Convention, following a teleological interpretation.

### 8.2.1. THE PROPORTIONALITY PRINCIPLE

As a result of the consequences derived from this principle, the proportionality principle is a factor in correcting the States' national margin of appreciation, and one of the richest general principles of law in the construction of a European *ius commune* of human rights. Although this may appear to bring about certain quantitative considerations, which might even be arithmetical, the principle is nevertheless built on the basis of qualitative considerations which the European Court of Human Rights has associated with the fundamental problem of striking a fair balance between general interests and individual rights. The legitimacy of those is, of course, indisputable, but the protection of individual rights and freedoms requires that the defence of general interests does not get confused with the so-called *raison d'état*.

None of the rules in the Convention or its additional Protocols refer explicitly to the proportionality principle but the Court has made it one of the key elements in the interpretation of the Convention ever since the judgment of 23 July 1968, relating to an affair regarding certain linguistic aspects of teaching in Belgium, when it recognised the need for a relationship of proportionality between the means employed and the objective aimed at, or, between the scope of the interference to a guaranteed right and the legitimate aim which, in principle, could justify the interference. Thereafter, the twin concepts of proportionality and a fair balance have been used in dozens of judgments adopted by the European Court of Human Rights as factors to control the national margin for appreciation and to determine whether there has been a violation of one of the rights guaranteed in the system of the Convention.

In effect, the proportionality principle has been a key element as regards the interpretation of the legal obligations taken on by member States; thus, for example, the requirement of proportionality has been decisive in relation to the right not to be arbitrarily deprived of life, as was made clear in the judgment of 27 September 1995, *McCann and others v. United Kingdom of Great Britain and Northern Ireland*, regarding the interpretation of the terms "use of force which is no more than absolutely necessary" in Article 2.2 of the Convention. The British, Spanish and Gibraltar authorities knew that IRA terrorists were going

to commit a terrorist attack in Gibraltar; in an act carried out by agents of a special regiment of the British Army, three IRA members were shot by the security forces. Although the Court found that these killings had not been premeditated, it nevertheless considered that the deaths of the three terrorists had not been the result of an absolutely necessary use of force for ensuring the defence of persons from unlawful violence, and decided, by ten votes to nine, that in this case there had been a breach of Article 2 of the Convention which was attributable to the United Kingdom of Great Britain and Northern Ireland.

Similarly, the proportionality requirement has been invoked by the European Court of Human Rights in the interpretation of limitations and restrictions in the context of Articles 8 to 11 of the Convention, and in paragraph 3 of Article 2 of Protocol No. 4, to the extent that the principle of proportionality has been determinant not only for limiting the margin of appreciation for States in determining possible interferences in the enjoyment of the rights guaranteed in these provisions, but also, and most importantly, as Daniel I. García San José has observed regarding the interpretation of the indeterminate legal concept "necessary in a democratic society", which appears in the second paragraphs of Articles 8 to 11 of the Convention, as one of the requisites required so that the limitation or restriction of the enjoyment of a right can be in accordance with the Convention. In the interpretation of the right to freedom of expression, for example, the proportionality principle has been a key element in the case law of the European Court of Human Rights: freedom of expression is not, of course, an absolute right, as its exercise, in the words of the second paragraph of Article 10 of the Convention, involves "duties and responsibilities", and can be subject to "formalities, conditions, restrictions or penalties". But because it is one of the essential foundations of a democratic society, all formalities, conditions, restrictions, or penalties imposed on the right must be necessary in a democratic society and, therefore, proportionate to the legitimate aim pursued (judgments of 7 December 1976, *Handyside v. United Kingdom* case; of 26 April 1979, *Sunday Times v. United Kingdom* case; of 26 November 1991, *Observer, Guardian, and Sunday Times (2) v. United Kingdom* case; of 23 September 1994, *Jersild v. Denmark* case; of 21 January 1999, *Janowski v. Poland* case; of 25 November 1999, *Nilsen and Johnsen v. Norway* case; and of 19 February 2000, *Fuentes Bobo v. Spain* case).

In the *Castells v. Spain* case the applicant had, in a periodical publication, denounced the impunity of extreme right-wing groups which committed violent acts in the Basque Country, and had been punished for it without being able to prove either the truth of his state-

ments or his good faith, in the sense that in his statements he did little other than collect and express a generalised state of opinion. The Court ruled that in a democratic system the actions and omissions of the Government must be subject to the close scrutiny of the press and of public opinion, and not only of the legislative and judicial authorities, and therefore it considered that, although the interference was prescribed by the law and dealt with a legitimate aim, it was not necessary in a democratic society due to the fact that it was not proportional. As a result, it decided unanimously that there had been a violation of the right to freedom of expression guaranteed in Article 10 of the Convention (paragraphs 43 and 46 of the judgment of 23 April 1992).

Some of the aforementioned decisions are, however, open to criticism, in my opinion, because of the fact that they give the impression that the Court used in them an excessive interpretation of the scope of the right to freedom of expression which, of course, is not an absolute right. Such is the case, for example, of the judgment on *Jersild v. Denmark*, a case brought about by a fine levied upon a journalist as a result of expressing racist and xenophobic opinions on television at peak time, and the Court made the right to freedom of expression prevail over the legal obligations which international law imposed on States regarding the prohibition of racial discrimination. From my point of view, the State concerned (Denmark) was obliged to punish and repress manifestations of racist ideas, not only because of conventional norms, but also because of imperative norms of general international law, which opens the Strasbourg Court's decision, obtained by a tiny minority, to criticism as it made the right to freedom of expression prevail over the legal obligation which international law imposes on States regarding the prohibition of racial discrimination.

Similar to the above decision is that of 29 February 2000, related to the *Fuentes Bobo v. Spain* case, which made the right to freedom of expression prevail in an affair in which the Court itself recognised that the applicant had expressed insults. The applicant alleged that his dismissal from Spanish State television company (TVE) for criticisms made against TVE's managers constituted a violation of his right to freedom of expression; faced with this claim, the Spanish government maintained that States enjoy a wide margin of appreciation when assessing the scope of critical declarations which could be deemed offensive, as freedom of expression cannot protect a right to insult. However, the Court, even though it acknowledged that the reasons invoked by the Spanish government were worthwhile, considered that "the relation between the penalty and the legitimate aim pursued was not reasona-

bly proportionate” and, consequently, that there had been a violation of Article 10 of the Convention.

#### 8.2.2. POSITIVE OBLIGATIONS OF PARTICIPATING STATES, AND THE SIGNIFICANCE OF ARTICLE 1 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 1 is of exceptional importance for three reasons: firstly, for helping the European Court of Human Rights develop in its case law the scope of the jurisdiction of States; secondly, because it makes clear that the European Convention on Human Rights is not limited to the protection of Europeans, nationals of the Member States of the Council of Europe, but has a much wider scope, as everyone falling under the jurisdiction of a Member State, whatever their nationality might be, or even if they do not have one, are protected by the Convention in the enjoyment of the fundamental rights and freedoms guaranteed therein; thirdly, because it has helped the Court to uphold in its case law, through a teleological and finalist view of the Convention, that Member States have positive obligations, and not only negative obligations to not interfere in the enjoyment of the guaranteed rights.

As of the judgment of 18 January 1978, *Ireland versus United Kingdom of Great Britain and Northern Ireland* case, the English text of Article 1 of the Convention has served as a basis for the Court in affirming that the Convention:

“does not merely oblige the higher authorities of the Contracting States to respect for their own part the rights and freedoms it embodies; as is shown by Article 14 (art. 14) and the English text of Article 1 (art. 1) (“shall secure”), the Convention also has the consequence that, in order to secure the enjoyment of those rights and freedoms, those authorities must prevent or remedy any breach at subordinate levels” (paragraph 239 of the judgment).

From this judgment, Article 1 has been the legal foundation upon which the Court has developed a teleological and progressive interpretation of the Convention which has allowed it to hold that this does not only impose negative obligations on States to refrain from doing something, but also *positive obligations* to do something. This aims to satisfy the duty of ensuring the effective enjoyment of the rights guaranteed to everyone coming under their jurisdiction. This interpretation of Article 1 of the Convention was confirmed by the Court in the judgment of 26 March 1985, *X and Y v. the Netherlands* case. In a case brought about by the impossibility in Dutch law of filing a lawsuit against the perpetrator of sexual violence where the victim was a minor

of over sixteen years of age, mentally handicapped, by a person other than the victim, the Court affirmed that although Article 8 of the Convention has as its object the protection of the individual against arbitrary interference by the public authorities, this provision:

“does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life (...). These obligations may involve the adoption of measures designed to secure respect for private life...” (paragraph 23 of the judgment).

Shortly after, in the judgment of 21 June 1988, *Plattform “Ärzte für das Leben” v. Austria* case, the Court confirmed this interpretation of the Convention and held that a State cannot be content with not interfering with a right, as in a democracy the right to counter-demonstrate (in this case, by those supporting abortion) cannot extend to paralysing the right to demonstrate of those opposed to legalized abortion. And so, following an examination of the facts, the Court found that there had not been a violation of the Convention attributable to Austria, and stated that:

“genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11 (art. 11). Like Article 8 (art. 8), Article 11 (art. 11) sometimes requires positive measures to be taken, even in the sphere of relations between individuals” (paragraph 32 of the judgment of 21 June 1988).

In effect, individuals can also commit abuses and violate fundamental rights and freedoms, hence the positive obligation of States – in short, guarantees of rights and freedoms – to adopt the measures necessary, both legislative and other, to truly protect the rights of individuals not only as regards public authorities, but also regarding possible interferences from other individuals.

The obligation to ensure the enjoyment of rights recognised in the Convention is one of the most important legal obligations on Member States and, as such, the Court has not hesitated to underline its relevance, especially as regards fulfilling the obligations in Article 2 (the right to life), Article 3 (the prohibition of torture), and Article 5 (the right to liberty and security of person) of the Convention, which are imposed on Member States. Regarding the right to life, for example, this is the sense of the judgments of 28 March 2000 in the *Cemil Kiliç v. Turkey* and *Mahmut Kaya v. Turkey* cases. In the former the Court recalled that

the first sentence of Article 2.1 of the Convention obliges the State not only to abstain from the intentional and unlawful taking of life, but to take appropriate steps to safeguard the lives of those who find themselves under its jurisdiction. Therefore States Parties to the Convention have the positive obligation to take operational measures to protect an individual whose life is in danger because of the criminal acts of another and, although in the case it had not been proved beyond any reasonable doubt that any agent of the accused States, or person acting on behalf of State authorities, was involved in the killing of Kemal Kiliç, brother of the applicant, the Court concluded that the authorities had not taken reasonable measures for the prevention of the real and immediate risk to the life of the journalist Kemal Kiliç. Accordingly, it found that there had been a violation of Article 2 of the Convention. The Court also stated, as it had already done in its judgment of 17 September 1995 (the *McCann and others v. United Kingdom of Great Britain and Northern Ireland* case), that the obligation to protect the right to life as set out in Article 2 of the Convention, in relation to the general duty of the State in accordance with Article 1:

“requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force” (paragraphs 62 to 78 of the judgment of 28 March 2000).

It would therefore seem undeniable that the Strasbourg Court has through its case law consolidated the notion of positive obligations on Member States, widening the scope of the rights protected by means of a finalist interpretation of the Convention and of its additional Protocols. The result is that rights not expressly mentioned in the wording of the said legal instruments would come into its sphere of control.

### 8.2.3. RIGHTS WHICH ARE EFFECTIVE AND NOT ILLUSORY

In the *Airey v. Ireland* case the problem of the effectiveness of the right of access to Court was brought up due to the lack of economic resources of a woman involved a separation process. The State concerned claimed that economic rights did not fall under the Convention: nevertheless, in its judgment of 9 October 1979, the Court held, in a passage that is one of the most significant achievements of the Strasbourg case law, that the Convention:

“must be interpreted in the light of present-day conditions (...) and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals (...). Whilst the Convention

sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers (...) that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention" (paragraph 26 of the judgment).

In this way, through a finalist interpretation of the obligations taken on by States, the European Court of Human Rights has contributed towards overcoming the classic distinction between civil and political rights, and economic, social and cultural rights, between which, in the opinion of the Court, there is not an insurmountable obstacle. There is not a striking separation between the two spheres as, despite the lack of "justiciability" of social and economic rights, it is not possible to be unaware of the economic and social implications of the rights and freedoms recognised by the Convention, especially if the scope of these rights and freedoms is interpreted in the light of the doctrine of Member States' positive obligations.

#### 8.2.4. INDIRECT PROTECTION OF RIGHTS NOT EXPRESSLY RECOGNISED IN THE CONVENTION

The European Court of Human Rights case law has expanded the scope of the Convention to include rights not expressly mentioned within it. Thus, for example, the rights of foreigners to enjoy a certain amount of indirect protection in the light of an extensive interpretation of the scope of application of Article 3 of the Convention, through which the Court has repeatedly held that foreigners cannot be the object of measures of expulsion or extradition when the person in question could be subject to inhuman treatment in the destination country.

As regards the expulsion of foreigners, the Court has affirmed that, although the right of a foreigner to enter or reside in a country is not recognised in the Convention, control of immigration should nevertheless be exercised in a way that is compatible with the demands of the Convention; as such, the expulsion of a person from the territory of the State in which his or her family lives could pose a problem as regards the application of Article 8 of the Convention.

With this in mind, the contributions of judgments where the Court has considered Article 8 to be applicable are important as regards applications filed by non-Europeans who found themselves under the jurisdiction of Member States. This last element is of exceptional importance as regards the scope of the obligations taken on by Member

States because it makes clear, as mentioned above, that the European Convention on Human Rights is not limited to protecting Europeans, nationals of the Member States of the Council of Europe, but it has a much wider scope, potentially universal, as every person under the jurisdiction of a Member State, whatever his or her nationality might be, and even if that person does not have one, is protected by the Convention as regards the enjoyment of the fundamental rights and freedoms which are recognised within it.

Non-Europeans who had been the object of expulsion measures (judgments of 21 June 1988, in the *Berrehab v. the Netherlands* case; of 18 February 1991, in the *Moustaquim v. Belgium* case; of 26 March 1992, in the *Beldjoudi v. France* case; and of 11 July 2000, in the *Jabari v. Turkey* case), or who had suffered restrictive measures on their right to respect for their family life (judgments of 28 May 1985, in the *Abdulaziz, Cabales and Balkandali v. United Kingdom* case), have been able to benefit from the protection of the European Convention on Human Rights thanks to the Strasbourg Court's interpretation. In the judgment of 21 June 1988, in a case where a foreigner had been expelled from Holland (despite the fact that he had legally lived in the country where he had been married to a Dutch woman and maintained affective links with his daughter) and denied a residency permit, the Court ruled that, in this case:

“a proper balance was not achieved between the interests involved and that there was therefore a disproportion between the means employed and the legitimate aim pursued. That being so, the Court cannot consider the disputed measures as being necessary in a democratic society” (paragraph 29 of the judgment of 21 June 1988, in the *Berrehab v. the Netherlands* case).

The same reasons and an identical “expansion of the scope” of Article 3 of the Convention have been applied to extradition, as was made clear in the judgment of 7 July 1989 in the *Soering v. United Kingdom of Great Britain and Northern Ireland* case. In this judgment, the Court highlighted above all that the Convention should be read regarding its special character as a treaty for the collective guarantee of human rights and that as it is an instrument for the protection of human beings its provisions should be understood as concrete and effective guarantees. This means that any interpretation of the guaranteed rights should be in accordance with the general spirit of the Convention, aimed at protecting and promoting the ideals and values of a democratic society. On this basis, the Court held that a State would be conducting itself in a manner incompatible with the underlying values



of the Convention if it handed over a fugitive – however heinous and disgusting the crime of which that person is accused – to another State where there were substantial grounds for believing that he or she would be in danger of being subjected to torture or to inhuman or degrading treatment or punishment. Consequently, the Court considered that, although the right not to be extradited is not a right expressly guaranteed under the Convention, if the extradition of a fugitive puts him or her at risk of being subjected to torture or to inhuman or degrading treatment or punishment, such extradition would be manifestly against the spirit of the Convention, as:

“extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court’s view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article” (paragraph 88 of the judgment).

On another note, the judgment of 9 December 1994, *López Ostra v. Spain* case (a case where the applicant alleged a violation of her right to respect for her home and her family life due to unpleasant smells, noises, and contaminated smoke coming from a plant for the treatment of liquid and solid waste), the Court declared that there had been a violation of Article 8 of the Convention attributable to Spain, because the State concerned:

“did not succeed in striking a fair balance between the interest of the town’s economic well-being - that of having a waste-treatment plant - and the applicant’s effective enjoyment of her right to respect for her home and her private and family life” (paragraph 58 of the judgment).

In this way, as mentioned above, the Court went beyond the position it had adopted in its judgment of 21 February 1990, in the *Powell and Rayner v. United Kingdom* case, and, rejecting the application of the States’ margin of appreciation doctrine, it expanded the scope of the European Convention on Human Rights by protecting a right to the environment, which is obviously not expressly mentioned in the treaty adopted in 1950, but which was given indirect protection through its link with the right to respect for home and family life, as a result of extending the scope of a right which is recognised in Article 8 of the Convention.

Similarly, in the *Guerra and others v. Italy* case (in which the applicants, neighbours of a factory which produced fertilisers and a chemi-

cal compound used in the manufacture of synthetic fibres, classified as high risk, and which, in the course of its production cycle, released large quantities of inflammable gas, alleged a violation of Article 8 of the Convention), the Court recalled its judgment of 18 February 1998 in the *López Ostra* case and asserted that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to adversely affect their private and family life. In this case, and until the cessation of the production of fertilisers, the applicants waited for essential information which would have permitted them to evaluate the risks they and their families might face if they continued to live in a place exposed to danger in the event of an accident at the factory; therefore, the Court decided that there had been a breach of the applicant' rights to private and family life.

The applicants also claimed that information for the public constitutes one of the essential elements for the protection of the well-being and health of the population, because of the wording of Article 10 regarding freedom of information (particularly "this right shall include freedom to (...) receive (...) information and ideas") should be construed as conferring an actual right to receive information, in particular from the relevant authorities, on members of local populations who have been or could be affected by an industrial or other activity which would be dangerous for the environment. In other words, Article 10 of the Convention would impose on member States not only a duty to make accessible public information regarding environmental matters (a requirement already present in Italian law), but also positive obligations to collect, process and disseminate such information which, by its very nature, could not otherwise come to the knowledge of the public. The Court did not accept this point of view and, conscious of its limitations, held that freedom of information could not be seen as imposing on a State positive obligations to collect and disseminate information of its own motion, meaning that, as a result, Article 10 was not applicable in this case.

Although in my opinion this decision can not be criticised, I recognise that it makes clear the inherent limitations of a finalist interpretation of the Convention; the Court, in effect, is not a legislator, and its active role in the progressive development of the rights guaranteed in the Convention and its normative Protocols, through a teleological and finalist interpretation of them, cannot displace States from their role as "legislators". When Member States want to expand the catalogue of rights recognised, the way is cleared for this through the adoption of a new additional Protocol; the role of the production of the right corresponds to them and not to the Court, though the Court might have

brought to fruition a task which in a way is creative through a teleological interpretation of the conventional norms for the protection of human rights.

In any case, it is undeniable that, through the European Court of Human Rights case law, it has consolidated the possibility of indirectly protecting rights not expressly recognised in the Convention, and that, through a finalist and dynamic interpretation of the Convention and its normative protocols, it has allowed rights not expressly guaranteed in the wording of the aforesaid legal instrument to come into its scope of application.

## **9. Problems currently facing the European Court of Human Rights and possible remedies: Protocol no. 14**

With the adoption and entry into force of Protocol No. 11 a very important step was made towards improving the European system for the protection of human rights, due to the fact that, as I have shown above, this was a huge advance regarding the system that had previously been in place. This is because now an international jurisdictional body, the European Court of Human Rights, is the only one authorised to decide whether there has been a violation of the rights guaranteed under the European Convention on Human Rights or its normative Protocols. But in the short time that has lapsed since it entered into force on 1 November 1998, the Court is clearly overwhelmed by the vast number of applications which leads us to reflect on the causes of the situation and on possible solutions for dealing with the current excess workload which is seriously threatening the efficiency of the European legal system for the protection of human rights as well as its quality, and even its credibility.

### *9.1. Causes: Problems brought about by changes undergone in the Council of Europe*

Following the fall of the Berlin wall and the later dismantling of the Russian Soviet empire, the Council of Europe became the European international organisation best placed to provide a solution to the demands for cooperation made by central and eastern European countries, as many of them saw the Council of Europe as a means for strengthening their transition processes to democracy, and considered Strasbourg as the 'waiting room' for Brussels, or a necessary step to reinforce their aspirations to later incorporation into the European Union.

But it is clear that, compared with the situation which had existed for forty years (from 1949 to 1989), the Council of Europe became, after the events of 1989 and 1991, an international organisation that was less homogenous and more unstable: in 1989, the Council of Europe had 23 members and embraced 400 million people; currently, there are 47 Member States, and the Council works with 800 million people. In order to better understand the risk of loss of cohesion and homogeneity which I am referring to, consider the fact that in 1989 almost half of these countries and people hardly had any contact with the Council of Europe; it has changed so much within a decade that, regarding its current composition, some have even begun to call it the "*Council of Eurasia*" rather than the Council of Europe. Throughout this swift process of change, it was necessary to carry out a political action, based on the values proclaimed in the Statute of the Council of Europe, with the aim of tackling the long and difficult task of building Europe out of problems and diversity. Hence in order to provide an adequate solution to the aforementioned risks, the accession of States born out of the splitting of the Soviet bloc became subordinate, as of 1990, to a political condition: their definitive and swift ratification of the European Convention on Human Rights.

This condition was not envisaged in the Statute of the Council of Europe or in the European Convention on Human Rights. Only members of the Council can be States Parties to the latter, but they were not under the legal obligation to be bound by the Convention; nowadays, however, all Member States of the Council are parties of the Convention, as this is a requirement from the Committee of Ministers of the Council of Europe on inviting a State to join the organisation.

The significant change which took place was due to awareness that the expansion of the number of members implied a risk that profound cultural, social and economic differences between the old and new members would bring about the debilitation of an organisation based on a heritage of common values, and hence the requirement that the post-Communist States would have to prove that they could be considered true democracies.

The commitment made by all States to ratify the Convention had, however, been made before the collapse of the Soviet bloc; it had become a Council of Europe practice with the accessions of Portugal, Spain, and Finland. Spain, for example, signed the Convention on the same day that it joined the Council of Europe, 24 November 1977 (as a sign of where the process of transition to democracy was going, begun with the Law for Political Reform and the elections of 15 June 1977), and ratified it on 4 October 1979 (Official Gazette 243, 10 October 1979).

This practice remained firmly formalised, and became a political and legal requirement in the Declaration of 9 October 1993, adopted in Vienna at the Summit of the Heads of State and Government of member States of the Council of Europe. The Vienna Declaration recalled that the end of the division of Europe offered an historic opportunity for the reaffirmation of European peace and stability, and that all Member States of the Council of Europe were committed to pluralist and parliamentary democracy, the indivisibility and universality of human rights, rule of law, and a common cultural heritage enriched by their diversity.

The Heads of State and Government added that the Council of Europe was the European political institution that was capable of welcoming, on an equal footing and in permanent structures, the democracies of Europe that had been freed from Communist oppression. For this reason, the accession of those countries to the Council of Europe became a central element in the construction of a Europe founded on common values. As a result:

“such accession presupposes that the applicant country has brought its institutions and legal system into line with the basic principles of democracy, the rule of law and respect for human rights. The people’s representatives must have been chosen by means of free and fair elections based on universal suffrage. Guaranteed freedom of expression and notably of the media, protection of national minorities and observance of the principles of international law must remain, in our view, decisive criteria for assessing any application for membership. An undertaking to sign the European Convention on Human Rights and accept the Convention’s supervisory machinery in its entirety within a short period is also fundamental”.

All these achievements are however threatened as much by factors external to the Convention as by the inherent difficulties in running a system for the legal protection of human rights in the context of a situation now covering 800 million people and 47 Member States of the Council of Europe which are all parties to the Convention.

The external factors undoubtedly affect the operation and effective working of the European system for the protection of human rights and freedoms. The significant increase in the number of Member States of the Council of Europe, which has brought with it a growing level of heterogeneity, forces us to ask ourselves whether these new Member States (for example, the Russian Federation) are ready to take on the obligations required by the European Convention on Human Rights. Moreover, what will be the effect of the enlargement on “the spiritual and moral values which are the common heritage of their peoples and

the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy?"

The political decision to open the doors of the Council of Europe to the States which arose from the collapse of the Russian Soviet Empire, on the condition that they signed and ratified the European Convention on Human Rights, is understandable. However, this bet could turn out to be perverse if the commitments undertaken by the new members are not fulfilled, or if they are but in an inadequate way. If this happens, the Council would have to choose either rigour, with its consequent political problems, or indulgence, with the negative repercussions that this would have for its credibility regarding the protection of human rights.

The passivity of the Committee of Ministers regarding the Russian Federation and its serious human rights violations in Chechnya, despite the critical resolutions adopted by the Parliamentary Assembly of the Council of Europe, confirms these fears, and calls into question the credibility of the Council of Europe as regards the protection of fundamental rights and freedoms.

And together with the external factors which I have just referred to, in other words the context in which the European Convention on Human Rights operates, the difficulties inherent to the working of a Court charged with applying a very complex regulatory system (the Convention and its additional normative Protocols) to such a high number of applications are such that they threaten to collapse it.

In effect, if the growing heterogeneity of the States bound by the Convention poses an undeniable risk, the current intrinsic difficulties of a legal system for the protection of human rights are equally undeniable.

The facts which I have just referred to are essential in order to understand the situation of asphyxiation currently facing the European Court of Human Rights. Its productivity is undeniable, but to what extent can it sustain itself? There is, therefore, the view that the eleventh additional Protocol has failed, and that what is needed is a "reform of the reform". I was in favour of the reform introduced by Protocol No. 11 into the guarantee mechanism set up in the European Convention on Human Rights because, in my opinion, its essential element was its primordial aim: perfecting the judicial character of the guarantee mechanism. However, I recognise that the negotiators might not have sufficiently taken into account how and with what intensity the European situation was changing or the consequences of improving the control system (a permanent court with obligatory jurisdiction, before which all individuals could lodge applications), namely an obvious increase in the number of applications.

## 9.2. Possible solutions

The very high number of applications has, without doubt, a positive aspect regarding the confidence placed by citizens and lawyers in the European Court of Human Rights, and this has caused some to think that the Court is a victim of its own success.

Nonetheless, there is also a negative aspect due to the fact that the Court is finding itself collapsed and it is no longer just a question of increasing the number of lawyers in the registry – which cannot be increased *ad infinitum* – or of improving working practices. Therefore, in the medium and long term, measures with a greater reach have to be introduced, some of which were already suggested at the Inter-Ministerial Conference held in Rome at the beginning of 2000, on the occasion of the celebration of the fiftieth anniversary of the adoption of the European Convention on Human Rights.

Some of these measures are as follows:

- 1) Introducing into the European Court of Human Rights the working practices of the Supreme Court of the United States of America, which publishes a list of the cases which it deems important enough for examination and decision, without giving grounds or reasons for the choice;
- 2) Regionalising the system, that is setting up courts in the main European areas and regions – for example, Southern Europe, Northern Europe, Eastern Europe and others – maintaining a superior jurisdiction in Strasbourg;
- 3) Transforming the European Court into a pre-judicial consultation body in the style of that which exists in the Court of Justice of the European Communities, in such a way that the national tribunal called to make a definitive decision in a case affected by the Convention could ask the European Court to give its opinion with the aim of finding a solution in accordance with the Court's view;
- 4) Reducing the number of rights and freedoms recognised, excluding, for example, the requirement for a trial within a reasonable time as part of the right to a fair and public hearing;
- 5) Doubling the number of judges – two per each State party to the Convention instead of one – and increasing the number of lawyers in the registry of the Court, so that the Court would have at its disposal a higher number of Chambers and Committees and would therefore be able to increase its productivity;
- 6) Creating, in the heart of the Court, an instance dedicated exclusively to the examination of the admissibility of applications, so

that the Court would be freed of having to consider these questions and would only have to deal with the applications which were declared admissible, approximately 16% of applications registered.

Amongst these proposals, it appears to me that the one suggesting that the European Court of Human Rights copy the working practices of the Supreme Court of the United States of America should be rejected. In fact, this method is already present in the Strasbourg Court, as in many cases the decisions regarding inadmissibility pronounced unanimously by a committee of three judges are very concisely motivated, which means that a particular applicant could have the impression that the case has not been duly considered by the Court. However this practice would involve the obvious risk of ignoring the fact that the Strasbourg Court is, above all, a human rights court before which all people under the jurisdiction of a Member State can lodge an application against a State which they consider to be guilty of the violation of one of the rights guaranteed in the Convention or the Protocols thereto.

If we disregard or do not value this essential element of the European system for the protection of human rights, we will be taking a significant and lamentable step backwards, and the Court will lose both the confidence of its citizens and its credibility and authority. This final point is very important as, due to its authority, the case law of the European Court is taken into consideration both by internal tribunals (for example, the case law of the Spanish Constitutional Court), and by other international judicial bodies (the Court of Justice of the European Communities, the Inter-American Court of Human Rights and, although it does not have judicial character in the strictest sense, the Human Rights Committee set up as a result of the International Covenant on Civil and Political Rights).

The regionalisation of the system, proposed by the former French Minister of Justice, should also be rejected because it would risk establishing different speeds and diverging case law regarding the protection of human rights, forgetting the specific nature of the Convention as an expression of a European public order of human rights.

The proposal to transform the European Court into a consultative body is similarly inappropriate as it would mean a step back regarding one of the most important achievements of the European Convention of Human Rights - the appeal of the individual before an international judicial body. It would be, however, desirable to overcome the rigid nature of the current Protocol No. 2 (which authorises the



Committee of Ministers of the Council of Europe to seek advisory opinions from the Court, and which has never been invoked), and to allow the Strasbourg Court, like in Luxembourg or the Inter-American Court of Human Rights, to give advisory opinions, which could serve as a guide for States Parties to the Convention and the Protocols thereto, and for the Committee of Ministers of the Council of Europe itself.

The proposal to “improve” the system through the reduction of the catalogue of rights guaranteed (excluding, for example, within the right to a fair trial, recognised in Article 6 of the Convention, the requirement of a reasonable timeframe for the proceedings) is, in my opinion, equally unworthy of support. Justice should not be either summary or excessively slow, and the reasonable timeframe is an essential element of a fair trial. Like all the rights guaranteed in the European Convention on Human Rights, the right to fair trial must be effective and not illusory or theoretical.

The proposal to double the number of judges (two for each Member State, which nowadays would mean 94 instead of 47) would, without doubt, allow an increase in “the productivity” of the Court, which could increase the number of admissibility committees and Chambers. But, apart from the cost, what would happen to the coherence of the case law? On the other hand, should “productivity”, meaning quantity, prevail over the quality of the decisions made by the Court? And, more generally, to what extent is it legitimate for the criterion of “productivity” to be so relevant in a Court dealing with the protection of human rights? Is it not, perhaps, more important that such a jurisdictional instance should exist, and that the people who consider themselves to have been victims of a violation of their rights and freedoms should be able to lodge an application before it, even though the proceedings of the appeal are less speedy than desirable?

Finally, the creation within the Court of an instance dedicated exclusively to examining the admissibility of applications would, without doubt, have the benefit of considerably reducing the Court’s workload, and would avoid this international legal mechanism not respecting, or not being able to respect (due to the excessive number of cases needing to be solved), the requirement of a reasonable time for a fair trial which the Convention imposes on internal tribunals. This solution, supported by Gérard Cohen-Jonathan – in my opinion one of the most relevant experts in the European system for the protection of human rights – and which I supported in my book *El Convenio Europeo de Derechos Humanos*, proposed the creation of a two tier system: a First Instance Court, a common law human rights tribunal, composed of a

number of judges equal to that of the States Parties to the Convention, and a European Court of Human Rights, made up of fifteen judges, which would decide on the most important cases involving issues of principles. Would this be a return to the double instance that existed before Protocol No. 11 (Commission and Court) came into force? Not exactly, because the old system used the Commission to judge admissibility, but regarding the merits of the case it could only give an opinion regarding whether or not there had been a violation, whereas the new instance proposed would decide on both the admissibility and the merits.

The First Instance Court would be a court – not a commission – which would, like the amendment Protocol No. 11, fulfil the aspiration contained in the Message to Europeans, adopted at The Hague Congress in 1948: “We desire a Court of Justice with adequate sanctions for the implementation of this Charter”.

This Court could also better assume the complex functions required from the Strasbourg judges, who are at the same time judges of admissibility, of instruction, mediators if there is a friendly settlement, and, finally, quasi-constitutional judges.

In the context of these proposals, on 13 May 2004 a new amendment Protocol for the control system set up in the European Convention on Human Rights was signed (Amending Protocol No. 14), which will come into force when it has been ratified by all Member States. At the time of writing, this protocol has been signed by all States Parties to the Convention and ratified by 46. The problem is that it still needs to be ratified by Russia to enter into force. This Protocol aims to facilitate the functioning of the Court which, when it comes into force, will be able to function with a single judge, a committee of three judges, Chambers, and Grand Chambers. The single judge will be able to declare inadmissible an individual application if such a decision does not require subsequent examination; the committee of three judges will be able to declare the inadmissibility of an application if such a decision is unanimous and, if it declares it to be admissible, will also be able to rule on the merits if the underlying question in the case is already the subject of well-established jurisprudence of the Court.

However, the entry into force of the new amending Protocol will take time, and hence my conviction that it is vital for lawyers and judges from Member States of the European Convention on Human Rights to definitively take in the subsidiary character of the European system for the protection of rights and freedoms, namely that domestic courts should function as the first and foremost protectors of the rights guaranteed in the Convention.

In other words, just as Spanish judges appear to have understood, their function as community judges as regards the application of European Community law, they should also consider themselves to be judges for the application of the European Convention on Human Rights, with its direct applicability and scope in Spanish law in accordance with Article 96 of the Constitution, and as a criterion for the interpretation of the rights and freedoms constitutionally recognised under Article 10.2 of the Spanish Constitution.

I do not believe statements that say that the European Court of Human Rights is a victim of its success; in my opinion, the avalanche of applications is more an indication of failure: that of the internal legal systems to adequately protect rights and freedoms through legislators, courts and lawyers. In fact, due to the subsidiary nature of European protection of human rights, it is the internal legal orders of Member States which should prevent and remedy eventual violations of the rights recognised in the Convention; when this fails, the result will inevitably be an avalanche of applications before the Strasbourg Court.

Member States are obliged to set up effective internal appeals in their legal orders (Article 13 of the Convention) and, given the subsidiary nature of the European system for the protections of human rights, I believe it indispensable that national legislators should be more conscious of the obligation placed on them by Article 13 of the Convention as interpreted by the Strasbourg Court: the awarding of an effective remedy before a national instance to all people who consider themselves victims of a violation of the rights recognised in the Convention.

This last point is of fundamental importance as it makes clear a procedural consequence of the Member States' duty to ensure that conventionally assumed obligations are fulfilled in their internal law. The exceptional relevance of the demand for previous exhaustion of domestic remedies among the requirements for the admissibility of applications before the Court has as its basis the fact that internal authorities are best placed to protect fundamental rights and freedoms. Thus the obligation for States to provide effective remedies in their legal orders regarding alleged violations of the Convention is seen as the counterpoint which balances the subsidiary character of the European mechanism for the protection of human rights.

The internal application of the Convention and its additional normative Protocols is essential: firstly, because of its preventive effect, in avoiding non-fulfilment of conventional obligations on the part of the States; secondly, because the European mechanism for the protection

of rights and freedoms is subsidiary in character, which means that the domestic judge is the first guarantor and first protector of the recognised rights and freedoms.

This, precisely, was one of the essential ideas of those of us in favour of the far-reaching reform that the eleventh amendment Protocol signified for the system set up in 1950: the coexistence of a sole body, of obligatory jurisdiction and permanent in nature, before which individuals who considered themselves victims of a violation of any of the rights recognised could have active legal standing to lodge applications under the same conditions as States.

Without this vital collaboration between legal orders of Member States, the international guarantee mechanism will have problems functioning, whatever reforms are introduced.

## 10. *De lege ferenda* proposals for perfecting the system

In my opinion, the time has come for the European system for the protection of human rights to be reconsidered so as to make it more efficient. In that respect, I believe the following questions should be raised:

- 1) Firstly, the problem of reservations and interpretative declarations, with the aim of eliminating them and bringing to an end the relativism which they inevitably introduce in a system of European public order of human rights, despite the limits which the control of the Court puts in place regarding the unilateral desires of States.
- 2) Secondly, the consideration of the utility of regulating, through a new Protocol, the problem of the effects and execution of the judgments of the European Court of Human Rights in the internal legal orders of Member States. The Committee of Ministers of the Council of Europe is aware of the importance of this issue, and on 19 January 2000 adopted a recommendation on "the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights".

As mentioned above in the discussion on the effects and execution of the judgments of the Strasbourg Court and on the problems of inevitably diverse and heterogeneous national solutions, I believe that a Protocol is needed to regulate in a homogeneous way the effects of the Strasbourg Court's judgments in the internal law of Member States.

- 3) Thirdly, I believe the time has come to pose the question of interim measures, which at present can only be recommended by the Court. With compulsory interim measures difficult situations will be able to be avoided, such as the one resulting from the judgment of 20 March 1991, *Cruz Varas and others vs. Sweden*. In this case (regarding the expulsion to Chile of a Chilean couple and their son, performed with regard to the husband, despite the recommendation not to carry out the expulsion by the European Commission on Human Rights), the Court considered that the indication of interim measures was only a recommendation that did not legally bind the State concerned; obviously, this situation is highly unsatisfactory in all cases which refer to Articles 2 and 3 of the Convention, namely those applications in which the right to life or the right to not be subjected to torture or inhuman or degrading treatment or punishment are at stake.

Due to the proposals I have just discussed, I believe that the progress towards a European human rights *ius commune* will continue, as the practice is progressively consolidating the constitutional dimension of the European Convention on Human Rights which is, of course, a treaty concluded by States, but of a specific nature due to the fact that it is a treaty of collective guarantee of fundamental rights and freedoms.

## 11. **Conclusions: the significance of the Convention in the framework of International Human Rights Law**

The European system for the legal protection of human rights is not perfect and can and should be improved. But despite its limitations, we should not forget that it is the most advanced of the existing systems for the international protection of rights and freedoms, both on a universal level and on a regional level, due to the following:

- 1) An international jurisdictional body is the only authority with competence to decide whether there has been a violation of the rights guaranteed in the European Convention on Human Rights and the Protocols thereto.
- 2) This jurisdictional instance, the European Court of Human Rights, is permanent and has obligatory jurisdiction, both if dealing with inter-State applications or those made by individuals.
- 3) In the same conditions as States, the individual has active legal standing before the Court, which means that, once the domes-

tic remedies have been exhausted, he or she will be able to lodge an application before the European Court of Human Rights.

In my opinion, the most characteristic and essential element of the European system lies in the right of individual petition, in other words the possibility for any person claiming to be victim of a violation of one of the rights recognised in the Convention or one of its additional normative Protocols, once all domestic remedies have been exhausted, to lodge an application before an international court with obligatory jurisdiction, which will decide whether or not there was a violation, and will resolve the complaint through a legally binding judgement.

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# The European Social Charter

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**Summary :** 1. Introduction. 2. The legal policy aims pursued by the ESC. 2.1. The aim of the international protection of economic and social rights at European regional level. 2.2. The aim to contribute to the creation of a European social space. 3. The content and scope of the legal commitments undertaken by the States Parties. 3.1. The identification of the object of the protection given by the ESC. 3.2. The determination of the legal obligations for the States. 4. The ESC control system. 4.1. The periodical reporting mechanism. 4.2. The collective complaints mechanism. 5. The ESC revision process. 5.1. The general characteristics of the Revised ESC. 5.2. The update of the economic and social rights brought about by the Revised ESC. 6. Final considerations.

## 1. Introduction

The European Social Charter (ESC), adopted on 18 October 1961, is, together with the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), one of the main contributions made by the Council of Europe to the development of a European system of human rights protection – according to the institutional aim to achieve “the maintenance and further realisation of human rights and fundamental freedoms” (Article 1.b of the Statute of the Council of Europe).

However, the evaluation of the relevance of the ESC must go beyond its mere consideration as an international treaty that intends to bind the States Parties –all of them Member States of the Council of Europe- to safeguard certain economic and social rights.

Firstly, because the ESC is not only considered a valid instrument to strengthen the respect of human rights in Europe, but also a tool for economic and social progress of European societies; the effectiveness of economic and social rights, as stated in the Preamble of the ESC, must contribute to “improve the standard of living and to promote the social well-being”. Thus the analysis of the ESC makes possible the debate on substantive issues: if we compare it with the ECHR, the discussion on the scope of equality and indivisibility of human rights can be

revived; in the meantime, its perception as an element of harmonization that promotes a European social space contributes to the reflection about the current relevance of the idea of a social Europe in a world which is increasingly globalized –assessing both the scope and the level of fulfilment of the commitments assumed by the States Parties-.

Secondly, because the ESC represents a very significant advance in the international promotion and protection of economic and social rights; leaving aside the contribution of the International Labour Organization (ILO), we must bear in mind that the ESC was adopted and entered into force before the International Covenant on Economic, Social and Cultural Rights (ICESCR). Therefore, although an international treaty with a regional scope, its contribution as an international legal instrument of a general nature on economic and social rights is remarkable: it is a step forward in the progressive development of International Human Rights Law in this field; but its relevance is even greater if the ESC is located in the context of the interaction, interrelation and mutual influence among those International Organizations like the Council of Europe, the UN or the ILO that deal with economic and social rights.

These remarks –together with the appreciation of the ESC as a starting point for a dynamic and evolving legal regime with a European dimension- are latent in the conceptual substance that determines the analysis of the ESC; and all that will be present when successively examining the aims of legal policy pursued by the ESC, the content and scope of the legal commitments undertaken by the States Parties, the ESC system of control, as well as a special reference to the process of revision of the ESC.

## 2. The legal policy aims pursued by the ESC

Chronologically, the ESC is the first international treaty whose specific aim is to protect a general catalogue of economic and social rights<sup>1</sup>. This singularity proves, in general terms, the different rhythm and consistency of the development of International Human Rights Law at the universal and the European regional level, and in particular the relevance also given in the Council of Europe to safeguarding economic and social rights. However, to accurately gauge the relevance, significance and specificity of the ESC within this sector of the international legal system other converging issues need to be examined, especially the legal policy aims pursued by the ESC.

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<sup>1</sup> WIEBRINGHAUS, H.: "La Charte sociale européenne: vingt ans après la conclusion du traité", *Annuaire Français de Droit International*, XXVIII, 1981, p. 934.

Even though they may be considered different sides of the same coin, the ESC had, and continues having<sup>2</sup>, a double legal policy aim: *to contribute at the European regional level to the international protection of economic and social rights*, and as an aim inseparable to the previous one, *to contribute to the creation of a European social space*.

### 2.1. *The aim of the international protection of economic and social rights at the European regional level*

As can be inferred from the introduction to this research, this legal policy aim finds its legitimacy in the Statute of the Council of Europe itself: respect for human rights is included among the institutional aims expressly mentioned in its Article 1. The ESC is, therefore, a legal realisation in agreement with the values and principles of this European Organization of political cooperation. Consistent with the spirit and practice of the Council of Europe, the ESC has a double programmatic referent: the Universal Declaration of Human Rights (UDHR), of 10 December 1948, and the ECHR; at its root, the legal policy grounds of the ESC are to develop at the European level a mechanism to guarantee the economic and social rights included in the UDHR complementary and autonomous to the one designed in the ECHR.

Accordingly, it must be noted how the ESC is a "part of the same ambitious process of standard-setting in the post-war era which led to, and emanates from"<sup>3</sup>, the adoption of the UDHR; thus, the ESC projects and transfers to the field of European cooperation on human rights the values and principles implied in the UDHR<sup>4</sup>, with the will to contribute to making its list of rights and freedoms partially effective. Thus, it is hardly surprising that during the preparatory work for the ESC the parallel experience of the United Nations was borne in mind as the prepara-

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<sup>2</sup> A time where we should maybe wonder whether SUKUP's words about the dominant ideological discourse are right, words he uses to warn Europe to stop deceiving itself about the goodness of the neoliberal dogmatism and to avoid identifying labour flexibility with work insecurity and social cuts (SUKUP, V.: *Europa y la globalización. Tendencias, problemas y opiniones*, Editorial Corregidor, Buenos Aires, 1998, pp. 369-370).

<sup>3</sup> EVJU, S.: "The European Social Charter", in BLANPAIN, R. (ed.): *The Council of Europe and The Social Challenges of the XXIst Century*, Kluwer Law International, London, 2001, p. 20.

<sup>4</sup> Paradoxically, the Preamble of the ESC does not make any reference to the UDHR -the only texts mentioned in the Preamble of the ESC are the ECHR and its Additional Protocol-; on the contrary, the Preamble of the ECHR links the origin of the European system of human rights to the UDHR values and principles: it was adopted "to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration".

tion and negotiation of an international treaty that would specify into legal obligations the economic, social and cultural rights from the UDHR, a process that culminated with the adoption, on 16 December 1966, of the ICESCR<sup>5</sup>.

On the other hand, it is generally accepted that the ESC is the *counterpart* of the ECHR and would be considered a complementary legal instrument of it: while the ECHR is basically founded on the will to acknowledge and the realization in the European area of the civil and political rights included in the UDHR, the ESC should do the same regarding the economic and social rights.

The complementary nature between the ECHR and the ESC must be clarified, as a *symmetric parallelism* can not be established between both international instruments<sup>6</sup>:

The ESC is the result of a conscious and excluding political will by those who drafted the ECHR. They decided to include in the ECHR only those rights and fundamental freedoms "defined and accepted after long usage, by the democratic regimes"<sup>7</sup>; in accordance with this, they assumed that the civil and political rights were essentially the ones that, on the one hand, represented a common denominator consolidated and accepted by all the Member States according to their constitutional traditions and, on the other hand, a requirement for the functioning of the democratic system.

In short, as Teitgen stated, the Council of Europe had to *begin at the beginning*<sup>8</sup>:

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<sup>5</sup> We must remind that in the early 50s -according to Resolution 543 (VI) of the General Assembly, 5 February 1952-, the draft of a single international treaty split in two projects finally adopted in 1966 as the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR.

<sup>6</sup> The ECHR and the ESC are "the regional counterparts" of the ICCPR and the ICESCR, but "there the parallel [of the ESC] with the European Convention on Human Rights ends" (GOMIEN, D.; HARRIS, D.; ZWAAK, L.: *Law and practice of the European Convention on Human Rights and the European Social Charter*, Council of Europe, Strasbourg, 1996, p. 378).

<sup>7</sup> CONSULTATIVE ASSEMBLY OF THE COUNCIL OF EUROPE: "Report of the Committee on Legal and Administrative Questions on the establishment of a collective guarantee of essential freedoms and fundamental rights", *Document 3* (COUNCIL OF EUROPE: *Collected edition of the 'travaux préparatoires' of the European Convention on Human Rights*, Vol. I, Nijhoff, The Hague, 1975, p.18).

<sup>8</sup> *Ibidem*.

Together with the above mentioned priorities, there are three essential factors that had influence on it: the lesser importance of the constitutional tradition of the legal recognition of economic and social rights; the conceptual difficulties to define and delimit its legal content and the differences existing among the economic and social structures of the Member States (LEZERTUA, M.: "Orígenes , funcionamiento, efectos y cuadro de

«5. Certainly, “professional” freedoms and “social” rights, which have in themselves a fundamental value, must also, in the future, be defined and protected; but everyone will understand that it is necessary to begin at the beginning and to guarantee political democracy in the Council of Europe, and to co-ordinate our economies, before understanding the generalisation of social democracy».

It is not surprising, given these criteria, that the final political decision to adopt an international treaty like the ESC came after the entry into force of the ECHR, in 1953.

The complementary nature between both legal instruments is in any case based on the principle of legal autonomy: even though they were formed within the same International Organization, the ESC and the ECHR are two international treaties that give rise to autonomous legal regimes –which have been independently completed and revised-; that’s why an *asymmetric differentiation* can be predicated between them, which affects not only the rights and freedoms respectively protected, but also the scope of the legal obligations assumed by the States Parties and the system of international guarantee established to monitor their behaviour. The autonomy and asymmetry of both legal regimes can be exemplified through the existing differences regarding the monitoring of the fulfilment of the legal obligations accepted by the States Parties: both legal regimes have their own specific and exclusive systems of international control, so the European Court of Human Rights does not have a *ratione materiae* jurisdiction to apply or interpret the ESC –nor the other way round in the case of the European Committee of Social Rights<sup>9</sup>-; this explains the presence, as far as the ECHR is concerned, of a jurisdictional mechanism that individuals can access, unlike the ESC –in spite of its progressive evolution-.

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ratificaciones por los Estados Miembros”, in LEZERTUA, M. and VIDA SORIA, J. (eds.): *La Carta Social Europea en la perspectiva de la Europa del año 2000, Acta del Coloquio conmemorativo del XXV aniversario de la Carta Social Europea (Granada, 26 octubre 1987)*, Ministerio de Trabajo y Seguridad Social, Madrid, 1989, p. 293.

<sup>9</sup> Even though the analysis of the possible interaction *ratione materiae* between the ESC and the ECHR is postponed, it is true that the jurisprudence of the European Court of Human Rights maintain an interpretative criterion –the so-called *indirect protection*- in favour of the guarantee of rights and freedoms not expressly recognised in the ECHR as soon as they are connected to the effective respect for the rights and freedoms provided in it (CARRILLO SALCEDO, J. A.: *El Convenio Europeo de Derechos Humanos*, Tecnos, Madrid, 2003, pp. 105-108); by applying the domestic law on economic rights as a whole, what EWING states especially regarding the right to work, the interpretation of the ECHR “could in principle affect labour law incidentally, and not always on peripheral issues” (EWING, K. D.: “The Human Rights Act and Labour Law”, *Industrial Law Journal*, 27, 1998, 4, p. 278).

## 2.2. *The aim to contribute to the creation of a European social space*

From the idea of *social State* developed during the 19<sup>th</sup> Century, we shift to a 20<sup>th</sup> Century characterized by the progressive legal acknowledgement of economic and social rights, both at the national and international levels<sup>10</sup>, as a manifestation of the will to progress. The ESC is shaped, in these terms, as a legal instrument of an international nature that contributes to a project of solidarity and social justice that pursues the construction of a common social policy<sup>11</sup>; the idea of a *social Europe* or a *European social space* is promoted. This idea can be implied both from the aims of the Council of Europe themselves -Article 1 a) of its Statute indicates that the aim of the Council of Europe consists in achieving “a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress”- and from the preparatory work for the ECHR because, as has already been stated, the option to admit in the beginning only civil and political rights did not mean a renunciation to do the same regarding those economic and social rights that could help to promote the generalisation of *social democracy* among the Member States-.

Insofar as the ESC has the aim to guarantee a European common denominator as regards economic and social rights, it plays a relevant task in the legal construction of an adequate social space for States with heterogeneous constitutional traditions and economic and social models: the identification of a common but flexible legal ground capable of contributing to a minimum harmonization<sup>12</sup> because only at a level of minimum standards can the creation of a shared legal space,

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<sup>10</sup> Particularly after World War I, there are some noteworthy Constitutions in this regard, like the republican ones of Mexico (1917) and Germany (1919), or the monarchist ones of the Serb-Croat-Slovene Kingdom (1921) or Romania (1923) -PECES-BARBA, G.: “Los derechos económicos, sociales y culturales: apuntes para su formación histórica”, in MARIÑO MENÉNDEZ, F. (dir.): *Política social internacional y europea*. Universidad Carlos III/ Ministerio de Trabajo y Asuntos Sociales, Madrid, 1996, p. 47; the creation of the ILO in 1919 also opens in that historic moment an international channel for progress in the field of social justice.

<sup>11</sup> DÍAZ BARRADO, C.: “La Carta Social Europea: un instrumento válido para el desarrollo de los derechos sociales en Europa”, in MARIÑO MENÉNDEZ, F. (dir.): *op. cit.*, p. 233.

<sup>12</sup> If the concept of *legal harmonisation* could express the will to achieve “the regulatory requirements of governmental policies of different jurisdictions” to be identical “or at least more similar” (LEEBRON, D. W.: “Lying down with Procrustes: an analysis of harmonization claims”, in BHAGWATI, J. & HUDEC, R. E.: *Fair trade and harmonization. Pre-requisites for free trade?*, Vol. 1: Economic Analysis, MIT Press, Cambridge (MA), 1997, p. 43), then the ESC would be assessed as a short-ranged but positive legal project of harmonisation.

coherent and uniform on this subject, seem viable-; the ESC provides “a common core of fundamental principles”<sup>13</sup>, both regarding the determination of common principles of social policy and regarding certain legal obligations in relation with economic and social rights.

However, though it was designed as an instrument of minimum legal standards –a characteristic of International Human Rights Law as a whole<sup>14</sup>-, the preparatory work for the ESC was not a *peaceful process* regarding the substantive options that were considered. Thus, the difficulties accumulated after a long gestation process opened after a very complex Memorandum of Understanding of the Secretary-General of the Council of Europe of 16 April 1953. The preparatory work took place in three consecutive steps<sup>15</sup> where the divergent sensibilities were revealed, as well as many doubts and oscillations about the conception of the core of the project. This explains the differences in the successive drafts that were proposed<sup>16</sup>, which are indicative of the existence within the Council of Europe of very conflicting positions with regard to the fundamental aspects of the project<sup>17</sup>.

In any case it is meaningful that problems were focused on the legal nature and scope of the commitments that should be accepted by

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<sup>13</sup> SCIARRA, S.: “From Strasbourg to Amsterdam: Prospects for the Convergence of European Social Rights Policy”, *European University Institute Working Papers*, Law 98/9, 1998, p. 12.

<sup>14</sup> This attribute is clearly expressed in the Article 32 of the ESC: “[t]he provisions of this Charter shall not prejudice the provisions of domestic law or of any bilateral or multilateral treaties, conventions or agreements which are already in force, or may come into force, under which more favourable treatment would be accorded to the persons protected”.

<sup>15</sup> Successively: the *parliamentary phase* (1953-1956), the *governmental phase* (1956-58), and, finally, the Tripartite Conference (1-12 December 1958); about them, for instance: LAMARCHE, L.: *Perspectives occidentales du Droit international des droits économiques de la personne*, Bruylant, Bruxelles, 1995, pp. 87-97; LECLERC, A.: “El papel de los gobiernos en la elaboración de la Carta Social Europea”, in ZERTUA, M. and VIDA SORIA, J. (eds.): *op. cit.*, pp. 182-188.

<sup>16</sup> For instance, in the framework of the so-called Consultative Assembly, three draft versions were elaborated.

<sup>17</sup> Without forgetting that, together with the divergent opinions on the conception of the project, there was no reasonable ground to consider that the substantive problems, existing at the time the inclusion of economic and social rights in the ECHR was suggested, had vanished (see Note 8). The preparatory work for the ESC is an illustrative example of the basic questions that a negotiation for the recognition of a list of economic and social rights involves; perhaps it would be necessary to discern if ALSTON is really right when he says that, in general terms, the States “are reluctant participants in the cause of economic and social rights”: they use to express their “ideological resistance” and “a negative attitude in front of the need to establish standards and benchmarks, and auditing and accountability mechanisms” (ALSTON, PH.: “Making Economic and Social Rights Count: a Strategy for the Future”, *Political Quarterly*, 188, 1997, p.190).

future States Parties: extreme options fluctuated from the adoption of an international treaty generating legal duties, to the elaboration of a merely declarative instrument that included some general principles<sup>18</sup>. The organization of the monitoring system to be implemented also was controversial: rejecting proposals like the creation of a monitoring body with tripartite representation or the possibility for the Committee on Economic Affairs of the then so-called Consultative Assembly of the Council of Europe to refer to the then existing European Commission of Human Rights any question regarding the compliance of legal duties articulated in the ESC<sup>19</sup>. As was to be expected, the final result is a compromised legal text which, for the same reason, has complex and ambiguous wording, with a very generic and sometimes vague language giving a great deal of leeway for the interpretation of the legal commitments accepted.

The so-called legal policy aims project on the legal configuration of the ESC gives two guiding principles that inspire and determine the logic and methodology of action stemming from the international legal regime: *dynamism* and *flexibility*.

The description of the ESC as a dynamic legal instrument is perfectly inferred from its own Preamble: it invokes both the aims of the Council of Europe: to facilitate the economic and social progress of States and to secure the maintenance and further realisation of human rights and fundamental freedoms-, which are *per se* proposals for future action in the field of economic development and protection of human rights, and the idea already mentioned that the ESC is a contribution to improve the standard of living of European peoples.

The dynamism that impregnates the ESC can be broken down into at least three levels:

- i) *Systemic*: the ESC is an international treaty that shapes an *evolutionary legal regime*, that is adaptable to the needs emerging in a dynamic European society through the legal techniques allowed by the Law of Treaties; in practice, the original legal regime in the ESC has been touched up, both materially - extension of the protected economic and social rights - and institutionally - improvement of the ESC monitoring system - which have been combined with a global process of review.

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<sup>18</sup> In this way, the proposal included in the first draft submitted by the Governmental Social Committee can be highlighted (LAMARCHE, L.: *op. cit.*, p. 95).

<sup>19</sup> Proposal included in the third version of the draft prepared within the so-called Consultative Assembly.



- ii) *Legal commitments made by the States Parties*: the flexibility given to States Parties to achieve the level of legal commitment they are willing to assume, within the fixed conventional limits, is complemented with the implicit aim to finally set a uniform higher legal standard on economic and social rights accepted by States Parties. Article 20.3 ESC<sup>20</sup>, which provides for the possibility for States to enlarge the legal scope of the accepted obligations, is a demonstration of this *gradualism*.
- iii) *Legal content of the economic and social rights recognized*: from the wording of the numbered paragraphs of the ESC it is predicated that an important number of the undertakings are of a progressive nature, so they imply a continued and sustained action by the State in favour of the highest effectiveness of the economic and social rights recognized<sup>21</sup>.

Flexibility is another characteristic of the ESC: together with the authorisation to formulate reservations not incompatible with the object and purpose of the ESC<sup>22</sup>, the States Parties, limited by the legal exigencies of the ESC, can choose *à la carte* those statutory provisions

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<sup>20</sup> "Any Contracting Party may, at a later date [after the deposit of its instrument of ratification or approval], declare by notification to the Secretary General that it considers itself bound by any articles or any numbered paragraphs of Part II of the Charter which it has not already accepted under the terms of paragraph 1 of this article. Such undertakings subsequently given shall be deemed to be an integral part of the ratification or approval, and shall have the same effect as from the thirtieth day after the date of the notification".

A similar provision can be found in the Additional Protocol of the ESC, adopted on 5 may 1988 -Article 5, 3-, and in the Revised ESC -Article A, 3-.

<sup>21</sup> For instance, in Article 1,1 ESC a reference is made to the undertaking of the States "to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment", while Article 1,3 ESC undertakes them "to provide or promote appropriate vocational guidance, training and rehabilitation"; Article 12, 3 has a special significance because it expressly provides that the State has "to endeavour to raise progressively the system of social security to a higher level".

<sup>22</sup> In practice, very few States have formulated reservations to the ESC -Source: COUNCIL OF EUROPE: *Treaty Office*, available on: <http://conventions.coe.int/Treaty/EN/v3MenuTraites.asp>-. The writers of the ESC certainly intended to exclude their use by laying down the mechanism of flexibility of Article 20 of the ESC (DÍAZ BARRADO, C.: *op. cit.*, p. 250); however, according to the Law of Treaties, the lack of reference in the provisions of the ESC to the total or partial authorization or prohibition of reservations means that they can be formulated as long as they are not incompatible with the object and purpose of the treaty (INTERNATIONAL COURT OF JUSTICE: *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, CJI Reports*, 1951, pp. 11-20).

they accept. This legal technique seems to be an obstacle to the legal homogenisation and harmonisation that the creation of a common legal space entails, as each State Party creates its own legal regime with a specific level of legal commitment; however, although this weakens and minimizes *a priori* the scope of the harmonizing project, the existing legal and socio-economic disparities among the States seemed to make its utilization unavoidable.

It is not easy to assess whether, then and now (as any analysis of the ESC must bear in mind that it is a living and evolving legal instrument) the ESC has achieved in an efficient manner both aims; whether the legal standard for economic and social rights is satisfactorily fulfilled; and whether it corresponds to the European social reality, to what level of compliance is the degree of social convergence reached, or whether the legal commitments under the ESC and subsequent treaties related to it are still a valid starting point for developing the idea of a European social space.

Anyhow, we have to bear in mind that, firstly, the European social space is not legally constructed only through the ESC –as its normative development also depends on the EU’s social policy developed in accordance with the Treaty establishing the European Community and on the ILO’s international standards<sup>23</sup>-. Secondly, that in the framework of the European Union the ESC constitutes a legal text of reference, although not the only one, to identify the fundamental social rights from which the aims of the EU’s social policy must be developed<sup>24</sup>. Thirdly, there persist at the beginning of the 21<sup>st</sup> Century deep differences among the European States both regarding their levels of development and their constitutional and legal models on

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<sup>23</sup> So, according to VOGEL-POLSKY, in the construction of that idea of a social Europe converges a *space of International Law* (VOGEL-POLSKY, E.: “La Europa social del año 2000: la Carta Social y el sistema comunitario”, in LEZERTUA, M. and VIDA SORIA, J. (eds.): *op. cit.*, p. 71); that is to say that the ESC is not the only international legal instrument devoted to that process.

<sup>24</sup> Article 136,1 of the European Community Treaty states: “The Community and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion”.

The 27 States Members of the European Union are Parties to the ESC or the Revised ESC.

this issue<sup>25</sup> -which call into question the opportunity to deepen the aims of the ESC-. And, fourthly, in this sense can operate ideologically –with an ideology almost standing as a *pensée unique*- and economic tendencies that undoubtedly mark the current stage of globalization, which seem to require socio-labour issues to be tackled from the single standpoint of the labour market, and States to reduce the public expenditure to its minimum –against their social policies<sup>26</sup>-.

### 3. The content and scope of the legal commitments undertaken by the States Parties

As far as the formal structure of its content is concerned, the ESC is divided into five parts, where successively: the principles of social policy to be followed by future States Parties are enumerated (Part I); the list of economic and social rights which are internationally protected are specified (Part II); the scope of the legal obligations established under the ESC (Part III); the ESC monitoring system is established (Part IV)<sup>27</sup>; and provisions regarding the application of the ESC, as well as the usual final provisions in any international treaty on its legal regime of entry into force and validity (Part V). The ESC also has an Annex –which as inferred from Article 38 is an integral part of it - which

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<sup>25</sup> Regarding the legal configuration of fundamental social rights, three constitutional models can be identified: the liberal model, the Southern Europe model and the moderate model (BUTT, M.E.; KÜBERT, J. & SCHULTZ, CH. A.: “European Parliament: Fundamental Social Rights in Europe”, in BLANPAIN, R. (ed.): *op. cit.*, p. 333); in view of the progressive incorporation of Central and Eastern European States to the European Union, some academics have warned that the deepening into the measures of social harmonization according to the potentialities of the European Community Treaty would be negative for these States, as it would seriously affect to their comparative advantage (BELKE, A. & HEBLER, M.: “Social Policy and Eastern Enlargement of the European Union: Labour Market Impacts for the Accession Countries”, *Journal for Institutional Innovation, Development and Transition*, 5, 2001, pp. 48-61).

<sup>26</sup> The translation made by FIGUEROA is very meaningful, stating that for the neoliberal economic doctrine “labour market = potato market” (FIGUEROA, A.: “Labour market theories and labour standards”, in SENGERBERGER, W. & CAMPBELL, D.: (eds): *International Labour Standards and Economic Interdependence*, International Institute for Labour Studies, Geneva, 1994, p. 57; the legal requirements of the ESC undoubtedly turn this international treaty into an uncomfortable legal instrument (FRANCO FOSCHI, M.: “La Carta Social y el espacio social europeo”, in LEZERTUA, M. and VIDA SORIA, J. (eds.): *op. cit.*, p. 61).

<sup>27</sup> According to the object of the current section, the content of Part IV will be analysed in the section of this research devoted to the system of control laid down in the ESC.

happens to be especially important, as we will see below, insofar as it sets parameters for the interpretation of the content of the ESC and delimits its personal field of application. The same formal structure is followed by the Additional Protocol of the ESC, adopted on 5 May 1988 (Additional Protocol), which enlarged the list of economic and social rights recognized, and, in a way, also by the Revised ESC, adopted on 3 May 1996<sup>28</sup>.

It can be stated that the formal structure of the ESC makes it possible to visualize, in general terms, the elements to be considered in order to delimit the legal content and scope of the commitments accepted by the States Parties; from this structure, two big issues can be inferred; first, the *identification of the object of the protection given by the ESC*, and second, the *determination of the legal obligations for the States*.

### 3.1. *The identification of the object of the protection given by the ESC*

The presence in Parts I and II of the ESC –as well as in the Additional Protocol and the Revised ESC- of a distinction between some *social policy principles* and a *list of economic and social rights* makes it clear that two levels of legal exigency for States Parties regarding the object of protection are provided.

Part I establishes –“as the aim of their policy, to be pursued by all appropriate means, both national and international in character, the attainment of conditions in which the following rights and principles may be effectively realised” (introductory paragraph of Part I)- a number of *social policy principles* addressed to guarantee that the States Parties integrate the recognition of economic and social rights included in the ESC into their decision-making, regardless of the legal commitments they can assume concerning the list of economic and social rights included in Part II. The aim of Part I would thus have a double meaning; as the expression of the will during the preparatory work for the ESC to give birth to a legal text that combined a double nature, declarative and compulsory; and also as a manifestation of the need to involve the States Parties in the achievement of a deeper effectiveness of all economic and social rights included in the ESC: hence the correspondence between the social policy principles generically formulated in Part I and

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<sup>28</sup> Although the last one divides the two typologies of issues included in Part V ESC into its Part V and Part VI respectively; the analysis of the legal content and scope of the undertakings in the Revised ESC are left for Section V of this research.

each of the economic and social rights whose content is expressly specified in Part II<sup>29</sup>.

Another question is which legal requirements can be derived from Part I for States Parties. Considering that Part I constitutes some sort of *declaration of intentions* or, maybe, a *policy commitment* “similar to that in the Universal Declaration of Human Rights”<sup>30</sup>, the programmatic nature that can result from its comparison with the UDHR does not exclude some legal consequences for States Parties, inferred from the wording of the ESC and its legal nature as an international treaty.

In agreement with the legal requirement provided by the Law of Treaties that every international treaty in force must be performed by Parties in good faith, the States Parties to the ESC assume an undertaking which would be inferred from Article 20.1 of the ESC: Part I must be considered “as a declaration of the aims which it will pursue by appropriate means, as stated in the introductory paragraph of that part”. When reading both paragraphs in connection, it can be concluded that there exists a very generic legal obligation to maintain a national policy inspired, in good faith, by those principles, as a whole, with the purpose to make them effective. This should exclude a national policy which would move in the opposite or reverse direction<sup>31</sup>.

Part I also results in the legal commitment of no subsequent retraction regarding any measure that has involved a progress towards the achievement of the principles in it, unless those measures adjust to the requirements provided in the ESC itself<sup>32</sup>.

<sup>29</sup> For instance, if in Part I the general principle that all workers have the right to just conditions of work can be identified –Principle 2-, in Article 2 ESC the legal exigencies of the right to just conditions of work are correlatively developed in five numbered paragraphs.

<sup>30</sup> GOMIEN, D.; HARRIS, D.; ZWAAK, L.: *op. cit.*, p. 379; in its Preamble, the UDHR proclaims itself “a common standard of achievement for all peoples and all nations”.

<sup>31</sup> This does not mean that a State cannot maintain a non-active policy if social evolution permits itself to progress in the adequate assumption of aims described in Part I; consequently, a State “may choose not to intervene directly if, according to its legal and institutional system, this is the best way of attaining the ‘conditions in which the [...] rights’ in question ‘may be effectively realised’, without need to express any reservations whatsoever end” (COUNCIL OF EUROPE: *Explanatory Report to the Additional Protocol to the European Social Charter (ETS No. 128)*. Council of Europe, *Treaty Office*, available on: <http://conventions.coe.int/Treaty/en/Reports/Html/128.htm>, para. 16).

<sup>32</sup> According to Article 31, 1 ESC, “the rights and principles set forth in Part I when effectively realised, (...), shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals”. This paragraph is clearly inspired by the restrictive clauses included in some provisions of the ECHR -for instance, see the respective paragraphs 2 of Articles 8, 9, 10 and 11 ECHR-.

The legal consequences of Part I are certainly very limited, as they seem to be restricted to demanding that the States Parties maintain, in a continuous and gradual way, a social policy in agreement with the social policy principles listed as a whole. In spite of that, they can serve as an instrument of political cohesion that can contribute to some extent to help the aim of a deeper uniformity in the social field, thanks to the flexibility provided by its Article 20: firstly, because to keep the political commitment of the States is particularly relevant when it comes to those economic and social rights about which the State Party will not undertake any legal obligation (since it does not free them from showing a positive political action); and, secondly, because these social policy principles can be useful as an interpretative element when examining the alleged violation of a certain right<sup>33</sup>.

Part II includes a list of economic and social rights susceptible of turning the programmatic provisions in the UDHR into international legal obligations, particularly its Articles 22 to 25<sup>34</sup>. Without disregarding its flexibility, which allows to choose to a large extent the scope of its undertakings, it is evident that Part II has as its aim that States Parties "consider themselves bound by the [legal] obligations laid down" -introductory paragraph to Part II of the ESC-. It is a dynamic list that has not only evolved through the interpretation made by the bodies involved in the ESC system of control, but also through the will to expand the list itself (Additional Protocol and Revised ESC), and to undertake the revision of the economic and social rights previously included in the ESC or in the Additional Protocol -Revised ESC-.

As far as the *classification* of economic and social rights is concerned, a minimalist option of the division into fundamental categories has been preferred, in view of "the broad range of social and economic rights with which the Charters are concerned"<sup>35</sup>: rights regarding work and employment and rights regarding social protection.

As far as the *rights regarding work and employment* are concerned, the following subcategories can be established:

- i) the right to work (Articles 1 and 9 ESC)<sup>36</sup>;

<sup>33</sup> DÍAZ BARRADO, C.: *op. cit.*, p. 251, or LAMARCHE, L.: *op. cit.*, p. 112.

<sup>34</sup> The right to property, to the extent it can be considered an *economic right*, was included in Article 1 of the Additional Protocol of the ECHR, adopted on 20 march 1952 -Article 17 UDHR-; through its Article 2 the right to education -Article 26 UDHR- is likewise recognised.

<sup>35</sup> EVJU, S.: *op. cit.*, p. 19.

<sup>36</sup> Articles 1-19 are common to the ESC and the Revised ESC.

- ii) the protection in the employment –including the protection of the employment relationship- and in the working environment (Articles 2, 3, and 4 ESC, Article 1 of the Additional Protocol<sup>37</sup>, and Articles 24-27 and 29 of the Revised ESC);
- iii) the right to a vocational training (Article 10 ESC);
- iv) the right to organise and to bargain collectively, including the special protection to workers' representatives (Articles 5 and 6 ESC, Articles 2 and 3 of the Additional Protocol, and Articles 28 and 29 of the Revised ESC);
- v) the right to a special protection for certain categories of workers belonging to vulnerable groups (Articles 7, 8, 15, 18 and 19 ESC).

As for the *rights regarding social protection*, the following subcategories can be established:

- i) rights concerning the social protection of the population as a whole (Articles 11-14 ESC and Articles 30-31 of the Revised ESC);
- ii) rights concerning the special social protection of certain categories of persons belonging to vulnerable groups (Articles 15-19 ESC and Article 4 of the Additional Protocol).

There is no doubt about the deep interrelation of the ESC with other international legal instruments whose object is the progressive development of economic and social rights at the universal level: the influence of the previous normative activity of the ILO is noticeable in the wording of the ESC –both regarding the content of the list of economic and social rights included and the conventional structure of the ESC<sup>38</sup>.

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<sup>37</sup> Articles 1-4 of the Additional Protocol have their correspondence in Articles 20-23 of the Revised ESC.

<sup>38</sup> Irrespective of the interaction among ILO Conventions and Recommendations and the ESC as far as the economic and social rights protected are concerned, the binding scheme adopted by Article 20 ESC can previously be found –with a high level of coincidence- in the Social Security (Minimum Standards) Convention (1952) –no. 102- or in the Plantations Convention (1958) –no. 110-, both adopted by the ILO; although the Council of Europe and the ILO have regularly maintained a fluent level of institutional co-operation –according to an agreement which came into force on 23 November 1951-, both International Organisations established more intensive links during the preparatory work for the ESC –for instance, the aforementioned Tripartite Conference, which finally resulted in a relevant meeting to determine the key issues in the final draft, was organised under the auspices of the ILO (according to the Article 3 of the Mutual Agreement)-.

The ESC is sometimes more ambitious than ILO Conventions expressly are; for instance, Article 6, 4 ESC expressly affirms the undertaking of the States to recognise the right to strike as a form of collective action –but such recognition has not been made in ILO Conventions no. 87 and 98: it has been later inferred by ILO monitoring bodies-.

The preparatory work in parallel for the ICESCR is also a referent for the normative process that would peak with the adoption of the ESC<sup>39</sup>. After the analysis of two legal instruments with similar characteristics like the ESC and the ICESCR (international treaties of a general nature on economic and social rights) it can be concluded that, in general, the ESC further specifies the legal content of the economic and social rights recognized: for instance, the wording of Article 7 (a) ICESCR -which refers to the fair remuneration as a part of the right of everyone to the enjoyment of just and favourable conditions of work- compared with Article 4 ESC -right to a fair remuneration-, or the differences between both formulations of the right to social security -Article 9 ICESCR and Article 12 ESC<sup>40</sup>-.

Even though the wording of the ESC has been criticized for the vagueness and imprecision of most of its provisions, what redounds is the lack of a complete specification of the protected rights; it has even been stressed that there exist both the non-inclusion of some economic and social rights in the list of the ESC<sup>41</sup> and an obsolescence of some of its provisions<sup>42</sup>. The legal questions raised by the list introduced by the ESC are not very different to those that, in general, are raised by any international treaty concerning economic and social rights.

In this respect, it can be added that the typical dynamism of the ESC has been a tool that has helped to polish part of the failings noticed, although, naturally not in such a way as to achieve their total elimination. Firstly, the functioning of the international monitoring system has generated a *jurisprudence*<sup>43</sup> that has allowed an evolutionary interpretation of the provisions of the ESC and thus it has contributed to specify the legal content of the ESC and to adapt it to the European social reality. And secondly, both the Additional Protocol and the Re-

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<sup>39</sup> For instance, the first draft of the ESC submitted to the so-called Consultative Assembly, in April 1955, was basically inspired in the UN's previous works.

<sup>40</sup> On the other hand, in Article 12, 2 ESC an express reference is made to ILO Convention no. 102.

<sup>41</sup> A brief remark on these criticisms in LAMARCHE, L.: *op. cit.*, pp. 112-113.

<sup>42</sup> BETTEN, L.: "Prospects for a Social Policy of the European Community and its Impact on the Functioning of the European Social Charter", in BETTEN, L.; HARRIS, D. and JASPERS, T. (dir): *The Future of the European Social Policy*, Kluwer Law and Taxation, Denter, 1989, p. 101.

<sup>43</sup> Despite the non-judicial nature of the competences of the bodies involved in the supervision -not even when they examine collective complaints-, this term is probably used in an inappropriate way in order to refer to the practice resulting from the implementation of the competence of control provided in the ESC, as happens with the UN bodies (WIEBRINGHAUS, H.: *op. cit.*, p. 939).



vised ESC have been adopted as international legal instruments whose aim is to take “account of developments in labour law and social policies since the Charter was drawn up in 1961”<sup>44</sup>: thus, for instance, if the undertaking “to provide for a minimum of two weeks annual holiday with pay” -Article 2.3 ESC- could be considered outdated, in the Revised ESC there is a legal commitment to increase the number of weeks holiday with pay to four. In any case, States can also, with their ability to choose *à la carte* the undertaken commitments, decide to leave aside some ambiguous, imprecise and even obsolete provisions<sup>45</sup>.

### 3.2. *The determination of the legal obligations for the States*

It has already been remarked that the particularity of the flexibility mechanism laid down in Article 20 ESC authorizes the States to choose (in agreement with a minimum rules previously established by the ESC itself) which provisions in it they will freely accept, hence its relevance for the determination of the legal obligations of States Parties to the ESC.

A flexibility mechanism such as the one laid down in the ESC cannot be said to be exceptional, not even original for being exclusively used by the ESC: firstly, because the introduction of flexibility mechanisms is a usual practice in multilateral international treaties –including the international human rights treaties-, and secondly, because a legal

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<sup>44</sup> COUNCIL OF EUROPE: *Explanatory Report to the European Social Charter (revised)* (ETS No. 163), Council of Europe, Treaty Office, available on: <http://conventions.coe.int/Treaty/en/Reports/Html/163.htm>, para. 8; notwithstanding, the State Party to the ESC can remain not bound neither by the Additional Protocol nor the Revised ESC (about legal consequences of the entry into force in a State of the Revised ESC, see Part V).

<sup>45</sup> It also exists the possibility to denounce presumably obsolete provisions –Article 37.2 ESC-: Spain has denounced the sub-paragraph 4 (b) of the Article 8 of the ESC -which expressly binds the States “to prohibit the employment of women workers in underground mining”- with effect as from 5 June 1991 (the ESC entered into force in Spain on 5 June 1980). The Spanish Constitutional Court later declared that the non employment of women in underground mining was not in conformity with the general prohibition of discrimination of Article 14 of the Spanish Constitution; doing so, the Spanish Constitution was interpreted according to the *Council Directive 76/207/EEC, of 9 February 1976, on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions*, and Article 11, 3 of the *UN Convention on the Elimination of All Forms of Discrimination against Women*, of 18 December 1979 -the main argument given by the court was that the scientific and technological progress would determine the revision of protective legislation (STC 229/1992, of 14 December, Legal Fundament 3)-, in despite of the opposite requirements of the *ILO Underground Work (Women) Convention* (1935) -no. 45-, also into force in Spain.

technique with a flexibility similar to the one reflected in Article 20 ESC –the partial acceptance of the legal obligations included in the international treaty- can be found in some ILO Conventions<sup>46</sup>. In any case, the need for flexibility is stressed when the guaranteed list includes economic and social rights –due to the resulting requirements of State positive action and their budgetary implications- if the international treaty is intended to be widely ratified and the standards it sets worthwhile<sup>47</sup>.

This procedure of *choice à la carte* works as follows:

- Every State undertakes to accept at least five out of seven articles which can be considered the *hard core* of the ESC<sup>48</sup> -Article 20.1 (b) of the ESC-.
- Additionally, every State undertakes to consider itself bound “by such a number of articles or numbered paragraphs of Part II” of the ESC, “provided that the total number of articles or numbered paragraphs by which it is bound is not less than 10 articles or 45 numbered paragraphs [provisions accepted by means of the mechanism in letter (b) included]” -Article 20.1 (c) ESC-. The Additional Protocol obliges the States to bind themselves by at least one of the four substantive articles included in it<sup>49</sup>.
- The selection shall be notified to the Secretary General of the Council of Europe at the time when the instrument of ratification or approval of the State is deposited -Article 20.2 ESC-; it can be presumed that if the State does not make any express indication about its selection, it is accepting Part II as a whole. Furthermore, a State may, at a later date, declare that it accepts other articles or paragraphs that it has not initially accepted -Article 20.3 of the ESC<sup>50</sup>-.

<sup>46</sup> See Note 38.

For instance, Article 2 of the ILO Convention no. 102 provides that each State in which this Convention is in force shall comply with at least three of the nine substantive Parts of the Convention –every part develops, respectively, a different type of social insurance cover-, included one of the five selected parts expressly indicated by article 2.

<sup>47</sup> GOMIEN, D.; HARRIS, D.; ZWAAK, L.: *op. cit.*, p. 379.

<sup>48</sup> These Articles are: 1 (right to work); 5 (right to organise), 6 (right to bargain collectively), 12 (right to social security), 13 (right to social and medical assistance), 16 (right of the family to social, legal and economic protection) and 19 (right of migrant workers and their families to protection and assistance); the Revised ESC extends the list of *hard core* articles and of the minimum number of articles that must be accepted too (see Part V).

<sup>49</sup> About the Revised ESC, see Part V.

<sup>50</sup> See Article 5,3 of the Additional Protocol and A, 3 of the Revised ESC.

Furthermore the level of flexibility made available to States Parties increases both because of the authorisation to make reservations or to denounce the ESC as a whole -Article 37.1 ESC<sup>51</sup>-, and because of the complementary faculty of any State to denounce any Article or paragraph of Part II of the ESC accepted by it, albeit with a limitation: that "the number of articles or paragraphs by which this Contracting Party is bound shall never be less than 10 in the former case and 45 in the latter and that this number of articles or paragraphs shall continue to include the articles selected by the Contracting Party among those to which special reference is made in Article 20, paragraph 1, sub-paragraph b" -Article 37.2 of the ESC<sup>52</sup>-.

The application of the legal technique of the partial acceptance of legal obligations in the ESC arouses, due to its specificity, some legal questions that must be commented upon.

First, Article 20 ESC lays down the priority of some economic and social rights that would be in theory the *hard core* of the ESC. Maybe the relevance of this differentiation should not be maximized for the purposes of the establishment of a strict hierarchical order: these articles "were chosen not because they necessarily protect the seven most important rights, but in order to achieve a balance between the different groups of rights"<sup>53</sup>; in practice, it is a *hard core* that can be relativized, insofar as it is susceptible of not being accepted as a whole and as it has turned out to be variable since the Revised ESC includes, as a part of it, some rights that were not initially recognized as such<sup>54</sup>; and finally, probably only the Revised ESC reflects in its hard core all those economic and social rights that are fundamental according to the ILO<sup>55</sup>.

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<sup>51</sup> "Any Contracting Party may denounce this Charter only at the end of a period of five years from the date on which the Charter entered into force for it, or at the end of any successive period of two years, and, in each case, after giving six months notice to the Secretary General of the Council of Europe who shall inform the other Parties and the Director General of the International Labour Office accordingly. Such denunciation shall not affect the validity of the Charter in respect of the other Contracting Parties provided that at all times there are not less than five such Contracting Parties".

See also Article 11,1 of the Additional Protocol and the Article M, 1 of the Revised ESC.

<sup>52</sup> See also Article 11, 2 of the Additional Protocol and Article M, 2 of the Revised ESC.

<sup>53</sup> GOMIEN, D.; HARRIS, D.; ZWAAK, L.: *op. cit.*, p. 380.

<sup>54</sup> Article N of the Revised ESC includes the right of children and young persons to protection -Article 7- and the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex -Article 20-; both articles have their own correspondence with Article 7 of the ESC and Article 1 of the Additional Protocol.

<sup>55</sup> In its Declaration on Fundamental Principles and Rights at Work (1998), the ILO has identified as fundamental rights at work: the freedom of association and the effec-

Secondly, the practice by States Parties must be analysed in order to assess the fragmentation of the general legal regime and the depth of State *particularisms* that dilute the will to harmonize. If we consider that 39 out of 47 Member States of the Council of Europe are Parties to the ESC, or to the Revised ESC, the following statement can be made<sup>56</sup>: first, while the States Parties to the ESC have not accepted about 25% of its numbered paragraphs –the Member States to the Additional Protocol have not done so regarding about 10%- the States Parties to the Revised ESC have not accepted slightly over 19.5% of the numbered paragraphs; second, that, in spite of the broad State discretion, it is noticeable how some Articles in the ESC and the Revised ESC tend to concentrate a greater number of non-acceptances<sup>57</sup> -but without being a generalized tendency extendable to the great majority of States-; and third, that the position of States is very heterogeneous, because together with those States Parties that accept all the provisions regarding those which they must choose, some other States restrict their legal undertakings<sup>58</sup> to the utmost. Therefore, it is a fragmentation that cannot be qualified as intensive, due to the systematically generalized use of Article 20 ESC, nor results in the rejection by more than a half of the States of any significant part of the ESC or the Revised ESC -perhaps, with the exception of Articles 30 and 31.1 and 3 Revised ESC-.

And third, and leaving aside the fact that it also authorizes the formulation of reservations, the differences must be stressed between the flexibility mechanisms provided by the ICESCR and by the ESC: the flexibility scheme of Article 2.1 of the ICESCR<sup>59</sup> is a good example of a

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tive recognition of the right to collective bargain; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.

<sup>56</sup> See annexed Tables.

<sup>57</sup> The respective Articles 18 and 19 of the ESC and the Revised ESC -rights of migrants- or Articles 30 and 31 of the Revised ESC -the right to protection against poverty and social exclusion and the right to housing, respectively- are very good examples of that.

<sup>58</sup> For instance, Latvia has not accepted the 64 % of the numbered paragraphs of the ESC, while Azerbaijan has not accepted the 52% of the numbered paragraphs of the Revised ESC.

<sup>59</sup> "Each State Party to the present Covenant undertakes to take steps, individually or through international assistance and co-operation specially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures". Article 2,1 ICESCR is the consequence of a compromise solution between partisans and detractors of a draft in

general flexibility clause; so the States Parties undertake to achieve the full realization of *all* the rights recognized in a progressive way, according to their available resources. This general flexibility clause offers “a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights”<sup>60</sup>. Certainly, this flexibility is not unlimited but the method that has been used to restrain the freedom of the State is different from the one in the ESC: first, every State undertakes to progressively adopt real and effective measures with the “obligation to move as expeditiously and effectively as possible towards that goal”<sup>61</sup>; and second, as the Economic, Social and Cultural Committee has pointed out, “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State Party”<sup>62</sup>.

From the standpoint of the determination of legal obligations for the States Parties, it is also interesting to shape the general characteristics of the legal obligations included in Part II ESC, the Additional Protocol and the Revised ESC. It must be admitted that, on the one hand, the provisions in those three international treaties, as in the ICESCR, include both obligations of result<sup>63</sup> and obligations requiring a particular course of conduct<sup>64</sup> -even being indistinctly a part of the legal content of the same article-. On the other hand, we must see whether the progressive nature typical to these three international treaties makes it possible to glimpse the inclusion of *norms of self-executing nature* -those norms that seem to be capable of immediate application by judicial and other national bodies<sup>65</sup>-. If that is quite easy to accept with

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which it would be included legal binding commitments about economic, social and cultural rights (CRAVEN, M.C.R: *The International Covenant of Economic, Social and Cultural Rights. A perspective on its development*, Clarendon Press, Oxford, 1995, p. 150)

<sup>60</sup> ECONOMIC, SOCIAL AND CULTURAL RIGHTS COMMITTEE (ESCR): *General Comment 3. The nature of States Parties obligations (Article 2,1)*, of 1990 (UN Doc. E/1991/23, para. 9).

<sup>61</sup> *Ibidem*, para. 10.

<sup>62</sup> *Ibidem*.

<sup>63</sup> These are those obligations which require “to achieve, by means of its own choice, a specified result” -Article 21 of the *Draft articles on State responsibility for internationally wrongful acts*, provisionally adopted by the Commission on first reading (1996)-.

<sup>64</sup> These are those obligations which require “to adopt a particular course of conduct when the conduct of that State is not in conformity with that required of it by that obligation” -Article 20 of the *Draft articles on State responsibility for internationally wrongful acts*, provisionally adopted by the Commission on first reading (1996)-.

<sup>65</sup> CESCR: *General Comment 3. The nature of States Parties’ obligations (Article 2,1)*, of 1990 (UN Doc. E/1991/23, para. 5).

regard to the ICESCR<sup>66</sup>, it is much more complicated regarding the ESC due to the wording of its provisions: for instance, according to Article 4, the States Parties “undertake” “to recognise the right of men and women workers to equal pay for work of equal value”<sup>67</sup> -paragraph 3-. The practice of States proves however that “the final decision as to whether a Charter [ESC] provision can be relied upon by an individual in a national court must be one for the national court concerned” according to the State laws<sup>68</sup>, and therefore that the direct application of some provisions of the ESC has effectively been accepted<sup>69</sup>.

Finally, we must note the presence both in Part V of the ESC and in the Revised ESC of some conditions of applicability that must serve as principles for action for the States in the fulfilment of their legal obligations (to a large extent those conditions of applicability provided in Part V of the ESC are applicable *mutatis mutandi* to the Additional Protocol (Article 8.2)).

With regard to these, it is relevant to point out that:

- There is no provision in the ESC relating to the prohibition of discrimination. For instance in Article 14 ECHR or Article 2.2 ICESCR –without disregarding that some of its provisions are specifically referred to this condition of application: Articles 4.3; 12.4; and 13.4 ESC, and Article 1 of the Additional Protocol-. Instead, Article E of the Revised ESC does state it clearly. Being a general le-

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<sup>66</sup> The ESCR has listed those provisions of the ICESCR which contain such a kind of norms: Articles 3, 7 (a) (i), 8, 10 (3), 13 (2) (a), (3) and (4) and 15 (3), adding that “any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain” (*ibid*).

<sup>67</sup> Comparing this Article of the ESC to the general configuration of the obligations of States in Article 1 ECHR –“[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”-, it is clear that a difference between the *legal undertaking to recognize* a right and the *legal undertaking to secure* a right which has been previously recognised.

<sup>68</sup> GOMIEN, D.; HARRIS, D.; ZWAAK, L.: *op. cit.*, p. 429: in a similar way, WIEBRINGHAUS, H.: *op. cit.*, p. 945.

<sup>69</sup> The aforementioned academics usually give examples from Dutch or German courts. In Spain, there are early examples of this trend, too: by 1987 it’s already possible to find a decision of the *Tribunal Central de Trabajo* in which the ESC -curiously, this decision is referred to the Article 8, 4 (b) which undertake the States “to prohibit the employment of women workers in underground mining” (see Note 45)- is considered a legal text in force and containing an executive mandate (STCT of 20 February 1987, *Recurso de Suplicación. Jurisprudencia Aranzadi*, 1987/3705); another example, in 1990, was the decision of the Spanish Supreme Court which had to decide whether Article 2 of the ICESCR has been violated -as a part of Spanish legal order- (STS of 13 December 1990, *Recurso de casación por infracción de ley, Jurisprudencia Aranzadi*, 1990/9785). Of course, these are not isolated jurisdictional decisions.

gal principle that delimits the application of International Human Rights Law, it seems logical to interpret Part II in agreement with the Preamble of the ESC –that does mention that legal principle– in a way that allows it “to achieve the same result [the prohibition of all kind of discrimination] where the wording of the provisions concerned is not clearly to the contrary”<sup>70</sup>.

- Article 30 ESC and Article F of the Revised ESC introduce a *clause of derogation* –similar to the one in Article 15 ECHR– that authorize States to “take measures derogating from its obligations” –respecting the principles of proportionality and temporality and such measures not inconsistent with the rest of international obligations of the State– “in time of war or other public emergency threatening the life of the nation”.
- The possibility to apply a progressive policy of a negative nature, in other words to take measures that entail a backward movement in the advancements achieved in the fulfilment of the assumed obligations, seems to be subject to some requirements, apparently very restrictive<sup>71</sup> and, in any case, susceptible to be object of international monitoring.
- As for the *personal field of application* of the ESC, there are some issues to comment upon:

The starting point must be that most of the provisions of the ESC are not addressed to *every person*<sup>72</sup> but provide instead the need to guarantee rights and to adopt the subsequent measures in regard to particular groups. Therefore, the general principle is that each conventional provision is applicable to every person reached by the protection it guarantees.

Notwithstanding this, Article 33.1 ESC –and, in similar terms, Article 7 of the Additional Protocol and Article I of the Revised ESC– softens this undertaking, assuming that the implementation of certain conventional provisions corresponds to “matters normally left to agreements

<sup>70</sup> GOMIEN, D.; HARRIS, D.; ZWAAK, L.: *op. cit.*, p. 412.

<sup>71</sup> Such measures will only be adopted if they are “prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals” –Article 31 ESC; in similar terms, Article G of the Revised ESC (Article 4 ICESCR is not very different to them).

<sup>72</sup> There are provisions addressed to those persons that hold the condition of workers, or persons identified on other grounds, like their age or their gender, or other personal or social grounds; for instance, such reference can be found in Articles 1, 9, 10, 11, 13 and 14 ESC (DIAZ BARRADO, C.: *op. cit.*, p. 241); to some extent, this can be extensive to provisions such as Article 31,1 of the Revised ESC.

between employers or employers' organisations and worker's organisations"<sup>73</sup>. This can certainly entail that, due to the game of collective bargaining, not everyone targeted by the international legal norm has effectively guaranteed through a collective agreement the standard that would correspond to them according to the conventional provision concerned. In view of this problem, the accomplishment of these provisions is softened, considering that the State Party is effectively complying if the legal provisions "are applied through such agreements or other means to the great majority of the workers concerned". The notion of *great majority* in this context seems to have been interpreted in the sense that the application of the measures is extended to at least 80% of the collective concerned<sup>74</sup>.

From the standpoint of the personal field of application we can turn to the Appendix of the ESC, where the applicability of Articles 1 to 17 ESC is restricted to the nationals of the State and to the "nationals of other Contracting States Parties lawfully resident or working regularly" –which will be interpreted according to its Articles 18 and 19<sup>75</sup>-. This extension implies the uniform application of the whole of the provisions accepted by the State Party, within the pre-established limits,

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<sup>73</sup> The provisions which have been identified as *normally left*, according to Article 33, 1, are: paragraphs 1 to 5 of Article 2 -right to just conditions of work-, paragraphs 4, 6 and 7 of Article 7 -right of children and young persons to protection- and paragraphs 1 to 4 of Article 10 -right to vocational training-; according to Article 7,2 of the Additional Protocol: Articles 2 and 3 -respectively the right to information and consultation and the right to take part in the determination and improvement of the working conditions and working environment-; the Revised ESC only adds or excludes a few number of paragraphs -paragraphs 7 of Article 2 and 5 of Article 10 are included, while paragraph 4 of Article 10 is excluded-.

<sup>74</sup> WIERBRINGHAUS observes that the interpretation given by the then so-called Committee of Independent Experts was upheld on the preparatory work for the ESC (WIERBRINGHAUS, H.: *op. cit.*, p. 943); such a percentage must be taken, anyway, as general guide, as the "common sense suggests that it should not be rigidly followed" (GOMIEN, D.; HARRIS, D.; ZWAAK, L.: *op. cit.*, p. 414).

<sup>75</sup> Article 33, 2 ESC introduces a correcting factor for those States Parties that regulate such issues through their domestic law -they are *normally subject of legislation*- instead of collective agreements. Thus, the applicability of the criterion of the *great majority* is extended; Article 7 of the Additional Protocol and Article I of the Revised ESC predicate the applicability of this criterion independently to the method used by the State in the implementation –what includes, for instance, the State Party that combines the use of laws or regulations and collective agreements-.

Respectively, the right to engage in a gainful occupation in the territory of the other State and the right to migrant workers and their families to protection and assistance; without disregarding that similar advantages can be extended to other groups and the special provision applicable to refugees. A similar provision is included in the Appendix of the Revised ESC.



without needing to take into consideration the principle of reciprocity –that is to say, the ESC must be applied regardless of its acceptance by the State of nationality-.

#### 4. The ESC control system

As happens in many international treaties whose object is the international protection of human rights, the guarantee of the enjoyment of the economic and social rights undertaken by the States Parties to the ESC is internationally linked to the subjection of States Parties to some sort of system of control to monitor the action of State authorities and to assess the effectiveness of those legal and administrative measures addressed to execute their undertakings.

Regarding the system to control the compliance with the ESC by States Parties, we must make reference, in principle, to the provisions of Part IV -Articles 21 to 29-, in which a *non-contentious monitoring mechanism* is established as the only instrument integrated in the system of control, based on the obligation to *submit periodical reports*<sup>76</sup>.

However, the initial expectations of the ESC have tended to be subjected to an evolutionary restatement that, since the formalization in 1990 of the decision to *revitalise* the ESC<sup>77</sup>, was embodied in a real will of review during the last decade of the 20<sup>th</sup> Century. As the Parliamentary Assembly of the Council of Europe pointed out in 1991<sup>78</sup>, the monitoring system required a restatement addressed to strengthening the means of action.

By that time the functioning of the mechanism of supervision through periodical reports as laid down in the ESC had accumulated some criticisms that Vandamme summarizes in four aspects of a mainly technical and political nature<sup>79</sup>: the relative slowness of the procedure –faced with the intervention of a plurality of bodies-; the insufficient precision in the delimitation of the competences of the then so-called Committee of Independent Experts and the Subcommittee of the Gov-

<sup>76</sup> This mechanism of supervision has as its referent, despite their marked differences, the system of supervision provided in the ILO Constitution –Articles 19, 22 and 23- (VALTICOS, N. & VON POTOSBKY, G.: *International Labour Law*, Second edition revised, Kluwer Law and Taxations Pub., Deventer/Boston, 1995, p. 312).

<sup>77</sup> Decision that will be mentioned later in Section V.

<sup>78</sup> PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE: *Recommendation 1168 (1991), Future of the Social Charter of the Council of Europe*, 24 September 1991, para. 10.

<sup>79</sup> VANDAMME, F.: "Revision of the European Social Charter", *International Labour Review*, 133, 1994, 5/6, pp. 639-641.

ernmental Social Committee of the Council of Europe; the resulting imperfections observed in the functioning of both bodies; and, finally, the scarce will of the Committee of Ministers to exercise its competence to formulate recommendations to States Parties, since from the first moment “[i]ts reluctance to make individual recommendations has been the subject of discussion since the adoption of the [European Social] Charter”<sup>80</sup>.

Some other substantial criticisms have tended to make evident that, unlike the mechanism provided for instance in the ILO Constitution, the representation of the social actors –employers and workers- places them as mere observers. On the other hand, any sanctioning seems to be absent<sup>81</sup>; in a different sense, what has been put forward underlines, in general, the insufficient transparency of the mechanism of supervision<sup>82</sup>.

Neither can we forget the context where those considerations of revision are projected: the entry into the Council of Europe and the possible incorporation as Parties to the ESC of Central and Eastern European States after the decline and collapse of the Soviet Bloc.

On this basis two additional international treaties to the ESC were adopted during the 1990s with the aim of transforming the system of control.

Firstly, the Protocol adopted on 21 October 1991 (from now on, the *1991 Protocol*) to amend the system of control laid down in the ESC –specifically, its Articles 23 to 29-, which has not entered into force yet because the twenty-one States that were Parties to the ESC by the time the Protocol was adopted had not yet expressed their consent to be bound by it<sup>83</sup>. Although most of its provisions have in practice been implemented through the decisions of the Committee of Ministers of the Council of Europe and are fully operative<sup>84</sup>, even when these are inconsistent with the original text of the ESC –this happens for instance regarding the composition of the originally so-called Committee of Independent Experts, which according to the wording of Article 25 ESC

<sup>80</sup> *Ibid*, pp. 639-640; in agreement with Article 29 ESC.

<sup>81</sup> GRÉVISSE, S.: “Le renouveau de la Charte sociale européenne”, *Droit Social*, 2000, 9/10, p. 885.

<sup>82</sup> PETTITI, CH.: “La Charte sociale européenne révisée”, *Revue Trimestrielle des Droits de l’Homme*, 8, 1997, 29, p. 7.

<sup>83</sup> Spain gave its consent on the 24 January 2000 (Source: *Treaty Office*, available on: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=142&CM=1&DF=7/9/2008&CL=ENG>).

<sup>84</sup> An idea already suggested in the Final Resolution of the Ministerial Conference of Turin, 21 and 22 October 1991 (GOMIEN, D.; HARRIS, D. and ZWAAK, L.: *op. cit.*, p. 415).

shall consist of seven members, while according to the wording given to it by the 1991 Protocol it shall consist of at least of nine members-.

And secondly, the *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints*, of 9 November 1995 (from now on, the *1995 Protocol*), to lay down a mechanism of a basically quasi-contentious nature, complementary to the reporting mechanism—thus a qualitatively renewing element would seem to be added to the ESC system of control—. This Protocol has entered into force—since 1 July 1998—.

The system of control laid down in the ESC, as it is currently shaped, formally attributes competences within the system of control to three bodies:

- The *European Committee of Social Rights* (hereinafter the *ECSR*)—a denomination given to the originally so-called Committee of Independent Experts<sup>85</sup>— consists of fifteen members<sup>86</sup>, elected by the Parliamentary Assembly of the Council of Europe from a list of experts of the highest integrity and of recognised competence in international social questions, nationals of any Member State of the Council of Europe—as decided by the Committee of Ministers—, for a renewable period of six years<sup>87</sup>. Their competences are essentially legal: on the one hand, they must examine the reports submitted by the States Parties in accordance with the ESC—Article 24—, even when the new wording of Article 24 suggested by the 1991 Protocol clarifies that this involves assessing the compliance of national laws, regulations and practices with the content of the obligations arising from the Charter for the Contracting Parties concerned; and, on the other hand, the decision on the admissibility and the drawing up of a report on the complaints submitted in accordance with the 1995 Protocol—in which it will conclude whether or not the Contracting Party

<sup>85</sup> Since control cycle XV-1 (March-June 2000).

<sup>86</sup> As resulting of a decision taken during the 751st meeting of the Ministers Deputies (2-7 May 2001). According to the amendment of Article 25,1 ESC introduced by the 1991 Protocol and applied since 1995, although the Protocol is not in force; even when the number of members must be at least of nine, the Committee of Ministers of the Council of Europe is granted the capacity to determine the number of members it must consist of—Article 3 of the 1991 Protocol—. On the other hand, the Article 3 of the 1991 Protocol stipulates that members of the ECSR will be elected by the Parliamentary Assembly—and not by the Committee of Ministers—, but this provision is still not being applied.

<sup>87</sup> The new wording of Article 25, 2 ESC, as provided in the 1991 Protocol, states that they can be reappointed only once.

cerned has ensured the satisfactory application of the provision of the Charter referred to in the complaint -Article 8-<sup>88</sup>.

- The *Governmental Committee* (the denomination of the old Subcommittee of the Governmental Social Committee of the Council of Europe according to the nomenclature of the 1991 Protocol), consists of a representative of each State Party to the ESC. Its competence seems now to be focused<sup>89</sup> (after the adaptations made according to the wording proposed by Article 4 of the 1991 Protocol) on the preparation of the decisions of the Committee of Ministers, providing it with information and making proposals within its powers. It must be emphasized how the possibility is provided for the invitation of two international organizations of employers and two international organizations of workers, at the most, to integrate in the working of the Governmental Committee, although they will participate in consultative status and as observers<sup>90</sup>.
- The *Committee of Ministers*, consisting of the Ministers of Foreign Affairs of the Member States of the Council of Europe (now 47 States), is the deciding body of the Organization which passes a general resolution after every control cycle corresponding to the periodical reports submission mechanism, which can be complemented with individual recommendations addressed to the States Parties according to the content of the periodical reports submitted by the States Parties and their previous examination by the ECSR<sup>91</sup>, or, in the framework of the mechanism of collective complaints, with recommendations declaring the violation of the ESC—otherwise, it will pass a resolution ending the procedure -.

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<sup>88</sup> Article 34 of the ECSR Rules of Procedure, of 29 March 2004-and revised on 12 May 2007-, specifies that it is a decision on the merits of the complaint.

<sup>89</sup> This issue, as we will see, has not been peaceful due to the original wording of Article 27 ESC.

<sup>90</sup> In the Governmental Committee there currently participate: the Union of Industrial and Employers' Confederations of Europe (UNICE), the International Organisation of Employers (IOE) and the European Trade Union Confederation (ETUC); it is also possible to consult Non-Governmental Organisations particularly qualified on the subjects regarding the ESC.

<sup>91</sup> The *Parliamentary Assembly of the Council of Europe*, the plenary and deliberative body of the Organisation, consisting of representatives of the Parliaments of the States Members of the Council of Europe, can consider the realisation of debates during its sessions on the basis of the reports by the ECSR and the Governmental Committee; it is thus applied *de facto* the wording of Article 29 ESC, according to the 1991 Protocol, that excludes its consultative competence, prior to the decision of the Committee of Ministers, in the framework of the reporting mechanism.

The supervision mechanisms related to the ESC system are the *mechanism of periodical reporting* and the *mechanism of collective complaints*.

#### 4.1. *The mechanism of periodical reporting*

Provided as a compulsory supervision mechanism for the States Parties, this mechanism originally involved the periodical submission of a report on the application of the provisions in Part II of the ESC accepted by the State Party (Article 21 ESC), as well as the periodical submission of reports "relating to the provisions of Part II of the Charter which they [the States Parties] did not accept at the time of their ratification or approve in a subsequent notification" (Article 22 ESC). While for the accepted provisions, the ESC establishes a two-year interval, in regard to the non-accepted provisions, it established a variable periodicity ("at appropriate intervals"), when requested by the Committee of Ministers, that can also periodically determine a time period in respect of which provisions will be required.

According to its current practice, the reporting mechanism works on the following basis:

- Regarding the submission of reports on the *accepted provisions*: every year the States Parties have the obligation to submit reports "concerning the application of such provisions of Part II of the ESC as they have accepted" (Article 21 of the ESC<sup>92</sup>), indicating how the accepted provisions have been implemented in their law and practice. The odd numbered years are reserved for reporting about certain provisions of Part II of the ESC that are considered by the ESC *hard core* or *fundamental obligations* (that is to say, those provisions expressly mentioned in Article 20.b) ESC, adding, when appropriate, those listed in Article A, 1 b) of the Revised ESC); while for the rest of provisions in Part II accepted by the State, the report about half of them will be submitted in the even numbered years<sup>93</sup>.
- Regarding the submission of reports on the *non-accepted provisions*, we must take into account the practice of the Committee of Ministers, whose requests have usually been focused on those provisions accepted by the majority of States Parties.

<sup>92</sup> The States Parties of the 1988 Protocol -Article 6- and of the Revised ESC -Article C- assume that the implementation of their respective provisions accepted shall be submitted to the same supervision as the European Social Charter.

<sup>93</sup> So, every four years the cycle report about all provisions accepted by the States Parties is completely closed.

As a result of a decision adopted during the 963<sup>rd</sup> meeting of the Ministers Deputies (3 May 2006), a new system of presentation of national reports was established; the aim of the reform is to rationalize and simplify (reduce?) the work of the ESCR since the supervisory body “will receive reports less frequently than under the current system”<sup>94</sup>. Having entered into force on 31 October 2007, the new system has the following characteristics: firstly, the States shall only present a report annually on a part of the provisions of the ESC (and of the 1988 Protocol, if they are Parties to it) or of the Revised ESC; secondly, the provisions have been divided into four thematic groups<sup>95</sup> -thus, the States Parties will report on each provision once every four years-; thirdly, the reports shall be presented on 31 October every year (the first cycle of four years having begun in 2007); fourthly, the conclusions of the ECSR shall be published before the end of the following year. It certainly seems to be a very restricted reform, which is only focused on the reporting activity of States and its effect on the work of the ESCR<sup>96</sup>. However, the decision adopted is logical and wise: a deeper reform of the supervisory machinery would probably entail a revision of the ESC and of the Revised ESC; on the other hand, this reform can be inscribed in a *rationalizing trend* that the ESC system shares, for instance, with the ILO.

The reports must be sent to the national organizations affiliated to the international organisations that participate in the work of the Governmental Committee, so that they can, if they want, make their own remarks which, according to Article 23.2 ESC, will be sent to the States Parties, although the 1991 Protocol authorizes them to be sent directly to the Secretary General of the Council of Europe (Article 1)<sup>97</sup>. Article 1 of the 1991 Protocol also provides that those reports will be forwarded to Non-Governmental Organisations in consultative status with the

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<sup>94</sup> *Opinion of the European Committee of Social Rights on the new system for the presentation of reports*, available on: [https://wcd.coe.int/ViewDoc.jsp?Ref=CM\(2006\)53&Language=lanEnglish&Site=COE&BackColorInternet=9999CC&BackColorIntranet=&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=CM(2006)53&Language=lanEnglish&Site=COE&BackColorInternet=9999CC&BackColorIntranet=&BackColorLogged=FDC864).

<sup>95</sup> See annexed Table 4.

<sup>96</sup> Apparently, it's not clear whether the new reporting system only implies the submission of a report on the provisions that have been accepted by the State or whether reports have to include a reference to the non-accepted provisions too; it's possible to find reports that include commentaries about non-accepted provisions –i.e. Romania- and reports which do not include such commentaries –i.e. Azerbaijan-; see: [http://www.coe.int/t/e/human\\_rights/esc/3\\_reporting\\_procedure/1\\_state\\_reports/Reports\\_en.asp#TopOfPage](http://www.coe.int/t/e/human_rights/esc/3_reporting_procedure/1_state_reports/Reports_en.asp#TopOfPage).

<sup>97</sup> Maybe this formula can be useful to promote the submission of observations because, despite a increasing tendency to correct the previous practice, in general terms it is an under-utilised resource (GOMIEN, D.; HARRIS, D. and ZWAAK, L.: *op. cit.*, p. 416).

Council of Europe and particularly qualified on the subjects regulated by the ESC, in order to allow them to make their own remarks.

The reports submitted and, when appropriate the existing remarks, will be examined by the ECSR. On the procedure before this body the following comments can be made: firstly, a representative appointed by the ILO is allowed to participate in consultative terms in the deliberations of the ECSR, according to the Rule 13.1 of the ECSR Rules of Procedure (hereinafter the ERP)<sup>98</sup>; secondly, and in order to streamline the work, the ERP provides for the appointment of *Rapporteurs* for each normative provision in the ESC, 1988 Protocol and Revised ESC (Rule 19), as well as of Sub-Committees to prepare the decisions of the plenary (Rule 20); thirdly, according to Article 24.3 ESC (as amended by the 1991 Protocol) and the way this is applied, the ECSR can specifically address a State to ask for complementary information or clarification, and even call and hold meetings, in principle in public, with the State<sup>99</sup>, where the international organisations that participate in the work of the Governmental Committee will be allowed to attend<sup>100</sup>; and, fourthly, the conclusions of the ECSR will be made public.

The conclusions of the ECSR, as well as of the Parliamentary Assembly of the Council of Europe, are sent to the Governmental Committee. This Committee, according to the original wording of Article 27 ESC, should examine the reports of the States Parties, the hypothetical comments formulated, and the conclusions of the ECSR (then the Committee of Independent Experts), to formulate "its conclusions and append the report of the Committee of Experts".

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<sup>98</sup> Participation that the ERP extends not only to the plenary meetings but also to the sub-committees internally created according the Rule 20 ERP; it is also provided to send to the International Labour Bureau the working documents to facilitate its participation -Rule 13,1 ERP-.

The Rules of 2004 ERP (adopted on 29 March 2004) replaced the Rules of 1999 ERP, except in respect of collective complaints under examination by 29 March 2004 which kept of being regulated by the Rules of 1999 ERP; it's not a mere presumption to say that all complaints under examination by 29 March 2004 have already been resolved by the ECSR or the Committee of Ministers

<sup>99</sup> The Rule 21,1 ERP only contemplates the power of the ECSR to decide "to organise meetings with representatives of States".

<sup>100</sup> The affiliated national organisations and Non-Governmental Organisations, to which copies of the report of the State Party have been transmitted, will be informed -the first ones, in agreement with Rule 21,2 RPC, through the international organisations to which they are affiliated-; on the other hand, the national organisations of employers and trade unions "may also be invited" to participate in these meetings -Rule 21, 3-.

As it can be seen, the RPC themselves assume the applicability of certain provisions of the 1991 Protocol.

Without dealing with the issue in depth, the ESC certainly seems to lead to a confusing duplicity of powers between both Committees (the ECSR and the Governmental Committee). However, the different nature of each one (the first, a technical and legal body, and the second, an intergovernmental and political body) was really reflected in their own practice: the Governmental Committee had been offering a more restrictive perception of the obligations undertaken by the States Parties<sup>101</sup>.

In view of this clear mismatch, it was decided, since 1993, to apply the reform provided in the 1991 Protocol, considering the Governmental Committee a body that would prepare the work of the Committee of Ministers: on the basis of the conclusions of the ECSR, it selects the situations that should be the object of a specific recommendation (according to grounds of social and economic policy), and suggests proposals to undertake studies on social issues. Even though it is true that this reform offers coherence and credibility to the reporting mechanism<sup>102</sup>, it can be noted how the competences of the Governmental Committee still allows it, in practice, to filter (and, when appropriate, not to send) the suggestions of the technical-legal body.

On the basis of the report of the Governmental Committee, the Committee of Ministers adopts a resolution about the whole control cycle made and, when appropriate, makes specific non-binding recommendations addressed to the States. The difficulty in getting a majority of two thirds of the States Members of the Committee of Ministers, together with a possible initial lack of political will, contributed to preventing any specific recommendation being formulated during the first twenty years of functioning of the mechanism<sup>103</sup>. But as a result maybe of the conviction of the Committee of Ministers about the need to collaborate in revitalizing the reporting mechanism as well as the application, since 1993, of the reform drafted in Article 5 of the 1991 Protocol (only States Parties have the right to vote on the decisions that affect/refer to the reports) the truth is that the practice of the Committee has noticeably changed.

As general considerations about this mechanism of supervision, we must appreciate, among other things, its relative efficiency. If we bear in mind that the lack of positive response of a State to the recommendations of the Committee of Ministers does not have an effect, beyond the dynamics itself, on the later supervision and verification of

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<sup>101</sup> GOMIEN, D.; HARRIS, D. and ZWAAK, L.: *op. cit.*, p. 422.

<sup>102</sup> *Ibid.*, pp. 423-424.

<sup>103</sup> *Ibid.*, p. 426.



that fact, because the adopted decisions are not legally binding on the affected State<sup>104</sup>. On the other hand, it is true that we can positively assess, as a conceptual referent of a uniform comprehension of the European social space, the practice of the ECSR (about which there really is a consensus on its quality and its identification as a sort of *jurisprudence about the ESC*). In the future, the new reporting system will be assessed on the basis of two parameters: the increase of the quality of the reports and the increase of the impact of supervision at the national level. Therefore, the reform could contribute to a rise in the coherence of the uniform comprehension of the European social space.

#### 4.2. *The mechanism of collective complaints*

The contribution of the 1995 Protocol to the revitalization of the ESC system of control depends on the establishment of a quasi-contentious mechanism similar to the one provided in Article 24 of the ILO Constitution<sup>105</sup>: the ILO *complaints procedure*. In this *procedure*, any "industrial association of employers or of workers" is entitled to allege "that any of the [ILO] Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party" (Article 24 of the ILO Constitution). Again, this has been discarded as an option of a jurisdictional and contentious mechanism<sup>106</sup>.

From the standpoint of the procedure, it begins through a complaint lodged in writing, submitted by any of the organisations with active standing according to Article 3 of the 1995 Protocol. The complaint shall be addressed to the Secretary General who, after acknowledging receipt, notifies the State Party concerned<sup>107</sup> and trans-

<sup>104</sup> HARRIS, D.: "Lessons from reporting system of the European Social Charter", in ALSTON, PH. and CRAWFORD, J. (eds.): *The Future of UN Human Rights Treaty Monitoring*, Cambridge University Press, Cambridge, 2001, p. 360.

<sup>105</sup> COUNCIL OF EUROPE: *Explanatory Report to the Additional Protocol to the European Social Charter providing for a system of collective complaints (ETS No. 158)*. Council of Europe, Treaty Office, available on: <http://conventions.coe.int/Treaty/en/Reports/Html/158.htm>, para. 1.

<sup>106</sup> This has justified and still justifies that the ESC system of control can not be compared to the system of control laid down in the ECHR, also adopted within the Council of Europe on 4 November 1950, that has a judicial procedure that allows the States Parties and the individuals to submit their complaints before the European Court of Human Rights (VERDIER, J. M.: "Les droits économiques et sociaux: relance au Conseil de l'Europe?", *Droit Social*, 1992, 4, p. 415).

<sup>107</sup> Complaints can only be submitted against the States Parties to the 1995 Protocol or States Parties to the Revised ESC who have accepted the procedure of collective com-

mits it to the ECSR, which is the body that from the legal standpoint has the competence to examine the collective complaints submitted.

Firstly, the ESCR must decide on the admissibility of the complaint; before the final decision, the President of the ESCR may ask the defending State and/or the complainant organisation, if considered appropriate<sup>108</sup>, for written information and observations about admissibility.

If the complaint is admitted (the decision of non-admissibility implies the end of the procedure), there begins a mainly written adversarial procedure:

- the Committee's decision on admissibility of the complaint is notified to the Parties to the 1995 Protocol or to the Revised ESC who have accepted the procedure of collective complaints (Rule 30.4 of the RPC<sup>109</sup>); upon previous requirement, a copy of the complaint and of the comments to the Parties (Rule 30. 7 of the RPC<sup>110</sup>) is also transmitted to the States Parties to the 1995 Protocol and to the international organisations invited to be represented at the Governmental Committee;
- A time-limit is given to the defending State and to the complainant organisation to respectively submit their comments on the merits of the matter and to answer those comments. The Parties to the complaint can also submit all supplementary relevant written explanations or information (Article 7. 1 to 3 of the 1995 Protocol and Rule 31 of the RPC), after inviting the States Parties to the 1995 Protocol<sup>111</sup>, as well as the international organisations

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plaints (art. D,2 of the Revised ESC): specifically, by the 9 July 2008, only 14 States out of the States Parties to the ESC or to the Revised ESC are Parties to the 1995 Protocol or have accepted the procedure according the Art. D of the Revised ESC –Spain is not among them- (Source: COUNCIL OF EUROPE: *Treaty Office*, available on: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=158&CM=1&DF=7/9/2008&CL=ENG->

<sup>108</sup> Rule 29. Previously, the Rapporteur appointed for the complaint submits a draft decision about its admissibility -Rule 27,3-

<sup>109</sup> The publication of the decision on the Internet site of the Council of Europe is "regarded as notification of other States Parties of the ESC [and the Revised ESC] who have not accepted" the procedure (Rule 30,6 of the RPC).

<sup>110</sup> Surprisingly, the Rule 30,7 of the RPC does not include a reference to the States Parties to the Revised ESC who have made a declaration under Article D,2 of the Revised ESC.

<sup>111</sup> As well as those States non-Parties to it that being Parties to the Revised ESC had done the declaration laid down in its Article D, 2 of the Revised ESC -Rule 32,1 of the RPC-; that is to say, if, not being previously Party to the 1995 Protocol, it is accepted to extend the mechanism of supervision provided in it to the legal obligations undertaken through the Revised ESC.

- represented at the Governmental Committee<sup>112</sup>, to make their comments;
- on the basis of a decision of the ECSR (Article 7.4 of the 1995 Protocol and Rule 33 of the RPC), at the request of one of the Parties or at the Committee's initiative, an adversarial hearing can be carried out, where not only the parties to the complaint will participate but also all the intervening parties that are authorized to submit written comments;
  - finally, the ECSR (taking into consideration the proposal of the Rapporteur) shall draw up a report that will include its conclusions about the compatibility of the action of the State regarding the provision referred to in the complaint;
  - the report will be transmitted to the Committee of Ministers and to the Parliamentary Assembly of the Council of Europe (Article 8.2 of the 1995 Protocol<sup>113</sup>), as well as to the organisation that lodged the complaint and to the Contracting Parties to the Charter (or to the Revised ESC), including the defending State, although it will be made public at the same time as the resolution of the Committee of Ministers, or no later than four months after it has been transmitted to said committee (Article 8 of the 1995 Protocol); and finally,
  - the Committee of Ministers shall adopt a resolution by a majority of those voting, declaring whether or not the Contracting Party concerned has ensured the satisfactory application of the provision of the Charter referred to in the complaint. If it is found that the Charter has not been applied in a satisfactory manner, the Committee of Ministers shall adopt, by a majority of two-thirds of those voting, a recommendation addressed to the Contracting Party concerned (Article 9 of the 1995 Protocol), which must provide information on the measures it has taken to give effect to the Committee of Ministers' recommendation, in the next report concerning accepted provisions which the State will submit to the ECSR (Article 10 of the 1995 Protocol).

This procedure, however, has some singularities that mainly influence the admissibility of the complaints and affects to the *entitled subjects* and to States Parties.

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<sup>112</sup> As long as complaint has been submitted by national organisations of employers or of workers, or by a national or international Non-Governmental Organisation -Article 7, 2 of the 1995 Protocol and Rule 32,2 of the RPC-

<sup>113</sup> But the Rule 34,3 of the RPC does not mention to the Parliamentary Assembly.

a) As far as the *entitled subjects* are concerned, the 1995 Protocol recognizes in Articles 1 and 2, the right of the following organisations to submit complaints alleging unsatisfactory application of the Charter: international organisations invited to participate in the work of the Governmental Committee; other international Non-Governmental Organisations which have consultative status with the Council of Europe and have been put on a list established for this purpose by the Governmental Committee<sup>114</sup>; representative national organisations of employers and trade unions; and those national Non-Governmental Organisations with particular competence in the matters governed by the Charter whose right to lodge complaints has been formally recognised by the State Party.

It can be noted firstly, as is already obvious, that the individual is not entitled to submit complaints<sup>115</sup>; but immediately we must realise that there are two controversial aspects raised by the 1995 Protocol<sup>116</sup>:

—on the one hand, firstly, the *representativity* of the national organisations of employers and trade unions, a requirement in relation with which the ECSR chooses, first, to delimitate through an *autonomous notion* (that is, it does not assume *ipso iure* that this representativity must be necessarily identical to the one in the laws of the State<sup>117</sup>), and secondly, to determine that the ex-

<sup>114</sup> COUNCIL OF EUROPE: *List of International Non-Governmental Organisations entitled to submit Collective Complaints (as from 1 January 2005)* –Source: COUNCIL OF EUROPE: *Human Rights. European Social Charter*, available on: [http://www.coe.int/t/e/human\\_rights/esc/4\\_collective\\_complaints/organisations\\_entitled/OINGList\\_en.pdf](http://www.coe.int/t/e/human_rights/esc/4_collective_complaints/organisations_entitled/OINGList_en.pdf)

<sup>115</sup> Unlike the draft Optional Protocol to the International Covenant of Economic, Social and Cultural Rights that lays down a quasi-contentious mechanism (UN Doc. E/CN.4/1997/105, para. 19; about the arguments in favour and against, see ARAMBULO, K.: *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights. Theoretical and Procedural Aspects*, Intersentia/Hart, Antwerp/Groningen/Oxford, 1999.

<sup>116</sup> Until the 3 July 2008, fifty-one complaints have been processed (<http://www.coe.int/t/e/human%5Frights/esc/4%5Fcollective%5Fcomplaints/List%5Fof%5Fcollective%5Fcomplaints>); about the decisions of the Committee, see: COUNCIL OF EUROPE: *European Social Charter Database*, available on <http://hudoc.esc.coe.int/esc/search/default.asp>.

<sup>117</sup> After the decisions adopted in *Complaints 6/1999, Syndicat national des professions du tourisme c. France* and *10/2000 Tehy et STTK c. Finlande* (AKANDJI-KOMBE, J.-F.: "La procédure de réclamation collective dans la Charte sociale européenne. Chronique des décisions du Comité européen des droits sociaux", *Revue Trimestrielle des Droits de l'Homme*, 12, 2001, 48, pp. 1040-1041; by the same author, "La application de la Charte social européenne: la mise en oeuvre de la procédure de réclamations collectives", *Droit Social*, 2000, 9/10, pp. 888-896); this allows to qualify as representative a national organisations that would not be such according to the domestic laws (*ibid*, p. 1040).

amination of this issue is done *specifically* regarding each complaint and each complainant<sup>118</sup>;  
 —and, on the other hand, the *particular qualification* that Non-Governmental Organisations, international or national, must have (as a result of the requirement in Article 3 of the 1995 Protocol, which is essentially observed by the ECSR) is from the formal standpoint of the object and mandate of the entity, rather than their specific activities<sup>119</sup>.

On the other hand, and as far as the defendants are concerned, we must bear in mind that, firstly, they must be States Parties to the 1995 Protocol or, being Parties to the Revised ESC and not to the 1995 Protocol, they must have accepted the extension of the system of complaints to control the compliance of their undertakings regarding the Revised ESC, but taking into consideration that *ratione materiae* can only be claimed against that State by virtue of the provisions of the ESC, the 1988 Protocol and, when appropriate, the Revised ESC previous and expressly accepted by that State (Article 4 of the 1995 Protocol).

b) Connected to this, as far as the *object* of the complaints is concerned, Article 4 of the 1995 Protocol warns that they must relate to a provision of the Charter accepted by the Contracting Party concerned but also *indicating in what respect the latter has not ensured the satisfactory application of this provision* (a requirement that the ECSR has interpreted in a liberal way, without needing to strictly stipulate that relation for the purpose of admissibility) in what would already be a substantive issue<sup>120</sup>.

It also must be taken into consideration, on the one hand, the possibility to reject a complaint whose object has been submitted to another international or national body, or examined in the framework of the reporting mechanism of the ESC (this possibility is interpreted by the ECSR in a restrictive way and admitting that it must be solved tak-

<sup>118</sup> We must bear in mind, however, that the explanatory report of the 1995 Protocol offers two meaningful criteria to weigh up: the number of affiliated members and the effective role they can play in the negotiation as at the national level (COUNCIL OF EUROPE: *Explanatory Report... Collective Complaints*, *op. cit.*, para. 23).

<sup>119</sup> AKANDJI-KOMBE, J.-F.: "La procédure...", *op. cit.*, p. 1042; on the basis of the decision in *Complaints No. 1/1998 International Commission of Jurists v. Portugal* and *No. 8/2000 Quaker Council for European Affairs v. Greece*.

<sup>120</sup> *Ibid.*, p.1043; on the basis of *Complaints No. 4/1999 European Federation of Employees in Public Services v. Italy* and *No. 5/1999 European Federation of Employees in Public Services v. Portugal*.

ing into consideration the specific facts<sup>121</sup>); and, on the other hand, that the object of the complaint is determined by the quality of the parties, especially when a Non-Governmental Organisation is involved<sup>122</sup>.

The above gives us a global assessment of the quasi-contentious mechanism of collective complaints.

The mechanism of collective complaints is certainly a noticeable advancement in the strengthening of the ESC system of control, as it allows representative organisations in the social field to denounce before a quasi-contentious mechanism the failings of the State social policies when executing the obligations undertaken in agreement with the provisions of the ESC, the 1988 Protocol and the Revised ESC, and therefore to get involved through their complaints in the control of the activity of the States Parties to the 1995 Protocol.

However, it must be cautiously considered, not only for the scarce binding legal force of the recommendations of the Committee of Ministers, but also because to some extent (as Sudre properly outlines) procedural innovation does not necessarily imply instrumental renovation: this mechanism of complaints (unlike the one provided at the ILO) is presided by the logic of the reporting mechanism, as the object of the complaints is rather of a general nature (the measures of social policy regarding one or several provisions of the ESC) and it does not admit, due to its formulation, the individualization from the standpoint of the entitled subject (typical of those cases where a collective right of complaint exists, that is, of the logic of the claim of rights)<sup>123</sup>.

## 5. The ESC revision process

The evolution of the European societies and of the labour markets since the adoption of the ESC (also considering the incipient consolidation of a process of globalisation since the end of the Cold War), as

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<sup>121</sup> According to the standpoint the Explanatory Report to the 1995 Protocol (COUNCIL OF EUROPE: *Explanatory Report...Collective Complaints...*, *op. cit.*, para. 31), and the practice of the ECSR (*Complaint o. 1/1998 International Commission of Jurists v. Portugal*); see AKANDJI-KOMBE, J.-F.: "L'application...", *op. cit.*, pp.892-893.

<sup>122</sup> As SUDRE states, the claimants need not to have a direct interest that allows them to be qualified as *victims* (SUDRE, F.: "Le Protocole additionnel à la Charte sociale européenne prévoyant un système de réclamations collectives", *Revue Générale de Droit International Public*, 100, 1996, 3, p. 726).

<sup>123</sup> *Ibid*, pp. 726-727.

well as the gradual incorporation of States from Central and Eastern Europe, are factors that can explain the reasons why a process of revision of the ESC was opened in the early 90s<sup>124</sup>.

Within these coordinates we must appreciate the proposals and decisions adopted at the Ministerial Conference on Human Rights (held in Rome on 5 November 1990) including the decision to invite the Committee of Ministers to adopt the measures needed to start a deep reflection about the meaning, the content and the functioning of the ESC<sup>125</sup>. These proposals resulted in an *ad hoc* committee (the ESC Committee) that was convened that year, consisting of representatives of the States Members and observers (for instance, the ILO, the UNICE or the ETUC), that was asked to make proposals to improve the effectiveness of the ESC including the revision of certain normative provisions and the introduction of new economic and social rights, and, particularly, of its system of control<sup>126</sup>; that *ad hoc* committee worked from 1991 to 1994, and drafted a revised ESC.

After sending this draft to the then so-called Committee of Independent Experts of the ESC and to the Parliamentary Assembly of the Council of Europe, in consultative terms, on 3 May 1996 the Committee of Ministers adopted the Revised ESC (which entered into force on 1 July 1999<sup>127</sup>); thus, together with the 1991 and 1995 Protocols, without forgetting the 1988 Protocol, it legally formalized the intent to update what Vandamme calls “the expression of a common heritage of rights and principles intended to underpin social policies”<sup>128</sup>.

The analysis of the Revised ESC will focus on its *general characteristics* and the legal scope of the *suggested updating of the economic and social rights*.

### 5.1. *The general characteristics of the Revised ESC*

The Revised ESC has the legal nature of an international treaty. Its aim is, according to its Preamble, to progressively take the place of the

<sup>124</sup> Thus, the Revised ESC takes into consideration the evolution in Labour law and in the conception of social policies since 1961 (COUNCIL OF EUROPE: *Explanatory Report. European Social Charter (revised)*, *op. cit.*, para. 8).

<sup>125</sup> CONSEIL DE L'EUROPE: *Droits de l'homme- Feuille d'information 27*, 1991, p. 99.

<sup>126</sup> On the table there were as well the proposals of the Parliamentary Assembly of the Council of Europe, for instance, those included in the already mentioned Recommendation 1168 (1991), of 24 September 1991.

<sup>127</sup> As it has been already mentioned, the Revised ESC has 24 States Parties –among them, 15 States Members of the European Union, although not Spain- (see Table 3).

<sup>128</sup> VANDAMME, F.: *op. cit.*, p. 635.

ESC, taking into account the fundamental social changes which have occurred since the text was adopted in 1961.

To some extent, both elements (the technical-legal and the teleological) converge in a necessary way in order to articulate the specific measures that characterize the international legal text. Thus, it is evident, firstly, that, although the Revised ESC entails the amendment of provisions of the ESC and the 1988 Protocol, as well as the introduction of new economic and social rights that were not previously provided, its adoption does not correspond to the technique of *supplementary international treaties*. It is neither a protocol amending the ESC nor an additional protocol to it<sup>129</sup>. Instead, as seen from its articles, it is an international treaty autonomous but complementary to the ESC: its Article K allows any State Member of the Council of Europe to ratify, accept or approve it as ways to give their consent, irrespective of whether they were States Parties to the ESC<sup>130</sup>, without prejudice of a special consideration being made of the situation of the States Parties to the ESC and, also, to the 1988 Protocol.

The essential principles on this subject, according to the provisions in Article B) of the Revised ESC, are the following:

- Non-duplicity of the international legal obligations: for the State that becomes a Party to the Revised ESC the corresponding provisions of the ESC and, where appropriate, of its Additional Protocol of 1988, cease to apply to the Party concerned from the date of entry into force of those obligations on the Party concerned, in the event of that Party being bound by the first of those instruments or by both instruments (Article B.2 of the Revised ESC);
- Hence, it can be inferred that they have dispensed with formal mechanisms to articulate this abrogation<sup>131</sup>; and,
- The maintenance of international legal standards previously accepted: no State Party to the ESC or to the ESC and the 1988 Protocol can accept, when giving its consent to becoming a party to the Revised ESC, a lesser number of provisions than those ac-

<sup>129</sup> AUST, A.: *Modern Treaty Law and Practice*, Cambridge University Press, Cambridge, 2000, p. 221.

<sup>130</sup> Neither Albania, nor Andorra, Armenia, Azerbaijan, Bulgaria, Estonia, Georgia, Lithuania, Moldova, Romania, Slovenia or Ukraine, which are Parties to the Revised ESC became Parties to the ESC.

<sup>131</sup> "The Revised European Social Charter does not provide for denunciation of the former Charter" (COUNCIL OF EUROPE: *Explanatory Report... European Social Charter (revised)*, *op. cit.*, para. 10).



cepted as a party to the ESC and the 1988 Protocol, as it must consider itself bound by at least the provisions of the Revised ESC corresponding to the provisions of the ESC and, where appropriate, of the 1988 Protocol, to which it was bound (Article B.1 of the Revised ESC).

The Revised ESC, within these parameters, follows an identical position to the ESC regarding the flexibility granted to the States as far as the acceptance of legal obligations is concerned, according to its Article A: Part I of the Revised ESC is also a declaration of social policy aims; regarding the rights provided in Part II, at least six out of the nine Articles listed must be accepted<sup>132</sup>; and, finally, a supplementary number of Articles or numbered paragraphs of Part II must be accepted (not less than sixteen Articles or sixty-three numbered paragraphs).

Together with this, it must be taken into account that from the perspective of its legal content, the Revised ESC has the basic aim of updating the ESC legal system, and it does it: on the one hand, by revising the content of the provisions included in the ESC and the 1988 Protocol, and on the other hand, by adding new economic and social rights.

Hence the correspondence in Part II of the rights provided in Articles 1 to 19 of the Revised ESC, with the ones provided in similar Articles of the ESC, in spite of the modifications of content introduced, and the correspondence of Articles 20 to 23 of the Revised ESC with Articles 1 to 4 of the 1988 Protocol. Articles 24 to 31 are those that introduce new economic and social rights<sup>133</sup>.

As Pettiti<sup>134</sup> points out, it must be stressed that the system of control is not modified: the ESC reporting mechanism is extensible and applicable to the ESC (actually, specific cycles of control have been set for the Revised ESC (Article C of the ESC)), as the mechanism of collective complaints is also applicable to the Revised ESC for those States that are also Parties to the 1995 Protocol (according to Article D.1 of the Revised ESC); although, on the other hand, those States that give their

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<sup>132</sup> Article 1 (right to work); Article 5 (right to organise), Article 6 (right to collective bargaining); Article 7 (right of children and young persons to protection); Article 12 (right to social security); Article 13 (right to social and medical assistance); Article 16 (right of the family to social, legal and economic protection); Article 19 (right of migrant workers and their families to protection and assistance); and Article 20 (right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex).

<sup>133</sup> As in Part I in relation with the declaration of social policy aims.

<sup>134</sup> PETTITI, CH.: *op. cit.*, p. 6.

consent to be or already are Parties to the Revised ESC, but not to the 1995 Protocol, are authorized to accept the application of the complaints mechanism through a declaration made at the time of giving consent or afterwards. It could be thought that, maybe, the Revised ESC could have been useful to rationalize the whole system of control and, above all, to incorporate all the modifications introduced on the basis of the 1991 Protocol. However, due to the reticence of some States Parties to the ESC, it was chosen to keep a *neutral attitude*<sup>135</sup> towards the 1991 Protocol, without prejudice to the fact that the current situation is not satisfactory from the standpoint of the legal security and the transparency of the system of control.

## 5.2. *The update of the economic and social rights brought about by the Revised ESC*

It is difficult to make a whole assessment of the update of the economic and social rights undertaken by the Revised ESC. Vandamme<sup>136</sup> points out as big issues in it: the working conditions, the protection of children and young persons, the protection of vulnerable groups, employment relations, social security, and non-discrimination.

What is important to stress is that the contributions made largely have as their referent, on the one hand, the ILO Conventions and Recommendations, and, on the other hand, the European Union Law (especially, the secondary legislation); thus "the revitalization process as a whole could not have been completed so rapidly without the recent standard-setting activity" of the International Labour Organization and the European Union"<sup>137</sup>.

The new economic and social rights included are: i) The right to protection in cases of termination of employment (Article 24) (on the basis of two principles: the right of all workers not to have their employment terminated without valid reasons and the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief); ii) the right of workers to the protection of their claims in the event of the insolvency of their employer (Article 25); iii) the right to dignity at work (Article 26) (sexual harassment and, to a certain extent, hostile or offensive practices against the worker are expressly mentioned); iv) the right of workers

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<sup>135</sup> COUNCIL OF EUROPE: *Explanatory Report...European Social Charter (revised)*, *op. cit.*, para. 131.

<sup>136</sup> VANDAMME, F.: *op. cit.*, pp. 644-650.

<sup>137</sup> *Ibid*, p. 654.

with family responsibilities to equal opportunities and equal treatment (Article 27); v) the right of workers' representatives to protection in the undertaking and facilities to be accorded to them (Article 28); vi) the right to information and consultation in collective redundancy procedures (Article 29); vii) the right to protection against poverty and social exclusion (Article 30); and viii) the right to housing (Article 31) (including the access to housing of an *adequate standard*).

It must be stressed the relevance given in the Revised ESC to non-discrimination on the basis of sex<sup>138</sup> and in general the prohibition of discrimination: not only because the former Article 1 of the 1988 Protocol (right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex), reconverted into Article 20 of the Revised ESC, has been included as a part of the *hard core* of the rights in the ESC (Article A. 1.b)), but also because a general clause of non-discrimination has been included in Article E of Part V of the Revised ESC (similar to Article 14 of the ECHR).

From the point of view of the update of the provisions already laid down in the ESC and the 1988 Protocol, we must start out from the fact that Articles 1 to 4 of the 1988 Protocol have been included without notable changes, as the only thing that has been done is to move paragraphs 2, 3 and 4 of Article 1 (right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex), and the common paragraphs 2 of Articles 2 (right to information and consultation) and 3 (right to take part in the determination and improvement of the working conditions and working environment) to the Annex of the Revised ESC, without affecting in principle the legal obligations that States can undertake<sup>139</sup>.

As far as the ESC is concerned, it must be stated firstly that the wording of Articles 1 (right to work), 4 (right to a fair remuneration), 5 (right to organise), 6 (right to bargain collectively), 9 (right to vocational guidance), 13 (right to social and medical assistance), 14 (right to benefit from social welfare services), and 18 (right to engage in a gainful occupation in the territory of other Contracting Parties), has not been modified and they have been entirely transcribed in the Revised ESC.

Changes have been focused on the following Articles, affecting even their title in some cases: i) Article 2 (right to just conditions of

<sup>138</sup> PETTITI, CH.: *op. cit.*, p. 14.

<sup>139</sup> COUNCIL OF EUROPE: *Explanatory Report... European Social Charter (revised)*, *op. cit.*, para. 81.

work); ii) Article 3 (right to safe and healthy working conditions); iii) Article 7 (right of children and young persons to protection); iv) Article 8 (right of employed women to protection of maternity); v) Article 10 (right to vocational training); vi) Article 11 (right to protection of health); vii) Article 12 (right to social security); viii) Article 15 (right of persons with disabilities to independence, social integration and participation in the life of the community); ix) Article 16 (right of the family to social, legal and economic protection); x) Article 17 (right of children and young persons to social, legal and economic protection); and xi) Article 19 (right of migrant workers and their families to protection and assistance).

In view of what has been stated above about the Revised ESC, we must acknowledge the praiseworthy effort involved in seeking to update an international legal text, the ESC, to the evolution of the social policy as well as to the regulation of work and employment relations in a socio-cultural area such as the European one, where social issues are a reference for the construction of a stable democracy; in this sense, the Revised ESC undoubtedly constitutes an advancement for the protection of economic and social rights<sup>140</sup>.

However, that does not prevent some obstacles which may in the future obscure the effectiveness of the Revised ESC and the effort it represents<sup>141</sup>:

- Firstly, the relative indifference of the States and the European societies, not only towards the international legal obligations of the Revised ESC as such, but even towards some of the objective situations that it intends to eradicate. The truth is that, for the moment, data on the formal acceptance of the Revised ESC is not very promising: after nine years in force 12 out of the 27 States Parties to the ESC, and 24 out of the 47 States Members of the Council of Europe, are Parties to the Revised ESC. There is a need for a greater involvement of the organisations of employers and workers, national and international, as well as of the Non-Governmental Organisations, in the field of social awareness.
- Secondly, the multiplicity of international legal instruments, universal and regional, whose object is the protection of the economic and social rights, and the formulation of social policies; thus, it can be stressed that the relevance of the coexistence and

<sup>140</sup> PETTITI, CH.: *op. cit.*, p. 15.

<sup>141</sup> GRÉVISSE, S.: *op. cit.*, p. 887.

interrelation between the Revised ESC and the legal norms of the European Community<sup>142</sup> are a priori not always ensured .

- Thirdly, the evidence of the crisis, more or less stressed, that the European social model goes through (to a certain extent represented by the Revised ESC), when confronted with the demands of a process of globalization that, far from being negative *per se* for the development of a social State, is ruled and led from neo-liberal ideological paradigms that intend to eliminate the main advances achieved in the social field.

All these obstacles, above all the second and the third ones, must be taken in the context of understanding the relevance acquired by the Revised ESC for the evolution of the social guidelines of the European Community<sup>143</sup> (with a special significance in the framework of the process of integration drawn up by the European Union), and also in the perspective of the legal and economical consequences of the progressive enlargement of the European Union<sup>144</sup>.

On this basis, we must start from the reciprocal relevance acquired by the ESC system and the European legal system: on the one hand, the consolidated text of Article 136 EC Treaty states that in order to develop the social policy aims described, the “fundamental social rights such as those set out in the European Social Charter”<sup>145</sup> must be taken into consideration; and, on the other hand, the acknowledgement in the provisions of the Revised ESC of the influence of certain European Community acts, particularly of some Directives<sup>146</sup>.

The final question to raise is whether this interrelation leads to a harmonious development of the evolution of the European social policy with the demands posed by the Revised ESC (not only influenced, as has been already said, by the European Community regulatory action but also by the legal labour standards adopted by the ILO at the universal level).

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<sup>142</sup> As GRÉVISSE points out, it seems as if the authors of the Charter of Fundamental Social Rights, of 9 December 1989, had ignored, conscious or unconsciously, the existence of the ESC (*ibid*).

<sup>143</sup> RENUCCI, J.-F.: *Droit européenne des droits de l'homme*, LGDJ, Paris, 1999, p. 311.

<sup>144</sup> See Notes 24 and 25.

<sup>145</sup> Even when this reference is made to the text adopted in 1961 –it is not mentioned neither the 1988 Protocol nor the Revised ESC, which had already been adopted but had not entered into force yet by the time the Treaty of Amsterdam was celebrated-; without prejudice of this, nothing prevents to understand that reference in an extensive sense.

<sup>146</sup> CONSEIL DE L'EUROPE: *Explanatory Report... European Social Chart (revised)*, *op. cit.*, paras. 26, 41, 49, 91 and 109.

On this subject, we have to bear in mind: firstly, that, although it must not be underestimated, the reference to the ESC in the EC Treaty reveals an indirect legal impact on the determination of the Community's social policy<sup>147</sup>; and secondly, the ascertainment of the slowness and fragmented progress in the construction of the Community's social policy, in view of the difficulties in harmonizing different national traditions and the discussion on the compatibility between an ambitious social policy and a market economy in the context of accelerated globalization<sup>148</sup>.

Therefore, we must wonder whether the subordination of the Community's social policy to the economic and monetary aims<sup>149</sup> will allow the social policy to develop in an integral way and whether this will make possible a regulatory action that will lead to the full effectiveness of the economic and social rights provided in the Revised ESC.

## 6. Final considerations

1. The ESC is a contribution to the construction of a European social space and to the creation of a European legal standard in the field of economic and social rights whose results, even if they can be judged as insufficient or unsatisfactory when considering the limited ambitions of the harmonizing project, the flexibility offered to States Parties in the determination of their undertakings or the lack of a sufficiently strong system of international supervision, can also be more positively evaluated if we reflect in realistic terms and realize that, due to its dynamism, it is a living instrument that can help to legally support a social model that faces some significant difficulties.

2. The ESC is, therefore, an international legal instrument that reflects the contradictions and difficulties that conditioned its adoption and that still remain. It is hard to know whether the combination of dynamism and flexibility (made clear in the preference for a mechanism of *à la carte* choice of the legal obligations) are enough to guarantee that in the future there will be progress towards consolidating a social Europe. It is easier to appreciate in its legal content the caution of its drafters: for instance, in the reciprocal interaction between principles of social policy and economic and social rights (Parts I and II).

<sup>147</sup> SCIARRA, S.: *op. cit.*, p. 38-39.

<sup>148</sup> DUBOIS, L. and BLUMANN, C.: *Droit matériel de l'Union européenne*, 2nd. edition, Montchrestien, Paris, 2001, p. 106.

<sup>149</sup> See the Article 4 EC Treaty.

3. The ESC system of control, based on a reporting mechanism and a quasi-contentious mechanism, is useful in order to know the deficiencies of the social policies of the States Parties from the angle of the legal obligations that each of them has accepted. Therefore, in that sense, we must admit, in spite of its possible defects, its contribution to the creation of a common European social space (emphasizing, from the legal point of view, the contribution of the ECSR). However, the opportunity has been probably lost to favour, thanks to the mechanism of collective complaints, a significant advancement regarding the justiciability of economic and social rights (even when the starting point was the impossibility for individuals to lodge complaints), in view of the apparent restrictivity of the potential object of the complaints.

4. The Revised ESC is the result of an effort needed in order to revise the material content of that European social space, and as such its adoption and entry into force can only be regarded as positive. Even then, it is obvious that the effectiveness of the Revised ESC, which promotes the social involvement of State policies, can be challenged in the framework of national policies that react in accordance with deregulating tendencies in the field of employment and restrictive tendencies in the social field (according to the not-so-unavoidable demands of the adaptation to rising world economic integration), as well as the limitations pointed out by the social policy undertaken in the framework of European integration.

**Table 1**

Acceptance of provisions of the European Social Charter (1961)  
(Status as of: 22/05/2008)

Acceptance  Non Acceptance 

Provisions of the European Social Charter	Austria	Croatia	Czech Republic	Denmark (a) 1	Germany	Greece	Hungary (b)	Iceland	Latvia	Luxembourg	Poland	Slovakia	Spain	Fyr Macedonia	United Kingdom 2
Art. 1,1															
Art. 1,2															
Art. 1,3															
Art. 1,4															
Art. 2,1															
Art. 2,2															
Art. 2,3															
Art. 2,4															
Art. 2,5															
Art. 3,1															
Art. 3,2															
Art. 3,3															
Art. 4,1															
Art. 4,2															
Art. 4,3															
Art. 4,4															
Art. 4,5															
Art. 5															
Art. 6,1															
Art. 6,2															
Art. 6,3															
Art. 6,4															
Art. 7,1															
Art. 7,2															
Art. 7,3															



Provisions of the European Social Charter	Austria	Croatia	Czech Republic	Denmark (a) 1	Germany	Greece	Hungary (b)	Iceland	Latvia	Luxembourg	Poland	Slovakia	Spain	Fyr Macedonia	United Kingdom 2
Art. 7,4															
Art. 7,5															
Art. 7,6															
Art. 7,7															
Art. 7,8															(e)
Art. 7,9															
Art. 7,10															
Art. 8,1															
Art. 8,2															
Art. 8,3															
Art. 8,4			(c)										(d)		(e)
Art. 9															
Art. 10,1															
Art. 10,2															
Art. 10,3															
Art. 10,4															
Art. 11,1															
Art. 11,2															
Art. 11,3															
Art. 12,1															
Art. 12,2															
Art. 12,3															
Art. 12,4															
Art. 13,1															
Art. 13,2															
Art. 13,3															
Art. 13,4															
Art. 14,1															
Art. 14,2															
Art. 15,1															

Provisions of the European Social Charter	Austria	Croatia	Czech Republic	Denmark (a) 1	Germany	Greece	Hungary (b)	Iceland	Latvia	Luxembourg	Poland	Slovakia	Spain	Fyr Macedonia	United Kingdom 2
Art. 15,2															
Art. 16															
Art. 17															
Art. 18,1															
Art. 18,2															
Art. 18,3															
Art. 18,4															
Art. 19,1															
Art. 19,2															
Art. 19,3															
Art. 19,4															
Art. 19,5															
Art. 19,6															
Art. 19,7															
Art. 19,8															
Art. 19,9															
Art. 19,10															

*Substantive questions:*

- Denmark has declared to be bound by Art. 4 (3) on 1979 (the ESC entered into force in Denmark in 1965).
- Hungary has declared to be bound by Arts. 7 (1), 10, 12 (1) and 15 in 2004 (the ESC entered into force in Hungary in 1999).
- Czech Republic has denounced acceptance of Art. 8 (4) in a Note Verbale registered on 26 March 2008.
- Spain has denounced acceptance of sub-paragraph *b* of Art. 8 (4) as from 5 June 1991.
- The United Kingdom has denounced acceptance of Art. 8 (4)(a) as from 26 February 1988, and Arts. 7(8) and 8(4)(b) as from 26 February 1990.

*Territorial questions:*

- The metropolitan territory of Denmark to which the provisions of the Charter shall apply is declared to be the territory of the Kingdom of Denmark with the exception of the Faroe Islands and Greenland.
- The United Kingdom has extended the application of the ESC to the Isle of Man.

**Table 2**

Acceptance of provisions of the Additional Protocol (1988)\*  
(Status as of: 22/05/2008)

Acceptance  Non Acceptance 

Provisions of the European Social Charter	Belgium	Croatia	Czech Republic	Denmark 1	Finland	France (a) 2	Greece	Hungary	Italy	Netherlands 3	Norway 4	Slovakia	Spain	Sweden
Art. 1														
Art. 2														
Art. 3														
Art. 4									(b)					

*Substantive questions:*

- (a) At the time of deposit of instrument of ratification, France declared: "Non-contributory benefits provided for by French law subject to a condition of nationality shall only be awarded to nationals of the member States of the European Community and of those States which have concluded a convention on reciprocity with France on the award of equivalent non-contributory benefits to French nationals residing in those States".
- (b) At the time of deposit of the instrument of ratification, Italy declared "that the provisions of Article 4, paragraph 2, letter a, are to be understood as having a programmatic character".

*Territorial questions:*

- Denmark declared that the Additional Protocol doesn't apply to the Faroe Islands and Greenland.
- France declared that the Protocol shall apply not only to the French metropolitan territory, but also to the French overseas departments.
- As regards the Netherlands Antilles and Aruba, the Kingdom of Netherlands has only accepted Article 1 of the Additional Protocol.
- Norway has declared that the Additional Protocol shall not apply to Svalbard, Jan Mayen and the Norwegian Antarctic Dependencies.

\* Six Parties to the Additional Protocol -Belgium, Finland, France, Italy, Norway and Sweden- have subsequently consented to be bound by the Revised ESC; in accordance with Art. B (2) of the Revised ESC, the "[a]cceptance of the obligations of any provision of this Charter [Revised ESC] shall, from the date of entry into force of those obligations for the Party concerned, result in the corresponding provision of the European Social Charter and, where appropriate, of its Additional Protocol of 1988 ceasing to apply to the Party concerned". Therefore, concerning the five States above mentioned, see Table 3 (Arts. 20 a 23).

**Table 3**

Acceptance of provisions of the Revised European Social Charter (1996)  
(Status as of: 22/05/2008)

Acceptance  Non Acceptance 

Provisions of the ESCR	Albania	Andorra	Armenia	Azerbaijan 1	Belgium	Bulgaria	Cyprus	Estonia	Finland	France	Georgia	Ireland	Italy	Lithuania	Malta	Moldova	Netherlands 2	Norway 3	Portugal	Romania	Slovenia	Sweden	Turkey	Ukraine
Art. 1,1																								
Art. 1,2																								
Art. 1,3																								
Art. 1,4																								
Art. 2,1																								
Art. 2,2																								
Art. 2,3								(a)																
Art. 2,4																								
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*Substantive questions:*

- (a) Bulgaria has declared be bound by Art. 2(3) in 2007 (Revised ESC has entered into force in Bulgaria in 2000).
- (b) Ireland is not bounded by sub-paragraph c) of Art. 27 (1).
- (c) Malta has not accepted sub-paragraphs b) and c) of Art. 10 (5).
- (d) Malta has not accepted sub-paragraph b) of Art. 12 (4).
- (e) Except with respect military personnel in active service and civil servants employed by the Ministry of Defence.
- (f) Norway is only bounded by sub-paragraph c) of Art. 27(1).
- (g) Norway has declared to be bound by Art. 28 in 2005 (Revised ESC has entered into force in Norway in 2001).
- (h) Portugal has declared "that it will not apply Article 2, paragraph 6 to contracts with a duration not exceeding one month or to those with an ordinary working week not exceeding eight hours, and to those of a particular or occasional nature".
- (i) Portugal has also declared "that the obligation under Article 6 does not prejudice, with respect to paragraph 4, the prohibition of lockouts, as specified in paragraph 4 of Article 57 of the Constitution".

*Territorial questions:*

1. The Republic of Azerbaijan declared on 2 September 2004 "that it will be unable to guarantee compliance with the provisions of the Charter in its territories occupied by the Republic of Armenia until these territories are liberated from that occupation".
2. The Netherlands accepted the Revised ESC for the Kingdom in Europe; so, Aruba and Netherlands Antilles remain bound by Articles 1, 5, 6 and 16 of the ESC and Article 1 of the Additional Protocol (1988).
3. The Revised ESC shall apply to all the territory of the Kingdom of Norway with the exception of Svalbard (Spitzbergen) and Jan Mayen; on the other hand, the Revised ESC shall not apply to the Norwegian dependencies either.

**Table 4**

Presentation of national reports under the new reporting system  
(groups and schedule of first cycle)

<b>Group 1</b>	<b>Group 2</b>	<b>Group 3</b>	<b>Group 4</b>
<b>Employment, training and equal opportunities</b>	<b>Health, social security and social protection</b>	<b>Labour rights</b>	<b>Children, families, migrants</b>
— Article 1 — Article 9 — Article 10 — Article 15 — Article 18 — Article 20 — Article 24 — Article 25	— Article 3 — Article 11 — Article 12 — Article 13 — Article 14 — Article 23 — Article 30	— Article 2 — Article 4 — Article 5 — Article 6 — Article 21 — Article 22 — Article 26 — Article 28 — Article 29	— Article 7 — Article 8 — Article 16 — Article 17 — Article 19 — Article 27 — Article 31
Date of submission of report: 31/10/2007	Date of submission of report: 31/10/2008	Date of submission of report: 31/10/2009	Date of submission of report: 31/10/2010
Conclusions ESCR: December 2008	Conclusions ESCR: December 2009	Conclusions ESCR: December 2010	Conclusions ESCR: December 2011



# The European Convention for the Prevention of Torture

Yolanda Román González

**Summary:** 1. Introduction. 2. The European Convention for the Prevention of Torture: its genesis and major characteristics: 2.1. Prevention, Co-operation and Confidentiality: a new approach to protection against torture. 2.2. The CPT: its composition and functions. 3. Degree of Protection and Scope of the Convention: the independence of evaluation criteria: 3.1. The European Court of Human Rights' interpretation of the Prohibition of Torture and Inhuman or Degrading Punishment or Treatment. 3.2. The CPT's Evaluation Criteria.

## 1. Introduction

While it is hard to imagine such a direct and brutal negation of human dignity, over the course of history, torture and corporal punishment have been common practice in most civilizations<sup>1</sup>.

In Europe, torture was accepted and practiced for centuries as a legal method for obtaining confessions and establishing proof in criminal proceedings as well as a punishment for those sentenced. Its use became generalised in the Middle Age and up until the 18th century when humanist ideas expanded throughout the continent thanks to a favourable economic and cultural context, and to illustrious thinkers of the time such as Montesquieu, Voltaire and, particularly Beccaria<sup>2</sup>, who staked a claim for the humanisation of Justice, for a profound reform of criminal legislation and for the prohibition of torture.

At the end of the 19th century, torture was abolished in the vast majority of European States, and this was celebrated as a triumph of reason over barbarianism, arbitrariness and cruelty.

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<sup>1</sup> It was known in ancient Greece (*basanos*) and during the Roman Empire (*quaestio*), and its use became generalized in the Middle Age. For a quick historical approximation, we recommend MORGAN, R. and EVANS, M.: *Preventing Torture: a study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, Clarendon Press, Oxford 1998 (chapter I), and TOMÁS Y VALIENTE, F.: *La tortura en España*, Ariel, Barcelona, 1994.

<sup>2</sup> His powerful book "Dei delitti et delle pene", published for the first time in Livorno in 1764, came as a veritable doctrinal event.

Unfortunately, despite its disappearance from legislation, the practice of torture has endured both as an unlawful phenomenon, and as a chronic illness and constant threat to our modern societies<sup>3</sup>. Moreover, the methods used to coerce, intimidate or punish criminals, prisoners or suspects<sup>4</sup> have become increasingly sophisticated over time, in such a way that, at times, their results are impossible to ascertain immediately or at a glance. Here reference is obviously made to psychological torture, but also to a great variety of disorientating and destabilising techniques affecting the physical and mental integrity of persons without leaving any evident traces. Constant changes in diet, brusque changes in temperature, lack of lighting, prolonged isolation, sound-proofing or excess noise are only a few examples.

For these reasons, in the framework of the process of internationalisation of human rights during the 20th century, the need to reiterate and update the principle that no one may be subjected to treatment that goes against his or her physical or mental integrity became evident, whether this meant torture in its classical form or any other type of cruel, inhuman or degrading treatment contrary to the respect of human dignity.

Article 5 of the Universal Declaration of Human Rights solemnly proclaims

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.

Other subsequent texts in International Law contain similar provisions. Amongst others, the International Covenant on Civil and Political Rights (Art.7), the American Convention on Human Rights (Art. 5.2), the African Charter on Human and People's Rights (Art. 5) and, of course, the European Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 3) include the same prohibition in practically identical terms to those in art. 5 of the 1948 Declaration<sup>5</sup>.

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<sup>3</sup> CASSESE, A.: *Inhuman States: Imprisonment, Detention and Torture in Europe Today*, Polity Press, Cambridge, 1996. This is also confirmed by Amnesty International's annual reports, as well as those by the United Nations Special Rapporteur.

<sup>4</sup> Strictly speaking, the notions of torture or inhuman or degrading treatment, as they have been conceptually delineated by international law and jurisprudence, involve the participation of States or State agents, such as law enforcement or prison officials, acting in the name of a public authority or with its consent. Suffering inflicted by individuals or domestic violence, although equally execrable, is encompassed under a different problem both in International Law and in national legislations.

<sup>5</sup> Also the Arab Charter for Human Rights (Art. 13), adopted on 15 September 1994, or the Convention on the Rights of the Child (Art. 37), dated 20 November 1989.

Currently, the prohibition of torture is considered to be an imperative part of customary International Law, that is, binding for all States in the international community<sup>6</sup>. Moreover, this is one of the few absolute prohibitions in International Human Rights Law and, to enforce it, specific protection mechanisms, both universal and regional in nature<sup>7</sup>, have been created on an international level.

Thus, in the framework of the United Nations, in 1984 the Convention Against Torture and other Cruel Inhuman or Degrading Treatment was adopted. This Convention sets out a series of measures that States must respect in order to ensure the prohibition of torture. The Convention provides for a monitoring body, the Committee Against Torture, in charge of supervising member States' respect for their obligations under the Convention. It examines periodic reports that they present, takes decisions on notifications made by private parties and, in exceptional cases, may determine whether there are systematic violations of the prohibition of torture in a given country<sup>8</sup>.

Also prominent in the context of the United Nations has been the existence of the Human Rights Commission's Special Rapporteur on the issue of torture. The creation of these two mechanisms bears witness to the efforts made to bolster protection against torture in the universal realm. Nevertheless, their scope is limited, amongst other reasons, because they are *ex post facto* mechanisms<sup>9</sup>.

It can be affirmed that it is in the Council of Europe where the most advanced, innovative and effective system of protection against torture has been established. In addition to the legal protection ensured by the European Human Rights Convention, in which Article 3 refers to the prohibition of torture and inhuman and degrading punishment or

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In addition, several international texts aimed at protecting certain social groups (the mentally or physically impaired, etc.) or prohibiting certain human rights violations (genocide, racial discrimination, etc.).

<sup>6</sup> GONZÁLEZ GONZÁLEZ, R.: *El control internacional de la prohibición de la tortura y otros tratos o penas inhumanos o degradantes*, Universidad de Granada, 1998, p. 48. Also see PASTOR RIDRUEJO, J.A.: «La Convención Europea de los Derechos del Hombre y el "ius cogens" internacional», in *Estudios de Derecho Internacional. Homenaje al profesor Mijaja de la Muela*, Tecnos, 1979, p. 581-590, and MERON, T.: *Human Rights and Humanitarian Norms as Customary International Law*, Clarendon Press, 1989, p. 94.

<sup>7</sup> For an in-depth study on international protection against torture, GONZÁLEZ GONZÁLEZ, R.: *El control internacional de la prohibición de la tortura... op. cit.*

<sup>8</sup> Adopted by the General Assembly of the United Nations in its Res. 39/46, 10 December 1984.

<sup>9</sup> See, for instance, INGELSE, C.: "The Committee Against Torture: One Step Forward, One Step Back", *Netherlands Quarterly of Human Rights*, vol. 18/3, 2000.

treatment, in 1987 the European Convention for the Prevention of Torture (ECPT) was adopted.

This Convention provides for a committee of experts, the European Committee for the Prevention of Torture (CPT)<sup>10</sup>, to which notable powers are given, and it establishes an unprecedented system of visits. The creation and functioning of this original protection mechanism based on prevention (as opposed to the *a posteriori* reparation that characterises contentious systems) and cooperation and constructive dialogue with governments has represented an indisputable, though not very well recognized, step forward in the international protection of human rights.

Ostensibly simple in its conception and approach, the European Convention for the Prevention of Torture nevertheless has its complexities. The Convention is a legal text that imposes legal obligations on its signatory States, but its effective enforcement and the work of the Committee in practice are translated into a subtle *diplo-matic* exercise, governed by the principles of cooperation and confidentiality.

Furthermore, the Convention omits any attempt to define or conceptualise the terms torture, inhuman treatment or degrading treatment, thereby leaving the CPT wide manoeuvring room for flexibility and comprehensiveness in this area. The outcome is a set of *standards* or criteria developed by the CPT after almost two decades of activity. Without being truly legal precepts, they are considered to be important *norms* for reference in the field.

The success of the Convention and its Committee's activity are undoubtedly based on these two aspects.

In order to gain a good understanding of this innovative mechanism, it is first necessary to analyse the text of the Convention, which will be done under heading (1), in order to reveal its principles and major characteristics as well as the composition, functions and the powers of the CPT. Another analysis, albeit partial, of the *standards* used by the Committee (2), is also necessary in order to properly value the breadth of the protection afforded and, ultimately, the true effectiveness of this original Council of Europe mechanism.

At the same time, the shortcomings and malfunctioning of the system will be brought out and certain future prospects for the protection against torture and inhuman and degrading treatment will also be indicated. As

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<sup>10</sup> Hereinafter Convention refers to the European Convention for the Prevention of Torture and Committee to the European Committee for the Prevention of Torture.

much as progress is made in the respect of human rights, one must not forget that no conquest is definitive, and current protection mechanisms must therefore be evaluated and improved on an ongoing basis.

## 2. The European Convention for the Prevention of Torture: its genesis and major characteristics

Article 3 of the European Convention of Human Rights (ECHR) is the only provision that was bolstered through the adoption on 26 June 1987 of a complementary protection mechanism: the European Convention for the Prevention of Torture.

Entering into force on 1 February 1989, this Convention brought about international, non-judicial, preventive monitoring of places of detention and internment subject to the jurisdiction of the States that are parties. Based on a virtually unconditional system of visits, the European Convention for the Prevention of Torture opens up a “true right to interference on a European level”<sup>11</sup>.

The text of the Convention is brief and simple, and is comprised of a Preamble, 23 Articles and an Annex specifying the privileges and immunities of the Committee members. The Convention has been fleshed out by an Explanatory Report<sup>12</sup> and two Additional Protocols, the first of which opens up the Convention to other non-Council of Europe member countries, and the second introduces technical modifications in order to ensure a certain degree of continuity in the Committee’s composition<sup>13</sup>.

The European Convention for the Prevention of Torture is rooted in the firm will of a single man, Jean-Jacques Gautier, founder of the Swiss Committee Against Torture. In 1976, inspired by the International Committee of the Red Cross’ activity, he proposed the creation of a Convention which would establish a universal system of visits to places of detention and internment, with a broad field of application and without the restrictions he knew that the Red Cross had<sup>14</sup>.

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<sup>11</sup> FOURTEAU, H.: *L’application de l’article 3 de la CEDH dans le Droit interne des Etats membres. L’impact des garanties européennes contre la torture et les traitements inhumains et dégradants*, L.G.D.J., 1996.

<sup>12</sup> This text that complements the convention is very useful, offering an interpretation article by article: CPT/Inf/C (89) 1.

<sup>13</sup> All of these texts, as well as the reports that have been published so far, are available on the Committee’s web site: [www.cpt.coe.int](http://www.cpt.coe.int)

<sup>14</sup> Indeed, the monitoring carried out for more than a century by the International Committee of the Red Cross, in charge of watching over the compliance of the Geneva

Initially, Jean-Jacques Gautier's proposal took on the form of an optional protocol to what at the time was still the draft United Nations Convention Against Torture. The text, presented by Costa Rica at the United Nations Human Rights Commission in 1980, was never made concrete nor could it prosper<sup>15</sup>.

It was in the Council of Europe where Gautier's proposal was to find an echo. After several initiatives in this sense, in 1983 the Council of Europe's Consultative Assembly adopted a recommendation on the protection against torture of persons deprived of liberty. This recommendation invited the Council of Ministers to approve a specific convention in this regard. After four years of intense debate among governments, the European Convention for the Prevention of Torture was approved.

The ECPT met with exceptional acclaim and, in 1989, fifteen States had ratified it. Currently, 47 Council of Europe member States have adhered to the Convention, which is considered to be a considerable success, particularly considering the demanding conditions imposed upon the signatory States in a politically delicate area.

### 2.1. *Prevention, Cooperation and Confidentiality: a new approach to the protection against torture*

Article 1 of the Convention establishes generally that

"There shall be established a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (...). The Committee shall, by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment".

Over the last few years, the efforts of the Council of Europe in its work to protect human rights prioritised prevention. Thus, the ECPT's

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Conventions in cases of international conflict or severe internal crises, is also independent, non-contentious inspection and monitoring. However, its capacity to act is extremely limited and the control it exercises is considerably less ambitious and developed than that of the CPT.

<sup>15</sup> Since 1992, a working group of the former United Nations Commission on Human Rights worked on a draft Optional Protocol of the Convention Against Torture in order to create a subcommittee modelled after the European Committee for the Prevention of Torture. After having been approved by the Human Rights Commission and the Economic and Social Council, the Protocol was adopted by the United Nations General Assembly on 18 December 2002, with votes against it from the United States, Nigeria, the Marshall Islands and Palao.

first and clear objective is to prevent torture and ill-treatment prohibited by Article 3 of the European Convention on Human Rights in the places that this type of abuses traditionally occur the most<sup>16</sup>, those where persons are deprived of their liberty and are therefore most vulnerable to suffering severe attacks against their dignity<sup>17</sup>.

The CPT's task consists of fighting against the causes of torture and inhuman and degrading treatment, in identifying the conditions and situations that are scarcely compatible with the respect for human dignity or those that may in some way favour any practice contrary to article 3 of the European Convention on Human Rights<sup>18</sup>.

The mechanism created by the Council of Europe does not purport to discover effective violations of the prohibition of torture, nor does it perform the task of denouncing or condemning States. Contrarily, it aims to prevent these violations from occurring or being repeated in the future, and attempts to establish the causes of these violations as well as the situations that favour them. It also proposes specific reforms that it considers necessary and cooperates with the State in question.

In other words, the fundamental objective of the Convention and the work of its Committee is prevention, and its strategic priority is constructive cooperation with States.

In effect, the States Parties engage to allow the Committee, whenever it deems necessary, to enter without any restrictions anywhere in the State's territory under its jurisdiction where there may be persons deprived of their liberty by decision of a public authority (Article 3). The CPT is entitled to interview, without witnesses, as many persons deprived of their liberty as it deems necessary, as well as any other person who may provide useful information for fulfilling its objectives.

In addition, the States accept the obligation to cooperate with the Committee, furnishing it with any necessary and useful information regarding the places where there are persons deprived of their liberty. Specifically, the States must ensure that the Committee is facilitated certain possibilities allowing it to perform its duties, such as the access

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<sup>16</sup> NOWAK, M.: "On the Prevention of Torture", in DUNER BERTIL (Ed.): *An End to Torture: Strategies for its Eradication*, Zed Books, 1998, p. 248.

<sup>17</sup> On the principle of human dignity, we recommend B. MAURER's very interesting study, *Le principe de la dignité humaine et la Convention européenne des droits de l'homme*, La Documentation Française, Paris, 1999.

<sup>18</sup> 1st. General Report, para. 45, CPT/Inf (91) 3.

to its territory and the right to travel freely within it, without any type of restrictions (Article 8)<sup>19</sup>.

This is how the principle of cooperation, which, together with confidentiality, is one of the two pillars on which the system rests, is manifested.

The counterpart of cooperation is confidentiality (Article 11). Confidentiality is a *sine qua non* condition in the cooperation and trust between member States and the Committee. For this reason, the Committee's procedure is confidential and the information obtained is therefore only communicated to those State authorities interested and to no one else, not even to other Council of Europe bodies in charge of protecting human rights. It is easy to understand that this was an indispensable condition made by the States in order to accept the demanding obligations imposed by the ECPT.

It is also easy to guess that this is one of the most highly criticized aspects of the CPT's work, since there was acquiescence in taking on confidentiality and a lack of transparency or secrecy. We however feel that a great deal of the CPT's success still rests on the principle of confidentiality. The only disadvantage we find with this confidentiality in the Committee's work is that it has become a great unknown to the public at large and the media, which rarely mirror the CPT's achievements or difficulties.

In any event, the principle of confidentiality is not absolute and cannot be understood separately from the principle of cooperation. The Convention actually provides for a significant exception to the principle of confidentiality which takes on the form of a sanction. When a State resists cooperating with the Committee or refuses to take the necessary measures suggested in the Committee's recommendations, the rule of confidentiality may be waived and the CPT may decide, by a two thirds majority of its members, to make a public statement against that State. This is the public statement sanction provided for in Article 10.2 of the Convention<sup>20</sup>:

“ If the Party fails to co-operate or refuses to improve the situation in the light of the Committee's recommendations, the Committee

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<sup>19</sup> For instance, visa requirements for Committee members or any other person belonging to the delegation in charge of making a visit, are considered to be restrictive measures that thwart the entry of the Committee into a State's territory. See CPT/Inf (93) 10, *Questions relatives à l'interprétation de la Convention Européenne pour la Prévention de la Torture...*, providing an account of the legal debate hinging around this issue.

<sup>20</sup> This measure has been taken twice against Turkey, in 1992 and 1996. Documents CPT/Inf (93) 1 and CPT/Inf (96) 34.



may decide, after the Party has had an opportunity to make known its views, by a majority of two-thirds of its members to make a public statement on the matter".

In addition, the States may give their consent for the publication of reports with the Committee's recommendations as well as their own reports with the corresponding responses and reactions (Article 11.2). This is what normally occurs in actual practice, and enables us to appraise the effectiveness of the Committee's work and the States' will to cooperate<sup>21</sup>.

In short, while confidentiality is the general rule and may therefore be invoked at any time, publicity may be used as a sanction against a State that refuses to cooperate or as a sort of prize for a 'diligent' State thereby affording it the opportunity to make its good behaviour or will to strengthen the protection of persons deprived of their liberty against torture and ill treatment known.

Confidentiality and publicity are thus combined to create a subtle balance ensuring the proper functioning of the system.

## 2.2. *The CPT: its composition and functions.*

The CPT is made up of independent, impartial experts who are chosen by the absolute majority of the Council of Europe's Committee of Ministers out of a list of candidates put forward by the national delegates of the Consultative Assembly (Article 5). The Committee has one member per each State Party to the Convention. However, members are individual and do not represent the States that put them forward.

Undoubtedly, the large number of Committee members currently poses serious problems in functioning and budgeting that limit the Convention's effectiveness and possibilities. We feel that the chapter on the composition of the CPT insofar as the number of members is concerned, is less than ideal and we would go so far as to suggest a revision of this item in the near future.

Article 4 stipulates that Committee members must be

"(...) chosen from among persons of high moral character, known for their competence in the field of human rights or having professional experience in the areas covered by this Convention".

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<sup>21</sup> To date, the CPT has made 250 visits (155 periodic visits, 95 ad hoc visits) and has published 199 Reports. The time elapsed between a Committee visit and the publication of the corresponding Report is generally two years.

The need for the Committee to have a multidisciplinary composition in terms of the qualifications of its members, and to be plural in terms of its members' political tendencies in order to ensure the demanded impartiality and independence has often been stressed. CPT members therefore come from different fields including, for instance, Medicine, Sociology, Law, Penitentiary Administration or Psychology.

The Convention's Explanatory Report specifies that CPT members "do not have to be lawyers"<sup>22</sup> and it is considered desirable for them to include members with pertinent experience in Penitentiary Administration and Medicine in order to facilitate the Committee's making specific recommendations.

The professionalism of Committee members is of great importance given the inherent difficulty in the work it performs<sup>23</sup>.

CPT members are chosen for four years and may be re-elected only once<sup>24</sup>. The Committee normally meets in camera and its decisions are taken by a majority of members present, with the exception of what is set out in Article 10.2, as previously mentioned, regarding public statements. The Committee establishes its Rules of Procedure and has a permanent Secretariat in Strasbourg (Article 6).

The CPT freely organises its visit regime on which the entire system rests. In addition to periodic or ordinary visits, the Committee may carry out any other visit it deems the circumstances require (Article 7). In its Rules of Procedure<sup>25</sup>, the CPT envisages and makes a distinction between three types of visits: periodic visits, *ad hoc* visits and follow-up visits.

The periodic visits are those that are organised in all of the States Parties with a certain degree of regularity. Envisaged in a general manner by the Convention, these are the basic visits through which prevention work is carried out<sup>26</sup>. The *ad hoc* visits are made after allegations

<sup>22</sup> *Explanatory report*, para. 36.

<sup>23</sup> See LEUPRECHT, P. and LABARHTE, J-F.: «La mise en oeuvre de la Convention européenne pour la prévention de la torture et des peines et traitements inhumains ou dégradants», *Revue Universelle des Droits de l'Homme*, vol. 2, 1990.

<sup>24</sup> With the entry into force of the Additional Protocol num. 2, Committee members may be re-elected twice.

<sup>25</sup> CPT/Inf/C (89) 3 rev.1 (1997).

<sup>26</sup> MORGAN, R. and EVANS, M.: *Protecting prisoners. The Standards of the European Committee for the Prevention of Torture in Context*, Oxford University Press, 1999, p.15. These authors lament that the increasing number of States Parties to the Convention makes the original aspiration of the Committee to make periodical visits to all countries every two years impossible. Currently, the normal cycle is every four years.

of serious, credible abuses in a given country. Lastly, the follow-up visits enable the Committee to check on how a specific situation is evolving and how or whether its recommendations are being practiced and effective.

Regarding the *ad hoc* visits, the Explanatory Report specifies that the Committee has discretionary power to assess the need to make a visit of this kind. Since the Committee does not investigate the requests of individuals, it is free to consider any type of information it may be sent by a private individual or group (for instance a non-governmental organisation) and by virtue of that information decide whether a specific or *ad hoc* visit is required.

As a general rule, the delegation of the Committee in charge of making a visit to a country is, as provided for in Article 7, comprised of at least two Committee members. Exceptionally, the Committee may be represented by a single member, for instance during an urgent, *ad hoc* visit. The Convention also establishes that in its visit and inspection tasks, a Committee delegation may be assisted by an undetermined number of experts and interpreters of its choice. In this sense, Article 14 adds that the names of the persons assisting the Committee shall be identified in the notification preceding the visit and that, exceptionally, a State may oppose the participation of an expert in the Committee visit, for instance when it considers that the person does not meet the required conditions of impartiality and independence. This exception is specified and clarified in the Explanatory Report (paragraphs 83, 84, and 85)<sup>27</sup>.

Along these same lines, the Committee Rules of Procedure impose that the Committee member of the nationality of the country being visited not belong to the delegation in charge of the visit. We see this as a proper guarantee for impartiality<sup>28</sup>.

As previously mentioned, the CPT visit is necessarily preceded by notification to the pertinent authorities of the State being visited. This requirement is set out in Article 8, which provides that the Committee must notify the Government concerned of its intention to carry out a visit in its territory. Once notification has been provided, the Committee may,

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<sup>27</sup> In the Explanatory Report, it is clarified that this right must be exercised on an exceptional basis so that each State can only refuse the presence of an expert, or any other professional assisting the Committee, if the person has manifestly shown a negative attitude towards the State by making a certain type of public statement or political comment, or when in the past s/he has not respected the rule of confidentiality. However, as far as we know, this type of situation does not normally arise.

<sup>28</sup> Rules of Procedure, Art. 37, para. 2 (added by the Committee in 1990).

at any time, carry out the corresponding visits by virtue of the provisions in the Convention.

Attention must be drawn to two aspects regarding this prior notification. First, notification does not require the member State's consent for the visit to take place. In this sense, notification is a formal requirement. Second, the Convention does not specify any deadline for the presentation of the notification. That is to say, prior notification is necessary for the entry of the Committee in the territory of the member State, but it may come days or even hours before the visit begins.

In practice, however, and according to the spirit of cooperation in the Convention, at the end of each year, the Committee announces a list of countries it aims to visit over the following year, and the specific notification, as a general rule, comes two weeks before the scheduled date of the visit.

Once the notification has been made, the Committee can begin its visit to a State Party. As we have indicated, the CPT may visit, without any restrictions, any place under the jurisdiction of that State where persons deprived of their liberty by the decision of a public authority may be found (or if there are grounds to suspect they may be found there).

It is now appropriate to specifically explain what, for these purposes, is understood as deprivation of liberty, and also the breadth of the Committee's inspection capacity.

Paragraph 24 of the Explanatory Report determines the concept of deprivation of liberty

"to be understood within the meaning of Article 5 of the European Convention on Human Rights as elucidated by the case law of the European Court and Commission of Human Rights",

although this does not prevent the Committee from making a distinction between "lawful" and "unlawful" deprivation of liberty<sup>29</sup>.

In addition to penitentiaries, the Committee may visit any police station or establishment, any administrative detention centre for asylum seekers or any other category of foreigners, psychiatric hospitals or centres for minors. In short, they may visit any place where there may be persons detained or admitted by decision of a public authority, be it

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<sup>29</sup> This indication has not always been observed by the CPT, which considered that it was within its mandate to inspect transit areas in airports where foreigners who are denied entry into a country are found since it considers they are deprived of their liberty. Since there is no jurisprudence on this issue, a controversy was generated until the European Court of Human Rights ruled on such a case with upholding the CPT's position. 25 June 1996 judgement, *Amuur vs. France*. See MURDOCH, J.: "CPT Standards and the Council of Europe", in MORGAN, R. and EVANS, M.: *Protecting prisoners...*, *op. cit.*, p. 112.

judicial or administrative, and be it a definitive or atemporary measure. Detentions exercised by military authorities also apply.

Private establishments, for instance psychiatric hospitals, may be visited by the Committee as long as there are persons interned there by decision of a public authority and not voluntarily or by their own decision.

In any of these places, the CPT can circulate freely and also interview, without witnesses, the persons it deems useful and necessary. They may be persons deprived of their liberty or officials in charge of custody, family members, lawyers, doctors or nurses that have been or are in contact with those deprived of their liberty or who have pertinent information for the Committee at their disposal. Naturally, no private party is obliged to have contact with the Committee or to accept being interviewed.

It should also be pointed out that it is common practice for the CPT to meet at the beginning of a country visit with the pertinent authorities, and with representatives of the major non-governmental organisations in the country working in the areas of interest to the Committee.

Two issues are worth mentioning. The primary issue is the exception provided for in Article 9 of the States' obligation to allow Committee visits in its territory at any time after receiving formal notification. The other issue also affecting the Committee's capacity on its visits is the competence of the European Committee for the Prevention of Torture and that of the International Committee of the Red Cross. We will now discuss both of these issues.

Can a State Party in any case prevent a Committee visit in its territory? The Convention establishes that, under exceptional circumstances, the competent authorities of a State Party may present to the Committee objections to its visit at a given time, either applying to the entire territory or to a specific place that the Committee intends to visit (Article 9). The reasons a State may invoke postponing a Committee visit or restrict the Committee's right to access certain places are limited and exceptional in nature and must be interpreted restrictively. Both Article 9 itself and the Explanatory Report stipulate:

- National defence and public safety, including the urgent need to avoid a serious crime,
- Serious disorder (for instance a mutiny)<sup>30</sup> in a prison or any other place where there are persons deprived of their liberty,

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<sup>30</sup> The example is ours. Neither the Convention nor the Explanatory Report specify the type of "serious disorders" they refer to.

- The health condition of a given person whom the Committee intends to visit when it is considered that the visit may jeopardize him or her and, lastly,
- When in the framework of an investigation relating to a serious crime there is an urgent interrogation that may be thwarted by the Committee's presence.

The second paragraph of the Article adds that once these objections have been presented, the Committee and the State Party shall immediately consult with each other in order to clarify the situation and reach an agreement on the provisions that allow the Committee to perform its functions as soon as possible. These provisions may include the possibility of a person that the Committee wishes to see and interview being transferred to another place. Until the visit actually takes place, the State has the obligation to provide the Committee with information on any person concerned.

In this sense, we can appreciate that the principle of cooperation governs relations between the Committee and the States, even under exceptional situations, and this is certainly positive.

Nevertheless, we feel that the wording in Article 9 is generally far from ideal. On the one hand, some of the situations stipulated that may give rise to the CPT's right to visit are situations in which the risk that ill treatment may occur is the greatest. Specifically, reference to an urgent interrogation that the Committee's presence could thwart or "prejudice"<sup>31</sup> would lead one to understand that at certain times and for certain offences, anything is allowed.

While we are sure that this was not the intention of the drafters of the Convention, we feel attention must be drawn to this point particularly given the current context in which the international fight against terrorism and the intensified debate on *security* threaten to justify, in certain cases and for certain groups, the denial of certain inherent rights that cannot be waived<sup>32</sup>.

Another limitation on the CPT's visiting possibilities falls under Article 17 of the Convention, which sets out a demarcation of competenc-

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<sup>31</sup> Explanatory Report, para. 71

<sup>32</sup> What we have in mind here is not only the treatment that suspects of international terrorism may receive, but also how the climate and current trends may affect groups such as asylum seekers or immigrants. See, for instance, Amnesty International, "Security, Refugee Protection and the Human Rights Agenda after the 11 September: Amnesty International concerns regarding EU policies", November 2001. The European Court of Human Rights has already referred in a general way to these risks in its 27 August 1992 judgement, *Tomasi vs. France*.

es between the CPT and the International Committee of the Red Cross. The Committee shall not visit places where, in application of the 1949 Geneva Conventions and their Additional Protocols of 1977, the International Committee of the Red Cross makes effective and regular visits. This is to say that, in cases of armed conflict, the Geneva Conventions take precedence.

This, however, does not mean that the ECPT only applies in times of peace. Contrarily, the CPT can visit, in times of conflict, those places that the International Committee of the Red Cross does not visit "effectively" and "regularly". There is no conflict of competences, however, in those visits made by the International Committee of the Red Cross in times of peace by virtue of bilateral agreements. Here, it is incumbent on the CPT to decide, at its discretion, whether or not to visit the same places.

Once a visit to a given country, which usually lasts an average of ten days, concludes, the CPT must draw up a report including a list of observations made during the visit and the specific recommendations necessary in order to reinforce the protection of persons deprived of their liberty. As we already know, this report is confidential and may only be conveyed to the corresponding authorities in the State concerned. In turn, the member State concerned is invited, in a period of six months, to provide a preliminary response and later a report on the measures taken or reforms undertaken according to the CPT's recommendations. Thus, a truly interesting constructive dialogue is established between the Committee and the country authorities<sup>33</sup>.

The impact of the Committee's visits and reports is not easy to evaluate since specific results, while satisfactory in the long term, are neither immediate nor spectacular, and even less are they media stories<sup>34</sup>. We will therefore attempt to illustrate the effectiveness of the system with a necessarily brief specific example:

Between 26 October and 2 November 1999, the CPT carried out a visit to Greece. As indicated in the corresponding report, it was an *ad hoc* visit required by the circumstances by virtue of Article 7 of the ECPT, and motivated by the alarming reports received by the Commit-

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<sup>33</sup> In practice, this dialogue is limited due, amongst other reasons, to lack of resources on the part of the Committee's Secretariat. Even so, the reading of the CPT's reports and governments' responses lead us to make a positive appraisal although it would seem desirable to us for the dialogue to be more regular and ongoing. For a much more critical version, see MORGAN, R. and EVANS, M.: *Protecting prisoners... op. cit.*, pp. 17 and ff.

<sup>34</sup> ANSTETT, M.: « La Convention Européenne pour la Prévention de la Torture: succès et incertitudes », *Revue Pénitentiaire et de Droit Pénal*, no 3, 1997.

tee regarding the condition of the detention of foreigners in the Greek police establishments.

In the section of the CPT's report devoted to detention conditions, the Committee affirmed that while it did not find any indication of torture or deliberate physical ill-treatment, it was obliged to stress that in several of the police establishments visited it could observe that "a large number of foreign nationals were subjected for prolonged periods of time to a combination of negative factors – overcrowding, appalling material conditions and levels of hygiene, lack of outdoor exercise, absence of any activities – which could easily be described as inhuman and degrading treatment"<sup>35</sup>. As a result, the CPT made a series of recommendations to the Greek Government in order to correct the situation.

The Greek Ministry of Public Order, in its response to the CPT Report, provided an orderly and systematic account of certain reforms that had been carried out and measures that had been adopted in following with the CPT's observations regarding the police establishments visited. It affirms, for instance, that in a certain police station sometimes used for the detention of foreigners waiting to be expelled, "mattresses and blankets have been obtained for the needs of the detainees" and that, in general, "the overall detention conditions have been improved", as well as the hygienic conditions. Specifically, a hot water and shower system were installed, periodic disinfection of the establishment was being done, and a meal service at scheduled times was established<sup>36</sup>. In other cases, photographs accompanied the list of improvements made. Certain projects approved for the future building of adequate specific facilities for temporary detention of foreigners and asylum seekers were also mentioned.

This limited but also revealing example provides an idea of the dialogue that is established between the Committee and the national authorities after a visit, of the effectiveness of this type of prevention system, and of the specific results that can be obtained in the short and medium term in order to bolster the protection of persons deprived of their liberty against torture and inhuman and degrading treatment.

It also gives us an idea of the CPT's recommendations or requirements to governments and how they are based on a broad, flexible interpretation of the concepts of torture and inhuman or degrading treatment, which will be our next issue.

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<sup>35</sup> Greece visit report, CPT/Inf (2001) 18, para.16.

<sup>36</sup> Greek Government Response (Ministry of Public Order), CPT/Inf (2001) 19, section V.



As a conclusion of this first chapter, we can assert that in addition to being a guide and reference for national authorities, the CPT's reports and recommendations may currently be considered as a sort of ethical obligation to which the States Parties cannot turn their backs, a sort of unpostponable commitment requiring short, medium and long term results.

### **3. Degree of Protection and Scope of the European Convention for the Prevention of Torture: the independence of evaluation criteria**

As was previously indicated, the text of the Convention does not contain any substantive provision on the issue of torture or "other treatment". The Convention omits any conceptualisation of the terms of torture and inhuman or degrading treatment, and this gives it flexibility and ample manouevering room in this field. This is a fundamental aspect of the work of the CPT, since the independence of its criteria for evaluating and assessing the treatment received by persons deprived of their liberty determines the degree of protection that the Committee may require of the Parties and, ultimately, the scope of the European Convention for the Prevention of Torture.

Let us remember that the objective of the CPT is to try and to bolster the protection of persons deprived of their liberty, ensuring that both general and specific detention or internment conditions do not constitute an attack against their physical and mental integrity. Demonstrating with conclusive proof or legal specifications that there was effectively a violation of the prohibition of torture or that there is a practice of systematic ill-treatment in a given country is not one of the Committee's specific tasks.

The Committee does not make judgements, given that it is not a body of a legal nature. It rather makes recommendations in order to maximise its reinforcement of the protection of persons deprived of their liberty, avoiding any interference or conflict with the competence of other Council of Europe bodies, particularly the European Court of Human Rights.

The CPT's obligation consists of identifying the causes of the violence and the abuses committed against persons detained or deprived of their liberty, evaluating the indicators and risk situations, and proposing to the government in question a series of specific measures in order to ensure that, in the future, conduct contrary to the respect of human dignity does not occur again. In doing so, the CPT makes an extensive interpretation of the international standards in the field,

thereby arriving at a set of *standards* that, while not actual legislation, are considered to be important rules of reference<sup>37</sup>.

In this sense, the CPT provides a broader, more profound and human approach to the situation of persons deprived of their liberty than, say, the European Court of Human Rights<sup>38</sup>, which is obliged and restricted by formalities and legal procedures inherent to legal instruments (formalities that uphold, let us not forget, the basic requirements of justice, such as legal certainty and equality before the law).

But does this mean that the CPT does not take into account international law or the jurisprudence of the European Court of Human Rights? What basic grounds does the CPT use in its considerations regarding its country visits? That is to say, what does the CPT understand to be torture or cruel and inhuman or degrading treatment? These questions all point towards the issue of the independence of the CPT's criteria, which we will try to elucidate in the following chapter in order to then analyse certain criteria used by the Committee on its visits.

The independence of the CPT's criteria mean that it is not bound by the jurisprudence of the European Court of Human Rights regarding the prohibition of torture and inhuman or degrading treatment, or by the interpretations that other bodies make regarding this prohibition. The Explanatory Report vaguely alludes to this issue<sup>39</sup>, signalling that the European Court of Human Rights jurisprudence on Article 3 of the ECHR serves as a point of reference and a guide for the Committee in its work, as does other international norms<sup>40</sup>, although their decisions or jurisprudence do not directly bind the CPT.

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<sup>37</sup> On several occasions, the bodies of Strasbourg, the Commission and the European Court of Human Rights, have taken the CPT's considerations into account in order to establish the facts and evaluate the consequences of a given case: 30 July 1998 judgement on *Aerts vs. Belgium*, and 27 September 1997 judgement on *Aydin vs. Turkey*, for instance. We understand that these references will be more frequent in the future and that it is therefore important to define and specifically delineate the competences of the two bodies and the legal value of their respective decisions.

<sup>38</sup> The Committee explicitly expressed its goal of offering "a greater degree of protection than that offered by the Commission and the European Court of Human Rights", 1st General Report, *op. cit.*, para. 51.

<sup>39</sup> Paras. 23, 26 and 27.

<sup>40</sup> In addition to the instruments mentioned in the introduction, *vid. supra.* notes 5 and 6, reference must be made to the 1975 Declaration on the Protection of all Persons Against Torture and Other Cruel, Inhuman or Degrading Treatment, the 1984 Convention Against Torture and other Cruel, Inhuman or Degrading Punishment and the 1985 Interamerican Convention to Prevent and Sanction Torture. All of these instruments contain a definition of torture. The European Penitentiary Rules adopted by the Council of

The Committee is not and cannot be removed from the jurisprudence of the Strasbourg bodies and, despite the full independence of both, they must obviously have an impact on each other<sup>41</sup>.

We therefore feel it is pertinent to briefly analyse the European Court of Human Rights' interpretation of Article 3 of the ECDH. The literature on this matter abounds<sup>42</sup>. Here we will limit ourselves to the most characteristic traits of the Court's jurisprudence on these issues since this will enable us to better evaluate the meaning and importance of the CPT's protection criteria.

### 3.1. *The Interpretation of the Prohibition of Torture and Degrading or Inhuman Treatment or Punishment by the European Court of Human Rights*

The various international instruments that include the prohibition of torture and inhuman or degrading treatment do not provide definitions that are satisfactory or universally accepted. Jurisprudence in this area has been and continues to be crucial for determining the content and scope of this legislation<sup>43</sup>. Of particular relevance has been the jurisprudence of the control organs of the European Convention of Human Rights, "architects of the most elaborate conceptual delineation of prohibited treatment and its respective fields of application"<sup>44</sup>.

We can highlight three aspects of Strasbourg jurisprudence regarding Article 3 of the ECDH: the absolute nature of the prohibition of torture and inhuman and degrading treatment, the minimum in terms of severity and the maximum in terms of suffering, and relative apprecia-

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Europe in 1987 also deserve special attention. See MURDOCH, J.: "CPT Standards and the Council of Europe", in MORGAN, R. and EVANS, M.: *Protecting prisoners...*, *op. cit.*, p.106.

<sup>41</sup> PEUKERT, W., "The European Convention for the Prevention of Torture and the European Convention on Human Rights", in MORGAN, R. y EVANS, M.: *Protecting prisoners...*, *op. cit.*, p. 87.

<sup>42</sup> Among other doctrinal contributions see SUDRE F.: «La notion de peines et traitements inhumains et dégradants dans la jurisprudence de la Commission et la Cour Européenne des droits de l'homme», *R.G.D.I.P.*, num 4, 1984, pp. 825-289, and CASSESE, A.: "Prohibition of Torture and Inhuman and Degrading Treatment or Punishment", in *The European System for the Protection of Human Rights*, Martinus Nijhoff, 1993, pp. 229 and ff.

<sup>43</sup> In addition to the jurisprudence developed by the Strasbourg bodies is that drawn up by the United Nations Commission on Human Rights, regarding Articles 7 and 10 of the International Covenant on Civil and Political Rights, and the Committee Against Torture, especially as regards Article 3 of the Convention Against Torture.

<sup>44</sup> GONZÁLEZ GONZÁLEZ, R.: *El control internacional de la prohibición de la tortura...*, *op. cit.*, p. 35.

tion. These criteria for determining and circumscribing the field of application of Article 3 have given rise to flexible, dynamic and protective jurisprudence, although not always congruent<sup>45</sup>.

To paraphrase a well-known author, we ask whether Article 3 is an absolutely relative or relatively absolute provision?<sup>46</sup> We can affirm that Article 3 of the ECHR sets out an absolute prohibition of torture and inhuman or degrading treatment or punishment, and that this prohibition expresses "one of the fundamental values of the democratic societies that make up the Council of Europe"<sup>47</sup>.

In Sudre's words, "the prohibition of torture is one of the few uncontested imperative rules in international human rights law that enunciates absolute rights"<sup>48</sup>. This means that the prohibition of torture included in the ECHR contemplates no exception and that the right to physical and mental integrity that it ensures cannot be subject to any limitations, suspensions or waivers, not even under exceptional circumstances.

The European Court of Human Rights was categorical in this issue, affirming that Article 3, unlike other ECHR legislation, "makes no provision for exceptions and, under Article 15 para. 2 (ECHR norms), there can be no derogation even in the event of a public emergency threatening the life of the nation"<sup>49</sup>. Neither specific local situations nor the severity of certain crimes and the difficulty in combating them can make the prohibition of torture and inhuman or degrading punishment or treatment relative.

The absolute nature of this prohibition, however, does not prevent the Court from taking in consideration the circumstances of a specific case when applying Article 3. The specific circumstances characterising a case are considered and assessed in order to set the *threshold of severity* used to establish whether or not there has been a violation of the legislation, and this has enabled the Committee to develop a dynamic and evolving interpretation of Article 3<sup>50</sup>.

The European Court of Human Rights has established the principle by which in order to be judged in the light of Article 3 of the ECHR, the

<sup>45</sup> MORGAN, R. and EVANS, M.: *Protecting prisoners...*, *op. cit.*, p. 98.

<sup>46</sup> CALLEWAERT, J.: «L'article 3 de la Convention Européenne: une norme relativement absolue ou absolument relative?», in *Liber Amicorum Marc André Eissen*, Bruylant, L.G.D.J., 1995, p. 13.

<sup>47</sup> This is affirmed by the European Court of Human Rights in its 7 July 1989 judgement in the *Soering vs. United Kingdom* case.

<sup>48</sup> SUDRE, F.: «Article 3», in PETTITI *et al.* (dirs.): *La Convention européenne des droits de l'homme: commentaire article par article*, Economica, 1995.

<sup>49</sup> 18 January 1978, *Ireland vs. United Kingdom*.

<sup>50</sup> CALLEWAERT, J.: *Is there a margin of appreciation in the application of articles 2, 3 and 4 of the Convention?*, *Human Rights Law Journal*, vol. 19, no.1, 1998, p. 6.

acts that have been made known to the Court must be of *minimum level of severity*, and that the appreciation of that threshold is necessarily relative.

In order to establish the minimum severity for Article 3 to be applied, the Court makes an *in concreto* appreciation on a case by case basis, considering the ensemble of circumstances and elements that characterise each case.

The principle of relative appreciation has been defined by the European Court of Human Rights in the famous *Ireland vs. United Kingdom* case<sup>51</sup>. In its judgement, the Court explains that the appreciation of minimum severity "depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.". This formula has been used repeatedly by both the Commission and the European Court of Human Rights.

This means that the "gate of entry" to Article 3 is set by the Court according to the specific circumstances in each case as well as by the social and political context. This has propitiated evolution in the application of Article 3 of the ECHR according to what is considered at each moment in history to be a *sufficiently severe* attempt against the person's physical, mental or moral integrity<sup>52</sup>.

A study of the Strasbourg bodies' jurisprudence seems to confirm in principle that there has been a tendency to lower this threshold for severity and to broaden the field of application of Article 3. This is what is seemingly gleaned from cases such as *Tomasi vs. France*, *LHAN vs. Turkey*, and *Ribitsch vs. Austria*<sup>53</sup>, among others<sup>54</sup>.

<sup>51</sup> *Ireland vs. United Kingdom* judgement, *op. cit.*

<sup>52</sup> This is the so-called "sociological parameter" of evaluation, whose legitimacy is debatable. The dangers involved in using this criterion are in a certain way offset by the ongoing and absolute assertion of the legislation emanating from the Strasbourg bodies. In any event, it seems that the evolution of the jurisprudence points towards a marginalisation of this technique for interpretation. See note *infra*.

<sup>53</sup> Judgements of 27 August 1992, *Tomasi vs. Francia*, 4 December 1995, *Ribitsch vs. Austria*, 27 June 2000, *LHAN vs. Turkey*. However, while certain steps forward have been seen in the Court's jurisdiction, there have also unfortunately been limitations on the effective application of these theoretical steps forward, such as certain requirements in providing proof. One can therefore speak of a manifest imbalance between potential protection provided for in Article 3 and real protection. See CHAUVIN, E.: "L'interprétation de l'article 3 de la CEDH: réelle avancée ou restriction déguisée?", *Revue Universelle des Droits de l'Homme*, 1997.

<sup>54</sup> See also more recent ECHR judgements: 29 April 2003, *McGlinchey vs. United Kingdom*; 27 November 2003, *Hénaf vs. France*; 11 December 2003, *Yankov vs. Bulgaria*; 15 January 2004, *Matencio vs. France*.

Relative appreciation is also a determining factor for establishing the threshold for the *intensity of suffering*, the other criterion used by the Court in order to distinguish between the concepts under Article 3 and to qualify what is called into question as torture, inhuman treatment or degrading treatment.

In effect, the Court distinguishes between three categories in Article 3, different degrees of violation of the prohibition in the legislation, that is to say the different types of violation of the right to one's physical and mental integrity. The degree of intensity of the suffering caused is what determines whether there have been torture, inhuman treatment or degrading treatment.

Plainly stated, first the Court determines whether the facts or actions are severe enough to be judged under Article 3. Once the surpassing of this threshold has been established, the facts or actions are established as being degrading treatment, inhuman treatment or torture, and this is basically based on the intensity of the pain caused or suffered.

In this sense, the criteria for minimum severity and intensity of suffering overlap or may even be considered the same since the legal category of degrading treatment, in which the degree of suffering is less, is still enough for Article 3 to be applied, and therefore opens up a way to accede to the protection this article affords.

The following level on the scale of severity is inhuman treatment, which involves more intense suffering than degrading treatment, yet without reaching the maximum level considered as torture. Here, as the European Court of Human Rights has indicated, all torture is at the same time inhuman and degrading treatment.

Obviously, as previously stated, the appreciation of these limits is relative and varies according to the ensemble of information in each case. The case law stemming from the application of these criteria abounds and has been intensely criticised by some and defended by others, although this is not the place to expound upon this issue in a detailed analysis.

We will suffice it to say that, in general, torture is an aggravated form of inhuman treatment that causes "very severe and cruel" suffering, and that the Court has reserved this term for exceptional cases, perhaps to prevent its trivialisation. It has favoured the use of the concepts inhuman or degrading treatment, whose interpretation is less restrictive and allows for a more useful and flexible application of Article 3<sup>55</sup>.

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<sup>55</sup> In the controversial *Ireland vs. United Kingdom* judgement, *loc.cit.*, the devastating techniques of sensory disorientation applied by the British police to alleged IRA terrorists were qualified as inhuman and degrading treatment although they had been

In any event, what we would like to stress is that the European Court of Human Rights has developed an interpretation of the prohibition of torture and inhuman or degrading treatment or punishment that is both dynamic and strict. It sets ceilings and floors for the scope of application based on the criteria of minimum severity and intensity of suffering.

However, as we have mentioned, the CPT's interpretation of the prohibition of torture and "other treatment" is broader and simpler. For instance, the CPT does not take the minimum threshold of severity and suffering characterising the Strasbourg Court's jurisprudence into account. The Committee tends to assure the fullest possible protection against any type of abuse, attack or situation, as moderate as it may appear by the standards of interpretation established by the Strasbourg Court<sup>56</sup>.

In this sense, it can be affirmed that the CPT has created its own set of standards regarding the protection of persons deprived of their liberty against torture and inhuman or degrading treatment (this is what some call the doctrine or even the *jurisprudence* of the Committee). This translates into a series of demands made upon States that, in terms of protection, are broader in scope than those of the Strasbourg Court<sup>57</sup>.

### 3.2. *The CPT's evaluation criteria*

The examination of the various documents drawn up by the CPT allows us to identify a series of constant, and to varying degrees consistent, criteria used to evaluate the situation of persons deprived of their liberty in the various countries it visits and in order to demand reforms and other pertinent measures to governments.

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considered to be torture by the Commission and indeed contained all of the elements in the traditional definition of torture. Contrarily, on a certain occasion, the Court was able to use the category of torture making a certain effect in order to provide a reminder as to the absolute nature of Article 3 of the ECHR and draw public attention to the severity of certain brutal practices. We see the 28 July 1999 judgement in the *Selmouni vs. France* as a clear example of this.

<sup>56</sup> MURDOCH, J.: "CPT Standards and the Council of Europe" ..., *op. cit.*, p.119.

<sup>57</sup> Here we do not purport to insinuate that the judicial mechanism is not effective. Contrarily, we consider both mechanisms to be necessarily and mutually complementary. See KELLY, M.: "Complementarity of Mechanisms within the Council of Europe. Perspectives from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment", *Human Rights Law Journal*, vol. 21, no.8, 2000, p. 301.

The CPT's work and its methodology are reflected basically in two different types of documents. First, in the reports on the various countries, corresponding to the visits carried out. Secondly, the Committee annually publishes general reports that summarize, evaluate and comment on its activities. It is true that there is no single publication by the Committee or the Council of Europe fully listing and clarifying the criteria consolidated over the last decade by the CPT, and this would be desirable<sup>58</sup>.

With no such publication, one must resort to other previously mentioned documents in order to establish what these criteria consist of. We do not aim to be exhaustive in doing so here, but rather to offer the reader a general idea that may serve as an introduction to such a vast and complex issue.

The first issue assessed by the CPT in its reports reflecting visits to the member States is the risk of suffering torture observed in the various places visited. In this regard, it must be specified that the Committee established a clear distinction between torture and ill-treatment on the one hand and inhuman or degrading treatment on the other. This distinction is not based on the intensity of suffering as in the European Court of Human Rights' jurisprudence, nor is it based on the lesser or greater degree of severity of the facts being assessed. The CPT uses both terms to refer to aspects of the protection of persons deprived of their liberty.

With the terms torture and ill-treatment, the Committee refers to deliberate forms of physical or psychological violence aimed at obtaining a confession or certain information, or to intimidate or humiliate. Specifically, the CPT warns of the existence or risk of torture or ill-treatment in a country when it finds proofs or indications of the use of specialised techniques or instruments (for instance the *falaka*, that is, the prolonged suspension of the victim, or the use of electric shock equipment). In short, torture involves premeditated and intentional physical or psychological violence (threats, isolation), normally used by the police, although also used by civil servants in prisons.

Also, the qualification inhuman and degrading is reserved for certain material detention conditions considered either in their ensemble or singly. As referred to above, the CPT considers that certain material detention conditions, when combined, to give rise to deplorable situations that deserve to be qualified as inhuman and degrading treatment<sup>59</sup>.

There are also certain detention conditions which, even when considered alone, have been qualified as inhuman and degrading treat-

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<sup>58</sup> MORGAN, R. and EVANS, M.: *Protecting prisoners...*, *op. cit.*, p. 22.

<sup>59</sup> *Vid. supra.* note 40.



ment by the Committee. Overpopulation in jails or crowding in places of detention, when reaching unacceptable levels, serve as examples. The Committee has also qualified as degrading treatment certain practices triggered by the lack of facilities or resources, such as “slopping out”, not only for those detained or the prisoners suffering from these conditions, but also for the other prisoners and the persons in charge of supervising them<sup>60</sup>.

These clarifications regarding the terminology used give an idea of the aspects that the Committee devotes its attention to in its visits to the different places where there are persons deprived of their liberty.

More specifically, the CPT has included as series of “substantive” sections in its General Reports where it refers to issues on which it basically focuses during its visits, or on issues it considers particularly important. These specific observations are put into chapters separate from the CPT’s general reports. They include a great portion of the Committee’s most consolidated doctrine regarding issues such as police custody, incarceration, the training of law enforcement officials, health services in prisons, and foreign citizens detained under foreign legislation<sup>61</sup>. The following protection criteria used by the CPT in various areas of its mandate can be gleaned from these chapters.

In the context of police custody, the CPT stresses the importance of three rights that must be guaranteed for the detainees and which constitute fundamental guarantees for prevention against torture and ill-treatment. These three rights are: the right of the detainee to notify the third person of his/her choice of the information involved in his/her detention; the right to a lawyer; and the right to a medical examination. The CPT requires/recommends that these rights always be observed from the outset of the deprivation of liberty (arrest, detention, etc.) and specifies their content.

In addition, the CPT considers that there must be clear rules or guidelines that regulate police interrogations and it recommends that they be electronically recorded as a highly useful safeguard against ill-treatment. Other basic guarantees against torture relate to police cus-

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<sup>60</sup> Practice established in certain countries whereby the detainees or prisoners must urinate and defecate without any privacy in cubes provided in their cells. See MORGAN, R. and EVANS, M.: *Protecting prisoners... op. cit.*, pp. 38-39.

<sup>61</sup> The CPT has published a document compiling all of the “substantive” sections drafted to date, with which the Committee hopes “to be able to offer a clear indication to the national authorities of its point of view regarding the way in which persons deprived of their liberty should be treated, and, more generally, to promote debate on these issues”: *The CPT Standards. Substantive Sections of the CPT’s General Reports*, CPT/Inf /E (2002) 1.

today and independent mechanisms for examining complaints against treatment filed during this period.

Insofar as the material conditions during police custody are concerned (and these may degenerate into inhuman or degrading treatment as we have seen previously), the CPT establishes a series of detailed demands insofar as the space, lighting and ventilation of cells<sup>62</sup>, as well as their facilities. More specifically, the CPT establishes that “persons in custody should be allowed to comply with the needs of nature when necessary in clean and decent conditions”, and they should be offered proper facilities for their personal hygiene. The diet is also considered important by the CPT, which actually specified that at least one of the daily meals should be “full” (in other words more substantial than a sandwich)<sup>63</sup>.

Regarding incarceration, the CPT has reiterated that all of the aspects of depriving of liberty in prisons are important for its mandate and not only those that might seem the most severe, such as allegations or indications of physical ill-treatment. In the Committee’s words, “ill-treatment can take numerous forms, many of which may not be deliberate but rather the result of organisational failings or inadequate resources”. The quality of life in a penitentiary establishment is assessed according to many different parameters. Particularly significant are the activities available for prisoners and relations between penitentiary personnel and the prisoners, as well as relations between the prisoners themselves.

The occupation rate of prisons is particularly significant, since overpopulation decreases the overall quality of the establishment and affects services and activities alike, thereby causing a great deterioration among the prisoners, and nearly always degenerating into inhuman or degrading treatment.

Other aspects of prison life that have been subject to reiterated comments from the Committee are outdoor exercise, contact with the outdoors and standards of hygiene<sup>64</sup>.

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<sup>62</sup> Regarding the size of cells and other types of accommodation, guidelines have been issued setting “desirable amounts” of space. For police cells in which a single person must remain for more than a few hours, the guidelines indicate 7 square metres, two metres or more between the walls and 2.5 metres between the walls and the ceiling.

<sup>63</sup> 2nd General Report, paras. 36-46, CPT/Inf (92) 3. These criteria were reiterated with a general nature in the 6th General Report and revised in the 12th General Report.

<sup>64</sup> 2nd General Report, paras. 44-57, CPT/Inf (92) 3. The significance of overpopulation in prisons was again underscored in the 7th General Report. The protection criteria for prisons were broadly revised again in the 11th General Report.

Insofar as foreigners detained under aliens legislation, the CPT has developed a series of specific criteria on the treatment that this category of persons deprived of their liberty should receive. It refers to them under the general term "immigration detainees". This is a complex and highly sensitive issue. The CPT stresses the need to ensure conditions for proper treatment of these persons, whether they be in transit areas and "international zones" of airports or in police stations or prisons<sup>65</sup>. Proper conditions mean at least a means to sleep, access to proper toilet facilities, food and health care.

In any event, when the deprivation of liberty is prolonged, "centres specifically designed for that purpose, offering material conditions and a regime appropriate to their legal situation and staffed by suitably-qualified personnel" must be provided<sup>66</sup>.

The safeguards required for other categories of detainees, that is, access to a lawyer and a medical examination, together with the right to inform a person of one's choice of one's situation are also required for detained immigrants. Furthermore, "they should be expressly informed, without delay and in a language they understand, of all their rights and of the procedure applicable to them".

In order to assess the risk of ill-treatment after expulsion, an issue on which the Commission and the European Court of Human Rights have taken a position on several occasions, the CPT, in accordance with its preventive function, is inclined to focus its attention on the question of whether the decision-making process as a whole offers suitable guarantees against persons being sent to countries where they run a risk of torture or ill-treatment.

Also regarding expulsion procedures, the CPT pays special attention to any coercive measures used, reminding that "the force used should be no more than reasonably necessary", that "to gag a person is a highly dangerous measure" and that administering medication to persons pending deportation may only be done by medical decision according to medical ethics<sup>67</sup>.

This is no more than a small sampling of the protection standards imposed by the CPT through its visits to States Parties and through its corresponding reports, following the system and principles described in

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<sup>65</sup> In principle, by definition, prisons are considered inappropriate for detaining persons who have not been sentenced or are not suspects of any crime. However, they are accepted in certain exceptional circumstances.

<sup>66</sup> The CPT expressly welcomes the fact that this is being observed increasingly in States Parties.

<sup>67</sup> 7th General Report, CPT/Inf (97) 10, paras. 24-36.

the first chapter. Many other aspects of protecting persons deprived of their liberty are monitored by the Committee and could also be highlighted. For instance, CPT doctrine on incommunicado detention, health care services in prisons, or involuntary internment in psychiatric establishments could be noted<sup>68</sup>.

In any event, in order to properly evaluate the content and scope of the previously mentioned criteria, one would need to analyse how they are mentioned in the different visit reports in order to relate them both on a case by case basis with what the CPT comes across in the various States, and with each one of the responses from the governments in question.

This is not an accessory assertion. Quite the contrary, one of the greatest challenges faced by the CPT is the application of criteria already consolidated for Western European countries in other countries more recently adhering to the Convention. Due to the different economic circumstances, it may be difficult for such countries to meet in the short term all of the CPT protection criteria.

It would be premature to make an evaluation in this regard, but we do consider that the Committee should not lower its protection standards in these countries, but rather set an order of priorities for each case and lower its requirements insofar as the deadlines for reaching these objectives. In addition, the CPT should continue to carry out ongoing monitoring and evaluation. It could even consider establishing a monitoring subcommittee in charge of overseeing the actual application of CPT recommendations and assisting reform processes in countries less advanced in human rights protection.

Entered into force in 2006, the universal mechanism for the prevention of torture established within the United Nations system will have to tackle this same problem<sup>69</sup>.

In conclusion, the European Convention for the Prevention of Torture is an important human rights protection mechanism of an innovative nature within the regional human rights system that has been consecrated in the Council of Europe. We consider that in this field the preventive approach is absolutely necessary in order to ensure effective protection, particularly because of its twofold approach of identifying causes on the one hand and, on the other, drawing up specific recom-

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<sup>68</sup> 3rd General Report, CPT/Inf (93) 12, and 8th General Report, CPT/Inf (98) 12, respectively.

<sup>69</sup> The Optional Protocol to the Convention Against Torture was adopted the 18 December 2002 by the United Nations General Assembly (A/RES/57/199). As of 12 January 2009, 42 States are Parties to the Protocol.

mendations in order to improve and reform both practices and conditions during deprivation of liberty. As reflected in this contribution, a great deal of this mechanism's effectiveness lies in the possibility of making an extensive interpretation of the notion of torture, inhuman treatment and degrading treatment, as well as in the principles of cooperation and confidentiality on which it is based. Undoubtedly, these same principles and the Committee's flexibility in interpretation will be key to successfully facing the challenges that lie ahead.

We finally believe that the European Convention for the Prevention of Torture should serve as a guide for the National Preventive Mechanisms foreseen in the Optional Protocol to the United Nations Convention Against Torture<sup>70</sup>. It should also inspire the creation of similar mechanisms aiming at preventing other human rights violations, both within the universal system as well as the various regional systems for the protection of human rights.

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<sup>70</sup> The Optional Protocol to the Convention against Torture obliges each State Party to "maintain, designate or establish ... one or several independent national preventive mechanisms for the prevention of torture at the domestic level" (Article 17).



# THE EUROPEAN UNION





# The protection of human rights in the European Union\*

José Martín Pérez de Nanclares

**Summary:** 1. Introduction. 2. The long road towards a catalogue of fundamental human rights: the leading role of the Court of Justice: 2.1. The initial silence of the founding treaties: a logical situation at the time. 2.2. The vital contribution of the Court of Justice: *taking rights seriously*: 2.2.1. Considering human rights as general principles of the Community legal system. 2.2.2. Drawbacks in the case law of the Court of Justice. 2.3. The incorporation of fundamental rights into the EU Treaty: another necessary step, but not in itself sufficient. 3. The Charter of Fundamental Rights of the European Union: the obtention of a catalogue of rights for the European Union Itself: 3.1. The drafting process: the new mechanism in the Convention. 3.2. The non-binding nature of the Charter. 3.3. The content of the Charter: a very complete and up-to-date catalogue. 4. The Regulation of Human Rights in the Treaty of Lisbon: Pros and Cons: 4.1. The incorporation of the Charter into the founding treaties: making the Charter legally binding. 4.2. The accession of the European Union to the ECHR: the best possible complement to the Charter. 4.3. The emergence of a *Europe a la carte* as regards human rights: the unfortunate exceptions granted to the United Kingdom and Poland. 5. Final Considerations.

## 1. Introduction

Fundamental rights came into being in the eighteenth century as the expression of the ideals of the Enlightenment (rationalism, individualism and secularisation), inexorably linked to the concepts of law and separation of power typical of the liberal State. Since then, the protection of fundamental rights has progressively been strengthened; the nineteenth century witnessed their *codification* and *generalisation*,

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while in the twentieth century, the watchword was *internationalisation*. And in terms of substance, the initial civil and political rights were supplemented by new rights, belonging to the so-called second and third generation. The legal protection given to these new rights varied markedly from one legal system to another.

Within the European Union, the issue of human rights is doubly relevant. First, the protection of human rights undoubtedly has a *constitutional* dimension. It is an element that forms part of and is irreducible from any Constitution<sup>1</sup>. Thus, respect for fundamental rights represents, in the eyes of one reputable school of thought, a clear *constitutional* principle of the Union<sup>2</sup>. And secondly, it also has an *integrating function*. In a process of integration where Member States transfer to the European Union broad competences that directly affect citizens, it is vital that fundamental rights are guaranteed against possible violations by the Community institutions. Yet at the same time, this guarantee strengthens and consolidates the very process of integration.

The protection of fundamental rights in the European Union has not occurred overnight, however, but through a progressive process of incorporation into the Community legal system. The founding treaties of the European Communities made no reference to human rights. Yet thanks to the active role of the Court of Justice, their protection from possible breaches by the Community institutions has gradually become part of the European Union, ultimately leading to the Charter of Fundamental Rights of the European Union, solemnly proclaimed in Nice in December 2000. This Charter is a decisive step forward in this process of protecting fundamental rights within the Community. Yet the Charter, which, strictly speaking, is not included within the founding treaties and is still not legally binding, is not the final point in the process. It is simply one more step –not the end of

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<sup>1</sup> It should be recalled, albeit in passing, that Article 16 of the Declaration of the Rights of Man and of the Citizen of August 1789 states that «[t]oute société dans la quelle la garantie droits n'est pas assuré (...) n'a point de constitution". Obviously, the European Union is not a State and, strictly speaking, it does not have a constitution. But nor is it a typical international organisation. Thus, its founding treaties do contain certain features and elements of a *constitutional* nature. To such an extent that the Court of Justice itself has laid down in its case law that these treaties are "the constitutional charter of a community of law", Opinion 1/91 of 14 December 1991, ECR, p. 6079.

<sup>2</sup> For an outstanding example of this academic position, see, for all, LENAERTS, K.: «Le respect des droits fondamentaux en tant que principe constitutionnel de l'Union européenne», AAVV: *Mélanges Michel Waelbroeck*, Bruylant, Brussels, 1999, pp. 423-457.

the road – in the *constitutionalisation* of the protection of fundamental rights within the EU, a process which will be much closer to completion if the Treaty of Lisbon of 13 December 2007 finally comes into force.

Further, it should not be forgotten that this process of incorporation into the Community legal system is in a state of constant tension: on the one hand between the European Union and the Member States, with conflicts between the Court of Justice and national constitutional courts, and on the other between the European Union and the Council of Europe, reflected in a latent rivalry between the two jurisdictions (the European Court of Justice in Luxembourg and the European Court of Human Rights in Strasbourg). That said, at present these tensions have been reduced to a minimum and, after difficulties in the past, the courts appear to have settled their differences.

Following the introduction, this paper will start by recalling the long road travelled by the European Union towards achieving a catalogue of human rights (II). The Charter of Fundamental Rights will then be analysed (III), in particular the unique way in which it was prepared (1), its legal nature (2) and its content (3). Finally, before concluding with some final considerations (V), we will look at how the Treaty of Lisbon will improve human rights (IV), in particular by making the Charter legally binding (1) and by granting the Union the power to accede to the European Convention on Human Rights (2) while commenting on the emergence of a certain *Europe a la carte* as a result of the exceptions provided to the United Kingdom and Poland (3).

## 2. **The long road towards a catalogue of fundamental rights: the leading role of the Court of Justice**

### 2.1. *The initial silence of the founding treaties: a logical situation at the time*

Neither the Treaty of Paris of 18 April 1951 establishing the European Coal and Steel Community (ECSC) nor the subsequent Treaties of Rome of 25 March 1957 establishing the European Economic Community (EEC) and the European Atomic Energy Community (EAEC) contain in their original wording any express reference to the protection of fundamental rights. This does not mean, however, that these treaties completely ignored the question of fundamental rights. They do refer to

one or other particular right in an isolated fashion<sup>3</sup>, although the function of these rights was more to eliminate competition problems and to complete economic freedoms rather than to introduce the concept of fundamental rights *per se*. And, in any case, no mechanism or system was defined to protect human rights and fundamental freedoms inherent to the individual.

On considering the matter more fully, however, it was to some extent logical that in the 1950s the founding treaties of the European Communities did not contain any express commitment to the protection of fundamental rights. In the first place, the initial objective of the process of European integration was clearly economic in nature, which meant that any non-economic issue was simply not afforded the same importance. Second, it is very likely that the then "Community fathers" did not have the remotest idea that the original founding treaties would lead to an integration process as intense as the one that has actually taken place. And third, it is quite possible that, at that time, the problem did not appear to be particularly pressing, since the six founding Member States of the Community (France, Germany, Italy, the Netherlands, Luxembourg and Belgium) were democratic States based on the rule of law with adequate internal mechanisms to safeguard fundamental rights. In addition, they were all parties to the Rome Convention of 1950<sup>4</sup>.

However, the initial silence of the founding treaties as regards fundamental rights soon became completely incompatible with an integration process based on the rule of law<sup>5</sup>. Thus, there were two

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<sup>3</sup> This could be the case of the right to a fair standard of living (Arts. 2, 39 and 117 of the ECT), the right to employment (Arts. 39, 118 and 123 of the ECT) or equal pay for equal work without discrimination on the grounds of sex (Art. 119 of the ECT) or the protection of professional and business secrets (Art. 214 of the ECT).

<sup>4</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950. It should, however, be recalled that not all founding Member States ratified the Convention at an early stage; eg France did not do so until 3 May 1974.

<sup>5</sup> For general literature on the process of incorporating human rights into the European Union, there is an abundant bibliography, see CASSESE, A./CLAPHAM, A./WEILER, J.H.H. (eds.): *European Union-The Human Rights Challenge*, Nomos Verlagsgesellschaft, Baden-Baden, 1991; CLAPHAM, A.: *Human Rights and the European Community: A Critical Overview*, Nomos Verlagsgesellschaft, Baden-Baden, 1991; DAUSES, M.: "La protection des droits fondamentaux dans l'ordre juridique des Communautés européennes", *Revue des Affaires Européennes* 1992, pp. 9-21; LIÑAN NOGUERAS, D. J.: "Derechos humanos y Unión Europea", in *Cursos Euromediterráneos Bancaja de Derecho Internacional*, vol. IV, 2000, pp. 371 *et seq.*; RUIZ JARABO COLOMER, D.: «La técnica jurídica de protección de los derechos humanos en la Comunidad Europea», *Revista de Instituciones*

fundamental reasons why this silence was clearly open to criticism. First, from a general perspective, the growing expansive force of European Community law and the progressive application of the competences attributed to the Communities led to there being direct legal contacts with private individuals. Initially, economic operators were the ones most affected by the goals laid down in the treaties – i.e. farmers, importers and exporters, professionals or business executives. But soon the treaties became applicable – at least in theory – to all citizens, so that the Treaties' silence underlined the lack of a requirement that Community activity be subject to fundamental rights. And, secondly, from a more specific perspective, the German Federal Constitutional Court decided, after some initial reticence<sup>6</sup>, to make a stand and in 1974 challenged the Court of Justice of the European Communities by making compliance with Community law in Germany conditional upon human rights being protected in the European Communities at the same level as under German constitutional law<sup>7</sup>. This declaration in favour of the national constitutional rules on fundamental rights over the Community rules, together with the ruling given by the Italian Constitutional Court<sup>8</sup>, amounted to a threat to the compliance of the main chapters of the independence and primacy of Community law. But it had the effect of provoking an intense debate within the Community about fundamental rights. And it also triggered a reaction from the Court of Justice of the European Com-

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*Europeas* 1990, pp. 151-182; RODRÍGUEZ IGLESIAS, G.C.: «La protección de los de los derechos fundamentales en la jurisprudencia del Tribunal de Justicia de las Comunidades Europeas», in VVAA: *El Defensor del Pueblo en el Tratado de la Unión Europea*, Universidad Carlos III, Madrid, 1993, pp. 203-224; RENGELING, H.W.: *Grundrechtsschutz in der Europäischen Gemeinschaft*, Beck, Munich, 1993.

<sup>6</sup> There are at least two judgments of interest: BVerfGE 22, 293 (298-299); and BVerfGE 31, 145 (174).

<sup>7</sup> Specifically, it declared itself to be competent to rule on whether a Community Regulation complied with the German Constitution, despite the fact that the Court of Justice of the European Communities had already declared that the Regulation complied with Community law and despite this being clearly incompatible with the most basic principles of Community law. Thus, it laid down the well-known formula that "as long as the process of Community integration has not developed to the extent that European Community law also contains a catalogue of fundamental rights, approved by a Parliament and in full force, which would be the equivalent of the content of the Basic Law of Bonn", the German Federal Constitutional Court would be competent to hear an appeal of this nature, if the Court found that the Community rule conflicted with a fundamental right contained in the Basic Law of Bonn; BVerfGE 37, 271 (285).

<sup>8</sup> Judgment of 27 December 1973; Published in *Rivista Diritto Europeo*, 1974, pp. 13-17.

munities which time has shown to be decisive in the process of creating mechanisms for protecting fundamental rights within the European Communities.

## 2.2. *The vital contribution of the Court of Justice: taking rights seriously*

### 2.2.1. CONSIDERING HUMAN RIGHTS AS GENERAL PRINCIPLES OF THE COMMUNITY LEGAL SYSTEM

Without a shadow of a doubt, the Court of Justice has been the Community institution that has done most to create a system for the protection of fundamental rights within the EU. The first step taken was the judgment in *Stauder*, in which the Court of Justice started by declaring itself competent to protect individual fundamental rights, despite the fact that written Community law did not expressly recognise them. And it did so by using the interesting argument that, despite the silence of the founding treaties of the European Communities, individual fundamental rights form part of the “general principles of Community law”<sup>9</sup>. After this first phase, a year later the Court applied this general statement in *Internationale Handelsgesellschaft*, finding the source of these general principles of law in the “common constitutional traditions” of the Member States<sup>10</sup>. Finally, in *Nold* the Court closed the gap as regards its competence to guarantee the protection of human rights at Community level, bringing within its jurisdiction the international treaties for the protection of fundamental rights, particularly the European Convention on Human Rights of 1950 (hereinafter, the ECHR). Specifically, the European Court of Justice held that “international treaties for the protection of human rights, on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law” when specifying human rights<sup>11</sup>. In this regard, while there is no doubt that the ECHR has been the benchmark treaty, the International Covenant on Civil and Political Rights<sup>12</sup>, Convention

<sup>9</sup> ECJ judgment of 11 November 1969, *Stauder* (Case 26/69, ECR, p. 419).

<sup>10</sup> ECJ judgment of 17 December 1970, *Internationale Handelsgesellschaft* (Case 11/70, ECR, p. 1125).

<sup>11</sup> ECJ judgment of 14 May 1974, *Nold* (Case 4/73 ECR, p. 491).

<sup>12</sup> Judgment of 18 October 1989 *Orkem/Commission* (Case 374/87 ECR, p. 3283), paragraph 31; Judgment of 18 October 1990 *Dzodzi* (Cases C-297/88 and C-197/89 ECR, p. I-3800), paragraph 68; Judgment of 17 February 1998, *Grant* (Case C-249/96, *cit.*), paragraphs 43-47.

No. 111 of the ILO<sup>13</sup>, the European Social Charter<sup>14</sup> and others have also been referred to occasionally.

From then until now, the Court of Justice has applied this approach laid down in the case law, and has continued to recognise specific rights in different judgments. Such rights cover (as a minimum) the principle of equal treatment<sup>15</sup>, the right to effective legal protection<sup>16</sup> (which includes the right to a fair hearing<sup>17</sup>), the right against self-incrimination<sup>18</sup>, the right of defence<sup>19</sup> or the right to obtain an effective remedy in a competent court<sup>20</sup>, the non-retrospective nature of criminal law (Art. 7 ECHR)<sup>21</sup>, respect for private<sup>22</sup> and family life<sup>23</sup> (Art. 8 ECHR) in all its shapes and forms (medical confidentiality<sup>24</sup>, inviolability of the home<sup>25</sup> and of correspondence<sup>26</sup>, etc.), religious freedom (Art. 9 ECHR)<sup>27</sup>, free-

<sup>13</sup> Judgment of 15 June 1978, *Defrenne/Sabena* (Case 149/77 ECR, p. 1365), paragraph 28.

<sup>14</sup> Judgment of 15 June 1978, *Defrenne/Sabena* (Case 149/77, *op. cit.*).

<sup>15</sup> Judgment of 19 October 1977, *Ruckdeschell/Hauptzollamt Hamburg* (Cases 117/76 and 16/77 ECR, p. 1753), paragraph 7. Despite the very different forms that it takes in the case law, the formulation of this principle is quite simple: it requires similar situations not to be treated differently except where differentiation is justified for objective reasons. See LENAERTS, K.: "L'égalité de traitement en droit communautaire: un principe unique aux apparences multiples", *Cahiers de Droit Européen* 1991, pp. 3-41.

<sup>16</sup> Judgment of 15 May 1986, *Johnston* (Case 222/84, ECR p. 1651), paragraph 18; judgment of 22 September 1998, *Coote* (Case C-185/97, ECR p. I- 5199), paragraphs 20-22.

<sup>17</sup> Judgment of 5 May 1980, *Josette Pecastaing* (Case 98/79, ECR p. 691), paragraphs 21 - 22.

<sup>18</sup> Judgment of 18 October 1989, *Orkem* (Case 374/87, *cit.*), paragraphs 18, 30 and 31; see also Judgment of 18 October 1990, *Dzodi* (Case C-297/88 and C-197/89, *cit.*), paragraph 68.

<sup>19</sup> Judgment of 13 February 1979, *Hoffmann-La Roche/Commission* (Case 85/76, ECR, p. 461), paragraph 9.

<sup>20</sup> Judgment of 15 May 1986, *Johnston* (Case 222/84, ECR p. 1651), paragraph 19.

<sup>21</sup> Judgment of 12 December 1997, *Criminal proceedings against X* (Cases C-74/95 and C-129/95, ECR, p. I- 6609), paragraph 25.

<sup>22</sup> Judgment of 8 November 1983, *Commission/The United Kingdom* (165/82, ECR, p. 3431), paragraph 13.

<sup>23</sup> Judgment of 18 May 1989, *Commission/Germany* (Case 249/86, ECR, p. 1263), paragraph 10.

<sup>24</sup> Judgment of 8 April 1992, *Commission /Germany* (Case C-62/90, ECR, p. I- 2575), paragraph 23.

<sup>25</sup> Judgment of 21 September 1989, *Hoechst/Commission* (Cases 46/87 and 227/88, *cit.*), paragraph 18. Does not cover business premises.

<sup>26</sup> Judgment of 26 June 1980, *National Panasonic* (Case 136/79, ECR, p. 2033).

<sup>27</sup> Judgment of 27 October 1976, *Prais/Council* (Case 130/75, ECR, p. 1589), paragraphs 6-18.

dom of expression (Art. 10 CEDH)<sup>28</sup>, the right of association (Art. 11 ECHR), particularly as regards trade unions<sup>29</sup>, the right to property (Art. 1 of the first protocol of the ECHR)<sup>30</sup>, business and professional freedom<sup>31</sup>, freedom of residence (Art. 2 of the fourth protocol of the ECHR)<sup>32</sup>, etc. In essence, then, it is a list of traditional civil and political rights.

Through its intelligent approach in the case law, the Court of Justice did not codify human rights as legal rules that formed an inherent part of the Community legal system. However, it did recognise them as general principles of Community law, thus affording protection from possible specific violations by the Community institutions or, where applicable, by the Member States in applying Community law, provided that there is a sufficient connection<sup>33</sup>.

### 2.2.2. DRAWBACKS IN THE CASE LAW OF THE COURT OF JUSTICE

This was, however, a specific protection on a case-by-case basis, one that did not mask the unsatisfactory situation of the founding treaties of the European Communities which – despite their clear constitutional dimension – contained no reference whatsoever to human rights. In addition, this situation created certain significant problems. The first of these was obviously the lack of a catalogue of rights and, as a result, the ensuing legal uncertainty due to the difficulty of specifying exactly which rights were to be protected in the European Union.

A second major problem is the difficulty of fixing the standard to which human rights should be protected in the European Union in each particular case. The same right may have a different level of protection

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<sup>28</sup> Of the many judgments where it is cited, among the most recent it is worth highlighting the following: Judgment of 5 October 1994, *TV 10* (Case C-23/93, ECR p. I- 4795), paragraphs 23-25; Judgment of 26 June 1997, *Familienpress* (Case C-368/95, ECR p. I- 3689), paragraphs 18 and 25 *et seq.*

<sup>29</sup> Judgment of 15 December 1995, *Bosman* (Case C-415/93, ECR p. I- 4921), paragraph 79.

<sup>30</sup> Judgment of 13 December 1979, *Hauer* (Case 44/79, *cit.*), paragraphs 17-30. Although it does not refer expressly to the protocol, see Judgment of 5 October 1994 *Germany/Council* (Case C-280/93, ECR, p. I- 4973), paragraphs 77-80.

<sup>31</sup> Judgment of 27 September 1979, *Eridania* (Case 230/78, ECR, p. 2749), paragraphs 20-22. This right has frequently been considered jointly with that of property; for example in Judgment of 13 December 1979, *Hauer* (Case 44/79, *cit.*).

<sup>32</sup> Judgment of 28 October 1975, *Rutili* (Case 36/75, ECR, p. 1219), paragraph 32.

<sup>33</sup> Judgment of 18 June 1991, *ERT* (Case C-260/89, *cit.*); Judgment of 24 March 1994, *Bostock* (Case C-2/92, ECR, p. 955).



according to whether it is applied by the European Court of Human Rights or the European Court of Justice<sup>34</sup>. The situation may also arise where a right that is important for the European Union that is recognised in the constitutions of the Member States is protected differently in each Member State. One may tend to think that the correct approach would be to apply the maximum standard of protection. However, while this approach may be theoretical admirable, in practice it is politically controversial (particularly as regards social rights) and is even capable of creating, in certain very specific circumstances, distortions in the single market<sup>35</sup>.

A third problem, partly as a result of the above, is that this lack of a catalogue of human rights in the European Union is also capable of causing friction between the Court of Justice and national courts; or even, as the controversial judgment in *Matthews*<sup>36</sup> showed, with the

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<sup>34</sup> To give a simple example, in relation to the freedom of expression recognised in Article 10 of the ECHR, in *ERT* the Court of Justice held that the existence of a monopoly on television did not breach such freedom; Judgment of 10 June 1991, *ERT* (Case C-260/89, *cit.*). However, The European Court of Human Rights in *Lentia* reached exactly the opposite conclusion; Judgment of 24 November 1993, *Informationsverein Lentia et al. vs. Austria*. The same occurs with the radically different interpretation of the scope of the right of the inviolability of the home (Art. 8 CEDH). The ECJ has held that this does not extend to cover business premises: Judgment of 21 September 1989, *Hoechst/Commission* (Cases 46/87 and 227/88, *cit.*), paragraphs 17 and 18. Yet the European Court of Human Rights took the opposite approach and has extended the scope of this right to cover business premises: Judgment of 16 December 1992, *Niemietz v. Germany*, Serie A, vol. 251-B, 23.

<sup>35</sup> This point can be seen clearly through the following two examples. If in *Hauer* the (high) German level of protection of property rights had been accepted or in *Grogan* the (equally high) Irish level of protection of the rights of unborn children had prevailed, apart from imposing on the other Member States a very singular philosophy of fundamental rights that is particular to these two States, the substantive unity and efficacy of Community law would have been damaged. This would inevitably lead to the unity of the single market being destroyed, while also endangering the very existence of the Community, whether the common agricultural policy, freedom in the provision of services or any other; Judgment of 13 December 1979, *Hauer* (Case 44/79, *cit.*), paragraph 14; Judgment of 4 October 1991, *Society for the Protection of Unborn Children Ireland/Grogan* (Case C-159/90, ECR p. I- 4685). In short, in practice, the main element used to resolve such conflicts is the ethereal and frequently inapprehensible, but always useful, principle of general interest. See *in extenso* WEILER, J.H.H.: *op. cit.* ("Fundamental Rights..."), pp. 107-116.

<sup>36</sup> Judgment of 18 February 1999, *Matthews vs. The United Kingdom*. The Act introducing elections by direct universal suffrage (Annex II) stated that persons resident in Gibraltar could not vote in elections to the European Parliament, which the European Court of Human Rights declared to be contrary to Article 3 of the first additional protocol. It should be noted that this ruling questions the primary law itself, and therefore its consequences are much more far reaching than those of *Melchers*, a case decided in

European Court of Human Rights as well<sup>37</sup>. In theory, it is crystal clear that national courts have no jurisdiction whatsoever to hear cases concerning violations of fundamental rights by the Community institutions. It is the Court of Justice that is competent to hear cases involving breaches of fundamental rights committed by the Community institutions or by Member States in applying Community law<sup>38</sup>. In practice, however, the risk of conflict is always there, although since the judgment of the German Constitutional Court in *Solange II* it is fairly limited<sup>39</sup>. And since *Bosphorus*, the problem is also somewhat reduced in relation to the jurisdiction of the European Court of Human Rights<sup>40</sup>. Nevertheless, such tension is logical and understandable when we consider that fundamental rights are indissolubly linked to the identity, values and basic principles underlying each constitutional tradition and that their definition and scope vary markedly according to the ideological, political and economic choices of each society<sup>41</sup>. Ultimately, we are dealing with three courts (Constitutional Courts, the EU Court of Jus-

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1990 when the European Commission of Human Rights made the Member States responsible (with respect to the ECHR) for acts of the European Communities that were directly applicable in their territory or that required implementation. The question was, as Iris CANOR put it, "does Matthews open the door for the subordination of the Community, which now exercises legislative powers in many areas transferred to it from the Member States, to the same international control to which the Member States themselves are subjected?", CANOR, I.: "Primus inter pares: Who is the Ultimate Guardian of Fundamental Rights in Europe?", *European Law Review* 2000, pp. 3-21, at p. 17. See also SÁNCHEZ RODRÍGUEZ, L.I.: "Sobre el Derecho Internacional de los Derechos Humanos", *Revista de Derecho Comunitario Europeo* 1999, pp. 95-108, at p. 102; SCHERMERS, H.G.: "European Court of Human Rights — Matthews v. United Kingdom", *Common Market Law Review* 1999, pp. 673-681; SCHUTTER, O. de/L'HOEST, O.: "La Cour Européenne des Droits de l'Homme juge du Droit communautaire: Gibraltar, l'Union européenne et la Convention Européenne des Droits de l'Homme", *Cahiers de Droit Européen* 2000, pp. 141-214.

<sup>37</sup> See, for example, DOUGLAS-SCOTT, S.: "A tale of two courts: Luxembourg, Strasbourg and the growing European human rights acquis", *Common Market Law Review* 2006, pp. 629-665.

<sup>38</sup> Judgment of 24 March 1994, *Bostock*, (Case C-2/92, ECR p. 955); Judgment of 29 June 1997, *Kremzow*, (Case C-299/95, ECR, p. I-2629).

<sup>39</sup> In *Solange II*, The German Constitutional Court refused to recognise the constitutionality of the Community law "as long as" the Community maintained its current level of protection of fundamental rights; BVerfGE 73, 339.

<sup>40</sup> Judgment of 30 June 2005, *Bosphorus vs. Ireland*.

<sup>41</sup> See WEILER, J.H.H.: «Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space», in *ib.*, *The Constitution of Europe. 'Do the New Clothes have an Emperor?' and Other Essays on European Integration*, Cambridge University Press, Cambridge, 1999, pp. 102-129, especially p. 102.

tice and the European Court of Human Rights) which are at the pinnacle of their respective legal systems<sup>42</sup>.

Finally, a fourth problem of a legal-technical nature is the tremendous difficulty in specifying the limits of the fundamental rights protected by the Court of Justice. The Court frequently fails to draw a precise line between the scope of protection and the limits of fundamental rights, in such a way that it often uses general principles of Community law as limits, such as the general interest, the structure or objectives of the Community, and, when controlling the violation of a fundamental right, examines the extent to which the essential content of the right in question and the principle of proportionality have been respected<sup>43</sup>. But it does so while completely lacking any clear approach of its own to the limits of fundamental rights<sup>44</sup>.

The case law of the Court of Justice has therefore been an incredibly valuable instrument, helping to fill the gaps in the founding treaties of the European Communities with respect to human rights. At the time, the Court took a huge step forwards in offering legal protection to fundamental rights at the Community level<sup>45</sup> - "taking rights seriously" as Coppel and O'Neill put it<sup>46</sup>. But this was far from sufficient.

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<sup>42</sup> See RODRÍGUEZ IGLESIAS, G.C./VALLE GÁLVEZ, A.: «El Derecho Comunitario y las relaciones entre el Tribunal de Justicia de las Comunidades Europeas, el Tribunal Europeo de Derechos Humanos y los Tribunales Constitucionales nacionales», *Revista de Derecho Comunitario Europeo* 1997, pp. 329-376; GIEGERICH, T.: «Luxemburg, Karlsruhe, Straßburg — Dreistufiger Grundrechtsschutz in Europe?», *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1990, pp. 836-868; SCHÖNLAU, J.: "Courts, Charters and Conventions: the Institutionalisation of Human Rights Protection in the European Union", in BROSIG, M. (ed.): *Human Rights in Europe: a fragmented regime?*, Peter Lang, Berlin, 2006, pp. 85-101.

<sup>43</sup> Cf., for example, Judgment of 13 April 2000, *Kjell Karlsson (C-292/97)*, paragraph 45.

<sup>44</sup> In any event, it is clear that the rights recognised by the Court of Justice are not absolute in nature, but rather should be examined in the light of their role in society. Accordingly, restrictions may be established on the exercise of such rights provided that these are clearly justified by general interest objectives pursued by the European Union. They must also affect core human rights and satisfy the requirement of proportionality; Judgment of 13 July 1989, *Wachauf* (Case C-5/88, ECR p. 2609); Judgment of 5 October 1994 *X v. Commission* (Case C-404/92, ECR p. 4737).

<sup>45</sup> See RODRÍGUEZ IGLESIAS, G.C.: «The Protection of Fundamental Rights in the Case Law of the Court of Justice of the European Communities», *Columbia Journal of International Law* 1995, pp. 169-181; SCHERMERS, H.G./WÆLBROECK, D.: *Judicial Protection in the European Communities*, Martinus Nijhoff, 5 ed., Dordrecht-Boston, 1992.

<sup>46</sup> See COPPEL, J./O'NEILL, A.: «The European Court of Justice: Taking Rights Seriously?», *Common Market Law Review* 1992, p. 669-692. For an indirect reply to this article three years later, see WEILER, J.H.H./LOCKHART, N.J.S.: "Taking Rights Seriously: The European Court and its Fundamental Rights Jurisprudence", *Common Market Law Review* 1995, pp. 51-94 (first part) and pp. 579-628 (second part).

### 2.3. *The incorporation of fundamental rights into the EU Treaty: another necessary step, but not in itself sufficient*

The situation, then, was not completely satisfactory. Thus, as well as the valuable contribution of the Court of Justice, various political Declarations were made by the Community institutions<sup>47</sup> —occasionally jointly with Member States<sup>48</sup>— and by various European Councils<sup>49</sup> that expressly referred to the convenience of achieving an adequate level of protection at the European level. There were two goals: first, to achieve a specific catalogue of human rights for the European Union, and second to achieve the accession of the European Union *per se* to the ECHR.

However, the definitive inclusion of rights in primary Community law proved elusive. In fact, the Single European Act of 17 and 28 February 1986 simply referred briefly to the question<sup>50</sup>. It was the Treaty of Maastricht of 7 February 1992 which, for the first time, codified the Community case law in the area, introducing into the provisions of the Treaty on the European Union (the TEU) an express recognition of human rights “as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, and as they result from the constitutional traditions common to the Member States, as general principles of Community law” (Art. 6.2 TEU). In addition, the Maastricht Treaty also included in the Treaty establishing the European Community (ECT) certain citizens’ rights within what is called Citizenship of the Union (Arts. 17-22 ECT)<sup>51</sup>, although these latter rights (right of free movement and resi-

<sup>47</sup> Joint Declaration of the European Parliament, the Council and the Commission on fundamental rights of 5 April 1977.

<sup>48</sup> Joint Declaration of the European Parliament, the Council, Representatives of the Member States meeting within the Council and the Commission against racism and xenophobia of 11 June 1986; Resolution of the Council and the Representatives of the Governments of the Member States meeting within the Council of 29 May 1990 on the fight against racism and xenophobia (OJ C 157, p. 1).

<sup>49</sup> Declaration on European identity of 14 December 1973 (EC Bulletin 12/73, section 2501; Declaration on democracy de 8 April 1978; Declaration on the role of the community in the world (EC Bulletin 12/88, section 1.1.10); Declaration on human rights of 29 December 1991 (EC Bulletin 6/91, annex V) and Declaration on human rights of 11 December 1993 (EC Bulletin 12/93, apdo. 1.4.12).

<sup>50</sup> In the third paragraph of its preamble, the first reference is made to “the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter.”

<sup>51</sup> See LADENBURGER, C.: “Fundamental rights and citizenship of the Union”, in AMATO, G.; BRIBOSIA, H. and DE WITTE, B. (eds.): *Genesis and destiny of the European Constitu-*

dence, right to vote and to stand as a candidate in elections to local councils and to the European Parliament, right to diplomatic and consular protection) are connected with being a national of a Member State (Art. 17 ECT) unlike those rights which, by definition, are inherent to the human condition, regardless of nationality.

In truth, however, this codification changed little compared to the previous situation. It did not include a specific catalogue of rights. It did not add any real guarantee to the protection of human rights in the European Union that did not already exist through the case law of the Court of Justice. Nor did it resolve the problems derived from the different standards for protecting such rights under national constitutional systems. And it did not even tackle the question of the accession of the European Union to the European Convention on Human Rights. It was, therefore, limited to codifying in the Treaties what the Court of Justice had established in the case law<sup>52</sup>. Finally, this codification of the Court of Justice's case law completely left out the whole range of "third generation" rights which obviously could not appear in a catalogue of rights such as that contained in an international convention drawn up in 1950.

The situation since the Maastricht Treaty was largely left unchanged by the Treaties of Amsterdam and Nice. The Treaty of Amsterdam of 2 October 1997 introduces an interesting procedure to sanction – even with the suspension of voting rights within the Council – those Member States that violate fundamental rights in a serious and persistent fashion. In addition, it also states that the Union is based on the respect for fundamental rights and public freedoms (Art 6.1 TEU). For its part, the Treaty of Nice, of 26 February 2001, limits itself to modifying this sanctions procedure by adding a phase prior to the establishment of the existence of a serious and persistent violation of fundamental rights by a Member State; in this phase, the *risk* of a breach of fundamental rights is found to exist (Art. 7 TEU)<sup>53</sup>.

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*tion: Commentary on the Treaty establishing a Constitution for Europe in the light of the travaux préparatoires and future prospects*, Bruylant, Brussels, 2007, pp. 311-365; O'LEARY, S.: "The Relationship Between Community Citizenship and the Protection of Fundamental Rights in Community Law", *Common Market Law Review* 1995, pp. 519 *et seq.*

<sup>52</sup> Moreover, to some extent it could be considered as a limitation on the case law of the Court of Justice, since while the latter referred generally to the international instruments for the protection of human rights – for example the Convention 111 of the International Labour Organization or the UN International Covenant on Civil and Political Rights referred to above— Art 6(2) TEU only refers to the European Convention on Human Rights.

<sup>53</sup> This finding, undoubtedly a complex and delicate matter, will be reached by the Council on a unanimous basis — obviously without the vote of the Member State in

This, then, is the manner in which the founding treaties currently regulate human rights. But not only primary Community law makes reference to human rights. Thus, through secondary legislation, the European Union Agency for Fundamental Rights was created in 2007<sup>54</sup>, whose basic function is to advise the institutions of the European Union and the Member States on fundamental rights<sup>55</sup>. And there is also another legal instrument that is neither part of the founding treaties nor legally binding, but is of vital importance in understanding adequately how human rights are protected in the European Union: the Charter of Fundamental Rights, which was proclaimed in Nice in December 2000.

### 3. The Charter of Fundamental Rights of the European Union: the obtention of a catalogue of rights for the European Union itself

#### 3.1. *The drafting process: the new mechanism in the Convention*

The idea of drawing up a catalogue of human rights specific to the European Union is by no means new. In fact, it is as old as the debate itself about the protection of human rights in the European Union. As noted above, it was one of the defects of the case law of the Court of Justice regarding human rights.

This has not, however, been an uncontroversial matter among academics. Thus, while the advantages of a catalogue are *prima facie* obvi-

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question — and could lead to a sanction procedure in which by a qualified majority it is decided whether to suspend certain rights arising from the application of this Treaty to the Member State concerned. With respect to the lack of definition of certain concepts used in this rule and the (political and legal) complexity of such definition, see VERHOEVEN, A.: «How Democratic Need European Union Members Be? Some Thoughts After Amsterdam», *European Law Review* 1998, pp. 217-234; WACHSMANN, P.: “Le traité d’Amsterdam. Les droits de l’homme”, *Revue Trimestrielle de Droit Européenne* 1997, pp. 883-902, particularly pp. 895-896.

<sup>54</sup> Council Regulation 168/2007, of 5 February 2007, OJ L 53 of 22 February 2007, p. 2. In fact, this agency is the successor to the European Observatory against Racism and Xenophobia which was created in 1997; Council Regulation 1035/97 of 2 June 1997, OJ L 151 of 10 June 1997, p. 1.

<sup>55</sup> See CHALMERS, D.: “The nebulous authority of fundamental rights in EU law”, *European Law Review* 2007, pp. 155-156; HOWARD, E.: “The European Union Agency for Fundamental Rights”, *European Human Rights Law Review* 2006, p. 445 *et seq*; TOGGENBURG, G.N.: “The role of the new EU Fundamental Rights Agency: Debating the ‘sex of angels’ or improving Europe’s human rights performance?”, *European Law Review*, 2008, pp. 385-398.

ous - visualisation of human rights, strengthening of the constitutional dimension of the founding treaties, greater transparency and bringing the process of integration closer to the citizen, greater legal certainty, and so on - at the same time, certain equally evident problems exist. Which rights should be included, since not all rights are "common" to all legal systems? Which standard should be adopted? The maximum, as *Nold* appears to infer? The minimum, as some Member States claim in relation to certain rights? Or should the standard be that of internal legal orders, as *Hoechst* seems to suggest?<sup>56</sup> Will its effect be merely declarative, in which case it would be more of a step backwards than a step forwards, or is the ECJ given full jurisdiction to ensure their compliance, which could lead to conflicting and diverging interpretations with respect to the rulings of the European Court of Human Rights? And finally, how should the Charter be drawn up - using the traditional method of intergovernmental conferences for treaty reform or some new instrument that allowed a greater degree of participation and transparency?

In the end, the European Union came down decisively in favour of preparing its own catalogue of rights. This task was carried out, at the request of the European Council of Cologne of 1999, by an *ad hoc* group that, after the European Council of Tampere, was composed of 62 members<sup>57</sup> and which called itself a "Convention" (a word with strong historical-constitutional connotations, evoking the Convention of Philadelphia of 1787). The most unusual feature of this body was its working method, since it consistently used a new method based on transparency and open participation in which many external contributions were obtained. In this way, the Convention drew up a draft Charter of fundamental rights that the European Council of Biarritz of October 2000 put before the European Parliament and the Commission for its approval on 14 November and 6 December respectively. But it is not an international treaty. The Charter does not, therefore, form part of the founding treaties. It was simply solemnly proclaimed by the Europe-

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<sup>56</sup> In this regard, see BESSELINK, L.F.M.: «Entrapped by the Maximum Standard: on Fundamental Rights, Pluralism and Subsidiarity in the European Union», *Common Market Law Review*, 1998, pp. 629-680.

<sup>57</sup> These represented the Heads of State or Government of the Member States (15), the President of the European Commission (1), the European Parliament (16) and the national Parliaments (30). It received support, as observers, from representatives of the Court of Justice (2), the Committee of the Regions (2), the Economic and Social Committee (2), the Ombudsman and also (of relevance with respect to human rights) from the Council of Europe (2).

an Council, the Commission and the European Parliament<sup>58</sup>. In other words, from a technical-legal point of view, the Charter is an inter-institutional declaration. While it is politically of paramount importance, legally it has limited value, since it is not binding<sup>59</sup>.

In any event, the preparation of this Charter had certain positive effects that are worthy of mention. First, the preparatory method - the use of the Convention - showed clearly that there are effective alternatives to reforming treaties through the traditional method of intergovernmental treaties<sup>60</sup>. And its content is undoubtedly an essential benchmark for the protection of fundamental rights in the European Union, particularly for the Court of Justice. In short, the Charter has been correctly described as "a remarkable document produced by a remarkable procedure"<sup>61</sup>.

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<sup>58</sup> On 7 December 2000 in Nice. The Council of Europe called it a «joint proclamation by the Council, the European Parliament and the Commission of the Charter of Fundamental Rights, combining in a single text the civil, political, economic, social and societal rights hitherto laid down in a variety of international, European or national sources»; OJ C 364 of 18 December 2000. See the Conclusions of the Presidency of the Nice Council of Europe, second paragraph.

<sup>59</sup> The bibliography relating to the Charter is copious. See, for example, CARRILLO SALCEDO, J.A.: "Notas sobre el significado político y jurídico de la Carta de Derechos Fundamentales de la Unión Europea", *Revista de Derecho Comunitario Europeo*, 2001, pp. 7-26; DUTHEIL DE LA ROCHERE, J.: "La Charte des Droits Fondamentaux de l'Union Européenne", *Juris-Classeur*, fascicule 160, p. 1; FERNÁNDEZ TOMÁS, A.: «La Carta de Derechos Fundamentales de la Unión Europea: un nuevo hito en el camino de la protección», *Gaceta Jurídica de la UE y de la Competencia* 2001, no. 214, pp. 15-30; *ib.*: *La Carta de Derechos Fundamentales de la Unión Europea*, Tirant lo Blanch, Valencia, 2001; MANGAS MARTÍN, A.: "La Carta de los Derechos Fundamentales y ciudadanía de la Unión Europea", *Estudios de Derecho Internacional en homenaje al Profesor Ernesto J. Rey Caro*, Córdoba, 2002, vol. II, pp. 985-995; MAYER, F.C.: "La Charte européenne des droits fondamentaux et la Constitution européenne", *Revue Trimestrielle de Droit Européenne* 2003, pp. 176 et seq; PI LLORENS, M.: *La Carta de los Derechos Fundamentales de la Unión Europea*, Universitat de Barcelona, Barcelona, 2001; ROLDÁN BARBERO, J.: "La Carta de Derechos fundamentales de la UE: su estatuto constitucional", *Revista de Derecho Comunitario Europeo*, 2003, pp. 943-991; TRIANTAFYLLOU, D.: "The European Charter of Fundamental Rights and the 'Rule of Law': Restricting Fundamental Rights by Reference", *Common Market Law Review* 2002, pp. 53-64.

<sup>60</sup> Its more open composition, the absolute transparency of its work thanks to Internet and the possibility of any interested person participating all helped forge an interesting working method which was later used by the Convention entrusted with preparing the European Constitution in 2004 (Convention II). Antonio VITORINO considered from the outset that the Convention was «a possible instrument for preparing the constitutional reform sought for 2004"; VITORINO, A.: «The Convention as a Model for European Constitutionalism», Hallstein Institut, Universidad von Humboldt, Berlin, 2001, especially p. 15 *in fine*, also available at <http://www.whi-berlin.de/vitorino.htm>.

<sup>61</sup> See the editorial of the *European Law Review-Human Rights Survey* 2001, p. 1



### 3.2. *The non-binding nature of the Charter*

The Charter is not, then, legally binding. At least not at present, since, as we will see later, if the Treaty of Lisbon comes into force, the situation will change radically<sup>62</sup>. But the fact that the Charter is not currently legally binding does not mean that it has no legal effect. In fact, the Charter was actually drawn up "as if" it was going to be legally binding<sup>63</sup>, which technically makes possible its future incorporation into the treaties. And what is, for the moment, more important, is that it also makes it possible for the institutions to act "as if" it were binding, so that they take it into account in their actions. The Commission and the European Parliament have thus undertaken, in a manner consistent with their position throughout the preparation procedure, to take it into account in the recitals to draft Community legislation. For their part, in the Court of Justice the Advocates General have used it as an aid to interpretation on various occasions<sup>64</sup>, although the Court itself has shown itself to be more reluctant in this respect<sup>65</sup>. Even the Constitutional Courts of some Member States or the European Court of Human Rights have referred to the Charter as an aid to interpretation that supplements those existing in their respective spheres of action, whether the national constitution in question<sup>66</sup> or the European Convention on Human Rights.

<sup>62</sup> See below Section IV.

<sup>63</sup> Cf. CARRILLO SALCEDO, J.A.: *op. cit.* («Notas sobre el significado...»), p. 14.

<sup>64</sup> See, for example, AG Siegbert ALBER, Opinion of 1 February 2001, *TNT Traco SpA*, (Case C-340/99), paragraph 94 (citing Art. 36 of the Charter); AG A. TIZZANO, Opinion of 8 February 2001, *BECTU vs. Secretary of State for Trade and Industry* (Case C-173/99), paragraphs 26-28 (citing Art. 31.2 of the Charter); AG Jean MISCHO, Opinion of 22 February 2001, *D/Council* (Cases C-122/99P and C-125/99P), paragraph 95 (citing Art. 9 of the Charter); AG F.G. JACOBS, Opinion of 22 March 2001, *ZI European Parliament* (Case C-270/99P), paragraph 40; AG F.G. JACOBS, Opinion of 14 June 2001, *Netherlands/ European Parliament and Council* (Case C-377/98), paragraphs 197 and 210 (citing Art. 3.2 of the Charter); AG STIX-HACKL, Opinion of 31 May 2001, *Commission/Italy* (Case C-49/00), paragraph 57, note 11 (citing Art. 31.1 of the Charter). One Advocate General, specifically the one who was an observer for the Court of Justice in the Convention, has proposed in a personal capacity that the Court of Justice take the Charter into account in its case law, so that its citation can be used as the basis for the future extension of Art. 6 TEU or even for the inclusion of a separate Article; ALBERT, S.: "Die Selbstbindung der europäischen Organe an die Europäische Charta der Grundrechte", *Europäische Grundrechte-Zeitschrift* 2001, pp. 349-353, see p. 349.

<sup>65</sup> See Judgment of Court of First Instance of 3 May 2002, *Jégo-Queré* (T-177/01, ECR p. II-2365).

<sup>66</sup> For example, this is the case of Spain and its Constitutional Court; See STC 292/2000, of 30 November 2000 (judge-rapporteur: GONZÁLEZ CAMPOS), legal grounds 8, specifically with respect to Article 8 on data protection. Cf. also the dissenting vote of

Continuing to analyse the effect and interpretation of the Charter, there are other problems in addition to its lack of a legally binding nature. In this regard, the Charter includes some general provisions (Chapter VII) that have caused a degree of controversy. For example, on the one hand it is stated that "this Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties" (Art. 51(2)). Accordingly, the European Union lacks any competence whatsoever to legislate with respect to fundamental rights. On the other hand, these general provisions also contain a reference to the Member States' constitutions that could give rise to certain interpretative doubts (Art. 53). And, finally, the fact that the Charter does not provide for its own system of guarantees for these rights can also be criticised. If it becomes legally binding in the future there will be no jurisdictional appeal of its own such as a constitutional complaint (the German *Verfassungsbeschwerde*); instead, the appeals system currently existing in the European Union would have to be used.

Nevertheless, despite these possible criticisms, the Charter has some highly positive features. In the first place, it correctly seeks a high standard of protection for the rights which it sets out. Thus, to deal with the disparity in levels of protection that the same right may have according to the State in which it is interpreted, the Charter expressly sets the standard of protection established by the European Court of Human Rights as the minimum reference level prohibiting any interpretation below this level<sup>67</sup>. Secondly, the Charter takes a mixed position that does not exclude the possible accession of the European Union to the European Convention on Human Rights. It therefore makes it possible to combine the existence of a catalogue of rights specific to the European Union (the Charter) with the EU's possible accession to the European system for the protection of human rights to which all Member States are parties (European Convention on Human Rights). Third, the Charter also contains certain explanations about its nature that are particularly helpful for the adequate interpretation of the actual scope

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the *Magistrado* JIMÉNEZ DE PARGA on the same date regarding the judgment given in certain actions for a declaration of unconstitutionality: see joint cases nos. 201/1993, 219/1993, 226/1993 and 236/1993, paragraph 3 *in fine*.

<sup>67</sup> Thus, Art. 53 provides that "[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, and by the Member States' constitutions".

of the rights contained in the Charter. And, fourthly, apart from its strictly legal scope, it is clear that, as Javier Roldán has stated, the Charter is undoubtedly of “didactic, dialectic, educational, civic, ethical and political value”<sup>68</sup>.

In short, it is a decisive step forward, one which allows no return, on the long road towards the effective protection of human rights in the European Union.

### 3.3. *The content of the Charter: a very complete and up-to-date catalogue*

The Charter contains in a single text the civil, political and social rights declared to date in different sources (international, European or national). Specifically, it contains a total of 54 articles, structured in seven chapters. Six of these are concerned with its substantive content – Dignity, Freedoms, Equality, Solidarity, Citizen’s Rights and Justice – written in a clear, comprehensible and concise manner<sup>69</sup>, and there is a final, seventh chapter of a general nature which will be of vital importance in determining the scope of the Charter’s provisions. The text starts, as a fundamental category, with the protection of Dignity (Chapter I, Arts. 1-5). This chapter sets out the rights to human dignity, life, the prohibition on torture and inhuman or degrading treatment and the prohibition on slavery. The reference made in Article 3(2) to biomedicine is worth highlighting, being a new provision<sup>70</sup>.

The chapter on *Freedoms* (Chapter II, Arts. 6-19) contains the right to liberty and security, respect for private and family life, the right to the protection of personal data, the right to marry and to found a family, freedom of thought, conscience and religion, freedom of expression and information, freedom of assembly and association, the right to education and to have access to vocational training, freedom of the arts and scientific research, freedom to conduct a business, the right to work, the right to property, the right to asylum and protection in the event of removal, expulsion or extradition.

The chapter on *Equality* (Chapter III, Arts. 20-26) declares the general principle of equality before the law, which specifically means a pro-

<sup>68</sup> ROLDÁN BARBERO, J.: *op. cit.* (“La Carta de...”), p. 948.

<sup>69</sup> With the exception of Article 41 on the right to good administration, no provision has more than three paragraphs, in marked contrast to the opaque and tortuous provisions of the founding treaties.

<sup>70</sup> This appears to be taken from the Treaty of 4 July 1997 on human rights and biomedicine, *International Legal Materials*, 1997, p. 817.

hibition on any type of discrimination, respect for diversity, equality between men and women, the rights of the child and of the elderly and the integration of those with disabilities.

The chapter on *Solidarity* (Chapter IV, Arts. 27-38) sets out economic and social rights and includes the following: the right to information and the right of workers in a business to be consulted, the right to collective bargaining, the right of access to placement services, protection in the event of unjustified dismissal, the right to fair and just working conditions, the prohibition of child labour, the protection of young people at work, the protection of family life, the right to social security, the protection of health, the protection of the environment and consumer protection.

The Charter also includes *Citizen's Rights* (Chapter V, Arts. 3-46), most of which are currently contained in Articles 18-22 of the EC Treaty and which remain restricted to citizens that are nationals of a Member State: the right to vote and to stand as a candidate in municipal and European Parliament elections, the right to access Council, European Parliament and Commission documents, the right to petition the European Parliament and to have access to the Ombudsman, freedom of movement and residence, the right to diplomatic and consular assistance and a new right: the right to good administration. There is a doubt, however, as to whether this group of rights should be included in the Charter, given that holders of such rights are solely those who are nationals in one of the Member States, that is, citizens of the Union.

The final group of rights that are regulated are those relating to *Justice* (Chapter VI, Arts. 47-50). These are the right to effective judicial protection, the right to a hearing before an impartial tribunal previously established by law, the presumption of innocence and the right to a fair defence, as well as the principles of legality and the proportionality of crimes and punishments.

To complete the substantive content, the Charter ends with certain general provisions (Chapter VII, Arts. 51-54) in which, among other matters, the Charter's legal scope and the level of protection of the rights and the prohibition on the abuse of rights are described. The Charter is addressed solely to the Community institutions and the Member States, the latter only when they are implementing EU law (Art. 51), it being provided that any limitation must be established by law and, in any event, must respect the essence of those rights and freedoms (Art. 52).

And it is in precisely this context that one of the most controversial questions regarding the Charter must be analysed, namely its legal value.

#### 4. The Regulation of Human Rights in the Treaty of Lisbon: Pros and Cons

##### 4.1. *The incorporation of the Charter into the founding treaties: making the Charter legally binding*

The Constitutional Treaty that emerged from the Convention II<sup>71</sup> and the subsequent Intergovernmental Conference of 2004 incorporated the Charter of Fundamental Rights into Part II of its provisions (Arts. II-61 - 114), thus giving it the same legal value as the other Treaty provisions. However, the failure of the Constitutional Treaty meant that during the brief Intergovernmental Conference of 2007 the debate about whether or not the Charter should be included within the provisions of the founding treaties was reopened. The United Kingdom and Poland opposed its inclusion and finally the Treaty of Lisbon provides that the Charter will not form part of either the TEU or the Treaty on the Functioning of the European Union (TFEU)<sup>72</sup>. Nevertheless, the legally binding nature of the Charter has finally been fully established.

The Treaty of Lisbon opted to include in the future EU Treaty a provision that will cover everything concerning fundamental rights. In this regard, the future Article 6 of the EU Treaty will have a new first paragraph, which will provide that “[t]he Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted at Strasbourg, on 12 December 2007”, going on to state that it will “have the same legal value as the Treaties”. In addition, it includes a paragraph which expressly provides that the “rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Chapter governing its interpretation and application, and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions”. The Charter is, therefore, incorporated by way of reference<sup>73</sup>.

<sup>71</sup> The European Council decided at the end of 2001 to set up a Convention to look at how the Union could be made more democratic, transparent and efficient. This Convention, which met between March 2002 and July 2003, drew up a Treaty establishing a Constitution for Europe which was intended to replace the existing treaties. It was subsequently submitted to an IGC, and was agreed, slightly amended, in June 2004, and signed in October 2004.

<sup>72</sup> OJ C 115 of 9 May 2008.

<sup>73</sup> See in this regard FERNÁNDEZ TOMÁS, A.F.: “La Carta de Derechos Fundamentales de la Unión Europea tras el Tratado de Lisboa. Limitaciones a su eficacia y alcance general por el Protocolo para la aplicación de la Carta al Reino Unido y Polonia”, in MARTÍN Y PÉREZ DE NANCLARES, J. (COORD.): *El Tratado de Lisboa — La salida de la crisis constitucional*, Iustel, Madrid, 2008, pp. 119-149.

Accordingly, if, after the stumble at the Irish fence, the Treaty of Lisbon finally comes into force, a definitive step forward will have been taken in the area of human rights. Once its legally binding nature has been recognised, this will be the end of a long journey that could not be successfully completed in Nice. But the Treaty of Lisbon does not stop there. It also gives form to a longstanding desire which will also contribute to a much more consistent and coordinated approach between the case law of the European Court of Human Rights and the Court of Justice of the European Union, since the TEU amended by the Treaty of Lisbon includes a new provision that will give the Union the authority to accede to the ECHR.

#### 4.2. *The accession of the European Union to the ECHR: the best possible complement to the Charter*

Once the Charter is incorporated into the founding treaties through the future Article 6(1) of the EU Treaty, the old dispute as to whether the Union truly needs a Charter of fundamental rights, as Joseph Weiler put it, will probably die out<sup>74</sup>. Indeed, an alternative to the Charter would have been simply for the EU to accede to the ECHR. However, it is submitted that these two alternatives should not be seen as mutually exclusive, it being possible - and even desirable - to combine them. And, in any event, since the European Court of Human Rights judgment in *Bosphorus*, the EU's accession to the ECHR has been considered to be almost a necessity<sup>75</sup>.

It is clear, however, that the EU's accession to the ECHR gives rise to significant legal problems<sup>76</sup>. First, the Statute of London would have to be reformed, since only those States that are members of the Council of Europe can be parties to the ECHR. Secondly, in the light of the

<sup>74</sup> WEILER, J.H.H.: «Does the European Union Truly Need a Charter of Rights?» *European Law Journal*, 2000, pp. 95-97.

<sup>75</sup> See BENOIT-ROHMER, F.: «À propos de l'arrêt *Bosphorus Air Lines* du 30 juin 2005: l'adhésion contrainte de l'Union à la Convention», *RTDH* 2005, pp. 827-853; BERRAMDANE, A.: «La Cour européenne des droits de l'homme juge du droit de l'Union Européenne», *Revue de Droit de l'Union Européenne* 2006, pp. 243-272.

<sup>76</sup> See, for all, COHEN-JONATHAN, G.: «La problématique de l'adhésion des Communautés européennes à la Convention européenne des droits de l'homme», in AAVV, *Études de droit des Communautés européennes. Mélanges offerts à P.H. Teitgen*, Pedone, Paris, pp. 81-108; JACQUÉ, J.P.: «Communauté européenne et Convention européenne des droits de l'homme», in AAVV, *Mélanges en hommage à J. Boulouis*, Paris, 1991, pp. 325-340; PIKORN, J.: «La Communauté européenne et la convention européenne des droits de l'homme», *Actualités de Droit* 1994, p. 463.

Court of Justice's Opinion 2/94, which considered the legal basis of Article 308 of the EC Treaty to be insufficient<sup>77</sup>, it would be necessary to introduce into the founding treaties an *ad hoc* provision concerning the EU's competence in this regard. Finally, the requirement of having exhausted the "internal procedure" (understood here to mean the Community procedure) before having recourse to the European Court of Human Rights in Strasbourg would need to be reinterpreted. Such obstacles are, however, capable of being overcome. The first can be resolved with a protocol which reflects the unique nature of the Community, thus allowing it to be part of the Council of Europe. The lack of a sufficient legal basis would be resolved by the Treaty of Lisbon introducing into Article 6.2 a provision giving the Union express competence to accede to the Convention<sup>78</sup>. And, with respect to the need to exhaust first the internal procedure, in our opinion this could be taken to mean, in cases which affect the Community, requiring that the ECJ had made a previous declaration<sup>79</sup>.

In short, if the Treaty of Lisbon comes into force, this will mean that the satisfactory completion of the system for protection human rights in the European Union will finally have been achieved. A legally binding Charter of rights will exist and, in addition, the Union may accede to the ECHR.

#### 4.3. *The emergence of a Europe a la carte as regards human rights: the unfortunate exceptions granted to the United Kingdom and Poland*

The notable progress made in the Treaty of Lisbon in enabling the Charter to be legally binding and allowing the EU to accede to the ECHR has unfortunately come at a high price: accepting an exception for two Member States. The Treaty of Lisbon contains a Protocol under which the Charter will not be legally binding for either the United King-

<sup>77</sup> Opinion of 28 March 1996 (Case 2/94, ECR p. I-1759), paragraphs 34-35.

<sup>78</sup> This provision, if the Treaty of Lisbon comes into force, provides that "[t]he Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties".

<sup>79</sup> As regards this possibility, see COHEN-JONATHAN, G.: «L'adhésion de la Communauté européenne à la CEDH», *Journal des Tribunaux-Droit Européen* 1995, pp. 49-53, especially pp. 51-52. It is true, however, that if the situation arises, the European Court of Human Rights may consider that the use of the annulment procedure is insufficient to protect adequately fundamental rights in the Community.

dom or Poland<sup>80</sup>. In addition, in relation to Poland there is also a unilateral declaration that provides a peculiar interpretation of morality and the family<sup>81</sup>.

For these two Members States, then, the effect of the Charter will be limited, recourse to which may be had for interpretative purposes, but nothing more. A sort of "Europe a la carte" is therefore created in an area as delicate as the protection of fundamental rights, something which, in our opinion, merits serious criticism<sup>82</sup>.

## 5. Final Considerations

The European Union has come a long way before finally achieving an adequate level of protection for human rights in the Community through the Treaty of Lisbon. From the initial silence of the founding treaties in their original wording to the inclusion of a modern *ad hoc* catalogue of human rights containing the most recent generation of rights and the authority to accede to the ECHR, a series of milestones have been reached, largely through the efforts of the Court of Justice. Adopting a prudent approach to its difficult jurisprudential relations with the European Court of Human Rights and with the national constitutional courts, and an imaginative approach in the initial definition of human rights as general principles of Community law, the European Court of Justice has rightly become viewed as a sort of Constitutional

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<sup>80</sup> See Protocol on the application of the Charter of Fundamental Rights to the United Kingdom and Poland. According to this Protocol, "The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms".

In case there was any doubt, the text reiterates the fact that the social rights contained in the Charter do not bind these two States: "In particular, and for the avoidance of doubt, nothing in Title IV of the Charter [Solidarity] creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law".

<sup>81</sup> According to this Declaration, "[t]he Charter does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity".

<sup>82</sup> Two interesting studies on these exceptions can be found in FERNÁNDEZ TOMÁS, A. F.: loc. cit. ("La Carta..."), pp. 131-138; and PASTOR PALOMAR, A.: "La regla *inclusio unius exclusio alterius* y la Carta de los Derechos Fundamentales: Polonia, el Reino Unido y los otros", in MARTÍN Y PÉREZ DE NANCLARES, J. (coord.): *op. cit.* (*El Tratado de Lisboa...*), pp. 159-178.



Court of the European Union. Without doubt, it has been the driving force behind the protection given to these human rights in the European Union.

As one would expect, this journey towards the Treaty of Lisbon has had its ups and downs, its steps forward and its steps back. Even today, in some important aspects (the existence of a catalogue of rights and attributing to the Union the competence to accede to the ECHR) success still hinges on the Treaty of Lisbon coming into force; and even if and when this happens, the unfortunate exceptions granted to the United Kingdom and Poland will still exist. For these two Member States, the Charter will not be legally binding. However, in overall terms the long journey towards the protection of fundamental rights reflects well the progressive nature of the unstoppable process of European integration— the “step-by-step” philosophy of the Schuman Declaration can be seen more clearly in this area than in any other— and the fact that this integration is not purely economic in nature. The European Union is no longer just another international organisation. It now has a clear political dimension, making it vital to provide an effective guarantee against possible human rights violations by the Community institutions or Member States when they apply Community law. In this way, the European Union helps, together with the national States and the Council of Europe, to define the *European public space* as one of the places in the world where human rights obtain their broadest and best protection.



Part V

The Organisation of  
American States and  
Human Rights



# The Inter-American System for Human Rights: operation and achievements

Ludovic Hennebel\*

**Summary:** 1. The operation of the Inter-American System for Human Rights: 1.1. Background. 1.2. The Inter-American Human Rights Institutions: A Commission and a Court: 1.2.1. The Inter-American Commission of Human Rights. 1.2.2. The Inter-American Court of Human Rights. 1.3. The Inter-American Human Rights Instruments: A Declaration and a Convention: 1.3.1. The American Declaration of the Rights and Duties of Man. 1.3.2. The American Convention on Human Rights. 1.3.3. The American Convention's Protocols. 1.3.4. The other Inter-American Conventions related to Human Rights. 1.4. The Inter-American Human Rights Mechanisms: Report and Complaint: 1.4.1. General Human Rights Situation Mechanism: the Country Reports. 1.4.2. Specific Human Rights Abuse Mechanism: the Individual Petitions. 2. The Achievements of the Inter-American System for Human Rights: the Court's Emerging Case-Law: 2.1. The rule most favorable to individual must prevail. 2.2. The States' general obligations and the access to justice. 2.3. The reparation regime.

The Inter-American system for Human Rights is one of the three major regional human rights systems, along with the European and the African human rights arrangements. It is a creation of the Organization of American States (OAS) and has evolved considerably over the past decades. The system as such is atypical. The Inter-American System of Human Rights is not a single homogenous regime, but rather an intricate set of norms, institutions and mechanisms. First, it rests upon two overlapping instruments, namely the *American Declaration on the Rights and Duties of Man* (1948)<sup>1</sup> and the *American Convention on Human Rights* (1969)<sup>2</sup>.

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<sup>1</sup> American Declaration of the Rights and Duties of Man, OAS Res. XXX, International Conference of American States, 9th Conf., OAS Doc. OEA/Ser.LV/II. 4 Rev. XX (1948) [hereinafter *American Declaration*].

<sup>2</sup> American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force 18 July 1978) [hereinafter *American Convention*].

Second, the inter-American system is bipartite since two institutions – the Inter-American Commission and the Inter-American Court – are in charge of supervising the obligations of the members of the OAS. As it is, the current configuration of the inter-American system was largely unplanned. In other words, it was constructed piece by piece following the slow rhythm of diplomatic negotiations and temporary arrangements that have eventually become permanent.

With the understanding that double dualism – both institutional and normative – is the key to comprehending the inter-American system as a whole<sup>3</sup>, the first section of this chapter provides an overview of the institutional and normative framework of the Inter-American Human Rights System. This system has produced a creative and stimulating legal framework. Inter-American human rights law, as applied, interpreted, and developed by the Commission and the Court, has reached a level of maturity and authority that can no longer be ignored by academic literature. The achievements of the Inter-American Human Rights System, mainly through inter-American case law, are the focus of the second section of this chapter.

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<sup>3</sup> On the inter-American system of human rights in general, see *inter alia*: FAUNDEZ LEDESMA, H.: *El Sistema Interamericano de Protección de los Derechos Humanos: Aspectos Institucionales y Procesales*, Inter-American Institute of Human Rights, 2004; HARRIS, D. & LIVINGSTONE, S. (eds.): *The Inter-American System of Human Rights*, Clarendon Press, 1998; DAVIDSON, S.: *The Inter-American Human Rights System*, Dartmouth, 1997; CAÑADO TRINDADE, A.A.: “El Sistema Interamericano de Protección de los Derechos Humanos (1948-1995): Evolución, Estado Actual y Perspectivas”, in BARDONNETT, D. & CAÑADO TRINDADE, A.A. (Eds) *Derecho Internacional y Derechos Humanos/Droit international et droits de l’homme*, Académie de droit international de La Haye/Instituto Interamericano de Derechos Humanos, 1996; BUERGENTHAL, T. & SHELTON, D.: *Protecting Human Rights in the Americas: Cases and Materials*, Engel, 1995; MEDINA QUIROGA, C.: *The Battle of Human Rights: Gross Systematic Violations and the Inter-American System*, Kluwer, 1988; BUERGENTHAL, T. & NORRIS, R.: *Human Rights: The Inter-American System*, Oceana, 1982. See also: CAÑADO TRINDADE, A.A.: “Le système inter-américain de protection des droits de l’homme: état actuel et perspectives d’évolution à l’aube du XXIème siècle”, 46 *Annuaire français de Droit international*, 2000, p. 547; HARRIS, D.: “Regional Protection of Human Rights: The Inter-American Achievement”, in HARRIS, D. & LIVINGSTONE, S.: *supra*, 1; CAÑADO TRINDADE, A.A.: “Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century”, 8 *Tul. J. Int’l & Comp. L.* 5, 2000; CAÑADO TRINDADE, A.A.: “The Evolution of the Organization of American States (OAS) System of Human Rights Protection: An Appraisal”, 26, *GYIL*, 498, 1982. See also the chapters on the inter-American system in: BUERGENTHAL, TH.; SHELTON, D. and STEWART, D.: *International Human Rights in a nutshell*, Westgroup, 2004, 221; H. STEINER, H.; ALSTON, PH. and R. GOODMAN, *International Human Rights in Context: Law, Politics, Morals*, Oxford University Press, 2007, p. 1020.

## 1. The operation of the Inter-American System for Human Rights

This first section describes briefly the historical background behind the Inter-American System for Human Rights and presents an overview of the inter-American institutions, the inter-American human rights instruments and the inter-American human rights mechanisms.

### 1.1. Background

The OAS<sup>4</sup>, as a regional organization, aims *inter alia* at strengthening the peace and security of the continent and ensuring the pacific settlement of disputes that may arise among member States<sup>5</sup>. Its Charter, known as the Bogotá Charter, was drafted during the ninth Inter-American Conference<sup>6</sup>, which took place in Bogotá from 30 March to 2 May 1948<sup>7</sup>. All the thirty five American states have ratified

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<sup>4</sup> On the OAS, see: SHEININ, D.: *The Organization of American States*, Transaction Publishers, 1996; VAKY, V.P. & MUÑOZ, H.: *The Future of the Organization of American States*, Twentieth Century Fund Press, 1993; STOETZER, O.: *The Organization of American States: An Introduction*, Frederick A. Praeger, 1966; FENWICK, CH.: *The Organization of American States: The Inter-American Regional System*, Kaufman, 1963; THOMAS, A.: *The Organization of American States*, Southern Methodist University Press, 1963; DREIER, J.: *The Organization of American States and the Hemisphere Crisis*, Harper and Row Publishers, 1962.

<sup>5</sup> Article 2 of the OAS Charter. Cf. Article 52 of the United Nations Charter states that: "1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations. 2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council. 3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council. 4. This Article in no way impairs the application of Articles 34 and 35".

<sup>6</sup> First International Conference of the American States (Washington 1889); Second ICAS (Mexico, 1901-1902); Third ICAS (Rio de Janeiro, 1906); Forth ICAS (Buenos Aires, 1910); Fifth ICAS (Santiago, 1923); Sixth ICAS (La Havana, 1928); Seventh ICAS (Montevideo, 1933); Eighth ICAS (Lima, 1938); Ninth ICAS (Bogotá, 1948).

<sup>7</sup> Since it entered into force in 1951, the Bogotá Charter has been amended four times. These amendments aimed at strengthening the structure of the Organization and the principles of collective security, regional solidarity, non-intervention, as well as the

it and are therefore members of the organization<sup>8</sup>. The Charter does not contain many references to human rights. The most important human rights related provisions are Article 3(l), which states that “American states proclaim the fundamental rights of the individual without distinction as to race, nationality, creed, or sex” and Article 17, which calls the states to “respect the rights of the individual and the principles of universal morality” while developing “its cultural, political and economic life freely and naturally”. The “fundamental rights” referred to by the Charter are not defined. However, during the Conference of Bogotá, the American States adopted the American Declaration on the Rights and Duties of Man<sup>9</sup>, the first stone of the inter-American human rights edifice, proclaiming a rich and substantial human rights catalogue (see *infra*).

The development of the inter-American system for the protection of human rights took a significant turn in 1959, with the creation of the Inter-American Commission on Human Rights<sup>10</sup>. Concerned by the massive human rights abuses perpetrated during the Trujillo regime in Dominican Republic, as well as during Fidel Castro’s rise to power in Cuba, and inspired by the emerging European and global human rights systems, the OAS’s governments called for the adoption of an American Convention and for the institutionalization of human rights bodies<sup>11</sup>.

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democratic and human rights principles asserted in the Declaration. See BUERGENTHAL, TH. & NORRIS, R.: *supra* note 3, pp. 37-44.

<sup>8</sup> The OAS original Member States (1948) are as follows: Argentina, Bolivia, Brazil, Chili, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, the United States, Uruguay, Venezuela. The States that joined later are: Barbados, Trinidad and Tobago (1967); Jamaica (1969); Grenada (1975); Surinam (1977); Dominica, St. Lucia (1979); Antigua and Barbuda, St. Vincent and Grenadines (1981); Bahamas (1982); St. Kitts and Nevis (1984); Canada (1990); Belize, Guyana (1991). Cuba, one of the founding members, was suspended in 1962.

<sup>9</sup> The States also adopted the Inter-American Charter of Social Guarantees that underlined the key role of work in society and proclaimed the minimal rights to which the workers of the Continent are entitled. This Charter, however, never entered into force. See on the social, economic and social rights in the inter-American system of human rights: CRAVEN, M.: “The Protection of Economic, Social and Cultural Rights under the inter-American System of Human Rights”, in HARRIS, D. & LIVINGSTONE, S.: *supra* note 3, p. 289.

<sup>10</sup> CERNA, CH.: “The Inter-American Commission on Human Rights: Its Organization and Examination of Petitions and Communications”, in HARRIS, D. & LIVINGSTONE, S.: *supra* note 3, pp. 65-114.

<sup>11</sup> The Fifth Meeting of Consultation of Ministers of Foreign Affairs took place in Santiago de Chile from 12 to 18 August 1959. It concluded that considering the progress that had been made regarding human rights since the adoption of the Ameri-



They decided to create the Inter-American Commission on Human Rights, which was charged with monitoring human rights in the hemisphere, at least until an American convention on human rights could be adopted<sup>12</sup>. Indeed, the political context in the region prevented the adoption of such convention for ten years. In the meantime, the Commission took office in June 1960 with the function "to promote respect for human rights" understood "to be those set forth in the American Declaration of the Rights and Duties of Man"<sup>13</sup>. The Commission was not, however, created by treaty, but instead simply by the resolution of a political body<sup>14</sup>. This origin confirms the temporary nature of the institution and also underlines its extreme institutional weakness since it could have been easily abolished by the member States<sup>15</sup>. The Buenos Aires Protocol<sup>16</sup>, which amended the OAS Charter and entered into force in 1970, remedied that weakness by institutionalizing the Inter-American Commission as an OAS Charter organ in charge of promoting the observance and protection of human rights. The Inter-American Commis-

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can Declaration, and in view of the mechanisms of protection that were being implemented by the United Nations and the Council of Europe, it was appropriate to envisage the adoption of an American convention on human rights backed by monitoring institutions. The Inter-American Council of Jurists was entrusted with the mission of preparing a draft Convention on human rights and "a draft convention or draft conventions on the Creation of an Inter-American Court for the Protection of Human Rights and of other organizations appropriate for the protection and observance of those rights." See the complete text of the Declaration at the Fifth Meeting of Consultation of Ministers of Foreign Affairs, Santiago, Chile, 12 to 18 August 1959, Final Act. Document OEA/Ser.C/II.5, 10-11.

<sup>12</sup> Article 150 of the OAS Charter, as amended by the Protocol of Buenos Aires states that "Until the Inter-American Convention on Human Rights, referred to in Chapter XVI, enters into force, the present Inter-American Commission on Human Rights shall keep vigilance over the observance of human rights".

<sup>13</sup> Article 2, 1960 Commission's Statute.

<sup>14</sup> See Resolution VIII of the Fifth Meeting of Consultation of Ministers of Foreign Affairs. Paragraph II of Resolution VIII resolved: To create an Inter-American Commission on Human Rights composed of seven members elected as individuals by the Council of the Organization of American States from panels of three names presented by the governments. The Commission, which shall be organized by the Council of the Organization and have the specific functions that the Council assigns to it, shall be charged with furthering respect for such rights. Res. VIII, Fifth Meeting of Consultation of Ministers of Foreign Affairs, Final Act, Santiago, Chile (12-18 Aug. 1959). OAS Off. Rec. OEA/ Ser.F/II.5, (Doc. 89, English, Rev.2) Oct. 1959 at 10-11.

<sup>15</sup> BUERGENTHAL, TH.: "The Revised OAS Charter and the Protection of Human Rights", 69 *AJIL*, 1975, 828 at 833.

<sup>16</sup> Protocol of Amendment to the Charter of the Organization of American States (also called Protocol of Buenos Aires), signed on 27 February 1967 and entered into force on 12 March 1970, OAS/Ser.A/ 1.

sion on Human Rights thus finally attained the “constitutional legitimacy” that it lacked<sup>17</sup>.

In November 1969, in San José, Costa Rica, the American States finally adopted the American Convention on Human Rights, which did not enter into force until 18 July 1978, and created the Court, which began to operate on 3 September 1979. According to the Convention both the Commission and the Court have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to the Convention. The time-lags between the creation of the Commission in 1959<sup>18</sup>, the adoption of the Convention in 1969 and the creation of the Court in 1979 explain the two overlapping inter-American systems: the first one is based on the Declaration and the operation of the Commission; the second one is based on the Convention and on the operation of the Commission, as a quasi-judicial body, and of the Court, autonomous judicial body<sup>19</sup>.

## 1.2. *The Inter-American Human Rights Institutions: A Commission and a Court*

In the current configuration of the Inter-American System of Human Rights the two main human rights organs<sup>20</sup> are the Inter-American Commission and the Inter-American Court.

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<sup>17</sup> CERNA, CH.: “The Inter-American Commission on Human Rights: Its Organization and Examination of Petitions and Communications”, in HARRIS, D. & LIVINGSTONE, S.: *supra* note 3, pp. 65 and 68.

<sup>18</sup> From the moment it was created until the Convention entered into force, the Commission created in 1959 had already developed its activities and played a substantial role not only regarding the adoption of reports, but also concerning individual petitions. From the time of the creation of the Commission until the adoption of the Convention, the Commission had already worked on series of individual complaints concerning such States as Argentina, Chile, El Salvador, Guatemala, Uruguay and Paraguay, among which none was eager to ratify the Convention. FARER, T.: “The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox”, in HARRIS, D. & LIVINGSTONE, S.: *supra* note 3, pp. 40-41.

<sup>19</sup> Indeed, when the Convention was drafted, the following question arose: was it more appropriate to limit the jurisdiction of the Commission to the one ascribed by the Convention or to maintain its existing jurisdiction and expand it accordingly? Formally, it would have been more efficient to choose the first solution. But politically, as former President of the Inter-American Commission on Human Rights (1976-1983) Tom Farer explains, it would have been problematic as States could merely abstain from ratifying the Convention to escape any sort of supervision regarding compliance with human rights obligations on their territory. FARER, T.: “The Rise...”, *op. cit.*, pp. 39-42.

<sup>20</sup> See also GÓMEZ, V.: “The Interaction between the Political Actors of the OAS, the Commission and the Court”, in HARRIS, D. & LIVINGSTONE, S.: *supra* note 3, p. 173.

### 1.2.1 THE INTER-AMERICAN COMMISSION OF HUMAN RIGHTS

The Commission's headquarters is located in Washington D.C., where it meets in regular and special sessions<sup>21</sup>. The seven members of the Commission are elected by the General Assembly of the OAS from a list of candidates proposed by the member States' governments. The members of the Commission are elected in a personal capacity among persons of the highest moral standards and recognized competence in the field of human rights, and must be nationals of a member State of the OAS. Their four-year mandate can be renewed only once<sup>22</sup>.

Created in 1959 at the Fifth Meeting of Consultation of Ministers of Foreign Affairs<sup>23</sup> held in Santiago del Chile, the Commission was "an autonomous organ of the Organization of American States, whose principal functions are to promote the observance and defense of human rights and to serve as an advisory body of the Organization in this area"<sup>24</sup>. As mentioned above, the Buenos Aires Protocol, amending the Bogotá Charter in 1970, transformed the Commission into an organ of the OAS. Following the adoption of the American Convention in 1969, the Commission began to serve its dual roles. First, the Commission remained an OAS Charter organ, which performed various functions relevant for the 35 OAS members. Second, the Commission became a conventional quasi-judicial body which has jurisdiction to apply and interpret the Convention and which performs functions relevant for the twenty-four States Parties to the Convention. Year after year, the Commission shaped its own functions and imposed its authority over the OAS and its members. The Commission mentioned by the 1969 American Convention was the one that had

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<sup>21</sup> On the Inter-American Commission of Human Rights, see CERNA, CH.: *op. cit.*, p. 65; SANTOSCOY, B.: *La Commission interaméricaine des droits de l'homme et le développement de sa compétence par le système des pétitions individuelles*, P.U.F., 1995; GROSSMAN, C.: "Proposals to Strengthen the Inter-American System of Protection of Human Rights", 32 *Ger. Y.B. Int'l L.*, 1989, p. 264; COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS: *Diez Años de Actividades 1971-1981*, 1982; CAÑADO TRINDADE, A.A.: "The Evolution of the OAS System of Human Rights Protection: An Appraisal", 25 *Ger. Y.B. Int'l L.*, 1982, p. 498; SCHREIBER, A.P.: *The Inter-American Commission on Human Rights*, A.W. Sitjthoff&Leyden eds., 1970; VASAK, K.: *La Commission interaméricaine des droits de l'homme*, L.G.D.J., 1968.

<sup>22</sup> See Articles 34-38 of the American Convention and Articles 2-15 of the Commission's Statute.

<sup>23</sup> See the complete text of the Declaration at the Fifth Meeting of Consultation of Ministers of Foreign Affairs, Santiago, Chile, 12 to 18 August 1959, Final Act. Document OAS/Ser.C/II.5, pp. 4-6.

<sup>24</sup> Article 1 of the Commission's rules of procedure.

been created in 1959. It had been created hastily, and was later absorbed and recognized by the Buenos Aires Protocol. Yet, by the terms of the Convention, this Commission would only have jurisdiction over ratifying countries. Refusing to abandon its jurisdiction over non-ratifying States, the Commission "proceeded to draft a new statute and regulations consistent with the view that the Convention's activation resulted simply in *adding* a second sort of jurisdiction to the Commission's armory"<sup>25</sup>. The new Statute of the Commission was adopted by the General Assembly of the OAS in 1979, thus confirming the dual functions of the Commission as a Charter organ on the one hand and as a Convention organ on the other<sup>26</sup>.

As a Charter organ, the Commission's functions are: to raise awareness of human rights among the peoples of the Americas; to make recommendations to the States concerning the adoption of progressive measures in favor of human rights in their legislation, constitutional provisions and international commitments, as well as appropriate measures to further observance of those rights; to prepare studies or reports; to request that the governments provide reports on the measures the human rights related measures they adopt; to respond to inquiries made by any member State through the General Secretariat of the Organization on matters related to human rights and to provide those States with the advisory services they request; to submit an annual report to the General Assembly of the Organization; and to conduct on-site observations, with the consent or at the invitation of the government in question<sup>27</sup>. Those functions are general and concern all the 35 members of the OAS. In addition, regarding those States that are not parties to the American Convention, the Commission has the power, after the exhaustion of domestic remedies, to examine communications and any other available information deemed pertinent to address the government concerned and to make recommendations when appropriate. The States that have not ratified the Convention will respond before the Commission for the alleged violation of the rights set forth in the American Declaration. Article 1 of its Statute specifically provides that for the States not parties to the Convention, human rights must be understood as the rights set forth in the American Dec-

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<sup>25</sup> FARER, T.: "The Rise...", *op. cit.*, pp. 40-41.

<sup>26</sup> *Id.* 31-64. See also HARRIS, D.: "Regional Protection of Human Rights...", *op. cit.*, pp. 1-29 MEDINA, C.: "The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture", 12 *Human Rights Quarterly*, 1990, p. 443.

<sup>27</sup> Article 18 of the Commission's Statute.

laration of the Rights and Duties of Man<sup>28</sup>. The Commission was officially endowed with the competence to receive complaints from individuals during the Second Special Inter-American Conference, held in Rio de Janeiro in 1965 with the adoption of the XXII Resolution amending the Statute of the Commission<sup>29</sup>. However, Article 20 of its new Statute did not give a general jurisdiction to hear individual petitions, but rather required that the Commission limit its attention to a certain set of rights in the Declaration<sup>30</sup>. The Commission initially adopted a restrictive interpretation of this provision, considering the text of Article 20.a to be an exhaustive list of rights. On the basis of this interpretation, the Commission was only competent to consider individual petitions alleging violations of the rights enumerated in the aforementioned article. Only at a later point did the Commission change its orientation, considering the list of rights to be illustrative but not exhaustive. Currently, individual petitions before the Commission may allege a violation of any of the rights set forth in the American Declaration. The procedure of adjudication for these petitions is similar to the one applicable under the Convention system (*infra*).

As a Convention organ, the Commission may adjudicate denunciations or complaints regarding States parties to the Convention lodged by individuals: any person or group of persons, or any non governmental entity legally recognized in one or more member States of the OAS<sup>31</sup>. It may also adjudicate communications in which a State Party alleges that another State Party<sup>32</sup> has committed a violation of a human right set

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<sup>28</sup> Article 1 of the Commission's statute reads as follow: "1) The Inter-American Commission on Human Rights is an organ of the Organization of the American States, created to promote the observance and defense of human rights and to serve as consultative organ of the Organization in this matter. 2) For the purposes of the present Statute, human rights are understood to be: a) The rights set forth in the American Convention on Human Rights, in relation to the States Parties thereto; b) The rights set forth in the American Declaration of the Rights and Duties of Man, in relation to the other member States".

<sup>29</sup> See Resolution XXII of the Second Special Inter-American Conference, Final Act, OAS/Ser.C/I.13, 1965, 32-34.

<sup>30</sup> Article 20.a of the Inter-American Commission's Statute requires that the Commission "pay particular attention to the observance of the human rights referred to in Articles I, II, III, IV, XVIII, XXV, and XXVI of the American Declaration of the Rights and Duties of Man". It refers to the right to life, liberty and personal security, right to equality before the law, right to religious freedom and worship, right to freedom of investigation, opinion, expression and dissemination, right to a fair trial, right of protection from arbitrary arrest, right to due process of law.

<sup>31</sup> Article 44 of the American Convention.

<sup>32</sup> Article 63(2) of the Convention; Article 19.c of the Commission's Statute; Article 74 of the Commission's Rules of Procedure.

forth in this Convention<sup>33</sup>. The Commission automatically has jurisdiction over individual communications regarding any State Parties to the Convention as soon as the State has ratified it, while it only has jurisdiction over inter-State communications if both States involved in the dispute have expressly recognized the Commission's inter-State jurisdiction<sup>34</sup>. Moreover, the Commission may order or request the Court to issue provisional measures in serious and urgent cases, which have not yet been submitted to the Court for consideration, whenever this becomes necessary to prevent irreparable injury to persons (*infra*).

### 1.2.2. THE INTER-AMERICAN COURT OF HUMAN RIGHTS

The Inter-American Court of Human Rights is the autonomous judicial organ of the Convention system competent to apply and to interpret the American Convention of Human Rights<sup>35</sup>. The Inter-American Court of Human Rights was created by the American Convention and became operative in 1979, when the General Assembly of the OAS elected its first judges<sup>36</sup>.

<sup>33</sup> Article 45 of the American Convention.

<sup>34</sup> Inter-State communications are regulated by Articles 46 through 50 of the American Convention on Human Rights. Article 45(1) of the American Convention on Human Rights: "Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention". Article 45.2 of the American Convention on Human Rights: "Communications presented by virtue of this article may be admitted and examined only if they are presented by a State Party that has made a declaration recognizing the aforementioned competence of the Commission. The Commission shall not admit any communication against a State Party that has not made such a declaration". This procedure has been used only once in 2006 when Nicaragua presented an inter-State communication against Costa Rica.

<sup>35</sup> Article 1 of the Court's Statute.

<sup>36</sup> On the Inter-American Court of Human Rights, see: HENNEBEL, L.: *La Convention américaine des droits de l'homme: mécanismes de protection et étendue des droits et libertés*, Bruylant, 2007; PASQUALUCCI, J.M.: *The Practice and Procedure of the Inter-American Court of Human Rights*, Cambridge, Cambridge University Press, 2003; TIGROUDIA, H. & PANOSSIS, K.: *La Cour interaméricaine des droits de l'homme: Analyse de la jurisprudence consultative et contentieuse*, Bruylant, 2003; CAÑADO TRINDADE, A.A.: "The Operation of the Inter-American Court of Human Rights", *op. cit.*, p. 133; DAVIDSON, S.: *The Inter-American Court of Human Rights*, Dartmouth, 1992; CAÑADO TRINDADE, A.A.: "Formación, Consolidación y Perfeccionamiento del Sistema Interamericano de Protección de los Derechos Humanos", in *XVII Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano 1990, 1991*; CERNA, CH.: "The Structure and Functioning of the Inter-American Court of Human Rights (1979-1992)", *Brit. Y.B. Int'l L.*, 1992, p. 135.

The Court sits in San José, Costa Rica<sup>37</sup>. It is composed of seven judges who must be nationals of a OAS State, and who are “elected in an individual capacity from among jurists of the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions under the law of the State of which they are nationals or of the State that proposes them as candidates”<sup>38</sup>. The Court’s judges have a six-year mandate that can be renewed only once<sup>39</sup>. The position of judge at the Court is not a full-time position. The judges meet three or four times per year during its sessions. A permanent professional staff – reputed to be insufficient – assists the judges with their work.

The Court performs two main types of functions. First, the Court has jurisdiction to adjudicate cases, referred by the Commission or by another State party, alleging that a State party, which has accepted the contentious jurisdiction of the Court, has breached the Convention. To date, twenty-one of the twenty-four States parties have accepted the contentious jurisdiction of the Court<sup>40</sup>: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela<sup>41</sup>. As

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<sup>37</sup> Article 3.1 of the Court’s Statute.

<sup>38</sup> Article 52(1) of the American Convention and Article 4.1 of the Court’s Statute. The procedure of election has been criticized, as it often is the result of diplomatic negotiations between States rather than a strict selection among experts on human rights issues. See on this point: PASQUALUCCI, J.M.: *supra* note 36, 348-49; BURGENTHAL, TH. & CASSEL, D.: “The Future of the Inter-American Human Rights System”, in MÉNDEZ, J. and COX, F. (eds.): *El Futuro del Sistema Interamericano de los Derechos Humanos*, 1998, pp. 539 and 544-5; CASSEL, D.: “Somoza’s Revenge: A New Judge for the Inter-American Court”, 13 *Human Rights Law Journal*, 1992, pp. 137 and 139.

<sup>39</sup> Articles 53-54 of the American Convention and Article 5.1 of the Court’s Statute.

<sup>40</sup> CAÑADO TRINDADE, A.A.: “Current State and Perspectives of the Inter-American System...”, *op. cit.* See Cañado Trindade’s comment on modes of acceptance of the Court’s jurisdiction: “Among these modes of acceptance of the Court’s jurisdiction, set forth in Article 62(2) of the Convention, it is rather surprising to find the condition of reciprocity, which, in practical terms, could only be resorted to in inter-State cases (never brought before the Court until the present time), but not in cases referred to it by the Commission. Moreover, considerations of reciprocity have proven utterly inadequate in the present domain of protection, where they have been gradually overcome by the notion of collective guarantee and considerations of common or general ‘public interest’ or *ordre public*”. On the erosion of reciprocity and the prominence of considerations of *ordre public* in the domain of the international protection of human rights, see CAÑADO TRINDADE, A.A.: *A Proteção Internacional dos Direitos Humanos – Fundamentos Jurídicos e Instrumentos Básicos*, Saraiva Ed., 1991, p. 10.

<sup>41</sup> Trinidad and Tobago has denounced the American Convention. See *infra* note 69.

2007, the Court has judged ninety-five cases brought by individuals. Its contentious jurisdiction load has increased since 2004: the Court judged fifty-five cases between 1987 and 2003 and forty between 2004 and 2007<sup>42</sup> (*infra*). Second, the Court has jurisdiction to issue advisory opinions<sup>43</sup>. The scope of the Court's advisory jurisdiction, as provided by the Convention and interpreted by the Court, is quite extensive. According to Article 64(1) of the Convention, any member State of the OAS, or any OAS organ including the Commission, within its spheres of competence<sup>44</sup>, may consult the Court regarding the interpretation of the Convention or of other treaties related to human rights in the American States. The Court interpreted broadly the notion "other treaties" and asserts its competence to interpret "any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such a treaty, and whether or not non-Member States of the inter-American system are or have the right to become parties thereto"<sup>45</sup>. The Court has rendered advisory opinions related, for instance, to the 1948 American Declaration and to the 1963 Vienna Convention on Consular Relations<sup>46</sup>. Moreover, according to Article 64(2), any member of the OAS may request the Court to provide opinions regarding the compatibility of any of its domestic laws with the Convention or with other treaties related to human rights in the

<sup>42</sup> 2007 annual report, Inter. Am. Ct. HR, at 61.

<sup>43</sup> See PASQUALUCCI, J.: "Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law", 38 *Stan. J. Int'l L.*, 2002, p. 241.; BUERGENTHAL, TH.: "The Advisory Practice of the Inter-American Human Rights Court", 79 *Am. J. Int'l L.*, Vol. 1, 1985, p. 25.

<sup>44</sup> Advisory Opinion OC-2/82, The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts. 74 and 75), Inter-Am. Ct. H.R. (ser. A) No. 2, para. 14 (1982) (the OAS organs must demonstrate a "legitimate institutional interest" in the subject matter of the request), para. 16 (the Commission enjoys, as a practical matter, an absolute right to request advisory opinions).

<sup>45</sup> Advisory opinion OC-1/82, "Other Treaties" Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights), Inter-Am. Ct. H.R., (Ser. A) No. 1, first point of the opinion (1982).

<sup>46</sup> Advisory opinion OC-10/1989, Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Inter-Am. Ct. H.R. (ser. A) No. 10 (1989); Advisory Opinion OC-16/99, The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Inter-Am. Ct. H.R. (ser. A) (1999). See CANÇADO TRINDADE, A.A.: "The Humanization of Consular Law: The Impact of Advisory Opinion n. 16 (1999) of the Inter-American Court of Human Rights on International Case-Law and Practice", 4 *Chinese Journal of International Law*, 2007, p. 1.



American States. The Court may issue an advisory opinion concerning the compatibility of laws already in force or proposed laws with the Convention or with other treaties<sup>47</sup>. By their very nature advisory opinions are not legally binding<sup>48</sup>. However, they have an authoritative interpretative effect<sup>49</sup>. The Court, as the autonomous judicial institution in charge of the application of the American Convention, has the authority to interpret the Convention and other treaties in the OAS. In other words, the advisory opinion is not per se binding and the failure of a State to comply with an opinion is not a breach of the Convention, but the interpretations pronounced by the Court cannot be ignored by the States<sup>50</sup>. Since 1979, the Court has rendered 19 advisory opinions: 12 concerning the interpretation of the Convention; 4 dealing with the interpretation of "other treaties"; and 3 on the compatibility between domestic laws and international human rights law; 6 of the 19 advisory's requests were lodged by the Commission and 13 by State members<sup>51</sup>. The Court has interpreted its advisory jurisdiction extensively, showing through the exercise of this power its intention to be a true regional court and not simply the judicial monitoring organ of the American Convention. The advisory procedure is quite open and all the OAS States as well as other actors acting as *amici curiae* have the opportunity to express their opinions. After the formal filing and notification of the request for advisory opinion, and at the end of the written procedure, the Court may organize hearings, which has been a systematic practice up to this point. The fact that all the OAS States and not exclusively the States parties to the Convention may request opinions is a way to leave the Court's door open for the States non-parties.

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<sup>47</sup> Advisory opinion OC-4/1984, Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica, Inter-Am. Ct. H.R., (ser. A) No. 4 (1984).

<sup>48</sup> Advisory opinion OC-3/83, Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Inter-Am. Ct. H.R., (ser. A) No. 3 (1983).

<sup>49</sup> BUERGENTHAL, TH. *et al.*, *supra* note 3, at 271.

<sup>50</sup> In particular, because Article 2 requires States parties to ensure that their domestic laws are compatible with the Convention, when the Court states in an advisory opinion requested by a State party that a law is incompatible with it, the State is duly informed that it is in violation of the Convention. The effect of the Convention as regards States non-parties to the Convention is more difficult to assess since they are not bound by the Convention. Moreover, the effect of the advisory opinions interpreting other treaties such as the International Covenant of Civil and Political Rights on the American States parties to these treaties raises the problem of a possible conflict of jurisdiction between the Court and the organ of supervision of the other treaties.

<sup>51</sup> 2007 Annual Report, Inter-Am. Ct. H.R., at 77.

### 1.3. *The Inter-American Human Rights Instruments: A Declaration and a Convention*

The OAS has elaborated a normative framework that is based on the Declaration, the Convention, and instruments aiming at the protection of human rights in general and the protection of specific rights or particular categories of persons.

#### 1.3.1. THE AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN

The American Declaration of the Rights and Duties of Man predates by some months the Universal Declaration of Human Rights adopted in 1948. The Ninth International Conference of American States proclaimed it on 2 May 1948. The Declaration regards rights as “attributes of human personality” and provides that “the fulfillment of duty by each individual is a prerequisite to the rights of all”<sup>52</sup>. It consists of a Preamble and 38 articles. The text is divided into two chapters: the first focuses on rights, while the second focuses on duties. The Declaration recognizes a vast array of civil, political, social, economic and cultural rights and aims at the protection of all human beings at all time. The rationale of the Declaration is expressed in its Preamble, which states that “the American peoples have acknowledged the dignity of the individual, and their national constitutions recognize that juridical and political institutions, which regulate life in human society, have as their principal aim the protection of the essential rights of man and the creation of circumstances that will permit him to achieve spiritual and material progress and attain happiness; The American States have on repeated occasions recognized that the essential rights of man are not derived from the fact that he is a national of a certain State, but are based upon attributes of his human personality; The international protection of the rights of man should be the principal guide of an evolving American law; The affirmation of essential human rights by the American States together with the guarantees given by the internal regimes of the States establish the initial system of protection considered by the American States as being suited to the present social and juridical conditions, not without a recognition on their part that they should increasingly strengthen that sys-

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<sup>52</sup> See generally CANÇADO TRINDADE, A.A.: “El Sistema Interamericano de Protección de los Derechos Humanos (1948-1995): Evolución, Estado Actual y Perspectivas”, in BARDONNET, D. and CANÇADO TRINDADE, A.A. (eds.): *Derecho Internacional y Derechos Humanos/Droit international et droits de l’homme*, 1996, p. 47.

tem in the international field as conditions become more favorable". The rights proclaimed by the Declaration include: the right to life, liberty and personal security; the prohibition of arbitrary arrest; the right to due process of law; the right to equality before the law; the right to religious freedom and worship; the freedoms of opinion, expression, assembly and association; the right to protection of honor, personal reputation and family life; the protection of the family; the protection of mothers and children; the right to residence and movement; the right to privacy; the right to health; the right to property; the right to education; the right to benefits of culture; the right to work and fair remuneration; the right to leisure time; the right to social security; the right to recognition of juridical personality and civil rights; the right to a fair trial; the right to nationality; the right to participate in government; the right to petition; and the right of asylum<sup>53</sup>. The duties include: duties to society; duties toward children and parents; duties to receive instruction; duties to vote; duties to obey the law; duties to serve the community and the nation; duties with respect to social security and welfare; duties to pay taxes; duties to work; and duties to refrain from political activities in a foreign country.

The American Declaration was not meant to be legally binding<sup>54</sup>. However, the American Declaration became indirectly binding thanks to the Inter-American bodies' dynamic interpretation. In Advisory Opinion no. 10<sup>55</sup>, the Court stated the following: "What is clear (...) is that the Declaration is not a treaty as defined by the Vienna Convention be-

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<sup>53</sup> See DAVIDSON, S.: "The Civil and Political Rights Protected in the Inter-American Human Rights System", in HARRIS, D. & LIVINGSTONE, S. (eds.): *supra* note 3, p. 213.

<sup>54</sup> See CASSEL, D.: "Inter-American Human Rights Law, Soft and Hard", in SHELTON, D. (ed.): *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford University Press, Oxford, 2000, p. 393; HARRIS, D.: "Regional "Protection of Human Rights: The Inter-American Achievement", in HARRIS, D. & LIVINGSTONE, S. (eds.): *supra* note 3, p. 4; BUERGENTHAL, TH.: "The American Human Rights Declaration: Random Reflections", in RESS, G. and STEIN, T. (eds.): *Staat und Völkerrechtsordnung. Festschrift für Karl Doehring*, 1989, p. 133.

<sup>55</sup> Advisory opinion OC-10/1989, Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Inter-Am. Ct. H.R. (ser. A) No. 10, para. 33 (1989). The question asked by the Government of Colombia regarding the interpretation of the American Declaration of the Rights and Duties of Man within the framework of Article 64 of the American Convention on Human Rights was the following: "Does Article 64 authorize the Inter-American Court of Human Rights to render advisory opinions at the request of a member State or one of the organs of the OAS, regarding the interpretation of the American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States in Bogotá in 1948?" (para. 2).

cause it was not approved as such (...) <sup>56</sup>. However, according to the Court, “the American Declaration is for these States a source of international obligations related to the Charter of the Organization” <sup>57</sup>. The Declaration is therefore virtually considered as the comprehensive and binding definition of the Charter’s human rights obligations. In other words, the American Declaration is seen as the authoritative interpretation of the fundamental rights of the individual proclaimed by the OAS Charter <sup>58</sup>. The Inter-American Commission has adopted the same position and applies and interprets the rights of the Declaration as an indirectly legally binding instrument when monitoring the Charter’s human rights obligations.

The binding nature of the Declaration, however, remains controversial for some States, in particular for the United States, that have repeatedly declared that the Declaration was not intended to be legally binding <sup>59</sup>. The issue of the legal effect of the Declaration is not only a

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<sup>56</sup> *Id.* para. 35: “The mere fact that the Declaration is not a treaty does not necessarily compel the conclusion that the Court lacks the power to render an advisory opinion containing an interpretation of the American Declaration”.

<sup>57</sup> *Id.* para. 45.

<sup>58</sup> *Id.* para. 43: “Hence it may be said that by means of an authoritative interpretation, the member States of the Organization have signaled their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter. Thus the Charter of the Organization cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration”.

<sup>59</sup> *Roach & Pinkerton v. United States*, Case 9647, Inter-Am. Ct. H.R., Resolution No. 3/87, OEA/Ser.LV/II.71 Doc. 9 rev. 1, para. 38 (1986-1987): “The U.S. Government does not agree with the Commission’s holding in Case No. 2141 (United States) that the Declaration acquired binding force with the adoption of the revised OAS Charter (Res. 23/81, OAS/Ser. LV/II.52, Doc. 48. Mar. 6, 1981). The Declaration was not drafted with the intent to create legal obligations”. *Advisory opinion OC-10/1989, Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Inter-Am. Ct. H.R. (ser. A) No. 10, para. 33 (1989), para. 12: “The Government of the United States of America believes: The American Declaration of the Rights and Duties of Man represents a noble statement of the human rights aspirations of the American States. Unlike the American Convention, however, it was not drafted as a legal instrument and lacks the precision necessary to resolve complex legal questions. Its normative value lies as a declaration of basic moral principles and broad political commitments and as a basis to review the general human rights performance of member States, not as a binding set of obligations. The United States recognizes the good intentions of those who would transform the American Declaration from a statement of principles into a binding legal instrument. But good intentions do not make law. It would seriously undermine the process of international lawmaking – by which sovereign States voluntarily undertake specified legal obligations – to impose legal obligations on States through a process of ‘reinterpretation’ or ‘inference’ from a non-binding statement of principles”.

theoretical one. It entails two questions essential to the efficient functioning of the Inter-American system for the protection of human rights. The first question deals with the States' legal obligations as regards the American Declaration. Since the Declaration is indirectly binding, the scope of the obligations of the States is unclear. Indeed, as the Declaration is not a convention and has not been adopted with the aim of being legally binding, it has been generally phrased and concerns individual human beings rather than States<sup>60</sup>. Because of its declaratory nature, this text does not provide general or specific legal obligations and the rights it enumerates are expressed in absolute terms<sup>61</sup>. Moreover, since it is not a treaty, States cannot make reservations, suspend, or derogate from the text. Therefore, the use of the Declaration as the authoritative enumeration of the OAS Charter's human rights obligations may raise difficult questions of interpretation that the Commission must address. The second question deals with the coexistence of the Declaration and the Convention. Indeed, not all OAS member States have ratified or adopted the American Convention. For these States non-Parties, which are the United States, Canada and most of the Anglophone Caribbean, the main Inter-American human rights source of obligations remains the American Declaration. For the States Parties to the Convention, the question was whether they were still bound by the Declaration. This question is highly relevant since the rights protected in the Declaration and the Convention are not identical. Indeed, the Declaration protects some rights that are not mentioned in the Convention, most notably socio-economic and cultural rights<sup>62</sup> such as the rights to education, to the benefits of culture, to work and to fair remuneration, to leisure time and to the use thereof, to social security, etc. In theory the two instruments coexist in such a way that a State that ratifies the Convention is still bound as a member of the OAS by the Declaration, since that State remains Party to the Bogotá Charter. The Inter-American Court corroborated this theory in Advisory Opinion no. 10: "For the States Parties to the Convention, the specific source of their obligations with respect to the protection of human rights is, in principle, the Convention itself. It must be remembered, however, that,

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<sup>60</sup> The Declaration states that "All men are born free and equal (...)" rather than "States shall respect and ensure the following rights and liberties".

<sup>61</sup> Yet, Article 28 of the Declaration states the scope of the rights protected: "The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy".

<sup>62</sup> See CRAVEN, M.: "The Protection of Economic, Social and Cultural Rights under the inter-American System of Human Rights", *op. cit.*, pp. 291-296.

given the provisions of Article 29(d), these States cannot escape the obligations they have as members of the OAS under the Declaration, notwithstanding the fact that the Convention is the governing instrument for the States Parties thereto"<sup>63</sup>. Yet, despite the position of the Court, the Inter-American Commission, which is the only body competent to monitor the States' human rights obligations provided by the Bogotá Charter (and the American Declaration), held the opposite view, according to which States Parties to the Convention are not bound anymore by the Declaration. That interpretation derives from Article 1(2) of the Commission's statute, which states the following: "human rights are understood to be: a. The rights set forth in the American Convention on Human Rights, in relation to the States Parties thereto; b. The rights set forth in the American Declaration of the Rights and Duties of Man, in relation to the other member States". The Commission applies a strict interpretation of this provision and, as such, refuses to apply the American Declaration to States Parties to the Convention<sup>64</sup>. This interpretation is quite restrictive, as the main objective of the 1979 amendment to the statute of the Commission was "to ensure that the Commission retained its monitoring powers over non Convention parties once the Convention had entered into force"<sup>65</sup>, rather than excluding States Parties to the Convention from the application of the Declaration. However, the Commission opted to distinguish clearly between the two systems based on two instruments with different rights, mechanisms and States<sup>66</sup>.

<sup>63</sup> Advisory opinion OC-10/1989, Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Inter-Am. Ct. H.R. (ser. A) No. 10, para. 46 (1989).

<sup>64</sup> *Maximo Bonchil et al. v. Argentina*, Cases 9777 and 9718, Inter-Am. C.H.R., OEA/Ser.LV/II.74, doc. 10 rev.1, Reports, Point V Conclusions para. 6, (1987-1988): "( ) no existe acuerdo o instrumento formulado o concertado entre los Estados Partes en la Convención Americana a los efectos de hacer valer la Declaración Americana de los Derechos y Deberes del Hombre (1948) como parte integrante de la Convención o suplementaria de la misma para los Estados Partes. (...) En consecuencia se concluye que, en cuanto a los Estados Partes en la Convención y para el caso que nos ocupa, la República Argentina, la CIDH solamente puede, conforme con su Reglamento (Art. 31), tomar en consideración las peticiones sobre presuntas violaciones de derechos humanos definidos en la Convención Americana sobre Derechos Humanos. El derecho al trabajo no está todavía incorporado a la Convención, que no incluye los derechos económicos, sociales y culturales".

<sup>65</sup> On these questions see HARRIS, D.: "Regional Protection of Human Rights...", *op. cit.*, p. 8.

<sup>66</sup> The States Parties to the Convention are, however, still bound by the Declaration regarding actions that predated their ratification of the Convention. See *Alonso Eugénio Da Silva v. Brazil*, Case 11.291, Inter-Am. C.H.R., Report No. 9/00, OEA/Ser.LV/II.106

### 1.3.2. THE AMERICAN CONVENTION ON HUMAN RIGHTS

The American Convention is the second cornerstone of the Inter-American system for the protection of human rights. Its adoption in 1969 substantially modified the juridical nature of the system. Previously based on a Declaration, it is now based on a Convention while preserving the Declaration for non-parties to the Convention. The Convention was envisioned as a regional intermediary of the universal system for the protection of human rights. As such, there are many similarities to be found between the American Convention and the 1966 International Covenant on Civil and Political Rights. The drafting process was highly influenced by the Covenant, which was taken as model for the American Convention<sup>67</sup>. The universalistic perspective is thus inherent to the American Convention on Human Rights<sup>68</sup>. The American Convention has been ratified by the following twenty-five States: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay, and Venezuela. However, Trinidad and Tobago has denounced the Convention and therefore is no longer a State Party<sup>69</sup>. To date, the United States of America, Canada,

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doc. 6 rev., para. 19 (1999): "The Commission recalls that, although the events took place on 8 March 1992, a number of months before Brazil ratified the Convention on 25 September 1992, the Brazilian State is not exempt from responsibility for acts violating human rights occurring prior to ratification of the Convention, since the rights guaranteed by the Declaration were binding. The Inter-American Court of Human Rights explicitly recognized the binding character of the Declaration when it stated that "Articles 1(2)(b) and 20 of the Commission's Statute define the Commission's jurisdiction with respect to the human rights enshrined in the Declaration. In other words, for States that ratified the Buenos Aires Protocol, the American Declaration constitutes a source of international obligations under the Organization's Charter".

<sup>67</sup> DUNSHEE DE ABRANCHES, C.: "Comparative Study of the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and the Draft Inter-American Convention on Human Rights", OAS/Ser.LV/II.19, Doc. 18, 24 June 1968. This report evaluated the compatibility between the draft of the American Convention and the 1966 United Nations Covenants.

<sup>68</sup> On the preparatory work of the American Convention, see Organización de los Estados Americanos (OAS), *Conferencia Especializada Interamericana sobre Derechos Humanos-Actas y Documentos (San José de Costa Rica)*, OEA doc. OEA/Ser.K/XVI/1.2, (1969).

<sup>69</sup> PARASSRAN CONCEPCION, N.: "The Legal Implications of Trinidad & Tobago's Withdrawal from the American Convention on Human Rights", 18 *Am. U. Int'l L. Rev.*, 2001, pp. 847-849. See also Hilaire, Constantine & Benjamin v. Trinidad and Tobago, 2001 Inter-Am. Ct. H.R. (ser. C) No. 94 (21 June 2000); 2005 Caesar v. Trinidad and Tobago, Inter-Am. Ct. H.R., (ser. C) No. 123 (11 March 2005).

and most of the English-speaking Caribbean countries, have not ratified the American Convention.

The Convention is divided into three parts: the first addresses the obligations of the States and the rights protected, the second focuses on means of protection, and the third deals with general and transitory provisions. The first paragraph of the preamble states that the Convention intends "to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man". The ideological aim of the Inter-American system for the protection of human rights can be inferred from this paragraph, as it regards democracy as the only system that can effect the protection of human rights.

The rights and liberties protected by the Convention include the prohibition of discrimination, the right to juridical personality, the right to life, the right to humane treatment, the prohibition of torture, the freedom from slavery and servitude, the right to personal liberty, the right to a fair trial and judicial guarantees and protection, the freedom from ex post facto laws, the right to a fair compensation for miscarriage of justice, the right to privacy, the freedom of conscience and religion, the freedom of thought and expression, the right to reply, the right of assembly, the freedom of association, the rights of the family, the right to a name, the rights of the child, the right to nationality, the right to property, the freedom of movement and residence, the right to participate in government, the right to equal protection of the law, and Article 26 refers to the progressive implementation of economic, social and cultural rights<sup>70</sup>. Article 32 endorses the relationship between rights and duties by providing that every person has responsibilities to his family, his community and mankind. The beneficiaries of most of the rights provided by the Convention are "persons," meaning in the Convention "every human being"<sup>71</sup>. That means that juridical persons such as corporations are not the beneficiaries of the Convention's rights. As a consequence, the "victim" that al-

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<sup>70</sup> Article 26. Progressive Development. "The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires". See CRAVEN, M.: "The Protection of Economic, Social and Cultural Rights...", *op. cit.*, p. 289.

<sup>71</sup> Article 1(2) of the American Convention. However, the beneficiaries of the political rights provided by Article 23 of the Convention are the "citizens".



leges human rights abuses before the Commission must be a physical person<sup>72</sup>.

The States Parties have two general obligations under the Convention: the obligation to respect and ensure human rights, and the obligation to adopt the domestic laws necessary to this end. First, according to Article 1 of the Convention the States Parties undertake "to respect the rights and freedoms" of the Convention and "to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination (...)". This general obligation is of major importance in the American Convention since the obligation to respect and ensure applies to all the rights recognized in the Convention. Respecting these rights entails that States cannot violate, directly or indirectly, their obligation to ensure entails that they must adopt and implement the measures that are reasonable and necessary to ensure the free and full enjoyment of human rights, which includes their duties to prevent, to investigate, to sanction and to compensate the human rights abuses<sup>73</sup>. Moreover, Article 25 of the Convention provides that the States Parties have the obligation to ensure that the victims of human rights abuses should be granted an effective judicial remedy. Second, according to Article 2 of the Convention, which provides the other general obligation, the State Parties undertake "to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms". For the Court, that general obligation "implies the adoption of measures on two fronts: on the one hand, the suppression of rules and practices of any kind that entail violation of the guarantees set forth in the Convention; on the other, the issuance of rules and the development of practices

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<sup>72</sup> Tomás Enrique Carvallo Quintana v. Argentina, Case 11.859, Inter-Am. C.H.R., Report No. 67/01, OEA/Ser.L/V/II.114 doc. 5. rev., para. 55 (2001): "The jurisprudence of the Commission is consistent in indicating that claims raised before it that were litigated before the national courts in the name of juridical persons as opposed to individual victims are not admissible, because the Commission lacks the competence *ratione personae* to examine claims which concern the rights of juridical persons. This is indicated quite directly in the preamble of the American Convention, which indicates that 'the essential rights' protected are 'based on attributes of the human personality', Article 1(1), which speaks to the obligation of the State to respect and ensure the rights of "all persons" subject to its jurisdiction, and Article 1(2) which defines 'person' as 'every human being'. The present case discloses no elements to justify a change in the Commission's practice in this regard".

<sup>73</sup> See BASCH, F.: "The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers", 23 *Am. U. Int'l L. Rev.*, p. 195.

leading to the effective observance of said guarantees"<sup>74</sup>. For the Court, the international liability of the States "arises from the violation of the general obligations, *erga omnes* in nature, to respect and enforce respect for - guarantee- the protection standards and to ensure the effectiveness of the rights enshrined therein, in all circumstances and in respect to all persons under their jurisdiction, embodied in Articles 1(1) and 2 of said treaty"<sup>75</sup>.

The majority of the rights of the Convention are not absolute. Most of them can be subject to the restrictions established by law when such restrictions are necessary in a democratic society, and are aimed at lawful purposes (such as protecting national security, public safety or public order, or protecting public health or the rights and freedoms of others)<sup>76</sup>. Moreover, Article 27 of the Convention states that "in time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin"<sup>77</sup>. Derogation is not permitted for the following so-called non-derogable rights, however: the right to juridical personality; the right to life; the right to humane treatment; the freedom from slavery; the freedom from *ex post facto* laws; the freedom of conscience and religion; the rights of the family; the right to a name; the rights of the child; the right to nationality; the right to participate in government; and the ju-

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<sup>74</sup> Case of the Juvenile Reeducation Institute v. Paraguay, 2004 Inter-Am. Ct HR, (ser. C) No. 112, para. 206 (2 September 2004); Case Cantoral Benavides v. Peru, 2000 Inter-Am. Ct HR, (ser. C) No. 69, para. 78 (18 August 2000).

<sup>75</sup> Case of Baldeón-García v. Peru, 2006 Inter-Am. Ct HR, (ser. C) No. 147, para. 80, (6 April 2006); Case of the Pueblo Bello Massacre v. Colombia, 2006 Inter-Am. Ct HR, (ser. C) No. 140, para. 111 (31 January 2006); Case of the "Mapiripán Massacre" v. Colombia, 2005 Inter-Am. Ct HR, (ser. C) No. 134, para. 111 (15 September 2005).

<sup>76</sup> Article 30 of the American Convention (general provision related to the restrictions). See on that article: Advisory Opinion OC-6/86, The Word "Laws" in Article 30 of the American Convention on Human Rights, Inter. Am. Ct. HR, Series A, No. 6 (1986). See for the specific restrictions to certain rights: Articles 8(5) (judicial guarantees); 13 (freedom of expression); 15 (freedom of assembly); 16 (freedom of association); 21 (right to property); 22 (freedom to move); 12 (freedom of religion); 11 (right to privacy).

<sup>77</sup> See FITZPATRICK, J.: "States of Emergency in the Inter-American Human Rights System", in HARRIS, D. & LIVINGSTONE, S. (eds.): *supra* note 3, p. 371; GROSSMAN, C.: "A Framework for the Examination of States of Emergency Under the American Convention on Human Rights", 1 *Am.U.J.Int'l L.&Pol.*, 1986, p. 35.

dicial guarantees essential for the protection of such rights<sup>78</sup>. In addition, according to Article 75 of the Convention, the States can make reservations to the Convention only in conformity with the 1969 Vienna Convention on the Law of Treaties<sup>79</sup>.

### 1.3.3. THE AMERICAN CONVENTION'S PROTOCOLS

According to Article 77 of the Convention, any State Party or the Commission may submit a protocol proposal<sup>80</sup>. The objective of this provision is to include gradually other rights and freedoms in the system of protection. Two additional protocols to the American Convention have been adopted.

The Protocol of San Salvador was adopted in 1988 and has been ratified by Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Mexico, Panama, Paraguay, Peru, Suriname and Uruguay. It intends to reaffirm, develop, perfect and protect economic, social and cultural rights<sup>81</sup>. The States Parties, according to Article 1 of the Protocol, "undertake to adopt the necessary measures, both domestically and through international cooperation, especially economic and technical, to the extent allowed by their available resources, and taking into account their degree of development, for the purpose of achieving progressively and pursuant to their internal legislations, the full observance of the rights recognized in this Protocol". The Protocol recognizes the rights to work and to the just, equitable and satisfactory

<sup>78</sup> Article 27(2) of the American Convention. See on the interpretation of that provision: Advisory Opinion OC-8/87, Habeas corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Inter. Am. Ct. HR, Series A, No. 8 (1987); Advisory Opinion OC-9/87, Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights), Inter. Am. Ct. HR, Series A, No. 9 (1987).

<sup>79</sup> See: Advisory Opinion OC-2/82, The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75), Inter. Am. Ct. HR, (ser. A), No. 2 (1982).

<sup>80</sup> According to Article 77(2) of the Convention, "Each protocol shall determine the manner of its entry into force and shall be applied only among the States Parties to it".

<sup>81</sup> Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, 17 November 1988, Resolution AG/RES 907 (XVIII-0/88), reprinted in 28 *I.L.M.*, 1989, p. 156. See LeBLANC, L.: "The Economic, Social and Cultural Rights Protocol to the American Convention and its Background", 2 *Neth. Q. Hum. Right*, 1992, p. 130; CAÑADO TRINDADE, A.A.: *La Cuestión de la Protección Internacional de los Derechos Económicos, Sociales y Culturales: Evolución y Tendencias Actuales*, 1992; CAÑADO TRINDADE, A.A.: "La question de la protection internationale des droits économiques, sociaux et culturels: évolution et tendances actuelles", 94 *Revue générale de Droit international public*, 1990, p. 913.

conditions of work; the rights regarding trade unions; the right to social security; the right to health; the right to a healthy environment; the right to food; the right to education; the right to the benefits of culture; the right to the formation and the protection of families; the rights of children; the protection of the elderly; and the protection of the handicapped. According to Article 19 of the Protocol, the main means of monitoring consist of a State report mechanism. The State Parties have to submit periodic reports on the progressive measures they have taken to ensure due respect for the rights set forth in the Protocol for examination by the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture. Only the violations of the right of workers to organize trade unions and to join the union of their choice and of the right to education can be alleged in individual petitions before the Inter-American Commission of Human Rights, and, when applicable, before the Inter-American Court of Human Rights.

The second additional protocol deals with the abolition of death penalty. It was adopted in 1990 in Asuncion, Paraguay, and entered into force on 28 August 1991<sup>82</sup>. It has been ratified by Brazil, Costa Rica, Ecuador, Mexico, Nicaragua, Panama, Paraguay, Uruguay and Venezuela. According to Article 1, the States Parties "shall not apply the death penalty in their territory to any person subject to their jurisdiction". During the *travaux préparatoires* of the American Convention, a suggested provision unconditionally prohibiting capital punishment was rejected. In that context, the Second Protocol intended to affirm the abolitionist tendency of the American States.

### 1.3.4. THE OTHER INTER-AMERICAN CONVENTIONS RELATED TO HUMAN RIGHTS

Moreover, the American States have adopted a series of several instruments in relation to specific rights or specific situations. Four main Inter-American Conventions related to human rights and open for signature to all the OAS States (and not exclusively to the States Parties to the American Convention) have been adopted<sup>83</sup>.

<sup>82</sup> Protocol to the American Convention on Human Rights to Abolish the Death Penalty, 8 June 1990, Inter-Am. C.H.R., reprinted in 29 *I.L.M.*, 1990, p. 1447.

<sup>83</sup> Inter-American Convention to Prevent and Punish Torture (Adopted at Cartagena de Indias, Colombia, on 9 December 1985); Inter-American Convention on Forced Disappearance of Persons (Adopted at Belém do Pará, Brasil, on 9 June 1994); Inter-American Convention on the Prevention, punishment and eradication of violence against Women «Convention of Belem do Para» (Adopted in Belém do Pará, Brasil, on 9 June 1994); In-

First, the Inter-American Convention to Prevent and Punish Torture was adopted in 1985 and entered into force on 28 February 1987<sup>84</sup>. The States Parties “undertake to prevent and punish torture” understood “to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose”<sup>85</sup>. According to Article 2 of the Convention, torture “shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish”. The States Parties should either extradite “anyone accused of having committed the crime of torture or sentenced for the commission of that crime,” or take the necessary measures to criminalize torture and prosecute offenders when torture has been committed within its jurisdiction, by one of its nationals, or, if appropriate, when the victim is of its nationals<sup>86</sup>. This Convention spells out more specifically the content of Article 5 of the American Convention, which also prohibits torture and inhumane treatments. According to Article 8 of the Inter-American Convention to Prevent and Punish Torture, “after all the domestic legal procedures of the respective State and the corresponding appeals have been exhausted, the case may be submitted to the international fora whose competence has been recognized by that State”. The international fora can be either the inter-American Commission<sup>87</sup> or, for the States that have accepted its contentious jurisdiction, the Inter-American Court of Human Rights<sup>88</sup>.

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ter-American Convention on the Elimination of all forms of discrimination against persons with disabilities (Adopted at Guatemala City, Guatemala, on 7 June 1999).

<sup>84</sup> Inter-American Convention to Prevent and Punish Torture, entered into force 22 February 1987, OAS Treaty Series No. 67, reprinted in 25 *I.L.M.*, 1986, p. 519. To date, the States Parties are: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Mexico, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela. See also on that instrument GROS ESPIELL, H.: “Las Convenciones sobre Tortura de las Naciones Unidas y de la Organización de los Estados Americanos”, in *XIV Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano*, Washington, D.C., OAS General Secretariat, 1987, pp. 221-242.

<sup>85</sup> Articles 1 and 2 of the Inter-American Convention to Prevent and Punish Torture.

<sup>86</sup> Articles 11-14 of the Inter-American Convention to Prevent and Punish Torture.

<sup>87</sup> Article 23 of the Commission’s rules of procedure.

<sup>88</sup> See Case of the “White Van” (*Paniagua-Morales et al.*) v. Guatemala, 1998 Inter-Am. Ct. H.R., (ser. C) No. 37, para. 136 (1998); Case of the “Street Children” (*Villagrán-Morales et al.*) v. Guatemala, 1999 Inter-Am. Ct. H.R., (ser. C) No. 63, para. 247 (1999). The Court “considers that it should refer to its own competence to interpret and apply

Second, the Inter-American Convention on Forced Disappearance of Persons was adopted in 1994 and entered into force 28 March 1996<sup>89</sup>. Article 2 of the Convention defines forced disappearance as “the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the State or by persons or groups of persons acting with the authorization, support, or acquiescence of the State, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees”. States parties cannot practice, permit or tolerate forced disappearance, and they must punish the persons who commit or attempt to commit forced disappearance and their accomplices. They also must cooperate with one another to adopt the necessary measures to prevent, punish and eliminate such practices. The States Parties undertake the obligation to extradite or prosecute the authors of such crimes. The Inter-American Commission and the Inter-American Court for the States that have accepted its contentious jurisdiction are competent to deal with petitions or communications alleging a violation of that Convention by a State Party<sup>90</sup>.

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the Convention against Torture and to declare the responsibility of a State that has agreed to be obliged by this Convention and has also accepted the jurisdiction of the Inter-American Court of Human Rights. As some member countries of the Organization of American States were still not parties to the American Convention and had not accepted the jurisdiction of the Court, the drafters of the Convention against Torture decided not to include in it an article that made express and exclusive reference to the Inter-American Court in order not to indirectly bind them to the former Convention and the aforementioned jurisdictional organ”.

<sup>89</sup> To date, the States Parties are: Argentina, Bolivia, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, Uruguay, and Venezuela. See the preparatory works: *Organización de los Estados Americanos (OAS)/Consejo Permanente, Informe del Presidente del Grupo de Trabajo Encargado de Analizar el Proyecto de Convención Interamericana sobre Desaparición Forzada de Personas*, doc. OEA/Ser.G/CP/CAJP/925/93/rev.1, (25 January 1994), at 1-49; OAS, *Informe de la Comisión de Asuntos Jurídicos y Políticos acerca del Proyecto de Convención Interamericana sobre Desaparición Forzada de Personas*, doc. OEA/Ser.G/CP/doc.2458/94, (22 February 1994), at 1-65; OAS, *Report of the Permanent Council on the Draft Inter-American Convention on Forced Disappearance of Persons*, doc. OEA/Ser.P/AG/doc.3072/94 (29 April 1994) at 1-56.; doc. OEA/Ser.P/AG/doc.2821/92 (22 April 1992) at 1-22.

<sup>90</sup> Article XIII of the Inter-American Convention on Forced Disappearance of Persons: “For the purposes of this Convention, the processing of petitions or communications presented to the Inter-American Commission on Human Rights alleging the forced disappearance of persons shall be subject to the procedures established in the American Convention on Human Rights and to the Statute and Regulations of the Inter-American Commission on Human Rights and to the Statute and Rules of Procedure of the Inter-

Third, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women was adopted in 1994 and entered into force on 5 March 1995<sup>91</sup>. In that Convention, violence against women is understood “as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere”. The States Parties must condemn all forms of violence against women, pursue policies to prevent, punish and eradicate such violence, and engage in various general or specific actions provided by Article 7 of the Convention, such as “to apply due diligence to prevent, investigate and impose penalties for violence against women”. The States Parties must include in their national report to the Inter-American Commission of Women, a specialized Organization of the OAS established in 1928, information concerning the implementation and respect of the Convention. Moreover, according to Article 12 of the Convention, any person or group of persons, or any non governmental entity legally recognized in one or more member States of the OAS may lodge petitions alleging violations of a State Party’s duties before the Inter-American Commission of Human Rights<sup>92</sup>. The Inter-American Court of Human Rights may also play a certain role as relating to this instrument since the States Parties and the Inter-American Commission of Women may request that the Court deliver advisory opinions on the interpretation of the Convention<sup>93</sup>.

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American Court of Human Rights, including the provisions on precautionary measures”. See also: Case of Blake v. Guatemala, 1996 Inter-Am. Ct. H.R., (ser. C) No. 27, (1996) (separate opinion of Judge A.A. Cançado Trindade). See also, on gross violations generally in the inter-American system MEDINA QUIROGA, C.: *The Battle of Human Rights. Gross, Systematic Violations and the Inter-American System*, Dordrecht, Nijhoff, 1988.

<sup>91</sup> Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, 9 June 1994, 33 *I.L.M.*, p. 1535 (entered into force on 5 March 1995). To date, the States Parties are: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Kitts & Nevis, Saint Lucia, St. Vincent & Grenadines, Suriname, Trinidad and Tobago, Uruguay, and Venezuela.

<sup>92</sup> See e.g., Maria Da Penha Maia Fernandes v. Brazil, Case 12.051, Inter-Am. C.H.R., Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. (2000).

<sup>93</sup> The Court considers that the inter-American Convention on women is part of the human rights *corpus juris* that may be used to interpret the American Convention. See e.g.: Case of the Miguel Castro-Castro Prison v. Peru, 2006 Inter-Am. Ct. H.R. (ser. C) No. 160 (25 November 2006). See also on the issue of violence against women in the inter-American system EWING, A.: “Establishing State Responsibility for Private Acts of Violence Against Women Under the American Convention on Human Rights”, 26 *Colum. Hum. Rts. L. Rev.*, 1995, p. 751.

Fourth, the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities adopted in 1999 entered into force on 14 September 2001<sup>94</sup>. That instrument aims at preventing and eliminating all forms of discrimination against persons with disabilities and at promoting their full integration into society. The States Parties undertake to adopt specific measures mentioned in broad terms by Articles 3 through 5 of the Convention. According to Article 1 of the Convention, disability is “a physical, mental, or sensory impairment, whether permanent or temporary, that limits the capacity to perform one or more essential activities of daily life, and which can be caused or aggravated by the economic and social environment”. Discrimination against persons with disability means “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”. A Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities was created by the Convention to ensure the States Parties’ follow up of their commitments through the evaluation of reports they must submit every four years after the submission of an initial report.

#### 1.4. *The Inter-American Human Rights Mechanisms: Report and Complaint*

The Commission and the Court can use various mechanisms to monitor, protect, and promote human rights. Some of them may potentially be used with respect to all the thirty-five States of the OAS, while others require that the State concerned has ratified the American Convention. Of course, the OAS Charter-based system and the American Convention-based system overlap and the mechanisms are to some extent interrelated. The two primary existing mechanisms are the country report mechanisms, which usually deal with human rights situations in general in specific countries, and the complaint mechanisms, which are used to address specific cases of human rights abuses.

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<sup>94</sup> Inter-American Convention on the Elimination of all Forms of Discrimination Against Persons with Disabilities, 7 June 1999, Organization of American States, AG/RES. 1608 (XXIX-O/99). To date, the States Parties are: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela.



#### 1.4.1. GENERAL HUMAN RIGHTS SITUATION MECHANISM: THE COUNTRY REPORTS

The Inter-American Commission of Human Rights uses various reporting mechanisms to promote and monitor human rights. One of these mechanisms consists of providing country studies<sup>95</sup>. The country report mechanism allows the Commission to investigate human rights conditions in any State member of the OAS<sup>96</sup>. At the beginning of its activities, the Commission used this mechanism to monitor serious and massive human rights abuses. The mechanism was used for the first time in the early 1960's in Cuba, Dominican Republic and Haiti. The Commission did not proceed to systematic and regular studies of all the OAS countries, although this might have been an option if the financial situation of the Commission had allowed it. The Commission has discretionary power to select the countries where the human rights situation should be investigated<sup>97</sup>, and will usually take such initiative when there is evidence (petitions or reports) showing that there are serious and widespread human rights abuses in a country, or to ensure the follow-up of a past country visit. The Commission may focus on the general human rights situation of a country, as it did in Venezuela in 2003, or on specific issues, as it did in its 2000 report on Canada that focused on refugees.

The Commission, interpreting broadly the terms of its initial mandate that gave it the power to prepare studies and reports and "to

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<sup>95</sup> On that mechanism, see MEDINA, C.: "The Role of Country Reports in the Inter-American System of Human Rights", in *The Inter-American System of Human Rights*, *supra* note 3, p. 115. Other report mechanisms are used by the Commission such as the thematic reports mechanism that consist of studying particular human rights issues that arise in one or more countries. The Commission has published thematic reports dealing with women's rights, indigenous populations, migrant workers, prison conditions and freedom of expression. A special rapporteur or one of the Commission's members is appointed to act as the thematic rapporteur for the topic.

<sup>96</sup> In addition, according to Article 43 of the American Convention, "[t]he States Parties undertake to provide the Commission with such information as it may request of them as to the manner in which their domestic law ensures the effective application of any provisions of this Convention". The control exercised through country reports with regard to States Parties to the Convention is essentially equivalent to the control that the Commission exercises over member States of the OAS

<sup>97</sup> In some cases, an OAS organ could request that the Commission undertake such an investigation (for instance, concerning Haiti, the Ad Hoc Meeting of Ministers of Foreign Affairs invited the Inter-American Commission to pursue its ongoing and close monitoring of the situation in Haiti and requested to remain informed, through the Permanent Council (see OEA/Ser.FV.1, MRE/RES. 5/93, 6 June 1993)). A government can also request a country study in its own country (see OAS, IACHR Report on the Situation of Human Rights in Nicaragua, 1981).

make recommendations to the governments (...)”<sup>98</sup>, has developed its own method of investigation which has been since then formalized<sup>99</sup>. The means of investigation include on-site investigations that require the express agreement of the State concerned<sup>100</sup>. The rules governing such on-site visits are codified in Articles 51-55 of the Commission’s rules of procedure and include the right for the Commission to travel freely in the country, to visit prisons and to interview any persons, groups, entities or institutions freely and in private. Using the information gathered, the Commission prepares a first draft of its report that must then be submitted to the State concerned for its comments. After receiving the State’s response, the Commission may reevaluate the findings and amend the report if it deems appropriate. If the State ignores its request for comments, the Commission will publish the report. If the State responds, however, the Commission is free to decide whether or not the report should be published.

Moreover, the Commission may include updated information on the human rights situation in countries that deserve “special attention” in its annual report. The OAS States required the adoption of some rule or at least criteria for selection of these countries<sup>101</sup>. In its 1996 annual report, the Commission clarified the criteria applicable “for purposes of identifying those OAS member States whose human rights practices merit special attention”. The first criterion is the *democratic test* according to which the Commission could investigate in “States which are ruled by governments which have not been chosen by secret ballot in honest, periodic and free popular elections in accordance with accepted international standards”. The second criterion is the *emergency*

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<sup>98</sup> Article 9 of the 1960 Commission’s Statute. See the original Statute of the Commission, Art. 11.(c), reproduced in IACHR Basic Documents, (OEA/Ser.LV/1.4, 1 Dec. 1960).

<sup>99</sup> For Medina, the first report published in 1962 about Cuba “contained the rudiments of what is today a country report”, while the 1985 report on Chile “can be considered a model report”, MEDINA, C.: “The Role of Country Reports in the Inter-American System of Human Rights”, in *The Inter-American System of Human Rights*, *supra* note 3, p. 118.

<sup>100</sup> VARGAS CARREÑO, E.: “Las Observaciones in Loco Practicadas por La Comisión Interamericana de Derechos Humanos”, in *Derechos Humanos en las Américas. Homenaje a la Memoria de C.A. Dunshee de Abranches*, 1984, p. 290; MÁRQUEZ RODRÍGUEZ, E.: “Visitas de Observación In Loco de la Comisión Interamericana de Derechos Humanos y sus Informes”, in CANÇADO TRINDADE, A.A. *et al.* (eds.): *Estudios Básicos de Derechos Humanos*, 1995, p. 135.

<sup>101</sup> See para. 15 of the 1993 General Assembly’s resolution, which requests that “in its annual report the Commission should strike a general balance of how human rights have fared in all of the member States of the OAS, taking into account, among other sources, information supplied by member States”. AG/Res.1213, n. 25.

test “where the free exercise of rights contained in the American Convention or Declaration have been effectively suspended, in whole or part, by virtue of the imposition of exceptional measures, such as a state of emergency, state of siege, prompt security measures, and the like”. The third criterion is the *mass and gross violation test* “where there are serious accusations that a State is engaging in mass and gross violations of human rights set forth in the American Convention and/or Declaration or other applicable human rights instruments”. The fourth criterion “concerns those States which are in a process of transition from any of the above three situations”. Finally, the last criterion added in 1997 “regards temporary or structural situations that may appear in member States confronted, for various reasons, with situations that seriously affect the enjoyment of fundamental rights enshrined in the American Convention or the American Declaration. This criterion includes, for example: grave situations of violations that prevent the proper application of the rule of law; serious institutional crises; processes of institutional change which have negative consequences for human rights; or grave omissions in the adoption of the provisions necessary for the effective exercise of fundamental rights”. Applying these criteria over the last five years, the Commission has focused in its annual report on the following States: Columbia, Cuba, Ecuador, Haiti, Guatemala and Venezuela.

#### 1.4.2. SPECIFIC HUMAN RIGHTS ABUSE MECHANISM: THE INDIVIDUAL PETITIONS

There are two main kinds of complaint mechanisms in the Inter-American human rights system<sup>102</sup>. First, as regards the States that did not ratify the Convention, the Commission examines individual petitions alleging specific human rights abuses of the American Declaration. Second, the American Convention empowers the Commission and, under certain conditions, the Court, to adjudicate over individual

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<sup>102</sup> Article 23 of the Commission’s rules of procedure provides that “Any person or group of persons or nongovernmental entity legally recognized in one or more of the Member States of the OAS may submit petitions to the Commission, on their own behalf or on behalf of third persons, concerning alleged violations of a human right recognized in, as the case may be, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the Additional Protocol in the Area of Economic, Social and Cultural Rights, the Protocol to Abolish the Death Penalty, the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on Forced Disappearance of Persons, and/or the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, in accordance with their respective provisions, the Statute of the Commission, and these Rules of Procedure”.

and inter-State communications<sup>103</sup> alleging specific violations of the Convention<sup>104</sup>. The Commission's jurisdiction to consider individual petitions is automatic and does not require specific acceptance from the States. The mechanisms for hearing individual complaints in the Declaration and the Convention individual mechanisms are distinct, but the procedures are similar<sup>105</sup>. In total, the Commission received some 1,456 in 2007, three times more than the 435 it received in 1997<sup>106</sup>.

The first phase of the procedure deals with the admissibility of the complaint. The Commission handles individual petitions lodged by any person, group of persons, or non-governmental entity recognized in at least one of the OAS's States<sup>107</sup>. To be admissible, a petition must meet two sets of standards: the jurisdictional requirements and the formal requirements. The jurisdictional requirements concern the Commission's jurisdiction *ratione materiae, temporis, loci* and *personae* to hear

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<sup>103</sup> The States Parties that have accepted the inter-State complaint jurisdiction are, to date, the following: Argentina, Chile, Colombia, Costa Rica, Ecuador, Jamaica, Nicaragua, Peru, Uruguay, and Venezuela.

<sup>104</sup> *Nicaragua v. Costa Rica*, Case 01/06, Inter-Am. C.H.R., Report No. 11/07, OEA/Ser.LV/II.130 Doc. 22, rev. 1, para. 127 (2007): "It may be concluded from the foregoing that both the American Convention and the Rules of Procedure of the IACHR have provided that communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in the Convention, are governed by the same rules of procedure and must meet the same requirements as petitions containing denunciations or complaints that are presented by any person, provided that they also satisfy the specific requirements set forth in article 45 of the Convention, the foregoing without prejudice to the fact that the applicable procedures and requirements must take into consideration the special characteristics and purposes of the mechanism for communications between States".

<sup>105</sup> Article 50 of the Commission's rules of procedure: "The procedure applicable to petitions concerning Member States of the OAS that are not parties to the American Convention shall be that provided for in the general provisions included in Chapter I of Title II; in Articles 28 to 43 and 45 to 47 of these Rules of Procedure". The procedures are described in the Commission's rules of procedure, the Court's rules of procedure, and the American Convention. The wordings used in the documents are the same, and most of the rules of procedure of the Commission were codified in the American Convention.

<sup>106</sup> 2007 annual report, Inter-Am. C.H.R., chapter "Statistics".

<sup>107</sup> Article 24 of the Commission's rules of procedure grants the Commission to consider a case *ex officio*. *El Aguacate v. Guatemala*, Case 10.400, Inter-Am. C.H.R., Report No. 6/91, para. 91 (1990-1991): "The Commission believes that two further clarifications are in order: this case, No. 10.400, was not set in motion by a complaint either from the Government of Guatemala or from the complainant whose complaint was lodged when the case was already being processed. The Commission began processing this case, in view of the seriousness of the matter, *ex officio* under the powers granted to it by Article 26(2) of its own Regulations". Today Article 24 of the Commission's Rules of Procedures.

the case. The formal requirements concern the petition itself, and consist primarily of the following: domestic remedies must have been exhausted "in accordance with generally recognized principles of international law," the petition must have been lodged within the six months from the date on which the victim was notified of the final domestic judgment, the petition cannot be substantially the same than one that was previously studied by the Commission or another international organization, and the "subject of the petition or communication" cannot be "pending in another international proceeding of settlement". Moreover, a complaint that is "manifestly groundless or obviously out of order" will be held inadmissible. The 2007 admissibility statistic report of the Commission shows that, in 2007, fifty-one cases were ruled admissible and fourteen inadmissible. A decision of inadmissibility is final and not subject to appeal.

In "cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons", the Commission and the Court may grant restraining orders<sup>108</sup>. First, the Commission may order precautionary measures for States non-Parties to the Convention or for States Parties to the Convention that did not accept the Court's contentious jurisdiction<sup>109</sup>. Second, for States Parties to the Convention that have accepted the Court's contentious jurisdiction, the Court has the authority to order provisional measures in cases that are already pending before it either on its own initiative or at the request of one of the parties. In cases that have been lodged with the Commission but not yet referred to the Court, only the Commission may request that the Court order such measures<sup>110</sup>. The legally binding force of the precautionary measures requested by the Commission is disputable since the Commission bases its jurisdiction to request such measures on its own rules of procedure only. Provisional measures ordered by the Court, however, must be considered binding since the Convention specifically grants the Court that power. The Court has also confirmed their binding nature in its own jurisprudence. Both the Commission and

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<sup>108</sup> REY CANTOR, E.: *Medidas provisionales y medidas cautelares en el sistema interamericano de derechos humanos*, Temis, 2005; PASQUALUCCI, J.: *supra* note 3, pp. 293-325. See CAÑADO TRINDADE, A.A.: "The Evolution of Provisional Measures of Protection under the Case-Law of the Inter-american Court of Human Rights (1987 – 2002)", 24 *Human Rights Law Journal*, 2004, p. 162; CAÑADO TRINDADE, A.A.: "Les mesures provisoires de protection dans la jurisprudence de la Cour Interaméricaine des Droits de l'Homme", in COHEN-JONATHAN, G & FLAUS, J-F. (eds.): *Mesures conservatoires et droits fondamentaux*, Bruylant/Nemesis, 2005, p. 145.

<sup>109</sup> Article 25 of the Commission's rules of procedure.

<sup>110</sup> Article 63(2) of the American Convention.

the Court have used this mechanism as an alternative mechanism to ensure and protect human rights in the Americas, and it has become a preventive judicial guarantee<sup>111</sup>. In 2007, the Court ordered forty-three provisional measures<sup>112</sup>. Most of the provisional measures requested (74%) concerned cases being processed by the Commission.

In the second phase of the procedure, the Commission considers the merits of those complaints that have been judged admissible. The Commission must ascertain the facts alleged in the petition and collect the necessary information including from the government and the victims. To do so, the Commission may hold hearings during its regular sessions (one hundred five hearings were organized in 2007) or even make on-site visits with the State's consent. At any point during the procedure, the parties may settle the dispute and therefore the Commission "shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention"<sup>113</sup>. If the parties settle the case, the Commission drafts a report describing the facts and the settlement, and follows-up the implementation and respect of the agreement by the parties. In 2007, the petitioners and the States have reached such settlements in 5 cases under the auspice of the Commission.

In the third phase of the procedure, if the parties cannot reach a friendly settlement, the Commission writes a preliminary report on the merits that examines "the arguments, the evidence presented by the parties, and the information obtained during hearings and on-site observations"<sup>114</sup> and sets out the conclusions, and, if relevant, the recommendations of the Commission<sup>115</sup>. If the report finds that a violation of the Declaration or of the Convention has been committed it is transmitted to the State concerned. Within three months following the notification of the Commission's report, the State must either comply with or respond to the Commission's recommendations<sup>116</sup>.

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<sup>111</sup> CANÇADO TRINDADE, A.A.: "Prólogo del Presidente de la Corte al compendio de resoluciones de la Corte Interamericana de Derechos Humanos", in *Medidas Provisionales. Compendio: 2001-2003*, Corte Interamericana de Derechos Humanos, (Ser. E), 2003, paras. 1 and 14.

<sup>112</sup> 2007 annual report, Inter-Am. Ct. H.R., at 75.

<sup>113</sup> Article 48(1).f of the American Convention. SEPÚLVEDA, C.: "El Procedimiento de Solución Amistosa ante la Comisión Interamericana de Derechos Humanos", in *Derechos Humanos en las Américas. Homenaje a la Memoria de C.A. Dunshee de Abranches*, Secretaría General de la OEA, 1984, p. 242.

<sup>114</sup> Article 42(1) of the Commission's rules of procedure.

<sup>115</sup> Article 50 of the American Convention.

<sup>116</sup> Article 51 of the American Convention.

In the fourth phase of the procedure, the Commission deals with the conclusions of the case, if the dispute has not been solved within the three months from the notification of the report to the State<sup>117</sup>. At this point, the Commission must refer all cases of non-compliance to the Court if the State Party to the Convention has accepted the contentious jurisdiction of the Court unless the Commission decides otherwise by an absolute majority vote. To address cases not referred to the Court, either because the State is not party to the Convention or because a State Party to the Convention did not accept the Court's contentious jurisdiction, the Commission "may, by the vote of an absolute majority of its members, set forth its opinion and conclusions concerning the question submitted for its consideration", and when it finds that the Convention was violated, the Commission "shall make pertinent recommendations and shall prescribe a period within which the State is to take the measures that are incumbent upon it to remedy the situation examined"<sup>118</sup>. After the expiration of that period, the Commission "shall evaluate compliance with its recommendations" and "shall decide by the vote of an absolute majority of its members whether the State has taken adequate measures and whether to publish its report"<sup>119</sup>. The legal effect of the Commission's reports, especially those adopted pursuant Article 51 of the Convention finding a violation of the Convention, has been debated<sup>120</sup>. While it is difficult to claim that such a report is legally binding as the Court's ruling would be, these reports could be considered an "authoritative legal determination" related to the fulfillment of the State's obligations<sup>121</sup>. An evaluation of compliance with the Commission's recommendations provided in its reports showed that in 2007, of one hundred fourteen reports, total compliance has been achieved in twelve cases, partial compliance in seventy-three cases, and compliance was still pending in twenty-nine cases.

In the fifth and final phase of the procedure, which only concerns States Parties to the Convention that have accepted the Court's con-

<sup>117</sup> Article 45 of the Commission's rules of procedure.

<sup>118</sup> Article 44(1) of the Commission's rules of procedure.

<sup>119</sup> Article 51(3) of the American Convention and 45(3) of the Commission's rules of procedure.

<sup>120</sup> BIDART CAMPOS, G.J. & ALBANESE, S.: "El valor de las recomendaciones de la Comisión Interamericana de Derechos Humanos", *Jurisprudencia Argentina*, 1999, p. 357; SALVIOLI, F.: "Un análisis desde el principio pro persona, sobre el valor jurídico de las decisiones de la Comisión Interamericana de Derechos Humanos", in BAZÁN, V. (ed.): *Defensa de la Constitución: Garantismo y controles. Libro en reconocimiento al Dr. Germán J. Bidart Campos*, EDIAR, 2003, p. 143.

<sup>121</sup> BUERGENTHAL, TH. *et al.*, *supra* note 3, p. 254.

tentious jurisdiction, the Court enters into action when the Commission or the State refers a case to it. To date, twenty-one States Parties have recognized the contentious jurisdiction of the Court: Costa Rica, Peru, Venezuela, Honduras, Ecuador, Argentina, Uruguay, Colombia, Guatemala, Suriname, Panama, Chile, Nicaragua, Paraguay, Bolivia, El Salvador, Haiti, Brazil, Mexico, the Dominican Republic and Barbados. In 2007, the Commission referred fourteen contentious cases to the Court<sup>122</sup>. Rather than simply continuing the quasi-judicial stage handled by the Commission, the procedure before the Court is autonomous. Only States Parties<sup>123</sup> or the Commission may refer a case to the Court<sup>124</sup>. The victims and the petitioners do not have the right to submit a case to the Court. However, the Court has amended its rules of procedure to grant victims their own procedural rights before the Court<sup>125</sup>. In this last phase of the inter-American procedure, the Commission acts more as public prosecutor (“ministerio publico”<sup>126</sup>) than as judge or a party to the case. The Convention provides that the Commission “shall appear in all cases before the Court”<sup>127</sup>.

The Convention provides that in order for the Court to have jurisdiction to hear a case, the procedure before the Commission (described above in the first to fourth stages) must be “completed”<sup>128</sup>. The Court has confirmed this requirement in a 1984 ruling where it refused to hear a contentious case referred directly by Costa Rica that was seeking

<sup>122</sup> 2007 Annual Report, Inter-Am. Ct. H.R., p. 60.

<sup>123</sup> The question of whether any States Parties to the Convention may refer a case to the Court or if this is the exclusive power of the State concerned in the case is still open.

<sup>124</sup> Article 61(1) of the American Convention.

<sup>125</sup> Article 23 of the Court’s rules of procedure. Article 23(1) provides that “When the application has been admitted, the alleged victims, their next of kin or their duly accredited representatives may submit their pleadings, motions and evidence, autonomously, throughout the proceedings”, CANÇADO TRINDADE, A.A.: “Vers la consolidation de la capacité juridique internationale des pétitionnaires dans le système interaméricain de protection des droits de la personne”, 14 *Revue québécoise de droit international*, 2001, p. 207; CANÇADO TRINDADE, A.A.: *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, Universidad de Deusto, Bilbao, 2001; CANÇADO TRINDADE, A.A.: “The Procedural Capacity of the Individuals Subject of International Human Rights Law: Recent Developments”, in *Les droits de l’homme à l’aube du XXIe siècle. K. Vasak Amicorum*, Bruylant, 1999, p. 521.

<sup>126</sup> Matter of Viviana Gallardo *et al.*, 1984 Inter-Am. Ct.H.R., No. 101/81, order of the president of 15 July 1981, para. 22 (1984). See BUERGENTHAL, TH. *et al.*: *supra* note 3, p. 255. According to the Court’s rules of procedure (Article 2), the “parties to the case” are the victim, the State and, in a procedural sense only, the Commission.

<sup>127</sup> Article 57 of the American Convention.

<sup>128</sup> Article 61(2) of the American Convention.



to waive the entire procedure before the Commission<sup>129</sup>. As the Court underlined in that ruling, the procedure before the Commission is of particular importance for the victims since they do not have standing before the Court (and they did not have a *locus standi* before 2001), whereas they do have a formal standing before the Commission where they can plead and defend their cases and confront the State concerned<sup>130</sup>. The rule requiring that the procedure before the Commission must be completed before the Court hears the case does not mean that the Court is bound by the Commission's findings<sup>131</sup>. The Court has the power to review Commission's factual and legal findings and, in principle, the State may raise preliminary objections that were rejected by the Commission at the admissibility stage before the Court<sup>132</sup>. Moreover, the Court must assess its own *ratione materiae*, *temporis*, *loci* and *personae* jurisdiction. States parties have raised preliminary objections in fifty-eight cases of ninety-five and the Court admitted such objections in only five of them<sup>133</sup>.

The procedures of the Court include both written and oral phases. The written procedure consists of the filing of the application with the secretariat of the Court, the notification of the application, the submission of written briefs containing pleadings, motions and evidences (within the next two months after notification of the application), and the submission of the respondent's brief (within four months after the notification of the application) in response to the application stating whether it accepts or not the facts and agrees or not with the claims<sup>134</sup>. The oral procedure consists of hearings where the parties plead their

<sup>129</sup> Matter of Viviana Gallardo *et al.*, 1984 Inter-Am. Ct.H.R., (ser. A) No. G 101/81, order of the President of 15 July 1981, para. 25 (1984).

<sup>130</sup> See BUERGENTHAL, TH. *et al.*: *supra* note 3, p. 259 (the authors state that "it remains to be seen whether the recent changes in the Court's Rules of Procedure, which give individuals standing in proceedings before the Court, will prompt the Court to reverse" that ruling and "whether the States Parties to an inter-State dispute may waive the Commission proceedings" since "the inequality between the parties (...) would not exist in this context").

<sup>131</sup> However, the Court relies increasingly on the fact-findings provided by the Commission. See on the issue REISMAN, M. & LEVIT, J.K.: "Fact-Finding Initiatives for the Inter-American Court of Human Rights", in NIETO NAVIA, R. (ed.): *La Corte y el Sistema Interamericano de Derechos Humanos*, 1994, pp. 443-457; BUERGENTHAL, TH.: "Judicial Fact-Finding: Inter-American Human Rights Court", in LILICH, R.B. (ed.): *Fact-Finding before International Tribunals*, 1990, pp. 261-274.

<sup>132</sup> That question was discussed in the Court's first contentious case, Velásquez Rodríguez v. Honduras, 1987 Inter-Am. Ct. H.R., (ser. C) No. 1, para. 29 (26 June 1987).

<sup>133</sup> 2007 annual report, Inter-Am. Ct. H.R., at 73.

<sup>134</sup> Articles 32-39 of the Court's rules of procedure.

cases before the Court and witnesses and experts are heard<sup>135</sup>. In 2007 the Court organized hearings in twelve cases totaling seventeen days of hearings<sup>136</sup>. The debates before the Court may concern preliminary objections, factual allegations, merits, and reparations.

The proceedings may end in three different ways: a discontinuance of the case, a friendly settlement; or the Court's judgment. A discontinuance of the case may occur either because the claimant does not wish to proceed, in which case the Court may strike the case from its list, or because the respondent assents to the claims, in which case the Court evaluates this acquiescence, and if appropriate, determines the appropriate reparations. Many of the States before the Court (in about 40% of its Court's cases) recognize their international responsibility for the alleged violations and assent, totally or partially, to the claims<sup>137</sup>. They then dispute only the requests for reparations. In that case, the Court's ruling endorses the acknowledgement, but still summarizes the facts and violations before discussing reparations. Second, a friendly settlement may occur at any time during the procedure. However, the Court is free to decide to whether or not to strike the case. Third, if none of these anticipated termination scenarios occurs, the Court will give a ruling. The average length of the Court's proceedings (from the moment the application was filed until the judgment) is 19.9 months<sup>138</sup>. According to Article 67 of the Convention, the judgments rendered by the Court are final and not subject to appeal<sup>139</sup>. If there is a disagreement over the "meaning or scope" of the judgment, however, the Court may interpret its judgment at the request of one of the parties<sup>140</sup>.

When the Court finds a violation of the Convention, it "shall rule that the injured party be ensured the enjoyment of his right and freedom that was violated" and "shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach

<sup>135</sup> Articles 40-43 of the Court's rules of procedure.

<sup>136</sup> 2007 annual report, Inter-Am. Ct. H.R., at 65.

<sup>137</sup> *Kimel v. Argentina*, Inter-Am. Ct. H.R., (ser. C) No. 177, para. 18 (2 May 2008) (Partial recognition of responsibility); *Case Barrios Altos v. Peru*, Inter-Am Ct.H.R., (ser. C) No. 75, para. 31 (14 March 2001); *Aloeboetoe et al v. Suriname*, Inter-Am. C.H.R., (ser. C) No. 11, para. 22 (4 December 1991).

<sup>138</sup> 2007 annual report, Inter-Am. Ct. H.R., at 66.

<sup>139</sup> Article 67 of the American Convention. See however on the request for revision of a judgment *Genie Lacayo v. Nicaragua*, Inter-Am. Ct. H.R., (ser. C), No. 43, Request for Revision of the Judgment of 29 January 1997, Order of the Inter-Am. Ct HR, Order, para. 13 (13 September 1997).

<sup>140</sup> Article 67 of the American Convention and 59 of the Court's rules of procedure.

of such right or freedom be remedied and that fair compensation be paid to the injured party"<sup>141</sup>. According to that provision, the Court is then empowered to give declaratory rulings stating the rights that were violated, and to award monetary compensation<sup>142</sup>. The Court has developed a creative and stimulating jurisprudence related to reparations<sup>143</sup>, which is a major component of its rulings (*infra*). According to Article 68(1) of the Convention, the States Parties "undertake to comply with the judgment of the Court in any case to which they are parties". The legally binding nature of the Court's rulings is indisputable. However, the Convention does not set any supervision mechanism to ensure the enforcement of the Court's rulings. At most, Article 65 of the Convention requires the Court to submit to each regular session of the General Assembly of the OAS a report of its work specifying, in particular, "the cases in which a State has not complied with its judgments, making any pertinent recommendations". The Assembly can then adopt a condemnatory resolution that may carry a certain political weight and thus convince the State to enforce the Court's ruling, and in particular, to implement the reparation measures ordered by the Court<sup>144</sup>. In a 2003 ruling dealing with its competence, the Court upheld its own power to supervise the enforcement of its own judgments according to its own rules<sup>145</sup>. The Court ensures the follow-up of the enforcement of its judgments and provisional orders through a method of monitoring and reporting. Moreover, since 2007, the Court has held private hearings monitoring compliance with its judgments and orders, using a form of ad hoc diplomatic and judicial mechanism to ensure enforcement. As of 2007, of ninety-five cases dealt with by the Court, eighty-four are in the stage of compliance monitoring<sup>146</sup>.

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<sup>141</sup> Article 63(1) of the American Convention.

<sup>142</sup> Article 68(2) provides that the part of "a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the State".

<sup>143</sup> On reparations in the inter-American human rights' case law, see SHELTON, D.: *Remedies in International Human Rights Law*, Oxford, 1999; SHELTON, D.: "Reparations in the Inter-American System", in HARRIS, D & LIVINGSTONE, S. (eds.): *supra* note 3, p. 151; PASQUALUCCI, J.M.: "Victim Reparations in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure", 18 *Mich. J. Int'l L.*, 1, 1996; SALVIOLI, F.O.: "Algunas Reflexiones sobre la Indemnización en las Sentencias de la Corte Interamericana de Derechos Humanos", in CANÇADO TRINDADE *et al.* (eds.): *3 Estudios Básicos de Derechos Humanos*, 1995, p. 145.

<sup>144</sup> BUERGENTHAL TH. *et al.*: *supra* note 3, pp. 264-265.

<sup>145</sup> Baena Ricardo Case *et al. v. Panama*, Inter-Am. Ct. H.R., (ser. C) No. 104, para. 89 (28 November 2003).

<sup>146</sup> 2007 Annual Report, Inter-Am. Ct. H.R., at 64.

## 2. The Achievements of the Inter-American System for Human Rights: the Court's Emerging Case-Law

Both the Commission and the Court have accomplished their original mission by meeting the main challenges with which they were originally confronted. The Commission has successfully dealt with a massive workload, despite weak resources, producing about sixty country reports, performing eighty-seven on-site visits, and hearing over twelve thousand individual complaints since the beginning of its operations. Moreover, as an institution, the Commission was granted constitutional legitimacy when it became a permanent organ of the OAS, without losing the expansive and praetorian powers it had gained through a dynamic and audacious practice in its first years of existence. The role of the Commission in the slow process of democratization in the hemisphere has been remarkable thanks to its constant monitoring and promotion of human rights<sup>147</sup>. However, aside from this crucial political accomplishment, the fundamental achievement of the Inter-American system for human rights rests on its contribution to international human rights law as a whole. The Court, and the Commission as a conventional organ, have been the architects of a creative and original jurisprudence that has contributed significantly to the evolution of international human rights law. A brief overview of the Court's case law is necessary to understand some of the major innovations of the emerging Inter-American human rights law<sup>148</sup>.

<sup>147</sup> CERNA, CH.: "The Inter-American System for the Protection of Human Rights", 16 *Fla. J. Int'l L.*, 2004, p. 195.

<sup>148</sup> The Court's case law dealt mainly with the following issues (the list is illustrative): Forced disappearances (see e.g.: Velasquez Rodriguez v. Honduras; Fairen-Garbi v. Honduras; Godinez-Cruz v. Honduras; Blake v. Guatemala; Bamaca Velasquez v. Guatemala; Juan Humberto Sanchez v. Honduras; Gomez Palomino v. Peru; Blanco Romero v. Venezuela; Goiburú v. Paraguay); killings (see e.g.: Myrna Mack-Chang v. Guatemala; Molina-Theissen v. Guatemala; Miguel Castro Castro Prison v. Peru; La Cantuta v. Peru); death penalty and judicial guarantees (see e.g.: Hilaire Constantine *et al.* v. Trinidad and Tobago; Fermin Ramirez v. Guatemala; Raxcaco-Reyes v. Guatemala; Boyce *et al.* v. Barbados); paramilitary attacks (see e.g.: 19 Tradesmen v. Colombia; Las Palmeras v. Colombia; 'Plan de Sanchez' Massacre v. Guatemala; 'Mapiripan' Massacre v. Colombia; Pueblo Bello Massacre v. Colombia; Ituango Massacres v. Colombia; La Rochela Massacre v. Colombia); handicapped persons' rights to life and health (Ximenez Lopes v. Brazil); ill-treatments of detainees (see e.g.: Loayza-Tamayo v. Peru; M. Urrutia v. Guatemala; G. Paquiyaui v. Peru; Tibi v. Ecuador); prison conditions (see e.g.: Montero Aranguren *et al.* v. Venezuela; Yvos Neptune v. Haiti); slavery and forced labor (see e.g.: Massacres de Ituango v. Colombia); right to an adequate standard for living and right to life (see e.g.: Case of the "Juvenile Reeducation Institute" v. Paraguay; Yakye Axa v. Paraguay; Ximenez Lopes v. Brazil); corporal punishment (see e.g.: Caesar v. Trinidad and Tobago);

### 2.1. *The rule most favorable to individual must prevail*

The Court has constantly reaffirmed the independent foundation of international human rights law. Like the European Court of Human Rights, the Inter-American Court considers in its jurisprudence that the Convention is a “living instrument”, that requires dynamic interpretation<sup>149</sup>. The Court uses the general methods of treaty interpretation set forth in the Vienna Convention on the Law of Treaties but emphasizes the particular character of human rights treaties<sup>150</sup>, their objective character<sup>151</sup>, the broad scope of their protection, the autonomy of their

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privation of liberty (see e.g.: Suarez Rosero v. Ecuador; Tibi v. Ecuador; Acosta Calderon v. Ecuador; Yvon Neptune v. Haiti); judicial guarantees and military jurisdictions (see e.g.: Castillo Petruzzi v. Peru; Lori Berenson Mejia v. Peru; Cantoral Benavides v. Peru; Durante et Ugarte v. Peru; Cesti Hurtado v. Peru; Ivcher Bronstein v. Peru); right to the truth (see e.g.: Barrios Altos v. Peru; Bamaca Velasquez v. Guatemala; Hermanas Serrano Cruz; Blanco-Romero v. Venezuela; Gutierrez Soler v. Colombia; Almonacid Arellano v. Chile; Goiburú v. Paraguay); judicial guarantees, due process and terrorism (see e.g.: Castillo Petruzzi v. Peru; Lori Berenson Mejia v. Peru; Cantoral Benavides v. Peru; Durante et Ugarte v. Peru; Cesti Hurtado v. Peru; Ivcher Bronstein v. Peru); ex post facto laws (see e.g.: Fermin Ramirez v. Guatemala; Raxcaco-Reyes v. Guatemala; Yvon Neptune v. Haiti); legality of crimes and punishments (see e.g.: Lori Berenson Mejia v. Peru; Asto y Rojas v. Peru); freedom of expression (see e.g.: Olmedo-Bustos *et al.* v. Chile; Herrera Ulloa v. Costa Rica; Canese v. Paraguay; Palamara-Iribarne v. Chile; Lopez Alvarez v. Honduras; Kimel v. Argentine; Claude Reyes v. Chile); trade union rights (see e.g.: Huilca Tecse v. Peru); right to a name and judicial personality (see e.g.: Ninas Yean et Bosico v. Dominican Republic); rights of the children (see e.g.: Villagran Morales *et al.* v. Guatemala; Paniagua Morales *et al.* v. Guatemala; Case of the “Juvenile Reeducation Institute” v. Paraguay; Servellon Garcia *et al.* v. Honduras); right to nationality (see e.g.: Castillo Petruzzi v. Peru; Ninas Yean & Bosico v. Dominican Republic); right to property (see e.g.: Mayagna (Sumo) Awas Tingni v. Nicaragua; Moiwana v. Surinam; Yakye Axa v. Paraguay; Sawhoyamaxa v. Paraguay; Saramaka People v. Surinam; Case of the “Five Pensioners” v. Peru; Tibi v. Ecuador; Palamara Iribarne v. Chile; Aguado-Alfaro *et al.* v. Peru); freedom of movement (see e.g.: Canese v. Paraguay; Massacres de Ituango v. Colombia); political rights (see e.g.: YATAMA v. Nicaragua); equality before law and positive discrimination (see e.g.: YATAMA v. Nicaragua; Case of the “Juvenile Reeducation Institute” v. Paraguay).

<sup>149</sup> Case of the «Mapiripán Massacre» v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134 para. 106 (15 September 2006): “The Court has pointed out, as the European Court of Human Rights has too, that human rights treaties are live instruments, whose interpretation must go hand in hand with evolving times and current living conditions. This evolutive interpretation is consistent with the general rules of interpretation set forth in Article 29 of the American Convention, as well those set forth in the Vienna Convention on Treaty Law” (references omitted).

<sup>150</sup> Advisory Opinion OC-2/82, The Effect of Reservations on the Entry into Force of the American Convention on Human Rights, Inter-American Court of Human Rights, (ser. A) No. 2 paras. 29-31 (24 September 1982).

<sup>151</sup> *ib.* para. 34.

terms<sup>152</sup>, and the collective guarantee underlying them<sup>153</sup>. Moreover, the Court uses all the human rights *corpus juris*, including other treaties and jurisprudence from other systems of protection, in order to interpret the American Convention and to construct and endorse the most favorable interpretation of the human rights set forth in the Convention<sup>154</sup>. In that sense, the Court has applied a universalistic method of interpretation in an effort to offer the broadest and most supportive protection possible<sup>155</sup>. Furthermore, the Court takes into account relevant historical, social, political, and cultural elements not only to find facts and adjudicate cases, but also to interpret and shape human rights, assessing human rights abuses through the lenses, for example, of the members of an indigenous community<sup>156</sup>.

The Court's jurisprudence, both advisory and contentious, emphasizes a certain conception of international human rights law based on a truly universalistic approach. As described by the former President and Judge of the Court, Antonio A. Cançado Trindade, the Court contributes to the construction of a new *jus gentium* of the 21<sup>st</sup> century, guided by the general principles of law (including the fundamental principles of equality and non-discrimination), characterized by the broad protection of due process guarantees and judicial protection *sensu lato*, strengthened by the recognition of *jus cogens* and by the effects of ob-

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<sup>152</sup> Advisory Opinion OC-6/86, The Word 'Laws' in Article 30 of the American Convention on Human Rights, Inter-Am. Ct. H.R., (ser. A), No. 6 paras. 19-21 (9 May 1986).

<sup>153</sup> See Case Blake v. Guatemala, Inter-Am. Ct. H.R., (ser. C) No. 48 (22 January 1999) (separate Opinion of Judge Cançado Trindade, esp. para. 33).

<sup>154</sup> Case of the «Mapiripán Massacre» v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134, para. 106 (15 September 2006): "(...) when interpreting the Convention it is always necessary to choose the alternative that is most favorable to protection of the rights enshrined in said treaty, based on the principle of the rule most favorable to the human being" (references omitted). See also: Case of Ricardo Canese v. Paraguay (ser. C) No. 111, para. 181 (31 August 2004); Case of Herrera Ulloa v. Costa Rica (ser. C) No. 107, para. 184 (2 July 2004); Case of Baena Ricardo *et al* v. Panama (ser. C) No. 72 (2 February 2001).

<sup>155</sup> Advisory Opinion OC-5/85, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights), Inter-Am. Ct. H.R. (ser. A) para. 52 (13 November 1985).

<sup>156</sup> See e.g. Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 (31 August 2001); Moiwana Village v. Suriname, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124 para. 102 (15 June 2005); Yakyé Axa Indigenous Community v. Paraguay, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125 (17 June 2005); YATAMA v. Nicaragua, 2005 Inter-Am. Ct. H.R. (ser. C) No. 127 (23 June 2005). See the analysis by T. ANTKOWIAK, Moiwana Village v. Suriname: A Portal Into Recent Jurisprudential Developments of the Inter-American Court of Human Rights, 25 Berkeley J. Int'l L., 2007, p. 268.

ligations *erga omnes*, and founded on the respect of the rights inherent to the human beings<sup>157</sup>. The Court seems to consider that international human rights law in all of its manifestations, including the 1966 International Covenants, the European Convention, the African Charter and all other human rights-related instruments, forms a coherent *corpus juris* aiming at the protection of all human beings<sup>158</sup>. In its first Advisory Opinion, the Court asserts the fundamental bonds between the regional human rights system and the universal system established by the United Nations<sup>159</sup>. That *jusnaturalist* vision of international human rights law divorces from the traditional voluntarist theory of international law<sup>160</sup> and characterizes the emerging Inter-American human rights law.

## 2.2. *The States' general obligations and the access to justice*

The rationale of the Court's jurisprudence relies mainly on the broad interpretation of States' obligations. First, the Court's interpretation of States' general obligations to ensure and to protect (Article 1 (1)) the rights and liberties set forth in the Convention has been very broad. In

<sup>157</sup> Advisory Opinion OC-18/03, Juridical Condition and Rights of the Undocumented Migrants, Inter-Am. Ct. H.R. (ser. A) No. 18 (2003) (separate opinion A.A. Cançado Trindade). Cançado Trindade's idea of the new *jus gentium* in the context of the Inter-American jurisprudence is explained in most of his individual opinions that have been published in CANÇADO TRINDADE, A.A.: *Derecho Internacional de los Derechos Humanos. Esencia y Trascendencia (Votos en la Corte Interamericana de Derechos Humanos, 1991-2006)*, Porrúa/Universidad Iberoamericana, 2007. Moreover, for the theory of the new *jus gentium*, see CANÇADO TRINDADE, A.A.: "International Law for Humankind: Towards a New *Jus Gentium*", *General Course on Public International Law*, Collected Courses, Volume 316, 2005, Martinus Nijhoff Publishers, 2006.

<sup>158</sup> See CANÇADO TRINDADE, A.A.: "Approximations and Convergences in the Case-Law of the European and Inter-American Courts of Human Rights", in COHEN-JONATHAN, G. and FLAUSS, J-F. (eds.): *Le rayonnement international de la jurisprudence de la Cour européenne des droits de l'homme*, Bruylant/Nemesis, 2005, p. 101; CANÇADO TRINDADE, A.A.: "The Development of International Human Rights Law by the Operation and the Case-Law of the European and Inter-American Courts of Human Rights", 25 *Human Rights Law Journal*, 2004, p. 157; CANÇADO TRINDADE, A.A.: "The Inter-American Court of Human Rights at a Crossroads: Current Challenges and Its Emerging Case-Law on the Eve of the New Century", in MAHONEY, P. et al. (eds.): *Protection des droits de l'homme: la perspective européenne. Mélanges à la mémoire de Rolv Ryssdal*, C. Heymanns Verlag, 2000, p. 167.

<sup>159</sup> Advisory Opinion OC-1/82, "Other treaties" subject to the advisory jurisdiction of the Court (Art. 64 American Convention on Human Rights), Inter-Am. Ct. H.R. (ser. A) para. 89 (24 September 1982).

<sup>160</sup> See for a criticism of the Inter-American Court's methods of interpretation NEUMAN, G.: "Import, Export, and Regional Consent in the Inter-American Court of Human Rights", 19 *Eur. J. Int'l L.*, 2008, p. 101.

the Court's opinion, "Article 1 (1) is essential in determining whether a violation of the human rights recognized by the Convention can be imputed to a State Party. In effect, that article charges the States Parties with the fundamental duty to respect and guarantee the rights recognized in the Convention. Any impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Convention"<sup>161</sup>. This provision can be seen as the pillar of the entire Convention. Its broad interpretation has been decisive to determine the international responsibility of the States in all cases. For example, in its cases regarding forced disappearances, the Court relied on that broad interpretation of the general obligation of the States combined with innovative mechanisms of demonstration and presumption<sup>162</sup>.

Second, the States' obligation to adopt internal measures (Article 2) allowed the Court to act as a sort of Inter-American constitutional court, with the power to rule that a State's norm or practice violates the Convention, or that its national law does not provide the means for individuals to enjoy the rights set forth by the Convention, and therefore request that the State concerned amend its domestic law<sup>163</sup>. Moreover, the Court judged that "a rule *per se* can violate Article 2 of the Convention, whether or not it has been applied in a specific case"<sup>164</sup>.

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<sup>161</sup> Case Velásquez Rodríguez v. Honduras, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4 para. 164 (29 July 1988).

<sup>162</sup> *Id.* Since these disappearances took place in the context of a systematic practice tolerated or organized by the State and that the victims' representatives were ill-equipped to demonstrate the facts, the Court set up a test for adjudicating disappearances: first, the complainant must demonstrate that a systematic practice of disappearance organized or tolerated by the State took place; second, the complainant must prove that the individual case of disappearance took place in that context. The Court may infer the international responsibility of the State from its failure to demonstrate either the general practice or the individual case of disappearance. Moreover, in these cases, the Court would presume the death of the victim to rule that the right to live as been violated and would presume that the right to integrity of the victim's family has been violated since the disappearance causes to the relatives suffering and psychological distress.

<sup>163</sup> See e.g. Case of Suárez-Rosero v. Ecuador, 1997 Inter-Am. Ct. H.R. (ser. C) No. 35 paras. 97-98 (12 November 1997) (Ecuadorian Criminal Code); see, e.g., Raxcacó-Reyes v. Guatemala, 2005 Inter-Am. Ct. H.R. (ser. C.) No. 133 para. 89 (15 September 2005); Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 para. 138 (31 August 2001); Baena-Ricardo and Others v. Panama, 2001 Inter-Am. Ct. H.R. (ser. C) No. 72 para. 180 (2 February 2001).

<sup>164</sup> See e.g. Case Cantoral Benavides v. Peru, 2000 Inter-Am. Ct. H.R. (ser. C) No. 69 para. 176 (18 August 2000) (Peruvian terrorism law).



Third, the States have the obligation to ensure that all victims of human rights abuses (for rights guaranteed by the Convention or by domestic law) have access to justice (Article 25)<sup>165</sup>. The denial of access to justice is a breach of the individual's right to judicial remedy set forth by Article 25 of Convention interpreted in concert with Article 8 (judicial guarantees)<sup>166</sup>. The Court interpreted the right to access to justice particularly innovatively in its forced disappearance cases, granting the victims' families a right to know the truth about the status of their relative<sup>167</sup>.

The Court's adjudication process consists of determining whether a human rights abuse is a breach of a State's obligation and therefore imputable by the Court. The Court has established that the "international liability of the States, within the framework of the American Convention, arises from the violation of the general obligations, *erga omnes* in nature, to respect and enforce respect for – guarantee – the protection standards and to ensure the effectiveness of the rights enshrined therein, in all circumstances and in respect to all persons under their jurisdiction, embodied in Articles 1(1) and 2 of said treaty"<sup>168</sup>. Moreover, the Court considers that the State's international responsibility may be "aggravated" when the abuses were particularly egregious and when they took place in a context of serious violations directly perpetrated by the State's agents<sup>169</sup>.

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<sup>165</sup> See e.g. Case Cantos v. Argentina, 2002 Inter-Am. Ct. H.R. (ser. C) No. 97 para. 52 (28 November 2002).

<sup>166</sup> See e.g. Case Mayagna (Sumo) Awas Tingni v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 paras. 123-124 (31 August 2001).

<sup>167</sup> Case of Bámaca-Velásquez v. Guatemala, 2000 Inter-Am. Ct. H.R. (ser. C) No. 70 para. 197 (25 November 2000). See ANTKOWIAK, T.: "Truth as Right and Remedy in International Human Rights Experience", 23 *Mich. J. Int'l L.*, 2002, p. 977.

<sup>168</sup> Case of Baldeón-García v. Peru, 2006 Inter-Am. Ct. H.R. (ser. C) No. 147 para. 80 (26 April 2006).

<sup>169</sup> Case of Myrna Mack-Chang v. Guatemala, 2003 Inter-Am. Ct. H.R., (ser. C) No. 101 para. 139 (25 November 2003): "(...) the State is responsible for the extra-legal execution of Myrna Mack Chang committed through actions of its agents, carrying out orders issued by the high command of the Presidential General Staff, which constitutes a violation of the right to life. This circumstance was worsened because at the time of the facts there was in Guatemala a pattern of selective extra-legal executions fostered by the State, which was directed against those individuals who were considered 'internal enemies'. Furthermore, since then and still today, there have not been effective judicial mechanisms to investigate the human rights violations nor to punish those responsible, all of which gives rise to an aggravated international responsibility of the respondent State". See also: Case of the Gómez-Paquiyaury Brothers v. Peru 2004 Inter-Am. Ct. H.R. (ser. C) No. 110 para. 76 (8 July 2004) (separate opinion A.A. Cançado Trindade); Goiburú Case v. Paraguay, 2006 Inter-Am. Ct. H.R. (ser. C) No. 153 (22 September 2006).

### 2.3. *The reparation regime*

Finally, with the use of a broad interpretation of Article 63(1) of the American Convention that grants the Court with remedial powers, the Court has built a reparation regime over the years in the context of its contentious jurisdiction<sup>170</sup>. The reparation phase of the contentious case can almost be seen as a new trial. The potential beneficiaries of remedial measures are not limited to the direct victims of human rights abuses, but may extend to their relatives if they have suffered harms from the violation, and sometimes to the members of a whole community. The damage resulting from violations that the Court may consider can be material and/or moral<sup>171</sup>, and parties may debate these issues before the Court. Finally, the Court may order all sorts of remedial measures. The Court considers that "reparation for damage caused by a breach of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists of reestablishing the previous situation. If that is not possible, the international court must order that steps be taken to guarantee the rights infringed, redress the consequences of the infringements, and determine payment of indemnification as compensation for damage caused"<sup>172</sup>. First, since the State must ensure the injured party the enjoyment of the right or freedom violated, the Court may order cessation or restitution measures such as the guarantee of a new trial for the victim<sup>173</sup>, reinstatement of the victim in their former employment<sup>174</sup>, release of a victim ille-

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The inter-American theory of aggravated responsibility remains however to be defined. See TIGROUDJA, H.: "La Cour interaméricaine des droits de l'homme au service de "l'humanisation du droit international public". Propos autour des récents arrêts et avis", *Annuaire Français de Droit International*, 2006, p. 617.

<sup>170</sup> See ANTKOWIAK, T.: "Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond", 46 *Colum. J. Transnat'l L.*, 2008, p. 351. See PASQUALUCCI, J.: *supra* note 36, p. 230.

<sup>171</sup> See e.g.: *Moiwana Village v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124 para. 102 (15 June 2005) (The Court takes into account the impossibility for the victims to have access to justice, their humiliation, and their fear of "spiritually-caused illnesses" caused by the fact that various death rituals have not been performed according to their tradition following the attacks of their village).

<sup>172</sup> *Barrios Altos (Chumbipuma Aguirre) et al. v. Peru*, 2001 Inter-Am. Ct. H.R., (ser. C), No. 87 para. 25 (30 November 2001).

<sup>173</sup> See e.g.: *Case of Fermín Ramírez v. Guatemala*, 2005 Inter-Am. Ct. H.R. (ser. C), No. 126 para. 138(7) (20 July 2005); *Case of Castillo-Petruzzi et al. v. Peru*, 1999 Inter-Am. Ct. H.R. (ser. C), No. 52 Res 13 (30 May 1999).

<sup>174</sup> See e.g.: *Case of Baena-Ricardo et al. v. Panama*, 2001 Inter-Am. Ct. H.R., (ser. C), No. 72 para. 203 (2 February 2001); *Case of Loayza-Tamayo v. Peru*, 1998 Inter-Am. Ct. H.R. (ser. C), No. 42 para. 113 (27 November 1998).

gally detained<sup>175</sup>, or expunging of criminal records<sup>176</sup>. Second, since the State must take appropriate measures to remedy the consequences of the violation and to prevent further similar violations, the Court may order the State to amend its laws<sup>177</sup>, including its constitution<sup>178</sup>, or to adopt new laws<sup>179</sup>, nullify a sentence<sup>180</sup>, investigate the abuses<sup>181</sup>, take or refrain to take action<sup>182</sup>, pay for future medical expenses<sup>183</sup> or provide free medical and psychological care<sup>184</sup>, or to adopt and implement institutional reforms<sup>185</sup>. Third, the Court may order the State to pay a fair compensation determined by the “American Convention and the applicable principles of international law”, and not by the domestic laws, to compensate the pecuniary damages or the moral damages

<sup>175</sup> See e.g.: Case of Loayza-Tamayo v. Peru, 1997 Inter-Am. Ct. H.R. (ser. C), No. 33 Res (17 September 1997).

<sup>176</sup> See e.g.: Case Acosta-Caldron v. Ecuador, 2005 Inter-Am. Ct. H.R. (ser. C), No. 129 para. 175(7) (24 June 2005); Case of Suárez-Rosero v. Ecuador, 1999 Inter-Am. Ct. H.R. (ser. C), No. 44 para. 113(1) (20 January 1999).

<sup>177</sup> See e.g. Case of Castillo-Petruzzi *et al.* v. Peru, 1999 Inter-Am. Ct. H.R. (ser. C), No. 52 p. 222 (30 May 1999).

<sup>178</sup> See e.g. Case of “The Last Temptation of Christ” (Olmedo-Bustos *et al.*), 2001 Inter-Am. Ct. H.R. (ser. C), No. 73 paras. 97-98 (5 February 2001).

<sup>179</sup> See e.g.: Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 para. 164 (31 August 2001); Case of the “Street Children” (Villagrán-Morales *et al.*) v. Guatemala, 2001 Inter-Am. Ct. H.R. (ser. C) No. 77 para. 98 (26 May 2001).

<sup>180</sup> See e.g. Hilaire, Constantine & Benjamin v. Trinidad and Tobago, 2001 Inter-Am. Ct. H.R. (ser. C) No. 94 para. 223(11) (21 June 2000).

<sup>181</sup> See e.g. Case of the Ituango Massacres v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148 para. 402 (1 July 2006); Case of the 19 Tradesmen v. Colombia, 2004 Inter-Am. Ct. H.R. (ser. C) No. 109 para. 256 (5 July 2004).

<sup>182</sup> See e.g. Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 para. 164 (31 August 2001) (demarcation of territory); Hilaire, Constantine & Benjamin v. Trinidad and Tobago, 2001 Inter-Am. Ct. H.R. (ser. C) No. 94 para. 223(11) (21 June 2000) (refrain from executing the victims condemned to the death penalty).

<sup>183</sup> See e.g. Case of Molina-Theissen v. Guatemala, 2004 Inter-Am. Ct. H.R. (ser. C) No. 108 para. 71 (3 July 2004).

<sup>184</sup> See e.g. Case of the Ituango Massacres v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 148 para. 403 (1 July 2006); Case of the ‘Juvenile Reeducation Institute’ v. Paraguay, 2004 Inter-Am. Ct. H.R. (ser. C) No. 112 para. 318-19 (2 September 2004); Case of the 19 Tradesmen v. Colombia, 2004 Inter-Am. Ct. H.R. (ser. C) No. 109 para. 275 (5 July 2004).

<sup>185</sup> See e.g. Case of Montero-Aranguren *et al.* (Detention Center of Catia) v. Venezuela, 2006 Inter-Am. Ct. H.R. (ser. C) No. 150 paras. 145-146 (5 July 2006) (regarding prison conditions); Case of Palamara-Iribarne v. Chile, 2006 Inter-Am. Ct. H.R. (ser. C) No. 135 paras. 256-257 (22 November 2005) (regarding military jurisdiction).

caused by the human rights abuses<sup>186</sup>. Fourth, to complete the reparations measures due to the victims, the Court may order that the State publicly recognize its responsibility<sup>187</sup>, apologize to the victims<sup>188</sup>, and take symbolic and concrete actions regarding the dignity and honor of the victims and of society as a whole. These actions may include, for example: to establish an annual scholarship<sup>189</sup>, to name a street<sup>190</sup> or a school<sup>191</sup> in honor of the deceased victims or to place a plaque or build a monument in their memory<sup>192</sup>.

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<sup>186</sup> See e.g. Case of Tibi v. Ecuador, 2004 Inter-Am. Ct. H.R. (ser. C) No. 114 paras. 236-237 (7 September 2004); Case of the Juvenile Reeducation Institute v. Paraguay, 2004 Inter-Am. Ct. HR, (ser. C) No. 112, para. 290 (2 September 2004); Case of Myrna Mack-Chang v. Guatemala, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101 para. 253 (25 November 2003). See PASQUALUCCI, J.: *supra* note 36, p. 254.

<sup>187</sup> See e.g. Case of Myrna Mack-Chang v. Guatemala, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101 para. 278 (25 November 2003); Case Cantoral Benavides v. Peru, 2001 Inter-Am. Ct. H.R. (ser. C) No. 88, para. 81 (3 December 2001).

<sup>188</sup> See e.g. *Moiwana Village v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124 para. 216 (15 June 2005).

<sup>189</sup> See e.g. Case of Myrna Mack-Chang v. Guatemala, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101 para. 285 (25 November 2003).

<sup>190</sup> See e.g. *Id.* para. 286.

<sup>191</sup> See e.g. Case of the "Street Children" (*Villagrán-Morales et al.*) v. Guatemala, 2001 Inter-Am. Ct. H.R. (ser. C) No. 77 para. 103 (26 May 2001).

<sup>192</sup> See e.g. Case of the Pueblo Bello Massacre v. Colombia, 2006 Inter-Am. Ct. HR, (ser. C) No. 140 (31 January 2006); Case of the "Mapiripán Massacre" v. Colombia, 2005 Inter-Am. Ct. HR, (ser. C) No. 134 (15 September 2005).

Part VI

Human Rights in Africa



# The African Regional Human Rights System

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## 1. Introduction

While the term 'human rights' is of relative recent currency on the continent, people in Africa have been struggling for freedom, dignity, equality and social justice for centuries. In Africa, as is the case elsewhere, that which is now called human rights finds its foundations in the struggle to assert these core values of human existence<sup>1</sup>.

Today, the term 'human rights' is used widely in the African context. The written constitutions of every country in Africa recognise the concept<sup>2</sup>; the inter-governmental organisation of African States, the African Union, regards the realisation of human rights as one of its objectives and principles; and the record of ratification of the human

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<sup>1</sup> For an exposition of the approach that human rights and legitimate struggle are two sides of the same coin, see C HEYNS, C.: 'A "struggle approach" to human rights' in HEYNS, C. & STEFISZYN, K.: *Human rights, peace and justice in Africa: A reader*, 2006, pp. 15-35.

<sup>2</sup> See HEYNS, C. & KAGUONGO, W.: 'Constitutional human rights law in Africa', 22 *South African Journal on Human Rights*, 2006, pp. 673-717.

rights treaties of the United Nations by African countries is on a par with practices around the world<sup>3</sup>. There is wide acceptance that the security and development of Africa – as in the world at large – will have to be based on human rights.

Not surprisingly, given the history of exploitation of Africa, the struggle roots of the concept of human rights are clearly visible in the human rights documents of the continent. The African Charter on Human and Peoples' Rights reflects in many ways a reaction to the continental experience of slavery and colonialism, for example by recognising a 'peoples' right to self-determination. The excesses of some post-independence leaders are reflected in the fact that a remarkable 16 African constitutions explicitly recognise a direct right (and in some cases a duty), located in the people, to protect constitutional and human rights norms, if need be through political struggle, should they be violated<sup>4</sup>. The Constitutive Act of the African Union uniquely provides for a right of humanitarian intervention in member States by the Union, in cases of grave human rights violations<sup>5</sup>.

As is well known, the struggle for human rights on the African continent is far from over or complete. The continent is plagued by widespread violations of human rights, often on a massive scale. The process to establish effective institutional structures, that will help to consolidate and protect the hard-earned gains of the freedom struggles of the past, has become a struggle in its own right. The challenge, so to speak, is to ensure that the see-saw is levelled – that today's victims do not become the victims of tomorrow. No doubt, the most important task in this regard is to establish legal systems on the national level that protect human rights. At the same time regional and global attempts to change the human rights practices of the continent, and to create safety nets for those cases not effectively dealt with at the national level, are assuming increased importance.

This contribution first introduces the main legal instruments relevant to the continental or regional protection of human rights in Africa, then discusses the norms recognised (individual and peoples' rights and

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<sup>3</sup> For a collection of the primary material dealing with human rights law in Africa on the United Nations, regional, sub-regional and domestic levels of all the countries of Africa, see HEYNS, C. (ed) *Human Rights Law in Africa*, 2004 (hereinafter referred to as *Human rights law in Africa* (2004)). See also HEYNS, C. and KILLANDER, M. (eds): *Compendium of key human rights documents of the African Union*, 3rd ed, 2007 (hereinafter referred to as *Compendium* (2007)), and the *African Human Rights Law Reports* (AHLRLR).

<sup>4</sup> HEYNS & KAGUONGO, n 2 above, p. 678.

<sup>5</sup> Article 4(h) of the Constitutive Act.



duties etc) and thereafter turns to the regional institutional structures set up to supervise and achieve the implementation of the norms. This institutional overview focuses primarily on four important pillars of the African human rights system: the organs of the African Union; the African Commission on Human and Peoples' Rights; the African Court on Human and Peoples' Rights; and the African Peer Review Mechanism.

## 2. The African Union and Human Rights

### 2.1. Background

The African regional system was developed under the auspices of the Organization of African Unity ('OAU')<sup>6</sup>, established in 1963, which was transformed in 2001 into the African Union ('AU' or 'Union')<sup>7</sup>. All the States of Africa are members of the AU, except Morocco which withdrew in 1984 when the OAU recognised Western Sahara, bringing the membership to 53. The 1963 OAU Charter made only passing reference to the concept of human rights by name, but can be seen as a human rights document in the sense that it set the OAU the task of eliminating colonialism and apartheid. The Constitutive Act of the AU of 2000 (which entered into force in 2001) has since placed human rights squarely on the agenda of the new regional body<sup>8</sup>.

### 2.2. The Constitutive Act

In its Preamble, the Constitutive Act of the AU refers to the African struggles for independence and human dignity 'by our peoples' and the determination of the Heads of State and Government 'to promote

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<sup>6</sup> The Charter of the OAU is reprinted in *Human Rights Law in Africa* (2004) pp. 111-115. The Preamble stated adherence to the principles of the Universal Declaration of Human Rights. See also Art II(1)(e). On the OAU see NALDI, G.J.: *The Organization of African Unity: An Analysis of its Role*, Mansell, London, 1999, p. 109.

<sup>7</sup> Constitutive Act of the African Union CAB/LEG/23.15, entered into force 26 May 2001, reprinted in *Compendium* (2007) pp. 4-12. For an overview of the AU see HEYNS, C.; BAIMU, E. & KILLANDER, M.: 'The African Union', 46 *German Yearbook of International Law*, 2003, p. 252. On the transformation from OAU to AU from a human rights perspective see MURRAY, R.: *Human Rights in Africa*, 2004. See also VILJOEN, F.: *International human rights law in Africa*, Oxford University Press, Oxford, 2007.

<sup>8</sup> For a discussion, see BAIMU, E.: 'The African Union: Hope for better protection of human rights in Africa?', 1 *African Human Rights Law Journal*, 2001, p. 299. See also MANBY, B.: 'The African Union, NEPAD, and 'Human Rights: The Missing Agenda'', 26 *Human Rights Quarterly*, 2004, p. 983.

and protect human and peoples' rights'. In terms of Article 3 the 'Objectives' of the AU 'shall be to ... (e) encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights;' and to '... (h) promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments ...'.

Article 4 deals with 'Principles' and provides:

The Union shall function in accordance with the following principles:  
 ... (g) non-interference by any Member State in the internal affairs of another; (h) the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity; (i) peaceful co-existence of member States and their right to live in peace and security; (j) the right of member States to request intervention from the Union in order to restore peace and security ... (l) promotion of gender equality; (m) respect for democratic principles, human rights, the rule of law and good governance; (n) promotion of social justice to ensure balanced economic development; (o) respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities; (p) condemnation and rejection of unconstitutional changes of governments.

There are no entry requirements in terms of their human rights records and practices for States to join the African Union (as is the case for example with the Council of Europe), and all the members of the OAU became members of the AU without scrutiny of their human rights records. However, there is at least a theoretical chance that violations of AU human rights standards may lead to suspension from the AU; certainly lesser forms of sanctions are possible.

According to Article 23(2),

any Member State that fails to comply with the decisions and policies of the Union may be subjected to ... sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly.

Article 30 provides: 'Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union'<sup>9</sup>.

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<sup>9</sup> On the response of the AU to unconstitutional change of government see WILLIAMS, P.D.: 'From non-intervention to non-indifference: the origins and development of the African Union's security culture', 106 *African Affairs*, 2007, pp. 253 and 271-275.

### 2.3. African human rights instruments

The central document of the African regional human rights system, the African Charter on Human and Peoples' Rights ('African Charter')<sup>10</sup>, was opened for signature in 1981 and entered into force in 1986. It has been ratified by all 53 member States of the OAU/AU<sup>11</sup>. The sole supervisory body provided for by the African Charter is the African Commission on Human and Peoples' Rights ('African Commission'). The African Commission was constituted and met for the first time in 1987. The Commission has adopted its own Rules of Procedure (amended in 1995)<sup>12</sup>. The work of the African Commission will be discussed later in this chapter.

Two protocols to the African Charter will be discussed in more detail later. The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights ('African Human Rights Court Protocol')<sup>13</sup> was adopted in 1998 and entered into force in January 2004. The African Charter has been supplemented by the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted in 2003, which entered into force in November 2005<sup>14</sup>.

In addition to these instruments the African regional human rights system is comprised of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969<sup>15</sup> which entered into force in 1974 (45 ratifications), and the African Charter on the Rights and Welfare of the Child ('African Children's Charter') of 1990<sup>16</sup>, which came into force in 1999 (41 ratifications). A special monitoring body for the African Children's Charter, the African Committee on the Rights

<sup>10</sup> OAU Doc OAU/CAB/LEG/67/3/Rev.5. Reprinted in *Compendium* (2007) pp. 29-40.

<sup>11</sup> The status of ratification of AU treaties is available on [www.africa-union.org](http://www.africa-union.org). The ratification status given for the treaties mentioned in this chapter is based on the information available at the said web site in May 2008, supplemented by information provided by e-mail from Fikerte Bekele, Office of the Legal Counsel of the AU, 19 May 2008. For the three reservations to the African Charter, see *Human Rights Law in Africa* (2004) pp. 108-109. The last State to ratify the African Charter was Eritrea, in 1999.

<sup>12</sup> ACHPR/RP/XIX. Reprinted in *Compendium* (2007) pp. 148-168. The Rules of Procedure was due to be amended in 2008 *inter alia* to take into consideration the creation of the African Court.

<sup>13</sup> OAU/LEG/MIN/AFCHPR/PROT (I) Rev. 2. Reprinted in *Compendium* (2007) pp. 41-47.

<sup>14</sup> The Protocol is discussed further below. As of May 2008 the Protocol had been ratified by 23 States.

<sup>15</sup> OAU Doc CAB/LEG/24.3. Reprinted in *Compendium* (2007) pp. 57-62. See Окопн-Обво, G.: 'Thirty years on: A legal review of the 1969 OAU Refugee Convention', *African Yearbook of International Law* 8, 2000, p. 3.

<sup>16</sup> OAU Doc CAB/LEG/153/Rev 2. Reprinted in *Compendium* (2007) pp. 62-75.

and Welfare of the Child, discussed further below, held its first meeting in 2002<sup>17</sup>.

The relatively unknown Cultural Charter for Africa of 1976 came into force in 1990<sup>18</sup>. Another treaty relevant to human rights is the Convention on Preventing and Combating Corruption adopted in 2003<sup>19</sup>, which entered into force in August 2006. The Convention for the Elimination of Mercenarism in Africa was adopted in 1977 and entered into force in 1985<sup>20</sup>. The OAU Convention on the Prevention and Combating of Terrorism of 1999 entered into force in 2002<sup>21</sup>. There are also two African regional treaties dealing with the environment<sup>22</sup>. The African Youth Charter<sup>23</sup> was adopted in 2006 and the African Charter on Democracy, Elections and Governance in 2007<sup>24</sup>.

### 3. The norms recognised in the African Charter on Human and Peoples' Rights

As alluded to earlier, the 1963 OAU Charter did not recognise the realisation of human rights as such as one of the objectives of that body. It would only be in 1979 that a meeting of experts was convened by the OAU in Dakar, Senegal, to prepare a preliminary draft of an African human rights charter<sup>25</sup>. This culminated in the Draft African Charter on Human and Peoples' Rights, finalised in Banjul, The Gambia, in

<sup>17</sup> See MEZMUR, B.D.: 'The African Committee of Experts on the Rights and Welfare of the Child: An update', 6 *African Human Rights Law Journal*, 2006, p. 549.

<sup>18</sup> Reprinted in *Human Rights Law in Africa* (2004) pp. 125-131.

<sup>19</sup> Reprinted in *Compendium* (2007) pp. 83-93. See OLANIYAN, K.: 'The African Union Convention on Preventing and Combating Corruption: A critical appraisal', 4 *African Human Rights Law Journal*, 2004, p. 74.

<sup>20</sup> Reprinted in *Human Rights Law in Africa* (2004) pp. 132-134.

<sup>21</sup> Excerpts reprinted in *Compendium* (2007) pp. 75-77. A Protocol to this Convention was adopted in 2004, excerpts reprinted in *Compendium* (2007) pp. 78-80.

<sup>22</sup> The African Convention on the Conservation of Nature and Natural Resources (1968/69), reprinted in *Human Rights Law in Africa* pp. 116-121, revised version adopted 2003, not yet in force, excerpts reprinted in *Compendium* (2007) pp. 80-83, and the [Bamako] Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (1991/98), reprinted in *Human Rights Law in Africa* (2004) pp. 153-165. See VAN DER LINDE, M.: 'A review of the African Convention on Nature and Natural Resources', 2 *African Human Rights Law Journal*, 2002, p. 33.

<sup>23</sup> Reprinted in *Compendium* (2007) pp. 94-107.

<sup>24</sup> Reprinted in *Compendium* (2007) pp. 108-119.

<sup>25</sup> The meeting was convened in terms of a decision of the Assembly of Heads of State and Government of the OAU, AHG/Dec 115 (XVI) Rev 1 1979, reprinted in HEYNS, C.

1981 (resulting in the name 'Banjul Charter' which is sometimes used for the African Charter). The OAU formally adopted the African Charter in Kenya later that year<sup>26</sup>.

A number of reasons have been advanced why the OAU changed its approach and gave the concept of human rights the prominence offered by the Charter during the late 1970s and early 1980s. These include the increased emphasis on human rights internationally at the time (notably in the foreign policy of President Carter of the United States of America), the use to which the concept of human rights was put in international bodies such as the UN and the OAU to condemn the apartheid practices in South Africa, and abhorrence at the human rights violations that had taken place in some member States, in particular Uganda, Central Africa and Equatorial Guinea<sup>27</sup>.

The African Charter recognises a wide range of internationally accepted human rights norms, but in addition has some unique features<sup>28</sup>. The Charter recognises not only civil and political rights, but also economic, social and cultural rights, not only individual but also peoples' rights, not only rights but also duties, and it has a singular system for restricting rights. The Charter also contains provisions concerning interpretation which are very favourable towards international law.

Article 1 sets out the obligation of States Parties in respect of all the norms recognised in the African Charter as follows:

The member states of the Organization of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.

As will be discussed below, the Commission has interpreted this to mean that there is a duty on the State to respect, protect, promote and fulfil the rights in question.

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(ed.): *Human Rights Law in Africa 1999, 2002*, p. 127 (hereinafter *Human Rights Law in Africa (1999)*).

<sup>26</sup> For the documents leading up to the adoption of the African Charter, see *Human Rights Law in Africa (1999)*, pp. 65-105.

<sup>27</sup> See UMOZURIKE, U.O.: *The African Charter on Human and Peoples' Rights*, Kluwer, Dordrecht, 1997, pp. 27-28.

<sup>28</sup> In his welcoming address in 1979 to the Meeting of African Experts preparing the Draft African Charter in Dakar, Senegal, Leopold Senghor, President of Senegal, referred to the example set by international human rights instruments, and said: 'As Africans, we shall neither copy, nor strive for originality, for the sake of originality ... [Y]ou must keep constantly in mind our values of civilisation and the real needs of Africa.' Reprinted in *Human Rights Law in Africa (1999)* p. 78.

### 3.1. *Civil and political rights*

The civil and political rights recognised in the African Charter are in many ways similar to those recognised in other international instruments, and these rights have in practical terms received most of the attention of the African Commission<sup>29</sup>.

The Charter recognises the following civil and political rights: The prohibition of discrimination (Art 2); equality (Art 3); bodily integrity and the right to life (Art 4); dignity and prohibition of torture and inhuman treatment (Art 5); liberty and security (Art 6); fair trial (Art 7); freedom of conscience (Art 8); information and freedom of expression (Art 9); freedom of association (Art 10); assembly (Art 11); freedom of movement (Art 12); political participation (Art 13); property (Art 14); and independence of the courts (Art 26).

A number of possible shortcomings in respect of the provisions concerning civil and political rights in the African Charter when compared to other international instruments can be noted. There is, for example, no explicit reference in the Charter to a right to privacy; the right against forced labour is not mentioned by name; and the fair trial rights<sup>30</sup> and the right of political participation<sup>31</sup> are given scant protection when measured against international standards. However, the Commission has in resolutions and in its decisions in cases before it interpreted the Charter protection to encompass some of the rights or aspects of rights not explicitly included in the Charter and to be largely in line with established international practice.

An overview of some Commission's decisions in respect of individual communications provides a sample of its approach:

- In a number of cases the Commission has held that there is not only a negative duty on the States Parties to refrain from violating Charter rights themselves, but also a positive duty on States Parties to protect those in their jurisdictions against violations by non-State actors. In a case concerning Mauritania, the Commis-

<sup>29</sup> For a full discussion, see HEYNS, C.: 'Civil and political rights in the African Charter' in EVANS, M. & MURRAY, R. (eds.): *The African Charter on Human and Peoples' Rights*, Cambridge University Press, Cambridge, 2002, p. 137.

<sup>30</sup> There is, for example, no explicit reference to the right to a public hearing, the right to interpretation, the right against self-incrimination and the right against double jeopardy. However, the Commission has interpreted the Charter protection to encompass some of these rights.

<sup>31</sup> While Art 13(1) the Charter recognises the right 'of every citizen to participate freely in the government of his country', it does not stipulate that this should be done through regular, free and fair elections, based on universal suffrage.

sion found that, although slavery had officially been abolished in that country, the government was not effectively enforcing this against individual slave owners<sup>32</sup>. Similarly, in a case involving Chad, the Commission held that the State's failure to protect people under its jurisdiction against attacks by unidentified militants during a civil war, not proven to be government agents, constituted a violation of the right to life<sup>33</sup>. In a case against Zimbabwe, the Commission invoked the case law of the Inter-American Court of Human Rights to examine the question whether the government had exercised due diligence with regard to violations perpetrated by non-state actors<sup>34</sup>.

- The imposition of *Shari'a* law on non-Muslims in Sudan was held to violate freedom of religion<sup>35</sup>.
- In *Media Rights Agenda and Others v Nigeria*<sup>36</sup> the Commission ruled against the Abacha government's clampdown on freedom of expression, and determined that politicians should be afforded less protection from free expression than other people. As with many of the bolder decisions of the Commission, this decision was unfortunately handed down only after the Abacha regime had fallen. Nevertheless, a positive precedent was set.
- The suspension of national elections was held to violate the right to political participation in *Constitutional Rights Project and Another v Nigeria*<sup>37</sup>.
- The Commission has held that decrees ousting the jurisdiction of courts to examine the validity of such decrees, violate the fair trial provision of the Charter<sup>38</sup>, and that the creation of special tribunals, dominated by members of the executive, violated the same right<sup>39</sup>.

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<sup>32</sup> *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000).

<sup>33</sup> *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995). See also *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

<sup>34</sup> *Zimbabwean Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006).

<sup>35</sup> *Amnesty International and Others v Sudan* (2000) AHRLR 297 (ACHPR 1999).

<sup>36</sup> (2000) AHRLR 200 (ACHPR 1998).

<sup>37</sup> (2000) AHRLR 191 (ACHPR 1998).

<sup>38</sup> *Civil Liberties Organisation v Nigeria* (2000) AHRLR 188 (ACHPR 1995).

<sup>39</sup> *Constitutional Rights Project (in respect of Akamu and Others) v Nigeria* (2000) AHRLR 180 (ACHPR 1995). The appearance of impartiality is enough to constitute a violation (para 12).

- The Commission has held that an execution after an unfair trial is amongst other things a violation of the right to life<sup>40</sup>, but that the death penalty in itself does not violate the African Charter<sup>41</sup>.
- A constitutional amendment providing that anyone who wanted to stand for office in the presidential election in Zambia would have to prove that both parents were Zambians by birth or descent was found to be in violation of the Charter in *Legal Resources Foundation v Zambia*<sup>42</sup>.

### 3.2. Socio-economic rights

A unique feature of the Charter is the inclusion of socio-economic rights in the main regional human rights treaty, alongside the civil and political rights mentioned above<sup>43</sup>. This inclusion is significant, in that it emphasises the indivisibility of human rights and the importance of developmental issues, which are obviously important matters in the African context.

At the same time it should be noted that only a modest number of socio-economic rights are explicitly included in the Charter. It only recognises 'a right to work under equitable and satisfactory conditions' (Art 15), a right to health (Art 16) and a right to education (Art 17). Some prominent socio-economic rights are not mentioned by name, such as the right to food, water, social security and housing<sup>44</sup>.

The socio-economic rights in the Charter have generally received scant attention from the Commission, but in one case the Commission has dealt extensively with the issue, and has in effect held that some internationally recognised socio-economic rights which are not explic-

<sup>40</sup> *Forum of Conscience v Sierra Leone* (2000) AHRLR 293 (ACHPR 2000).

<sup>41</sup> *Interights and Others (on behalf of Bosch) v Botswana* (2003) AHRLR 55 (ACHPR 2003).

<sup>42</sup> (2001) AHRLR 84 (ACHPR 2001).

<sup>43</sup> For a discussion, see ODINKALU, C.: 'Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights', in EVANS & MURRAY: n 29 above, p. 178.

<sup>44</sup> It is also somewhat surprising that the socio-economic rights that are recognised, are not explicitly made subject to the usual internal qualifiers that apply in respect of such rights in most international instruments – such as the provision that the State is only required to ensure progressive realisation, subject to available resources, etc. However, in *Purohit and Another v The Gambia* the Commission referred to the progressive realisation of the right to health (para 84). See also VILJOEN: n 7 above, pp. 240-241. It should also be noted that the Protocol on the Rights of Women provides for progressive realisation with regard to most socio-economic rights.



itly recognised in the Charter should be regarded as being implicitly included.

The so-called *SERAC v Nigeria*<sup>45</sup> decision dealt with the destruction of part of Ogoniland by Shell oil company, acting in collaboration with the government of Nigeria. The Commission held that the presence of an implicit right to 'housing or shelter' in the Charter has to be deduced from the explicit provisions on health, property and family life in the Charter<sup>46</sup>. Similarly, a right to food has to be read into the right to dignity and other rights<sup>47</sup>. It was accepted, without argument or reasoning, that the Ogoni's constituted a 'people'.

The Commission's approach to filling in the gaps in the Charter as was done in the *SERAC* case could be seen as a creative and bold move on the part of the Commission, but it could also be argued that a too wide divergence between the Commission's interpretation of the Charter and the Charter itself could compromise legal certainty<sup>48</sup>.

### 3.3. *Women's rights*

The way in which the Charter deals with gender issues has been a bone of contention. Article 18(3) provides as follows:

The state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

This lumping together of women and children, in an article which deals primarily with the family, re-enforces outdated stereotypes about the proper place and role of women in society and has been partially responsible for the drive to adopt the Protocol to the African Charter on the Rights of Women in Africa<sup>49</sup>. The Protocol on the Rights of Women was adopted by the AU Assembly in 2003. It received the re-

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<sup>45</sup> *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*, n 33 above.

<sup>46</sup> Para 60.

<sup>47</sup> Para 65.

<sup>48</sup> HEYNS, C.: 'The African regional human rights system: In need of reform?', 1 *African Human Rights Law Journal*, 2001, p. 155.

<sup>49</sup> BANDA, F.: *Women, law and human rights: An African perspective*, Hart, Oxford, 2005. A further important development for women's rights was the adoption by the AU Heads of State and Government of a 'Solemn Declaration on Gender Equality in Africa' in July 2004, reprinted in *Compendium* (2007) pp. 138-140.

quired 15 ratifications on 26 October 2005 and entered into force on 25 November 2005.

The Protocol on the Rights of Women is detailed with 24 substantive articles, some dealing with specific issues affecting women, while others deal with rights that should apply equally to men and women, some of which are not included in the African Charter. The rights in the Protocol include elimination of discrimination against women (Art 2); right to dignity (Art 3); right to life, integrity and security of person (Art 4); elimination of harmful practices (Art 5); marriage (Art 6); separation, divorce and annulment of marriage (Art 7); access to justice and equal protection of the law (Art 8); political participation (Art 9); peace (Art 10); protection of women in armed conflict (Art 11); education (Art 12); economic and social welfare rights (Art 13); health and reproductive rights (Art 14); food security (Art 15); adequate housing (Art 16); positive cultural context (Art 17); healthy and sustainable environment (Art 18); right to sustainable development (Art 19); widow's rights (Art 20); inheritance (Art 21); special protection of elderly women (Art 22); women with disabilities (Art 23); and women in distress (Art 24).

Because women's rights are dealt with in a Protocol to the African Charter, the African Commission and Court are responsible for monitoring the implementation of the Protocol, thereby avoiding the duplication that exists with regard to children's issues, where, as mentioned above, a separate Committee on the Rights and Welfare of the Child has been established by a separate treaty.

### 3.4. *Peoples' rights*

In its protection of peoples' rights the Charter goes further than any other international instrument<sup>50</sup>.

According to the Charter, all 'peoples' have a right to be equal (Art 19); to existence and self-determination (Art 20); to freely dispose of their wealth and natural resources (Art 21); to economic, social and cultural development (Art 22); to peace and security (Art 23); and to a satisfactory environment (Art 24). Clearly part of the motivation for the recognition of 'peoples' rights' lies in the fact that, historically, entire 'peoples' in Africa have been colonised and otherwise exploited.

The concept of 'peoples' has been referred to in some of the cases before the Commission, including the following:

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<sup>50</sup> See MURRAY, R. and WHEATLEY, S.: 'Groups and the African Charter on Human and Peoples' Rights', 25 *Human Rights Quarterly*, 2003, p. 213.

- In a case concerning Katangese secessionists in the former Za-ire<sup>51</sup>, a complaint was brought on the basis that the Katangese people had a right, as a people, to self-determination in the form of independence. The Commission ruled that there was no evidence that a Charter provision had been violated, because widespread human rights violations or a lack of political participation by the Katangese people had not been proven. This could be understood to suggest that if these conditions had been met, secession by such a ‘people’ could be a permissible option. At the same time, and perhaps more to the point, the Commission was careful to emphasize that self-determination can also take forms other than secession, such as self-government, local government, federalism, or confederalism<sup>52</sup>.
- In a case concerning the 1994 *coup d’état* against the democratically elected government of The Gambia, the Commission held that this violated the right to self-determination of the people of The Gambia as a whole<sup>53</sup>. The same conclusion was reached when the Abacha government in Nigeria annulled internationally recognised free and fair elections<sup>54</sup>.
- In the abovementioned *SERAC* case the Commission held that the right to a satisfactory environment in Article 24 requires the State ‘to take reasonable ... measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources’<sup>55</sup>. Significantly, here the rights of peoples are used outside the context of self-determination.

### 3.5. *Limitations, derogation and duties*

The way in which the African Charter deals with restrictions on all rights, including civil and political rights, presents significant challenges. The African Charter does not contain a general limitation clause (although, as is noted below, Article 27(2) is starting to play this role). This means that the Charter does not contain general guidelines on how its rights should be limited – no clear ‘limits on the limitations’, so

<sup>51</sup> *Katangese Peoples’ Congress v Zaire* (2000) AHRLR 71 (ACHPR 1995).

<sup>52</sup> As above, para 4.

<sup>53</sup> *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000).

<sup>54</sup> *Constitutional Rights Project and Another v Nigeria* (2000) AHRLR 191 (ACHPR 1998) para 52.

<sup>55</sup> n 33 above, para 52.

to speak. A well-defined system of limitations is important in any human rights regime. A society in which rights cannot be limited will be ungovernable, but it is essential that appropriate human rights norms be set for the limitations, to prevent the rights from being rendered illusory.

A number of the Charter's provisions setting out specific civil and political rights do contain limitations on those particular rights. Some of these internal limitations clearly spell out the procedural and substantive norms with which limitations should comply<sup>56</sup>, while others only describe the substantive requirements which limitations must meet<sup>57</sup>.

A last category of these internal limitation clauses merely poses the apparently procedural requirement that limitations should be done 'within the law'. An example of this category of internal limitations is Article 9(2), which provides that '[e]very individual shall have the right to express and disseminate his opinions within the law'. This kind of limitation is generally known as a 'claw-back clause'. They seem to recognise the right in question only to the extent that it is not infringed upon by national law.

If that was the correct interpretation, claw-back clauses would obviously undermine the whole idea of international supervision of domestic law and practices and render the Charter meaningless in respect of the rights involved. In those cases domestic law will have to be measured according to domestic standards; a senseless exercise. It seems that what is given by the one hand is taken away by the other<sup>58</sup>.

However, as has been noted above, the Charter has a very expansive approach to interpretation. In terms of Articles 60 and 61, the Commission has to draw inspiration from international human rights law in interpreting the provisions of the Charter. The Commission has used these provisions very liberally in a number of instances to bring the Charter in line with international practices, and the claw-back clauses are no exception.

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<sup>56</sup> For example, Art 11 recognises the right of freedom of assembly, subject to the following proviso: 'The exercise of this right shall be subject only to necessary restrictions provided for by law, in particular those enacted in the interests of national security, the safety, health, ethics and rights and freedoms of others.'

<sup>57</sup> Art 8 provides that the freedom of conscience and religion may only be limited in the interest of 'law and order'.

<sup>58</sup> Despite all the information available to the contrary, some authors still perpetuate this view of the African Charter. For a discussion see HEYNS, C. & KILLANDER, M.: 'Africa in international human rights textbooks', 15 *African Journal of International and Comparative Law*, 2007, p. 130.

In the context of the claw-back clauses, the African Commission has held that provisions in articles that allow rights to be limited 'in accordance with law', should be understood to require such limitations to be done through domestic legal provisions that comply with international human rights standards<sup>59</sup>.

Through this interpretation, the Commission has gone a long way towards remedying one of the most troublesome features of the Charter. However, it remains unfortunate that the Charter, to those who have not had the benefit of exposure to the approach of the Commission, will continue to appear to condone infringements of human rights norms as long as it is done through domestic law.

The African Charter does not contain a provision either allowing or disallowing derogation from its provisions during a state of emergency. This has led the Commission to the conclusion that derogation is not possible<sup>60</sup>. This could mean that in real emergencies the Charter will be ignored, and will not exercise a restraining influence.

In addition to rights, the Charter also recognises duties<sup>61</sup>. For example, individuals have duties towards their family and society<sup>62</sup>, and States Parties have the duty to promote the Charter<sup>63</sup>.

Perhaps the most significant provision under the heading 'Duties' is Article 27(2), which states that '[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest'. The African Commission has in effect now given this provision the status of a general limitation clause. According to the Commission, '[t]he only legitimate reasons for limitations of the rights and freedoms of the African Charter are found in Article 27(2) ...'<sup>64</sup>.

The Commission's use of Article 27(2) as a general limitation clause seems to confirm the view that the concept of 'duties' should not be

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<sup>59</sup> The Commission has held, eg, in *Media Rights Agenda and Others v Nigeria*, n 36 above, para 66: 'To allow national law to have precedent over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradicting national law'.

<sup>60</sup> *Commission Nationale des Droits de l'Homme et des Libertés v Chad*, n 33 above, para 21.

<sup>61</sup> See MUTUA, M.: 'The Banjul Charter and the African cultural fingerprint', 35 *Virginia Journal of International Law*, 1995, p. 339.

<sup>62</sup> Arts 27, 28 & 29.

<sup>63</sup> Art 25. See also Art 26.

<sup>64</sup> See *Media Rights Agenda and Others v Nigeria*, n 36 above, para 68. See also *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999), para 41.

understood as a sinister way of saying that rights should first be earned, or that meeting certain obligations is a precondition for enjoying human rights. Rather, it implies that the exercise of human rights, which people have simply because they are human beings<sup>65</sup>, may be limited by the duties which they also have. Rights precede duties, and the recognition of certain duties is merely another way of signifying the kind of limitation that may be placed on rights. For example, property rights may be limited by the duty to pay taxes.

#### 4. Norms recognised in other treaties

A number of other OAU/AU treaties also impact on human rights.

##### 4.1. *OAU Convention Governing Specific Aspects of Refugee Problems in Africa*

The definition of 'refugee' in Article 1 of the OAU Refugee Convention is broader than of the UN Refugee Convention. In addition to 'well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular group or political opinion'<sup>66</sup> the OAU Convention also stipulates that anyone who is compelled to leave his country because of 'external aggression, occupation, foreign domination or events seriously disturbing public order' shall be considered a refugee. The OAU Convention does not provide for any supervisory system but the African Commission has considered a number of communications dealing with refugees<sup>67</sup>.

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

The African Children's Charter, adopted in 1990, in many respects has similar provisions to the UN Convention on the Rights of the Child (CRC), adopted less than a year prior to the African instru-

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<sup>65</sup> '[I]nherent in a human being', in the words of Art 5 of the Charter, in respect of dignity.

<sup>66</sup> OAU Convention Art 1(1), UN Refugee Convention Art 1(a)(2) read with the Protocol relating to the status of refugees (1967) Art 1(2). For a discussion see Lawyers for Human Rights *African exodus*, 1995.

<sup>67</sup> See eg *Organisation Mondiale Contre la Torture and Others v Rwanda* (2000) AHRLR 282 (ACHPR 1996) and *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* (2000) AHRLR 321 (ACHPR 1996).

ment. In some respects the African Children's Charter goes further than the CRC. No person under 18 years should be recruited or take part in direct hostilities<sup>68</sup>. The CRC sets the age-limit at 15 years, though a Protocol adopted in 2000 now also raises it to 18 years. The African Children's Charter goes further than the CRC in other aspects as well, for example, by prohibiting child marriages<sup>69</sup>. The implementation of the African Children's Charter lies with the African Committee of Experts on the Rights and Welfare of the Child, discussed further below.

#### 4.3. *AU Convention on Preventing and Combating Corruption*

Corruption depletes the resources necessary for a State to be able to fulfil its human rights obligations. This is recognised in the AU Convention on Preventing and Combating Corruption which has as one of its objectives to '[p]romote socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights'<sup>70</sup>. The Convention also provides for rights linked to the fight against corruption, such as access to information<sup>71</sup>. The Convention provides for an Advisory Board on Corruption as a follow-up mechanism<sup>72</sup>.

### 5. **Organs established for the enforcement of human rights**

The establishment of the African Union has seen an unprecedented institutional proliferation of bodies with a human rights mandate<sup>73</sup>. Schematically, the continental bodies with a human rights function may be set out as follows<sup>74</sup>:

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<sup>68</sup> Art 22(2).

<sup>69</sup> Art 21(2). See VILJOEN, n 7 above, p. 262. See also CHIRWA, D.M.: 'The merits and demerits of the African Charter on the Rights and Welfare of the Child', 10 *International Journal of Children's Rights*, 2002, p. 157.

<sup>70</sup> AU Convention on Preventing and Combating Corruption, Art 2(4).

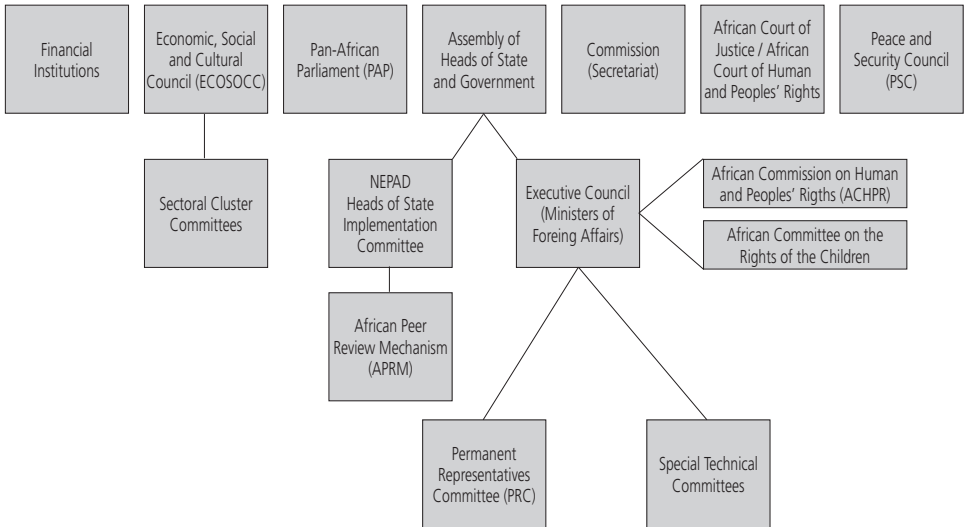
<sup>71</sup> As above, Art 9.

<sup>72</sup> As above, Art 22.

<sup>73</sup> LLOYD, A. & MURRAY, R.: 'Institutions with responsibility for human rights protection under the African Union', 48 *Journal of African Law*, 2004, p. 165.

<sup>74</sup> *Compendium* (2007) p. 144.

### Organigram: African Union



#### 5.1 *The role of the main organs of the AU in protecting human rights*

The African Union has the following main organs: the Assembly of Heads of State and Government, the Executive Council, the Permanent Representative Committee, the Pan-African Parliament, the African Court of Justice, the AU Commission, Specialised Technical Committees, the Economic, Social and Cultural Council, financial institutions and the Peace and Security Council<sup>75</sup>.

The Pan-African Parliament shall 'ensure the full participation of African peoples in the development and economic integration of the continent'<sup>76</sup>. One of the Parliament's objectives is to '[p]romote the princi-

<sup>75</sup> AU Constitutive Act Art 5. The PSC is not included as a main organ of the AU in the original Constitutive Act, but will be included under amendments that have not yet entered into force. For a discussion see HEYNS; BAIMU & KILLANDER: n 7 above, p. 252.

<sup>76</sup> AU Constitutive Act Art 17(1). The functions of the Parliament is set out in the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament, adopted by the OAU Assembly in March 2001 and entered into force in 2003. Reprinted in *Human Rights Law in Africa* (2004) p. 212. See MAGLIVERAS, K.D. & NALDI, G.J.: 'The Pan-African Parliament of the African Union: An overview', 3 *African Human Rights Law Journal*, 2003, p. 222 and DEMEKE, T.: 'The new Pan-African Parliament: Prospects and challenges in view of the experience of the European Parliament', 4 *African Human Rights Law Journal*, 2004, p. 53.



ples of human rights and democracy in Africa'<sup>77</sup>. The Parliament held its first session in 2004. Each State Party to the Protocol establishing the Parliament sends five national parliamentarians to the Parliament that meets twice a year in Midrand, South Africa. Currently its powers are purely consultative and advisory<sup>78</sup>.

The Economic, Social and Cultural Council (ECOSOCC) is 'an advisory organ composed of different social and professional groups'<sup>79</sup>. Its purpose is to provide a role for civil society in the AU. One of ECOSOCC's objectives is to '[p]romote and defend a culture of good governance, democratic principles and institutions, popular participation, human rights and freedoms as well as social justice'<sup>80</sup>. The statutes of ECOSOCC were adopted by the AU Assembly in July 2004 and the Council held its first meeting in Addis Ababa in March 2005<sup>81</sup>.

The Protocol of the Court of Justice of the African Union, one of the main organs of the AU, has not yet entered into force<sup>82</sup>. The Court of Justice is set to merge with the African Court on Human and Peoples' Rights, discussed further below.

The attempts to develop mechanisms to deal with conflict in Africa are also of importance in trying to prevent massive human rights violations<sup>83</sup>. The Protocol on the Peace and Security Council (PSC), adopted

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<sup>77</sup> Protocol on the Pan-African Parliament Art 3(2).

<sup>78</sup> It is clear that the Parliament has yet to find its feet, but among the activities relevant to human rights are its fact-finding mission to Darfur, which produced a report to the April 2005 session of the Parliament and its decision at the same session to send missions to Côte d'Ivoire and the Democratic Republic of Congo. The Parliament will also play a role in the African Peer Review process. See Recommendations on the New Partnership for Africa's Development and the African Peer Review Mechanism, adopted at the second ordinary session of the Pan-African Parliament, 16 September – 1 October 2004, PAP-Rec 002/04. [http://www.iss.co.za/AF/RegOrg/unity\\_to\\_union/pdfs/pap/3rdres.pdf](http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/pap/3rdres.pdf) (accessed 26 September 2005).

<sup>79</sup> AU Constitutive Act Art 22(1).

<sup>80</sup> ECOSOCC Statutes Art 2(5).

<sup>81</sup> <http://www.africa-union.org/organs/ecosocc/home.htm>. ECOSOCC has a membership of 150 organisations, constituting the General Assembly, and an 18-member Standing Committee. To facilitate policy input into the other AU organs the Council has ten sectoral cluster committees, roughly corresponding to the departments of the AU Commission (political affairs; peace and security; infrastructure and energy; social affairs and health; human resources, science and technology; trade and industry; rural economy and agriculture; economic affairs; women and gender; and cross-cutting issues. Human rights fall under political affairs).

<sup>82</sup> The Protocol and other AU treaties are available on the web site of the African Union, [www.africa-union.org](http://www.africa-union.org).

<sup>83</sup> See Declaration on the Establishment of a Mechanism for Conflict Prevention, Management and Resolution, AHG/DECL. 3 (XXIX). The Central Organ of this Mechanism was included as an organ of the AU at the 37<sup>th</sup> OAU Assembly in 2001, AHG/Dec. 160 (XXXVII).

in 2002, entered into force in 2003. The PSC is composed of 15 members. The criteria for membership include 'respect for constitutional governance ... as well as the rule of law and human rights ...'<sup>84</sup>.

Article 4 of the PSC Protocol provides that the Council shall be guided by the AU Constitutive Act, the UN Charter and the Universal Declaration of Human Rights. The Protocol further provides that one of the Council's objectives is to

promote and encourage democratic practices, good governance and the rule of law, protect human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law, as part of efforts for preventing conflicts<sup>85</sup>.

Article 19 of the Protocol provides:

The Peace and Security Council shall seek close cooperation with the African Commission on Human and Peoples' Rights in all matters relevant to its objectives and mandate. The Commission on Human and Peoples' Rights shall bring to the attention of the Peace and Security Council any information relevant to the objectives and mandates of the Peace and Security Council.

From its Annual Activity Reports it appears that the Commission has not made use of this provision, though it has made reference to PSC resolutions in its own country-specific resolutions<sup>86</sup>.

The development programme of the AU, the New Partnership for Africa's Development (NEPAD), links human rights to development and provides for the African Peer Review Mechanism (APRM), discussed below.

## 5.2. *The African Commission on Human and Peoples' Rights*

As was mentioned earlier, the African Charter adopted in 1981 provided only for the creation of a Commission and not a Court on Human Rights, in contrast with the other two regional systems in the

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According to Art 22 of the Protocol Relating to the Establishment of Peace and Security Council of Africa, ASS/AU/Dec. 2(I), this Council will replace the earlier Mechanism.

<sup>84</sup> PSC Protocol Art 5(2)(g).

<sup>85</sup> PSC Protocol Art 3(f).

<sup>86</sup> See eg Resolution on Côte d'Ivoire and Resolution on Darfur (2004), 17th Annual Activity Report of the African Commission on Human and Peoples' Rights. See also the recommendation of the Brainstorming Meeting on the African Commission on Human and Peoples' Rights, 9-10 May 2006, that the Commission should explore 'the possibility of the Peace and Security Council of the AU (PSC) to enforce the decisions of the ACHPR within the framework of Article 19 of the PSC Protocol'. See 20th Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/279 (IX), Annex II, p. 32.

world – in Europe and in the Americas, which, at the time, had both<sup>87</sup>. The Commission is not formally an organ of the AU, as it was created by a separate treaty.

### 5.2.1. THE COMMISSIONERS

The African Commission consists of 11 Commissioners who serve in their individual capacities<sup>88</sup>. The Commission meets twice a year in regular sessions for a period of up to two weeks. They are nominated by States Parties to the Charter and elected by the Assembly<sup>89</sup>. The Secretariat of the Commission is based in Banjul, The Gambia. The Commission alternates its meetings between Banjul and other African capitals. The Commission has both a protective and a promotional mandate<sup>90</sup>.

Although the Charter provides that the Commissioners should be independent there have been many instances where the independence of individual Commissioners was questioned. The fact that many Commissioners have been serving civil servants or ambassadors has been criticised. For example, a Commissioner from Mauritania elected in 2003 became a Minister in his home country shortly thereafter. However, an important step was taken when the AU requested nominations to fill the post of four Commissioners in 2005. In a *note verbale* to the member countries in April 2005 the AU Commission provided guidelines that excluded senior civil servants and diplomatic representatives from being elected<sup>91</sup>. This has proven largely effective in terms of new appointments.

The main mechanisms employed by the Commission to fulfil its task of supervising compliance with Charter norms by States Parties are the following:

### 5.2.2. THE COMPLAINTS PROCEDURE

Both States and individuals may bring complaints to the African Commission alleging violations of the African Charter by States Parties.

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<sup>87</sup> With the entry into force of Protocol 11 to the European Convention on Human Rights in November 1998 the European Commission on Human Rights was abolished.

<sup>88</sup> Art 31.

<sup>89</sup> Art 33.

<sup>90</sup> Art 45(1) & (2). See DANKWA, V.: 'The promotional role of the African Commission on Human and Peoples' Rights' in EVANS and MURRAY: n 29 above, p. 335.

<sup>91</sup> BC/OLC/66/Vol.XVIII.

The procedure by which one State brings a complaint about an alleged human rights violation by another State is not often used<sup>92</sup>. Currently only one such case has been decided by the Commission – a case brought by the Democratic Republic of Congo against three neighbouring countries<sup>93</sup>.

The so-called individual communication or complaints procedure is not clearly provided for in the African Charter. One interpretation of the Charter is that communications could be considered only where 'serious or massive violations' are at stake, which then triggers the rather futile Article 58 procedure, described below. However, the African Commission has accepted from the start that it has the power to deal with complaints about any human rights violations under the Charter even if 'serious or massive' violations are not at stake, provided the admissibility criteria are met<sup>94</sup>.

The Charter is silent on the question as to who can bring such complaints, but the Commission practice is that complaints from individuals as well as NGOs are accepted. From the case law of the Commission it is clear that the complainant does not need to be a victim or a family member of a victim<sup>95</sup>. The Commission in the *SERAC* case expressed its thanks to

the two human rights NGOs which brought the matter under its purview ... This a demonstration of the usefulness to the Commission and individuals of *actio popularis*, which is wisely allowed under the African Charter<sup>96</sup>.

The individual complaints procedure is used much more frequently than the inter-State mechanism of the African Charter, although not as frequently as one would have expected on a continent with the kind of

<sup>92</sup> Provided for in Arts 47-54.

<sup>93</sup> *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003). Cf. the judgment of the International Court of Justice in *Armed Activities on the Territory of the Congo (DRC v Uganda)*, of 19 December 2005. In a case brought by a Burundian organisation against a number of neighbouring States the Commission held that the complainant was in essence representing the State. However, the communication was considered under the individual communication procedure as the organisation's standing to bring the complaint was not challenged by the responding governments. Communication 157/96, *Association Pour la Sauvegarde de la Paix au Burundi v Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia* (2003) AHRLR 111 (ACHPR 2003).

<sup>94</sup> Following directly after the provisions on inter-State communications, Art 55 provides for 'other communications'. The Commission has proceeded from the assumption that this refers to individual communications. See *Jawara v The Gambia*, n 53 above, para 42.

<sup>95</sup> *Malawi African Association and Others v Mauritania*, n 28 above, para 78.

<sup>96</sup> n 33 above, para 49.

human rights problems that Africa experiences<sup>97</sup>. This could to some extent be attributed to a lack of awareness about the system. Even where there is awareness, however, there is often not much faith that the system can make a difference.

According to a recent study on the compliance of States with the findings of the Commission there has been full State compliance in six of the 44 cases where the Commission found States Parties in violation of the African Charter. The study found that there has been non-compliance in 13 cases, partial compliance in 14 cases, seven cases of situational compliance (through change of government) and unclear compliance in four cases<sup>98</sup>. Viljoen and Louw found that

[i]n the analysis of cases of full and clear non-compliance, it appears that the most important factors are political, rather than legal. The nature of the case, the elaborateness of reasoning or the type of remedy required seems to have little bearing on the likelihood of adherence by States. The only factor of relevance that relates to the treaty body itself is follow-up activities undertaken by the Commission<sup>99</sup>.

As is the case with other complaints systems, the African Charter poses certain admissibility criteria before the Commission may entertain complaints<sup>100</sup>. These criteria include the requirement of exhausting local remedies. The Commission may be approached only once the matter has been pursued without success in the highest court in the country in question, or where this has not happened, if there was no reasonable prospect of success.

The Commission has stated that for a case not to be admissible local remedies must be available, effective, sufficient and not unduly prolonged<sup>101</sup>. In *Purohit and Another v The Gambia*<sup>102</sup>, a case dealing with detention in a mental health institution, the Commission gave a potentially far-reaching decision on the exhaustion of local remedies when it held that

[t]he category of people being represented in the present communication are likely to be people picked up from the streets or people

<sup>97</sup> The Commission has received around 300 individual communications since its inception in 1987, many of them submitted by NGOs.

<sup>98</sup> VILJOEN, F. & LOUW, L.: 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1993-2004', 101 *The American Journal of International Law*, 2007, p. 1.

<sup>99</sup> As above.

<sup>100</sup> Art 56. For a discussion, see VILJOEN, F.: 'Admissibility under the African Charter' in EVANS & MURRAY: n 29 above, 61.

<sup>101</sup> *Jawara v The Gambia*, n 53 above.

<sup>102</sup> *Purohit and Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003).

from poor backgrounds and as such it cannot be said that the remedies available in terms of the Constitution are realistic remedies for them in the absence of legal aid services<sup>103</sup>.

The Charter also has a requirement that the communications are 'not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity'<sup>104</sup>.

When a complaint is lodged, the State in question is asked to respond to the allegations against it. If it does not respond, the Commission proceeds on the basis of the facts as provided by the complainant<sup>105</sup>. If the decision of the Commission is that there has indeed been a violation or violations of the Charter, the Commission sometimes also makes recommendations that continuing violations should stop (eg prisoners be released)<sup>106</sup>; or specific laws be changed<sup>107</sup>, but often the recommendations are rather vague, and the State Party is merely urged to 'take all necessary steps to comply with its obligations under the Charter'<sup>108</sup>. Sometimes there is no provision at all in Commission decisions as to remedies<sup>109</sup>, while in other cases the remedies provided are elaborate<sup>110</sup>. Recently the Commission required some States to report on measures taken to comply with the recommendations in their State reports to the Commission<sup>111</sup>.

Article 58 provides that the Commission must refer 'special cases which reveal the existence of serious or massive violations of human and peoples' rights' to the Assembly, which 'may then request the Commis-

<sup>103</sup> As above, para 37.

<sup>104</sup> Art 56(3). The Commission has only applied this provision in one case, *Ligue Camerounaise des Droits de l'Homme v Cameroon* (2000) AHRLR 61 (ACHPR 1997). Cf. *Tsikata v Ghana* (2006) AHRLR 112 (ACHPR 2006).

<sup>105</sup> See eg *Commission Nationale des Droits de l'Homme et des Libertés v Chad*, n 33 above, para 25. See also MURRAY, R.: 'Evidence and fact-finding by the African Commission' in EVANS and MURRAY: n 29 above, p. 100.

<sup>106</sup> See eg *Constitutional Rights Project (in respect of Akamu and Others) v Nigeria*, n 39 above; *Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria* (2000) AHRLR 183 (ACHPR 1995); *Constitutional Rights Project and Another v Nigeria*, n 54 above; *Constitutional Rights Project v Nigeria I* (2000) AHRLR 241 (ACHPR 1999); *Centre for Free Speech v Nigeria* (2000) AHRLR 250 (ACHPR 1999).

<sup>107</sup> See eg *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998); *Avocats Sans Frontières (on behalf of Bwampamyé) v Burundi*; (2000) AHRLR 48 (ACHPR 2000).

<sup>108</sup> *Constitutional Rights Project and Others v Nigeria*, n 64 above.

<sup>109</sup> *Huri-Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000).

<sup>110</sup> See eg *Malawi African Association and Others v Mauritania*, n 32 above; *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*, n 33 above.

<sup>111</sup> See eg *Legal Resources Foundation v Zambia*, n 42 above.

sion to undertake an in-depth study of these cases'. Where the Commission has followed this route, the Assembly has routinely failed to respond, but the Commission has nevertheless made findings that such massive violations have occurred. At present, the Commission does not seem to refer cases to the Assembly in terms of Article 58 anymore<sup>112</sup>.

The Charter does not contain a provision in terms of which the Commission has the power to take provisional or interim measures requesting States Parties to abstain from causing irreparable harm. However, the Rules of Procedure of the Commission grant the Commission the power to do so<sup>113</sup>. The Commission has used these provisional or interim measures in a number of cases. One such case concerned Ken Saro-Wiwa and other Ogoni activists, who had been sentenced to death by a special tribunal set up by the military government in Nigeria<sup>114</sup>. In that case, the interim measures requesting the Nigerian government not to execute them were ignored. The execution of Saro-Wiwa and the others caused a worldwide outcry<sup>115</sup>.

### 5.2.3. CONSIDERATION OF STATE REPORTS

Each States Party is required to submit a report every two years on its efforts to comply with the African Charter<sup>116</sup>. State reporting is a common feature of the United Nations human rights treaties and is also used to some extent in the other regional human rights systems<sup>117</sup>. Although the African Charter does not provide that the reports should be submit-

<sup>112</sup> It seems that the Commission will be able to refer such cases to the PSC (Art 19 of the PSC Protocol, see above).

<sup>113</sup> Rule 111. For a discussion, see NALDI, G.J.: 'Interim measures of protection in the African system for the protection of human and peoples' rights', 2 *African Human Rights Law Journal*, 2002, p. 1.

<sup>114</sup> *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*, n 107 above.

<sup>115</sup> The Commission said in its decision that it had tried to assist Nigeria to meet its obligations under the Charter by means of the interim measures, and the execution in the face of the interim measures consequently violated Article 1. However, in a recent decision the Commission held that Article 1 could only be violated if 'the State does not enact the necessary legislative enactment'. *Interights and Others (on behalf of Bosch) v Botswana*, n 41 above, para 51. In that case non-compliance with interim measures was not held to have constituted a violation of Art 1.

<sup>116</sup> Art 62. For a discussion, see EVANS, M. *et al.*: 'The reporting mechanism of the African Charter on Human and Peoples' Rights' in EVANS & MURRAY: n 29 above, p. 36 and MUGWANYA, G.W.: 'Examination of State reports by the African Commission: A critical appraisal', 1 *African Human Rights Law Journal*, 2001, p. 268.

<sup>117</sup> See eg the European Social Charter and the Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador).

ted specifically to the African Commission, the Commission recommended to the Assembly that the Commission be given the mandate to consider the reports. The Assembly has endorsed this recommendation<sup>118</sup>. NGOs are allowed to submit shadow or alternative reports, but the impact of this avenue is diminished by the lack of access of NGOs to the State reports to which they are supposed to respond. The Commission considers the reports in public sessions. Reporting by States Parties should be done in accordance with guidelines adopted by the Commission. Currently there are two sets of guidelines: one, adopted in 1988<sup>119</sup>, is long and unnecessarily complex and the other, adopted in 1998<sup>120</sup>, is overly brief<sup>121</sup>. The relationship between these guidelines is unclear and it should be a priority of the Commission to clarify the situation as regards guidelines on State reporting<sup>122</sup>.

Reporting under the Charter, as is the case under the UN treaties, is aimed at facilitating both introspection and inspection. 'Introspection' refers to the process where the State, in writing its report, measures itself against the norms of the Charter. 'Inspection' refers to the process where the Commission measures the performance of the State in question against the Charter. The objective is to facilitate a 'constructive dialogue' between the Commission and the States.

Reporting has been very tardy, and 18 of the 53 States Parties to the African Charter have never submitted any report. In 2001 the Commission in some cases started to issue concluding observations in respect of reports considered. However, their usefulness is diminished by the fact that they are not widely disseminated by the Commission.

#### 5.2.4. SPECIAL RAPORTEURS AND WORKING GROUPS

The Commission has appointed a number of special rapporteurs, with varying degrees of success<sup>123</sup>. There is no obvious legal basis for the appointment of the special rapporteurs in the Charter; it has been

<sup>118</sup> See AHG/Res 176 (XXIV) 1988, reprinted in *Human Rights Law in Africa* (1999), p. 128.

<sup>119</sup> Reprinted in *Human Rights Law in Africa* (2004), p. 507.

<sup>120</sup> Reprinted in *Compendium* (2007), p. 169.

<sup>121</sup> EVANS *et al.*: n 116 above, p. 45.

<sup>122</sup> The Commission's Working Group on Economic, Social and Cultural Rights has a mandate to 'elaborate a draft revised guidelines pertaining to economic, social and cultural rights, for State reporting'. Resolution On Economic, Social And Cultural Rights In Africa, ACHPR/Res.73(XXXVI)04, adopted by the African Commission on Human and Peoples' Rights, December 2004.

<sup>123</sup> VILJOEN, F.: n 7 above, pp. 392-399.



described as another innovation of the Commission<sup>124</sup>. Thus far, the special rapporteurs have all been members of the Commission.

The mandates of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, the Special Rapporteur on Prisons and Conditions of Detention and the Special Rapporteur on the Rights of Women were adopted in the mid 1990s. The Commission has recently appointed special rapporteurs on freedom of expression and access to information; refugees and internally displaced persons; human rights defenders and a focal point on the rights of older persons. The Commission has also established a committee to monitor the implementation of the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines); a Working Group on Indigenous People or Communities; a Working Group on Economic, Social and Cultural Rights; and a Working Group on the Death Penalty. Some of the members of these working groups are not members of the Commission. The position of Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has been vacant since 2001<sup>125</sup>.

#### 5.2.5. ON-SITE VISITS

The Commission has since 1995 conducted a number of on-site visits. These involve a range of activities, from fact finding to good offices and general promotional visits<sup>126</sup>. Many mission reports have never been published.

#### 5.2.6. RESOLUTIONS

The Commission has adopted resolutions on a number of human rights issues in Africa. In addition to country-specific and other more *ad hoc* resolutions, they have adopted resolutions on topics such as a

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<sup>124</sup> It has been argued that the legal justification is to be found in Article 46, which allows for 'any appropriate method of investigation'. For a discussion, see HARRINGTON, J.: 'Special rapporteurs of the African Commission on Human and Peoples' Rights', 1 *African Human Rights Law Journal*, 2001, p. 247 and EVANS, M. & MURRAY, R.: 'The special rapporteurs in the African system' in EVANS & MURRAY: n 29 above, p. 280. For the mandates of the special rapporteurs, see [www.achpr.org](http://www.achpr.org).

<sup>125</sup> VILJOEN, F.: n 7 above, p. 393.

<sup>126</sup> See MURRAY, R.: 'Evidence and fact-finding by the African Commission' in EVANS & MURRAY: n 29 above, p. 100; MUTANGI, T.: 'Fact-finding missions or omissions? A critical analysis of the African Commission on Human and Peoples' Rights', 12 *East African Journal of Peace and Human Rights*, 2006, p. 1, VILJOEN, F.: n 7 above, pp. 362-367, 401-402.

fair trial; freedom of association; human and peoples' rights education; humanitarian law; contemporary forms of slavery; anti-personnel mines; prisons in Africa; the independence of the judiciary; the electoral process and participatory governance; the International Criminal Court; the death penalty; torture; HIV/AIDS; and freedom of expression<sup>127</sup>. The Commission, in turn, has relied upon these resolutions in its case law.

### 5.2.7. RELATIONSHIP WITH NGOS

NGOs have a special relationship with the Commission<sup>128</sup>. Large numbers have registered for observer status<sup>129</sup>. NGOs are often instrumental in bringing cases to the Commission. Sometimes they submit shadow reports, propose agenda items at the outset of Commission sessions and provide logistical and other support to the Commission, for example, by placing interns at the Commission and providing support to the special rapporteurs and missions of the Commission. Commission documents are also published and disseminated by NGOs, which often organise special NGO workshops just prior to Commission sessions, and participate actively in the public sessions of the Commission. NGOs also collaborate with the Commission in developing normative resolutions and new protocols to the African Charter. While it is true that in some cases NGOs have been used by governments as fronts to promote their views and to protect them from proper scrutiny at Commission sessions, it can by and large be said that the Commission has benefited greatly from their support.

### 5.2.8. INTERACTION WITH AU POLITICAL BODIES

The Annual Activity Reports of the Commission, which reflect the decisions, resolutions, and other acts of the Commission, are submitted each year for permission to publish to the meetings of the Assembly of

<sup>127</sup> For the text of the resolutions see *Human Rights Law in Africa* (2004), *Compendium* (2007) and [www.achpr.org](http://www.achpr.org).

<sup>128</sup> See MOTALA, A.: 'Non-governmental organisations in the African system', in EVANS & MURRAY: n 29 above, p. 246 and WELCH, C.E.: *Protecting Human Rights in Africa: Strategies and Roles of Non-governmental Organisations*, University of Pennsylvania Press, Philadelphia, 1995.

<sup>129</sup> See the resolution reprinted in *Compendium* (2007) pp. 271-272. National human rights institutions may also register for observer/affiliate status. See the resolution reprinted in *Compendium* (2007) pp. 269-271.

Heads of State and Government ('Assembly') of the OAU/AU that have traditionally taken place in June or July of the following year. Article 59, one of the more controversial provisions of the African Charter, provides as follows:

1. All measures taken within the provisions of the present Chapter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide.

2. However, the report shall be published by the Chairman of the Commission upon the decision of the Assembly of Heads of State and Government.

3. The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.

The Assembly has now delegated the authority to discuss the Activity Report to the Executive Council<sup>130</sup>. However, the Activity Report is still formally adopted by the Assembly as this is required by the Charter<sup>131</sup>.

In practice the Assembly has served as a rubber stamp for the publication of the report by the Commission containing its decisions, but the principle that the very people in charge of the institutions whose human rights practices are at stake – the Heads of State – should take the final decision on publicity undermines the legitimacy of the system. Recent decisions of the Executive Council and Assembly highlight the threat that Article 59 poses to the independence of the Commission. When the 17th Annual Activity Report was considered by the Executive Council at the AU summit in July 2004, Zimbabwe complained that it had not had the opportunity to respond to allegations contained in the report concerning a fact-finding mission undertaken by the Commission to Zimbabwe. The Council suspended the publication of the report and its publication was only finally authorised at the summit in January 2005. Similarly country-specific resolutions which appeared in the draft 19th Activity Report submitted to the Executive Council in January 2006 were removed after the countries concerned requested time to reply<sup>132</sup>.

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<sup>130</sup> Decision on the 16th Annual Activity Report of the African Commission on Human and Peoples' Rights, Doc. Assembly/AU/7 (II), July 2003, para 5.

<sup>131</sup> African Charter on Human and Peoples' Rights, Art 59(3).

<sup>132</sup> For a discussion of Art 59 see KILLANDER, M.: 'Confidentiality versus publicity: Interpreting Article 59 of the African Charter on Human and Peoples' Rights', 6 *African Human Rights Law Journal*, 2006, p. 572.

### 5.2.9. INFORMATION ON THE COMMISSION

The decisions of the Commission are published in the *African Human Rights Law Reports (AHRLR)*<sup>133</sup>. A small but growing number of secondary publications on the work of the Commission have appeared<sup>134</sup>. Information on the work of the Commission is available on a number of web sites<sup>135</sup>.

### 5.3. *The African Court on Human and Peoples' Rights*

Several reasons have been advanced why only a Commission, and not a Court, was provided for in the African Charter in 1981 as the body responsible for monitoring compliance of States Parties with the Charter. On the one hand, there is the more idealistic explanation that the traditional way of solving disputes in Africa is through mediation and conciliation, and not through the adversarial, 'win or lose' mechanism of a court. On the other hand, there is the view that the member States of the OAU were jealous of their newly found sovereignty<sup>136</sup>.

The notion of a human rights court for Africa was taken up by the OAU 13 years after the adoption of the African Charter when, in 1994,

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<sup>133</sup> In addition to the decisions of the Commission, *AHRLR* include decisions from UN treaty monitoring bodies on cases from African countries and domestic judgments from across the continent. *AHRLR* can be found in electronic form on [www.chr.up.ac.za](http://www.chr.up.ac.za).

<sup>134</sup> Among the most prominent are ANKUMAH, E.: *The African Commission on Human and Peoples' Rights: Practice and Procedures*, Martinus Nijhoff Publishers, The Hague, 1996; UMOZURIKE, U.O.: *The African Charter on Human and Peoples' Rights*, *op. cit.*; EVANS & MURRAY (eds.): n 25 above; and OUGUERGOUZ, F.: *The African Charter on Human and Peoples' Rights: a comprehensive agenda for human rights*, Kluwer, 2003. For a detailed overview, see VILJOEN, F.: 'Introduction to the African Commission and the regional human rights system', in *Human Rights Law in Africa* 385 and VILJOEN: n 7 above. Developments in the system have been covered on a regular basis in the *African Human Rights Law Journal* since 2001. For more information on the *African Human Rights Law Journal* see [www.chr.up.ac.za](http://www.chr.up.ac.za).

<sup>135</sup> [www.achpr.org](http://www.achpr.org); [www.africa-union.org](http://www.africa-union.org); [www.chr.up.ac.za](http://www.chr.up.ac.za).

<sup>136</sup> HARRINGTON, J.: 'The African Court on Human and Peoples' Rights', in EVANS & MURRAY (eds.): n 29 above, p. 306. For commentary on the envisaged Court, see also NALDI, G.J. & MAGLIVERAS, K.: 'Reinforcing the African system of human rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights', 16 *Netherlands Quarterly of Human Rights*, 1998, p. 431; UDOMBANA, N.J.: 'Towards the African Court on Human and Peoples' Rights: Better late than never', 3 *Yale Human Rights and Development Law Journal*, 2000, p. 45; MUTUA, M.: 'The African Human Rights Court: A two-legged stool?', 21 *Human Rights Quarterly*, 1999, p. 350; 'The African Court on Human and Peoples' Rights' in EVANS & MURRAY: n 23 above, p. 305; and VILJOEN, F.: 'A Human Rights Court for Africa, and Africans', 30 *Brooklyn Journal of International Law*, 2004, p. 1.

the Assembly adopted a resolution requesting the Secretary-General of the OAU to convene a Meeting of Experts to consider the establishment of an African Court on Human and Peoples' Rights<sup>137</sup>.

Ostensibly, the concept of human rights was accepted widely enough in Africa in the early 1990s for the decision to give more 'teeth' to the African human rights system, in the form of a court. This came in the wake of the different waves of democratisation at national level, epitomised by the watershed elections in Benin in 1991 and the advent of democracy in South Africa in 1994. Worldwide, of course, the idea of human rights also gained prominence after the end of the cold war.

The Protocol on the African Court on Human and Peoples' Rights was adopted in Addis Ababa, Ethiopia, in 1998<sup>138</sup>. The Protocol entered into force in January 2004 and by May 2008 had received 24 ratifications.

The AU Assembly decided at its Summit in July 2004 that the African Human Rights Court should merge with the African Court of Justice, one of the organs of the AU that are provided for in the Constitutive Act. The protocol establishing the latter court had been adopted by the Assembly in July 2003<sup>139</sup>, without any reference to a merger with the human rights court. As of May 2008 the Protocol on the African Court of Justice had not received the required 15 ratifications to enter into force. A draft merger protocol has been circulated<sup>140</sup> and at the AU Summit in July 2005 the Assembly decided that:

2. ... a draft legal instrument relating to the establishment of the merged court comprising the Human Rights Court and the Court of Justice should be completed for consideration by the next ordinary sessions of the Executive Council and the Assembly ...

3. ALSO DECIDE[D] that all necessary measures for the functioning of the Human Rights Court be taken, including particularly the election of the judges, the determination of the budget and the operationalization of the Registry;

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<sup>137</sup> AHG/Res 230 (XXX) 1994. Reprinted in *Human Rights Law in Africa* (1999) p. 139.

<sup>138</sup> The documents leading up to the adoption of the African Human Rights Court Protocol are reprinted in *Human Rights Law in Africa* (1999) pp. 233-296.

<sup>139</sup> Protocol of the Court of Justice of the African Union, adopted by the AU Assembly of Heads of State and Government, Maputo, July 2003.

<sup>140</sup> AMNESTY INTERNATIONAL: 'African Union: The establishment of an independent and effective African Court on Human and Peoples' Rights must be a top priority', IOR 30/002/2005, 28 January 2005.

4. FURTHER DECIDE[D] that the Seat of the merged court shall be at a place to be decided upon by the Member States of the Eastern Region, which shall also serve as the seat of the Human Rights Court pending the merger<sup>141</sup>.

The African Human Rights Court 'complements' the protective mandate of the Commission under the Charter<sup>142</sup>. The Court consists of 11 judges, serving in their individual capacities<sup>143</sup>, nominated by States Parties to the Protocol<sup>144</sup>, and elected by the Assembly. Only the president holds a full-time appointment<sup>145</sup>. The judges were elected by the Assembly in January 2006<sup>146</sup>. The seat of the Court is in Arusha, Tanzania. By May 2008, the Court had not yet published its Rules of Procedure.

The Protocol provides that the judges are appointed in their individual capacities<sup>147</sup>, and that their independence is guaranteed<sup>148</sup>. Special provision is made that '[t]he position of judge of the Court is incompatible with any activity that might interfere with the independence or impartiality of such a judge ...'<sup>149</sup>. A judge will not be allowed to sit in a case if that judge is a national of a State which is a party to the case<sup>150</sup>.

In respect of the Court's findings, the Protocol determines that '[i]f the Court finds that there has been a violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation'<sup>151</sup>. The Court is explicitly granted the power to adopt provisional measures<sup>152</sup>.

By ratifying the Protocol, States accept that the Commission and the States involved will be in a position to take a case that has appeared before them to the African Human Rights Court, to obtain a le-

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<sup>141</sup> Decision on the merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, Assembly/AU/dec.83 (v).

<sup>142</sup> Art 2 of the African Human Rights Court Protocol.

<sup>143</sup> Art 11.

<sup>144</sup> Art 12.

<sup>145</sup> Art 15(4).

<sup>146</sup> Assembly/AU/Dec.100(VI)

<sup>147</sup> Art 11.

<sup>148</sup> Art 17.

<sup>149</sup> Art 18. This is significant because one of the criticisms against the Commission has been that a number of commissioners have been closely associated with the executive in their countries.

<sup>150</sup> Art 22.

<sup>151</sup> Art 27(1).

<sup>152</sup> Art 27(2).

gally binding decision<sup>153</sup>. Individuals and those who act on their behalf will be able to take cases to the Court only in respect of those States that have made an additional declaration specifically authorising them to do so. In such instances the case can be taken 'directly' to the Court, presumably bypassing the Commission or, if the Commission was approached first, the case can be taken to the Court without obtaining authorisation from the Commission<sup>154</sup>.

Article 3(1) reads as follows:

The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned.

The phrase 'any other relevant human rights instrument ratified by the States concerned', according to most commentators, means that adjudication in respect of even UN and sub-regional human rights instruments will fall within the jurisdiction of the African Human Rights Court, provided that such treaties have been ratified by the States concerned<sup>155</sup>.

It is submitted that nothing is wrong with the African Human Rights Court interpreting the Charter in view of international standards<sup>156</sup>. Advisory opinions<sup>157</sup> could also deal with other treaties<sup>158</sup>.

<sup>153</sup> Art 5(1).

<sup>154</sup> Art 5(3), read with Art 34(6). Only Burkina Faso and Mali have so far made such a declaration, and it will be surprising if many States follow soon. Where a State has not made the additional declaration, the access of the individual to the Court will resemble the position under the Inter-American system – the individual does not have the power to seize the Court himself or herself (although it should be noted that the Inter-American Commission now routinely forwards cases to the Court). Where the additional declaration has been made, the situation of the individual resembles the current European system, where there is no Commission and the Court is accessed directly. For criticism, see HEYNS: n 48 above.

<sup>155</sup> See NALDI & MAGLIVERAS: n 136 above, p. 435; UDOMBANA: n 136 above, p. 90; and MUTUA: n 136 above, p. 354.

<sup>156</sup> It should be noted, however, that technically Arts 60 and 61 of the African Charter only provide that this should be done by the African Commission.

<sup>157</sup> VAN DER MEI, A.P.: 'The advisory jurisdiction of the African Court on Human and Peoples' Rights', 5 *African Human Rights Law Journal*, 2005, p. 27.

<sup>158</sup> The American Convention on Human Rights provides in Art 64(1) that the Inter-American Court can give 'interpretation of this Convention or of other treaties concerning the protection of human rights in the American States'. The Inter-American Court has interpreted 'other treaties' to include '[a]ny provision dealing with the protection of human rights set forth in any international treaty applicable in the American States ...'. See Advisory Opinion OC-1/82 of 24 September 1982, Series A No 1, para 52, quoted in VAN DER MEI: n 157 above, p. 38.

However, if contentious cases could be brought to the African Human Rights Court on the ground that, for example, UN treaties have been violated, with no reference to the African Charter, this could lead to conflicting decisions in the different systems<sup>159</sup>.

The jurisdiction of the African Human Rights Court to give advisory opinions was mentioned above. In addition to member States and AU organs any 'African organization recognized by the [AU]' can request an advisory opinion from the Court<sup>160</sup>. Advisory jurisdiction has proved useful in the Inter-American human rights system and could potentially play a similar role in the African system.

#### 5.4. *African Committee on the Rights and Welfare of the Child*

The African Children's Charter was adopted in 1990 and entered into force in November 1999. The 11 members of the African Committee on the Rights and Welfare of the Child, provided for under the Charter, were elected in July 2001. The Committee held its first meeting in 2002. The Committee has adopted Rules of Procedure and Guidelines for State Reports. States have to report to the Committee within two years from the entry into force of the Convention for the State Party concerned and thereafter every three years<sup>161</sup>. Apart from state reporting, the African Children's Charter, uniquely among international instruments for the protection of the rights of children, also provides for a communication procedure. The Committee has received at least one communication but it remains unclear how the Committee will handle it<sup>162</sup>.

The Committee does not have its own secretariat, and is serviced by the Department for Social Affairs. The Committee has not func-

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<sup>159</sup> At the same time it should be recognised that in practice the potential of conflicting decisions will only arise in cases of 'direct' access to the Court, where the Commission is bypassed, because in other cases one of the admissibility criteria before the Commission will be compatibility with the Charter. It is submitted that the word 'relevant' in the phrase 'relevant human rights instrument' should be understood to restrict the contentious jurisdiction of the Court beyond the Charter and the Protocol only to those instances where the instrument in question has explicitly provided for the jurisdiction of the Court. See HEYNS: n 48 above, pp. 166-167.

<sup>160</sup> African Human Rights Court Protocol Art 4.

<sup>161</sup> Art 43. It is unclear how many State Parties have actually submitted State reports. However, the Committee has adopted its procedures for considering State reports and has indicated that it will start considering State reports at its meetings. Report of the African Committee on the Rights and Welfare of the Child, EX.CL/200 (VII), report presented to the meeting of the AU Executive Council, 28 June – 2 July 2005, 1.

<sup>162</sup> As above, 11.



tioned well and the question could be asked whether the Committee should not be merged with the African Commission<sup>163</sup>.

### 5.5. *The African Peer Review Mechanism*

In July 2002 in Durban the OAU/AU Assembly of Heads of State and Government adopted the Declaration on Democracy, Political, Economic and Corporate Governance ('Governance Declaration')<sup>164</sup>. The Governance Declaration provided for the establishment of an African Peer Review Mechanism ('APRM') 'to promote adherence to and fulfilment of the commitments' in the Declaration<sup>165</sup>. The initiative grew from the New Partnership for Africa's Development ('NEPAD'), adopted by the AU in 2001 as the development framework for the Union.

Section 10 of the Governance Declaration provides as follows:

In the light of Africa's recent history, respect for human rights has to be accorded an importance and urgency all of its own. One of the tests by which the quality of a democracy is judged is the protection it provides for each individual citizen and for the vulnerable and disadvantaged groups. Ethnic minorities, women and children have borne the brunt of the conflicts raging on the continent today. We undertake to do more to advance the cause of human rights in Africa generally and, specifically, to end the moral shame exemplified by the plight of women, children, the disabled and ethnic minorities in conflict situations in Africa.

The APRM deals with political, economic and corporate governance and socio-economic development<sup>166</sup>. Under the heading 'Democracy and Good Political Governance', section 13 of the Governance Declaration provides:

In support of democracy and the democratic process, We will: ensure that our respective national constitutions reflect the democratic ethos and provide for demonstrably accountable governance; promote political representation, thus providing for all citizens to par-

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<sup>163</sup> This would be in line with the current initiative to merge the UN human rights treaty bodies. See Plan of action submitted by the United Nations High Commissioner for Human Rights, A/59/2005/Add.3, para 99.

<sup>164</sup> AHG/235(XXXVIII) Annex I.

<sup>165</sup> As above, para 28.

<sup>166</sup> Initially, there was some debate as to the inclusion of political governance aspects, including human rights, but as pointed out by Cilliers: 'Without making political governance the core focus of NEPAD, the Partnership is unlikely to make an impact on the continent', CILLIERS, J.: 'Peace and Security through Good Governance: A guide to the NEPAD African Peer Review Mechanism', *ISS Occasional Paper*, April 2003, p. 70.

ticipate in the political process in a free and fair political environment; enforce strict adherence to the position of the African Union (AU) on unconstitutional changes of government and other decisions of our continental organization aimed at promoting democracy, good governance, peace and security; strengthen and, where necessary, establish an appropriate electoral administration and oversight bodies, in our respective countries and provide the necessary resources and capacity to conduct elections which are free, fair and credible; reassess and where necessary strengthen the AU and sub-regional election monitoring mechanisms and procedures; and heighten public awareness of the African Charter on Human and Peoples' Rights, especially in our educational institutions.

At the Durban Summit the Assembly also adopted a document specifically dealing with the APRM process, the so-called APRM Base Document:

The process will entail periodic reviews of the policies and practices of participating States to ascertain progress being made towards achieving mutual agreed goals and compliance with agreed political, economic and corporate governance values, codes and standards as outlined in the Declaration on Democracy, Political, Economic and Corporate Governance<sup>167</sup>.

The APRM process consists of a self-evaluation by the country that has signed up to be reviewed and a review by an international review team, in other words a process of introspection and inspection. It is in this respect similar to State reporting under the African Charter. However, there are also clear differences such as country visits by the APRM review team and the political stage, when the leader of the country discusses the outcome of the review with his peers in other participating countries.

The highest decision-making body in the APRM is the APRM Forum consisting of the Heads of State and Government of the participating States. A panel of eminent persons with seven members oversees the review process and a member of this panel is chosen to lead the review team on its country mission.

The international review process consists of five stages<sup>168</sup>. First a background study is carried out by the secretariat assisted by consultants. This stage also includes a support mission to the country that will

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<sup>167</sup> The New Partnership for Africa's Development (NEPAD): The African Peer Review Mechanism (APRM), AHG/235(XXXVIII) Annex II (APRM base document), para 15.

<sup>168</sup> As above, paras 18-25.

be reviewed. In the second stage, a review team led by one of the eminent persons visits the country for discussions with all stakeholders, after which the team prepares its report (third stage). A number of partner institutions and independent consultants assist in the process. The fourth stage consists of the submission of the report to the APRM Forum and the discussion among peers. By May 2008, six countries – Ghana, Rwanda, Kenya, Algeria, South Africa and Benin – had reached this stage. The fifth stage is the publication of the report and further discussion in other AU institutions such as the Pan-African Parliament. After concluding the reviews, participating countries submit annual reports to the Forum on the implementation of the Programme of Action.

The APRM is voluntary and as of May 2008, 28 out of 53 AU member States have signed the Memorandum of Understanding (MOU)<sup>169</sup> that forms the legal basis for the review. In paragraph 24 of the MOU a signatory State agrees to 'take such steps as may be necessary for the implementation of the recommendations adopted at the completion of the review process ...'. The MOU does not deal with the substantive undertakings of the signatories, but instead refers to the Governance Declaration. This Declaration makes reference to standards that have already been accepted by the participating States in other declarations and treaties, including global and regional human rights instruments. The Governance Declaration comprises of only 28 paragraphs and covers all the areas that are being reviewed, that is, political, economic and corporate governance as well as socio-economic development. Further documents have been developed with regard to standards and indicators, including a questionnaire to help participating States complete their self-assessments.

Many observers have emphasised the necessity for civil society to engage the APRM if the mechanism is to make any difference on the ground<sup>170</sup>. The possibilities for such engagement vary greatly between participating countries, as do the approaches to the independence of the national process from government interference.

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<sup>169</sup> Memorandum of Understanding on the African Peer Review Mechanism, adopted by the 6th summit of the NEPAD Heads of State and Government Implementation Committee, 9 March 2003, Abuja, Nigeria, NEPAD/HSGIC/03-2003/APRM/MOU. See also Communiqué on the 4th Summit of the Committee of Participating Heads of State and Government of the African Peer Review Mechanism (APR Forum), 22 January 2006, Khartoum, Sudan, <http://www.nepad.org/2005/files/aprm/communiqueKhartoum2006.pdf> (accessed 3 March 2006).

<sup>170</sup> See eg KAJEE, A.: 'NEPAD's APRM: A progress report', *South African Yearbook of International Affairs*, 2003/2004.

The APRM integrates the political level of the AU/NEPAD in a way that other parts of the African human rights system have not done<sup>171</sup>. As in other parts of the world, African leaders have not shown a great interest in criticising their peers. Hence there are reasons to be sceptical about whether 'peer pressure' will be employed in the process and whether the provision in the APRM Base Document, which provides for sanctions as a last resort if peer pressure is not enough, will ever be used<sup>172</sup>. However, to focus solely on the pressure exercised at this level would be to underestimate the process as a whole.

There has not been much cooperation between the APRM and the African Commission, which is unfortunate. The documents guiding the APRM process have been criticised for leaving out important issues and it has been suggested that regional human rights instruments, such as the African Charter, should be clearly reflected in the questionnaire that forms the basis for the review<sup>173</sup>.

## 6. Conclusion

It is not difficult to criticise the African regional human rights system, and many have done so. Some have argued that given the fact that the African Charter was adopted 25 years ago and the African Commission has been in operation for 20 years, the track record of the Commission is less than impressive. The Commission has been poorly managed by its Secretariat for many years. The Commission has suffered from a lack of resources in the past, but questions may be asked about the way in which available resources have been managed.

The perceived lack of impartiality of some Commissioners has been a constant bone of contention, as has been the lack of political will in the OAU/AU at a political level to ensure the effectiveness of the Charter system.

The Charter itself has its own internal limitations and thus has required extensive creative interpretation by the Commission. For exam-

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<sup>171</sup> The main African human rights body, the African Commission on Human and Peoples' Rights submits its Annual Activity Report to the Executive Council of the AU which submits it to the Assembly for adoption. Though the report in 2003 elicited a certain amount of debate, this was not for trying to implement suggestions in the report but rather to shield Zimbabwe from criticism.

<sup>172</sup> APRM base document, n 167 above, para 24.

<sup>173</sup> KILLANDER, M.: 'The African Peer Review Mechanism and human rights: The first reviews and the way forward', 30 *Human Rights Quarterly*, 2008, pp. 41-75 at p. 73.

ple, the main mandates of the Commission – receiving individual communications and State reports – are not clearly recognised in the Charter. Some of the internationally accepted rights are recognised only in a cursory form in the Charter.

Moving beyond the Charter system, the need to have established a separate system for the protection of children's rights has been questioned. There is a danger of a proliferation of mechanisms, each one depleting scarce resources even further, instead of establishing one or two truly effective mechanisms before more are created.

Some commentators have also focused on the potential weaknesses of the APRM, which relies on Heads of State – who often do not have much interest in promoting a system of finger-pointing about human rights violations – to police each other.

There is undeniably some truth in these criticisms, and much room for improvement. At the same time the merits of the African regional human rights system also need to be recognised.

The fact that Africa has a regional human rights system in the first place provides an entry point for international human rights to play a role which would otherwise not have existed. The arguments about a possible 'African exception' to the concept of human rights – the idea that human rights is a foreign imposition with little application to the African situation – are considerably weaker than they would otherwise have been. A regional human rights system which is part and parcel of the broader African Union system provides the possibility of imminent critique through a mechanism created by African States themselves, which cannot be shrugged off as easily as critique expressed by far-away capitals.

The current make-up of the African regional system in terms of the norms recognised and the enforcement mechanisms followed are probably well suited to the African environment. The fact that the recognised norms also reflect socio-economic rights, duties and people's rights does not detract from the recognition of civil and political rights, and the rights of individuals, in the system. Their addition ensures that norms that have local legitimacy on the continent are also reflected. It should be noted in this regard that so far the jurisprudence of the African Commission by and large reflects internationally accepted standards, and constitutes a valuable point of reference also for national courts.

A wider range of enforcement mechanisms than that which is used elsewhere is followed in Africa. While the European regional human rights system places a strong emphasis on the judicial enforcement of individual civil and political rights through the European Court of Hu-

man Rights, the African system operates on a number of levels simultaneously. While the African Human Rights Court (under whatever name that may be used) will provide for a component of judicial suspension, the APRM on the other side of the spectrum has a more political character. This is complimented by the quasi-judicial mechanism of the African Commission, which occupies a place somewhere between the other two mechanisms.

On a continent as diverse as Africa, with its multi-layered landscape of human rights issues, employing an enforcement mechanism with such diverse components seems to be a wise approach. Each component of the collective mechanism plays a different and equally important role. Courts can address individual cases in a strong and decisive manner, but they have a more limited role to play in respect of mobilising a political consensus or dealing with widespread human rights violations. A commission on human rights, which can consider State reports and conduct on-site visits, can play an important role in identifying human rights issues that need to be addressed in a systematic way and in working towards negotiated solutions which courts cannot always do. To the extent that such a commission functions and is perceived as an independent body, it can to some extent play a role which those placed inside the confines of power politics will have difficulty in playing.

At the same time there is also a role for human rights supervision in the political processes of the continent. A mechanism such as the APRM, despite its limitations because of its political nature, can also precisely for that reason have an impact on aspects of political life which the other mechanisms cannot achieve. Standing alone the APRM would probably not have made much of a difference, but as part of a broader network of mechanisms aimed at the protection of human rights it has the potential to play a significant role – and the same probably applies also to the Court and the Commission.

Much will depend in this regard on the increased realisation of human rights at the domestic level – an international human rights system cannot survive without a critical mass of building-blocks of States Parties that take human rights seriously at home. The issue of political will remains, and it cannot be denied that much remains to be done to turn the potential offered by the available systems and mechanisms into reality. At the same time, the new institutional focus of the African Union on human rights, as reflected in its Constitutive Act and in the mandates of its organs provides a starting point. Increasingly individuals are encountered within the system in governments and in civil society in Africa who take this orientation seriously. Clearly, it is on their input –

their struggles – that the full implementation of an effective African regional human rights system will depend.

## 7. Postscript: comparative regional human rights systems

The fairly extensive body of material (primary and secondary) on the African regional system which now exists, allows comparison of the experience in Africa with that in the regional systems of the Americas and Europe, and the development of a new field of study, focusing on the different aspects of the phenomenon of regional human rights systems. Engaging in this task in any detail falls beyond the scope of this study – instead only some explanatory remarks will be made<sup>174</sup>.

Some of the issues that will come into play in such a study are how to compare the effectiveness of the different systems and, proceeding from that, to establish why some systems are less or more effective than others. Are regional human rights systems appropriate for all regions? Is it feasible to establish a regional system, for example, for Asia<sup>175</sup>, or for the Arab-speaking world?<sup>176</sup> Where does regional protection of human rights fit in compared with the global (UN) system on the one hand and the domestic protection of human rights on the other? What role does civil society have in influencing these systems? What is the relationship between the human rights and the other functions of the parent regional bodies (such as the AU)?

To start answering these questions, a more thorough comparison of the different regional systems in the world today than is currently available would have to be made. To a large extent, existing comparisons take the features of the different regional systems and juxtapose them,

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<sup>174</sup> Some of the ideas advanced here draw on HELFER, L.R. and SLAUGHTER, A.: 'Towards a theory of effective supranational adjudication', 107 *Yale Law Journal*, 1997, p. 275. See also KOH, H.: 'Why do nations obey international law?', 106 *Yale Law Journal*, 1997, p. 2599; CASSEL, D.: 'Does international human rights law make a difference?', 2 *Chicago Journal of International Law*, 2001, p. 121 and NEUMAYER, E.: 'Do international human rights treaties improve respect for human rights?', 49 *Journal of Conflict Resolution*, 2005, p. 1.

<sup>175</sup> MUNTARBHORN, V.: 'Asia, human rights and the new millennium: Time for a regional human rights charter?', 8 *Transnational Law and Contemporary Problems*, 1998, p. 407; HARRIS, S.R.: 'Asian human rights: Forming a regional covenant', 17 *Asian-Pacific Law and Policy Journal*, 2000, p. 1. See also the contribution by Grimheden in this book.

<sup>176</sup> RISHMAWI, M.: 'The revised Arab Charter on Human Rights: A step forward?', 5 *Human Rights Law Review*, 2005, p. 361. The Arab Charter on Human Rights entered into force in early 2008.

seen in isolation and divorced from their context<sup>177</sup>. Such comparisons are quick to point out that the case load of the European system is, for example, much higher than that of the African system, that the facilities of the one system are superior to the other, etc. This is a starting point, but analysis will have to move beyond these superficial comparisons, and also bring into the picture the fact that the challenges faced by the respective systems differ in fundamental respects, and this should in turn affect how they are to be assessed.

For example, it is often said that many of the problems faced by the European system – in particular before the enlargement of the membership after the end of the cold war – were ‘luxury’ problems, compared to the gross and systematic human rights violations often witnessed in Africa and the Americas. In Europe, the finer points of fair trial procedure or freedom of expression are often at stake, involving governments with a strong commitment to human rights. On the other side of the spectrum, human rights violations in Africa have often taken the form of massive violations, in States where the basic mechanisms for the protection of human rights are not in place on the domestic level. A comprehensive assessment of the relative effectiveness of a regional human rights system should take the different contexts into account and ask how the systems compare in terms of meeting the often very different challenges they are confronted with.

Based on an initial overview, it seems that considerations such as the following may play a role in terms of the impact of the different regional systems, and are worth investigating further.

Focusing on the role played by the States Parties, the following issues may come into play:

- Are there effective domestic systems for the protection of human rights in place in the countries that form part of the regional human rights system? These seem to be the building blocks of any functioning regional system.
- Do States Parties have the political will to be subjected to human rights scrutiny? This is reflected among other things in the extent to which they accept human rights treaties subject to debilitating reservations, and whether they are willing to comply with formal treaty requirements (eg submitting State reports, engaging with individual complaints, and implementation of recommendations). It also impacts on the question whether they are prepared to

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<sup>177</sup> See eg HEYNS, C.; PADILLA, D. & ZWAAK, L.: ‘A schematic comparison of regional human rights systems’, in this volume.



support the creation of a strong regional human rights system through the role that they play in the parent regional body (see below).

- What is the balance in the region between the countries where there is a strong commitment to human rights, and the countries where there is not? Do the majority of the States have a poor or a good domestic human rights record and at what point is a critical mass reached on either side?

On the regional level, a number of considerations could affect the impact of the system:

- Does the human rights system form part of a range of activities of the regional parent body which, taken as a whole, is to the clear benefit of the States concerned? If human rights protection is one part of a broader mandate which includes, for example, diplomatic, environmental and trade activities, it may have a stronger chance of success. The more attractive the net benefits of membership of the regional body are, the more likely States may be to accept effective human rights supervision as part of the package. In Europe the human rights criteria for membership of the European Union with all the associated financial benefits have led to reforms in many candidate countries.
- Is the human rights component of the activities of the regional human rights body well resourced, in terms of financial as well as human resources (both the number of people involved and their ability in this field).
- Do the member States follow an approach of appointing independent and capable experts to be members of supervisory bodies?
- Do the members of the supervisory bodies maintain the highest standards of independence and impartiality, and do they develop a jurisprudence which is compelling and persuasive on principled grounds?
- Is there sufficient correspondence or ‘norm resonance’ between the values of the societies in question and the values recognised in the regional systems? For example, if the concept of the group is important among the people of the region, some emphasis on peoples’ rights and duties could be important in ensuring the legitimacy and, as a result, the spontaneous acceptance of the systems.
- Is there resonance between the traditional ways of resolving disputes in the region and the methods followed by the supervisory bodies? For example, as was alluded to above, in Europe the tra-

ditional emphasis on judicial processes could support the central role of the European Court of Human Rights in that system, while the emphasis on non-judicial methods of resolving disputes in Africa could require a more mixed system of supervision, for example, not only by a court, but also by a quasi-judicial commission and by institutions with a strong political component such as the APRM.

- Is there effective publicity for the work of the regional human rights bodies? This appears to be essential in a system based on peer and public pressure.
- Do trade and other links exist between the States involved? Without such links States seem to have little leverage over each other to implement peer pressure.
- Are the existing mechanisms focused and well coordinated to ensure maximum efficiency in the use of resources? At first glance there seems to be an unnecessary proliferation of systems in the African region.
- Is civil society active in the field of human rights? This applies to NGOs and other institutions such as universities.
- Is a certain level of homogeneity required for a regional system to be effective?

The issues raised above serve merely to introduce the idea that a comparative study of regional systems in the world today is now a feasible and necessary endeavour, given the availability of information on the African and other regional human rights systems. Comprehensive and ongoing studies of comparative regional human rights systems are bound to open up avenues for the improvement of the existing systems, and will support informed decision-making on the question whether similar systems should be established in other parts of the world.

Regional human rights studies will also serve to integrate into the understanding worldwide of the concept of human rights the experience gained in Africa over the last 20 years in a situation where the concept of human rights is often strongly challenged, but where it arguably can also make its strongest contribution.

# The Transformation of Africa. A Critique of the Rights Discourse

Makau Mutua

**Summary:** 1. Introduction. 2. liberalism, Democracy, and Human Rights. 3. Ideology and Human Rights. 4. Human Rights and the African Reality. 5. The Limitations of Human Rights. 6. Can Human Rights Recover the African State? 7. Conclusion.

## 1. Introduction

International human rights law, perhaps the most important transformational idea of our times, is fraught with conceptual and cultural problems. Human rights norms seek to impose an orthodoxy that would wipe out cultural milieus that are not consonant with liberalism and Eurocentrism. While it is useful to develop international standards for human rights, it is imperative that we understand the complexity of the diversity of our world, and work to create doctrinally inclusive and normatively multicultural formulae for dealing with human rights and social justice. Otherwise, we will lose the liberatory potential of human rights and fail to reconstruct societies that need recreation. While no society can truly emerge from a legacy of conflict and violence without the implementation of serious social justice measures, such an exercise cannot be carried out in a cultural vacuum. For Africa, it is essential to recognize that communities and collectives are an integral part of social reality. As such, the individualist focus of the human rights corpus must be tempered with communalist or group-oriented approaches if human rights prescriptions are going to enjoy any legitimacy on the continent.

The last fifty years represent the entire period of the African post-colonial State, and gives us a fantastic window through to interrogate the performance of the human rights project in Africa. But first, I want to lay aside some misconceptions about the human rights corpus and the movement. At the outset, though, I want to level with you about the subject of intellectual bias or normative location. Even though objectivity is the name of our game, we are nevertheless products of our legacies and heritages that have forged our identity and philosophical

outlooks. In that sense, true objectivity is an academic fiction, for no one could be truly objective. In any case, if we were truly objective, we would be truly boring. And so, I want to plead my biases at the outset. But I also want to warn you that with respect to the subject at hand—that of the utility of human rights and liberalism in Africa – I adopt the view of an insider-outsider, an engaged skeptic who completely believes in human dignity, but is not sure about the typology of political society that ought to be constructed to get us there<sup>1</sup>.

Third World scholars like myself come to the study of human rights with a considerable degree of discomfort and an in-built sense of alienation. Neither human rights, nor liberalism, have been germinated in the African garden. To be sure, my native ears are not deaf to many of the substantive issues addressed by both disciplines. I have a keen interest in the relationships between States and citizens. My alienation comes not from these facts, but from the particularized historical, cultural, and intellectual traditions and tongues in which both human rights and liberalism law are steeped. It is in that sense that I am an outsider. Though an outsider to human rights and liberalism, I am in a very real sense an insider to both. I am part of the international elite that personally benefits from the norms and structures of international liberalism. My reality is not that of marginal and down trodden citizens in Latin America, Africa, Asia, or for that matter, in North America. I do not strain under the daily avalanche of the cruelties of globalization, State repression, and abuse.

But I am also an outsider because of that other consciousness which I carry, the consciousness of the historical, political, and cultural realities of the Africa that I am a part of, indeed of the Third World to which I belong, as distinct from the West. In human rights, I see a system of ordering the world, of understanding the world, a system and normative edifice that makes me accurately aware of my subordinate and marginal place in it, as the other. This is not to say that I completely reject the human rights project or dismiss its redemptive impulses and purposes. It is rather to say that human rights are not for me a final, inflexible truth, or a glimpse of eternity, so to speak. That is to say that I do not see the human rights project as some kind of a sacred gospel with armies of missionaries poised to save savage cultures from themselves so that they can stop churning out victims<sup>2</sup>. Human rights

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<sup>1</sup> MUTUA, M.: "Critical Race Theory and International Law: the View of an Insider-Outsider", *Villanova Law Review* 45, 2000, pp. 841-854.

<sup>2</sup> MUTUA, M.: "Savages, Victims, and Saviors: the Metaphor of Human Rights", *Harvard International Law Journal* 42, 2001, pp. 201-245.

do not have a holy writ, nor could they, because like all rights regimes, they are just a genre of socially constructed tenets that have come to define modern civilization. Nor should human rights be, as its most dominant proponents have constructed them, a part of the colonial project that forms the unbroken chain of the Christian missionary, the early merchant of capital, and the colonial administrator. I guess these observations mean that I am not a true liberal, a label that I do not want to wear anyway.

But nor do I agree with those who say that the human rights project "is so over" that we must abandon it altogether. That is the view of a small number of post-modern, post-colonial thinkers who believe that nothing is really knowable or doable in a very complex world. There is a strain in some of these thinkers that objects to any reconstructionist project as a reintroduction somehow of oppressive values, structures, or institutions. For me, such a view is an abdication by some of us who are comfortable in our personal and professional lives and who seek to intellectually paralyze ourselves so that we can have a rational excuse for doing nothing. This is ultimately cowardly, opportunistic, or even anarchistic. I believe that Africans and Africanists ought to reject such nihilism.

But I want to suggest also that human rights are imprisoned in universality, one of the central proclivities of liberalism. This fact alone should give us pause about human rights because we ought to approach all claims of universality with caution and trepidation. I say this because visions of universality and predestination have often been intertwined throughout modern history. And that intersection of universality and predestination has not always been a happy one: with an alarming frequency, liberalism's key tenets have been deployed to advance narrow, sectarian, hateful, and exclusionary practices and ideas. So, at the purely theoretical level, we are chastised to look not once – but twice, and again – at universalizing creeds, ideas, and phenomena. This is not to suggest that universality is always wrongheaded, or even devious, although it has frequently been those things as well – but it is rather to assume that the universality of social phenomena is not a natural occurrence. Universality is always constructed by an interest for a specific purpose, with a specific intent, and a projected substantive outcome in mind.

This critical view has special implications for Africa because it questions both the fit and utility of liberalism and human rights for the continent. If we agree that all social truths are initially local – even truths about the so-called natural attributes of human beings or the purposes of political society – what does that say about the assump-

tions of liberalism in Africa? If social truths are contextual, cultural, historical, and time-bound, how can one find the relevance of the human rights project in Africa? This is not to say that local truths cannot be transformed into universal truths. They can, but the question for students of Africa is how one gets from here to there – in other words, what are the limitations of liberalism in general, and human rights in particular, as transnational projects? How do we turn local claims into universal human rights claims? If it is desirable to put liberalism in the service of Africa, how does one do so?

## 2. Liberalism, Democracy, and Human Rights

Political democracy – no matter its iteration – is the most critical realization of the liberal tradition. Perhaps there is no better foundational articulation of liberalism and politics than John Locke's seminal works<sup>3</sup>. Formal autonomy and abstract equality, its twin pillars, underlie the notion of the bare republican State, popular sovereignty, and ultimately a limited constitutional government<sup>4</sup>. Even though Locke thinks of the individual as living in society, he nevertheless is the center of the moral universe<sup>5</sup>. This emphasis on the individual as an atomized artifact frames the development of political society in the West, and forges a normative project that produces the human rights corpus. As I have argued elsewhere, in the "historical continuum, therefore, liberalism gave birth to democracy, which, in turn, now seeks to present itself internationally as the ideology of human rights"<sup>6</sup>. It is granted that the theory and practice of political democracy are not static, nor can they be. Even so, both rise on several fundamental principles and assumptions. First, the individual, for whom the system ostensibly exists, is abstractly endowed with certain formal inviolable – sometimes called unalienable – rights. These are historically constructed from culture, religion, tradition, citizenship, and economic modes of production. There is nothing *natural* about such rights.

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<sup>3</sup> LOCKE, J.: *Two Treatises of Government*, in LASLETT, P. (ed.): Cambridge University Press, Cambridge, 1988.

<sup>4</sup> STEINER, H.J. & ALSTON, PH.: *International Human Rights in Context: Law, Politics, Morals*, Oxford University Press, New York, 2008.

<sup>5</sup> STRAUSS, L.: *Natural Right and History*, University of Chicago Press, Chicago, 1999, p. 248.

<sup>6</sup> MUTUA, M.: "The Ideology of Human Rights", *Virginia Journal of International Law* 36, 1996, p. 601.

However, such rights are normatively presented as the quintessence of human dignity, another elusive terminology that is loaded with cultural and political bias. Secondly, political society must be constructed in such a way that it protects and nurtures this vision of the ideal individual.

Political democracy is the moral expression of human rights. Political democracy, as understood today, describes a normative typology of government that is characterized by certain procedural attributes. Even though it is a regime of institutions, political democracy is not consequentialist in substantive terms. Rather, some of its well-known theorists and proponents have defined it in purely procedural language<sup>7</sup>. Democracy is at some level a *method* that yields a *particular system*. As Samuel Huntington puts it, the democratic method has two key dimensions: contestation and participation. It is through these dimensions that the “most powerful collective decision makers are selected through fair, honest, and periodic elections in which candidates freely compete for votes and in which virtually all the adult population is eligible to vote”<sup>8</sup>. This definition does not problematize democracy and its proclivity for machine politics and the vested class interests that encumber the State through the media and other institutions of social control. But that is largely the point – democracy is mostly about process that on its face looks fair and ostensibly permits popular participation. What happens underneath the process, or its outcome, is not the major concern of democracy.

What is important is that contestation and participation – as critical pillars of the system – imply the existence of a number of vitally significant rights. These rights, which are referred to as *democratic rights*, are necessary for free and fair elections. Among others, these freedoms include the rights to speak, assemble, organize, and publish<sup>9</sup>. But these rights only make a polity a democracy provided universal suffrage is granted, real political opposition is permitted, and the elections are free and fair<sup>10</sup>. According to Huntington, therefore, “Elections, open, free, and fair, are the essence of democracy, the in-

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<sup>7</sup> DAHL, R.: *A Preface to Democratic Theory*, Chicago University Press, Chicago, 1956; SCHUMPETER, J.: *Capitalism, Socialism, and Democracy*, HarperCollins Publishers, New York, 1984.

<sup>8</sup> HUNTINGTON, S.P.: *The Third Wave: Democratization in the Twentieth Century*, University of Oklahoma Press, Norman, 1991, p. 7.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

escapable sine qua non"<sup>11</sup>. This means that the elected leaders will be responsible for addressing – or not – the most pressing issues once they assume office. It is not difficult to see why this limited vision of democracy is problematic. What if the elected leaders – or the political class – are not concerned about certain forms of powerlessness or assaults on human dignity? Is the populace then doomed? This minimalist definition of democracy hearkens to liberalism's cardinal commitments – formal autonomy and juridical equality. Henry Steiner has captured this commitment well:

Under the traditional understandings of liberal democratic theory, the correlative duties of government do not obligate it to create the institutional frameworks for political debate and action, or to assure all groups of equal ability to propagate their views. Rather, those traditional understandings require governments to protect citizens in their political organization and activities: forming political parties, mobilizing interest groups, soliciting campaign funds, petitioning and demonstrating, campaigning for votes, establishing associations to monitor local government, lobbying"<sup>12</sup>.

Thus, traditional understandings of liberalism or political democracy, are not concerned about the asymmetries of power between citizens, or the ability of entrenched interests to maintain social control over politics. This *marketplace* approach to political democracy keeps impediments to actual equality and constrains the autonomous individual. Again, Steiner has identified this question:

Government makes many paths possible, but it is for citizens to open and pursue them. Choices about types and degrees of participation may depend on citizens' economic resources and social status. But it is not the government's responsibility to alleviate that dependence, to open paths to political participation which lack of funds or education or status would otherwise block<sup>13</sup>.

Steiner suggests, and I agree with him, that the basic human rights conventions and treaties provide for a regime of political participation that is virtually identical to political democracy<sup>14</sup>. There is little doubt

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<sup>11</sup> *Ibid.*, p. 9.

<sup>12</sup> STEINER, H.J.: "Political Participation as a Human Right", *Harvard Human Rights Yearbook* 1, 1988, p. 109.

<sup>13</sup> *Ibid.*, pp. 109-110.

<sup>14</sup> *Ibid.*, pp. 85-94.



that the drafting of these treaties documents drew from a century of Western liberal pluralist doctrine and practice. Human rights texts provide elsewhere for other civil and political rights – such as due process protections, independence of the judiciary, and equality and non-discrimination norms that are essential for a political democracy. Today, the spread of the liberal constitution – and constitutionalism – are deeply rooted in the human rights corpus and its discourse. Constitutionalism defines the genus of government that is envisioned by the human rights corpus. Its pillars are popular sovereignty, an idea based on the will of the people as the basis of government; genuine periodic elections in a multiparty system; checks and balances with an independent judiciary; and the guarantee of individual rights. The bills of rights in many post-1945 constitutions are central to the spread of this genus of government. William P. Alford has correctly written that after the end of the Cold War, the United States embarked on a campaign to export political democracy, even if it was done on a selective basis<sup>15</sup>. European political democracies followed suit. In this civilizing orgy, human rights were often employed interchangeably with political democracy.

### 3. Ideology and Human Rights

Perhaps no other moral idea has exerted more influence over the internal character of the State than human rights in the last sixty years. As put by Louis Henkin, “Ours is the age of rights”<sup>16</sup>. To emphasize the point, Henkin states, without qualification, that “Human rights is the idea of our time, the only political-moral idea that has received universal acceptance”<sup>17</sup>. Such categorical statements from one of the most respected voices in the academy must be taken seriously. There is no doubt that the idea of human rights has proven seductive to many societies and traditions in the last half century, although Henkin’s unequivocal statements appear to be aimed at critics of universalism. But whether cultures across the globe have given the idea what Henkin calls “universal acceptance” is a different matter. Distinction must be

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<sup>15</sup> ALFORD, W.: “Exporting the “Pursuit of Happiness”, *Harvard Law Review* 113, 2000, p. 1677 [reviewing CAROTHERS, TH.: *Aiding Democracy Abroad: The Learning Curve*, Carnegie Endowment for International Peace, New York, 1999].

<sup>16</sup> HENKIN, L.: *The Age of Rights*, Columbia University Press, New York, 1990, ix.

<sup>17</sup> *Ibid.*

made between the ratification of human rights treaties by States and the internalization of the norms of the human rights corpus by the cultures on which those States stand. Even if one were to concede the point, the tension does not resolve the question about the politics of human rights.

It is my contention that the birth of the modern human rights movement during the Cold War irrevocably distorted the true identity and *raison d'être* of the human rights corpus. It is certainly true that human rights scholars and activists have been reluctant to ask uncomfortable questions about the philosophy and political purposes of the human rights movement. Such questions are often taken as a mark of disloyalty to the movement, or an attempt to provide cover and comfort to those States that would violate its norms. Unfortunately, only a handful of critical thinkers have seriously engaged this debate. The result is a paucity of good critiques about one of the most powerful ideologies of the modern times. At the very least, it is irresponsible for thinkers to avoid such conversations precisely because human rights norms have become a blunt instrument in the hands of imperial states<sup>18</sup>. Of all the branches of international law, human rights scholarship appears to have suffered the most from zealous advocacy as opposed to critical analysis. In their role as thinkers, which ought to be largely compartmentalized and protected from proselytism, scholars have become unabashed advocates blurring the invisible line between thought and action.

The failure of critical analysis is not accidental. While not conspiratorial, it is historical, strategic, and the unavoidable result of the internal logic of the human rights corpus. The founders of the human rights movement – most principally the drafters of the Universal Declaration of Human Rights<sup>19</sup> – could only have succeeded by presenting the human rights idea as universal, non-partisan, acultural, ahistorical, and non-ideological<sup>20</sup>. Mary Ann Glendon attempts to show that the founders struggled with this dilemma, but in the end concludes that “the principles underlying the draft Declaration [UDHR] were present in many cultural and religious traditions, though not always expressed

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<sup>18</sup> ANGHE, A.: *Imperialism, Sovereignty, and the Making of International Law*, Cambridge University Press, Cambridge, 2005.

<sup>19</sup> *The Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc. A/810, at 71, 1948.

<sup>20</sup> GLENDON, M.A.: *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, Random House, New York, 2001, pp. 73-78.

in terms of rights"<sup>21</sup>. Nevertheless, the fact that they decided to cast the text in the Western idiom of the rights language is a telling choice. Surprisingly, there was not an extended discussion about the political nature of the society that would be yielded by the UDHR. Nor are there any extended philosophical postulates or ideological justifications in the UDHR, or in any of the two principle human rights covenants<sup>22</sup>. These are glaring omissions, especially for the launch of a universal creed.

Although the reasons for the failure to explicitly identify the human rights corpus with a particular political ideology, typology of government, or economic philosophy are complicated, the silence does not mean that such identification is completely absent. A critical study of the corpus places it squarely in the liberal tradition, and firmly in the genre of the State known as a political democracy. This is the floor below which human rights norms do not permit an observant State to fall. But within this iteration, where a bare political democracy is the minimum, a maximalist political society is a mature welfare State. In other words, a political democracy passes the human rights test for meeting the basic normative and institutional requirements for that typology of government. At their most rudimentary, these can be characterized by bare republicanism, as would be the case, for example, in some of the new democracies of Eastern Europe. At its most sophisticated, political democracy is complimented by social democracy, or a *thick welfare State*<sup>23</sup>, as has been the case in most Scandinavian countries. In contrast, a political democracy could also be a *thin welfare state*<sup>24</sup>, such as the United States, in which marginalization is largely seen as an individual moral failing. In any case, both the *thin* and *thick* welfare States exceed the minimum normative standard set by the human rights corpus.

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<sup>21</sup> *Ibid.*, p. 76. See also MORSINK, J.: *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*, University of Pennsylvania Press, Philadelphia, 2000, and the contribution by Jaime Oraá in this volume.

<sup>22</sup> The International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21<sup>st</sup> Sess., Supp. No. 16, at 52, U.N. Doc. A/6316, 1966 [ICCPR]; the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21<sup>st</sup> Sess., Supp. No. 16, at 49, U.N. Doc. A/6316, 1966 [ICESCR].

<sup>23</sup> This is a term I coin to refer to the State whose political, economic, and social norms and structures are designed to eliminate, to a large extent, glaring manifestations of poverty, exclusion, and privation. Usually, this is done through social security and other economic safety nets that prevent extreme forms of powerlessness.

<sup>24</sup> Another term that I invent to capture the less generous welfare State in which government is more reticent to support social programs for despised or marginalized groups.

My point is that no matter how biblical and humanist, the rhetoric of the human rights corpus is a project of political democracy. Whether wittingly – or unwittingly – the framers of human rights doctrine sought to vindicate values and norms that incubate political democracy. This should not be very surprising, given the identities of the conceptual framers of the UDHR. Virtually all were either drawn from, or steeped in, the liberal tradition<sup>25</sup>. Africa, for instance, was not represented at the drafting table. Even though Glendon has pointed to a significant contribution by Latin America to the UDHR, she is not referring to the input of native Latin American or non-European actors<sup>26</sup>. In the late 1940s, when the UDHR was being formulated, the Latin American officials at the table were decidedly Eurocentric. But even Antonio Cassese, one of the most influential Western scholars and practitioners of human rights, has flatly admitted that the West was able to “impose” its philosophy of human rights on the rest of the world because it formulated the post-1945 international order and dominated the United Nations<sup>27</sup>. It is true that later human rights texts, particularly after decolonization in the 1960s, were more participatory because of the entry into the United Nations of States from the global South. However, it would be a mistake to conflate inclusivity with a radical normative shift in the basic character of the human rights corpus. Subsequent texts built on the normative script of the founders.

It is very strange that the founding documents of the human rights movement studiously avoided – did not even mention once – the most important words and terms of the past several hundred years. They still don't. Is it not very curious that neither the UDHR, the ICCPR, nor the ICESCR use the terms “capital”, “market”, “colonize”, “imperial”, “political democracy”, “liberalism”, or any of their derivatives? The exception is the oblique and dubious reference to “democracy” in the UDHR<sup>28</sup>. The UDHR appears to sanction political democracy as the pre-

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<sup>25</sup> DONELLY, J.: “Human Rights and Western Liberalism”, in ABDULLAHI AN-NA’IM, A.A. & DENG, F.M. (eds.): *Human Rights in Africa: Cross-Cultural Perspectives*, Brookings Institution, Washington D.C., 1990, p. 31; LEARY, V.: “The Effect of Western Perspectives on International Human Rights”, in *Human Rights in Africa: Cross-Cultural Perspectives, ibidem.*, p. 15.

<sup>26</sup> GLENDON, M.A.: “The Forgotten Crucible: the Latin American Influence on the Universal Human Rights Idea”, *Harvard Human Rights Journal* 16, 2003, p. 27.

<sup>27</sup> CASSESE, A.: “The General Assembly: Historical Perspective 1945-1989”, in ALSTON, PH. (ed.): *The United Nations and Human Rights: a Critical Appraisal*, Oxford, Oxford University Press, 1992, p. 31.

<sup>28</sup> Article 29 (2) of the UDHR provides that: “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law

sumptive choice of the human rights corpus, although it does not explicitly say so, or explain why. A similarly intriguing reference to “democracy” is made by the ICCPR<sup>29</sup>. There are possible explanations for these omissions, or the reluctance to identify the human rights movement with a particular normative tradition, philosophy, or ideology. Were any of these deficits deliberate or calculated? Whatever the case, the lack of extended theories and philosophical justifications for the human rights corpus has left the doctrine vulnerable to attack. Importantly, it has mystified and obfuscated the normative and cultural gaps in the corpus.

That is why I contend that the human rights corpus is a moral project of political democracy, and that the failure of the framers to openly base the doctrine on this irrefutable premise has done more damage than good. First, it leaves human rights discourse as a project that orbits in space, not anchored in historical, cultural, and ideological choices. This abstraction is either debilitating, if you are critic, or empowering, if you are a true believer. As a critic, one starts from the disadvantage of disproving a negative. But as a believer, all one has to do is deny the negative. Secondly, the distortion of the true identity of the corpus masks its deficits, and makes it difficult to debate them in the open. It is an exercise that is akin to shadow boxing. The target is elusive, and the energy expended is not productively applied. Thirdly, because of delinking political democracy from human rights, a critique of the former is not necessarily the unveiling of the latter. Soon the problem becomes obvious. The human rights corpus has a mercury-like quality: elusive and slippery. This is not a fingerprint that augurs well for a truth-searching inquiry. Nor does it render the corpus to a reformist impulse. My argument is that identifying – *equating* – political democracy to human rights would provide us with a solid foundation for debating, articulating, and formulating an ideology that can better respond to powerlessness, human indignity, and the challenges of markets and globalization.

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solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a *democratic society*” [my emphasis].

<sup>29</sup> Article 21 of the ICCPR states that: “The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a *democratic society* in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others” [my emphasis].

The human rights movement is presented by its scholars and advocates as above politics. Even though its basic texts assume a genre of political and social organization, the literature and discourse of human rights are divorced from self-interest, ideology, materialism, and partisanship. Instead, movement scholars and activists paint it as a universal creed driven by nobility and higher human intelligence. The idiom of human rights is tinged with metaphors and language that suggest eternity or a final resting point in human history. The basic human rights documents are not presented as either instrumentalist, utilitarian, experimental, or convenient. Rather, the authors speak as though such documents are the final truth. This elusive, yet lofty, idealism is almost biblical in its forbidding language. It implies that questioning its doctrine is perverse and unwelcome. The reality, however, is that human rights norms address mundane human problems and are routine politics. That is why the veneration of human rights together with the attempt to clean the movement of partisanship requires close and critical scrutiny.

To understand why its proponents are shy to assert the ideological and historical signatures of the human rights corpus, one need not look further than their cradle. Admittedly, many of the ideas in human rights find analogies in other cultures and traditions, but this *particular* human rights corpus has its specific identity. It is that identity that yields certain societal typologies. As David Kennedy has aptly noted, the “human rights movement is the product of a particular moment and place”<sup>30</sup>. He then indicts the origins of the human rights movement as “post-enlightenment, rationalist, secular, Western, modern, capitalist”<sup>31</sup>. Kennedy talks about the ways in which these origins could be problematic for the movement – legitimacy in other cultures, the type of society that is created by the movement, and the social and other costs associated with this vision<sup>32</sup>. Unlike most Western legal academics writing on human rights, Kennedy has no problem in identifying it with the politics of the modern, liberal, capitalist West, or political democracy. One can certainly conjecture as to why Kennedy is not invested in the general mystification of human rights that is the norm among Western writers and policy makers. The reason, as Kennedy himself alludes, is that he is not fully committed to the human rights project. He sees a movement in crisis.

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<sup>30</sup> KENNEDY, P.: “The International Human Rights Movement: Part of the Problem”, *Harvard Human Rights Journal* 15, 2002, p. 114.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

The generation that built the human rights movement focused its attention on the ways in which evil people in evil societies could be identified and restrained. More acute now is how good people, well-intentioned people in good societies, can go wrong, can entrench, support, the very things they have learned to denounce<sup>33</sup>.

Yet, even in this article where I agree with so much of what he says, Kennedy falls prey to the dichotomous matrix of the human rights movement in which the "good" secular West civilizes the "evil" or savage South, or "the other"<sup>34</sup>. For what does he mean by "well-intentioned people in good societies?" Is that not the kind of language that *excuses*, *legitimizes*, and *apoliticizes* human rights without picking apart its political agenda? Ironically, though, I think this kind of language makes the point that the human rights movement *does* have a political agenda. After all, the "good society" is itself a normative project and "well-intentioned people" are driven by the norms of the good society. What those norms are is what constitutes the political project of the human rights movement. Even so, Kennedy would probably object to the comments that Kenneth Roth, the executive director of Human Rights Watch, made in 1998 at a conference organized by the Carr Center for Human Rights Policy at the JFK School at Harvard<sup>35</sup>. In response to my critique of human rights as a Eurocentric project, Roth likened human rights norms to antibiotics that must be administered to the sick, in this case the global South, even if they are unwilling to cooperate. For me, that was a revealing moment. Roth might as well have explicitly said that human rights were the antidote to political despotism, a regime of rules that would produce a secular, rights-based, modern political democracy. But he did not. The response by Roth betrays the deep-seated Eurocentrism of international law and its civilizing projects<sup>36</sup>.

But not all human rights activists refuse to own up to the political program of the movement. Ian Martin, a former head of Amnesty International, the one organization whose name is synonymous with hu-

<sup>33</sup> *Ibid.*, pp. 125.

<sup>34</sup> MUTUA, M.: "Savages, Victims, and Saviors:...", *op. cit.*

<sup>35</sup> The conference was the basis for an edited collection of essays on human rights. See POWER, S. & ALLISON, G. (eds.): *Realizing Human Rights: Moving from Inspiration to Impact*, St. Martin's Press, New York, 2000.

<sup>36</sup> THUO GATHII, J.: "International Law and Eurocentricity", 9 *European Journal of International Law*, 1998, p. 184; ANGHIE, A.: "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law", *Harvard International Law Journal* 40, 1999.

man rights, called for the grounding of the movement in the “Universal Declaration of Human Rights and the two principal covenants on civil-political rights and social-economic-cultural rights”<sup>37</sup>. Here, he was emphasizing the universality and equal importance of both sets of rights, and arguing against a bias for the former over the latter. But he also warned that the human rights movement should not identify with the new Western rhetoric of “democracy, human rights, and the free market economy”<sup>38</sup>. But Martin’s admonition appears to be tactical – if not strategic – although it is not based on principle or a sophisticated analysis of the relationship between human rights norms, democracy, and free markets. He seems to be saying that the movement should not be associated with the rhetoric of Western States. He is not saying that the rhetoric has no justification, philosophical foundation, or that it is wrong-headed. Rather, he is opposed to an *open* alliance between the human rights movement and the foreign policy objectives of the West. Nevertheless, he directly associates human rights norms with democracy.

Of course the human rights movement works to guarantee democracy. Universal human rights principles subsume democracy. They provide, however, a more precise definition of rights than can be derived from the hazier notion of promoting democracy, which itself can lead to too great a tolerance of human rights violations of governments which have been popularly elected – whatever the conditions and larger context for the elections<sup>39</sup>.

These assertions by Martin are unusual for a Western human rights crusader. They should be taken seriously, and then further interrogated. One might ask Martin to extrapolate on what he thinks constitutes political democracy, and where he sees a divergence, if any, between democracy and human rights. To the extent that he sees democracy as the *subset* of human rights, can he envisage other political systems, apart from political democracy, that are acceptable to human rights norms? Henkin seems to suggest this as a possibility, although he does not elaborate. In an apparent contradiction, Henkin writes that human rights norms point to a particular political society although not its form.

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<sup>37</sup> MARTIN, I.: *The New World Order: Opportunity or Threat for Human Rights*, Harvard Law School Human Rights Program, Cambridge, 1993, p. 21 [Edward A. Smith Visiting Fellow Lecture].

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*, pp. 21-22.



[t]he idea of rights reflected in the instruments, the particular rights recognized, and the consequent responsibilities for political societies, imply particular political ideas and moral principles. International human rights does not hint at any theory of social contract, but it is committed to popular sovereignty. "The will of the people shall be the basis of the authority of government" and is to "be expressed in periodic elections which shall be by universal and equal suffrage." It is not required that government based on the will of the people take any particular form"<sup>40</sup>.

It is not clear what Henkin is talking about when he uses the word "form" here. It appears that he is referring to *different forms* of political democracy such as presidential or parliamentary systems, or different electoral systems (proportional representation as against first-past-the-post-system). These are types or iterations of the genre known as political democracy. As Steiner points out, and I think Henkin would agree, open political dictatorships, sham democracies, inherited leaderships, monarchies, and one-party states would violate the associational rights central to human rights and political democracy<sup>41</sup>. A more direct and honest conversation about the political purposes of human rights can be had once these admissions are openly made. It becomes easier to debate the values of the human rights, its deficits, and ultimately the reformist project that must be undertaken to fully legitimize it. Whether that reformist project is really possible – as a pragmatic matter – is a different question.

What is important at this point in the history of the human rights movement is not whether its norms call for the installation of a political democracy. Movement scholars and activists should outwardly acknowledge this inherent conceptual and philosophical link so that attention can be focused on the meaning of that linkage. Are there, for example, some normative problems that are caused by this linkage? Do those problems deny the human rights movement – or political democracy – an opportunity to redeem their shortcomings? What are those shortcomings, and can they be tweaked, or is there a necessity for a radical transformation of the human rights regime? It will be difficult, if not impossible, to get at some of these pressing questions if full disclosures are not made by the guardians of the human rights movement.

<sup>40</sup> HENKIN, L.: *The Age of Rights*, *op. cit.*, p. 7.

<sup>41</sup> STEINER, H.J.: "The Youth of Rights", *Harvard Law Review* 104, 1991, pp. 930-931.

#### 4. Human Rights and the African Reality

Assuming these basic philosophical difficulties, how can human rights as conceived be of any help to the reconstruction and recovery of the African post-colonial State? Five decades after decolonization, the African State is still haunted by crises of geographic, political, and moral legitimacy. It is beset by the protracted reality of national incoherence and the ills of economic underdevelopment. At its dawn, the African post-colonial State was handed a virtually impossible task – assimilate the norms of the liberal tradition overnight within the structures of the colonial State while at the same time building a nation from disparate groups in a hostile international political economy. Instead, the newly minted African post-colonial elites chose first to consolidate their own political power. We can blame them now, as I have, but we must also understand that the first instinct of the political class is to consolidate itself and concentrate power in its own hands.

In the Cold War context, this frequently meant stifling dissent, dismantling liberal constitutions, retreating to tribal loyalties or sycophantic cronies, and husbanding State resources for corruption or patronage purposes. In other words, any viable fabric of the post-colonial State started to crumble even before it was established. We know the rest – coups and countercoups, military regimes, and one-party dictatorships with the inevitable results of economic decay; collapse of infrastructure; the fragmentation of political society; bilious re-tribalization; religious, sectarian, and communal conflicts and civil wars; and State collapse in a number of cases. The achievement of political independence from colonial rule turned into false renaissance as one African after another experienced transitional difficulties. While the African State retained some form of international legitimacy, its domestic writ was wafer thin. It was a miracle that many African States did not implode altogether given the challenges of internal legitimacy. Whatever the case, the liberal tradition failed to take hold as human rights were violated across the board<sup>42</sup>.

However, the 1980s saw a resurgence of civil society and the re-emergence of the political opposition. This started what has come to be loosely referred to as the Second Liberation. The entire continent was rocked by a wave of political liberalization not witnessed since the

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<sup>42</sup> TIYAMBE ZELEZA, P. & MCCONNAUGHAY, P.J. (eds.): *Human Rights, the Rule of Law, and Development in Africa*, Pennsylvania University Press, Philadelphia, 2004.

1950s and 1960s. Virtually all States succumbed to some of political reform. In all cases, the civil society and the political opposition sought a new social compact framed by the tenets of the liberal tradition. These were the rule of law, political democracy through multipartyism, checks on executive power, limitations on the arbitrary use of State power, judicial independence, directly elected and unencumbered legislatures, separation of powers, freedoms of the press, speech, assembly, and association – in a word, the whole gamut of civil and political rights or the full complement of so-called basic human rights.

It was as though Africans were asking to go back to the liberal constitutions imposed by the departing colonial powers. In some cases, new constitutional orders were established to respond to these demands. But a decade a half after the frenzy to reintroduce the liberal tradition to the politics of Africa, we cannot count many blessings because the tumult of political liberalization has yielded very mixed results. Optimists see a steady progression, even though the reversals have been many and discouraging. Pessimists or what one might even want to call realists, see an African State that is a stubborn predator, unable and unwilling to accept reform. For every one step forward, there seems to be several steps back. The near meltdown of Kenya in the aftermath of the December 2007 is only one case in point.

Is the African State impervious to human rights and the liberal tradition, or is the problem much more serious? The fault is variously placed on a bankrupt elite or political class; structural impediments within the State – ethnicity, religious zealotry, underdevelopment, the failure to establish a legitimate political order, social cleavages; an unyielding international economic order. Whatever the case, the jury on the current process of political liberalization, which is taking place at the same time with economic globalization, is still out. It is still too early to say for certain whether the African post-colonial State is out of the woods yet.

## 5. The Limitations of Human Rights

The human rights corpus is defined by a variety of pathologies – both of choice and substance – that are limited and limiting. Many of these pathologies arise not only from the internal logic of the corpus but also the tactical and strategic choices that its proponents have made over the past sixty years. One of these is the equation of the containment of State despotism with the attainment of human dignity. This “hands

off" logic is an integral, if not the essential, signature of the corpus. Without going into a discussion about the critique of rights – indeterminacy, elasticity, and their double-edge signature – suffice it to note that the human rights project basically polices the space between the State and the individual, and not between individual citizens. As put by Karl Klare, the dominant understanding of "the human rights project is to erect barriers between the individual and the State, so as to protect human autonomy and self-determination from being violated or crushed by governmental power"<sup>43</sup>. Yet, there is nothing intrinsic about human beings that requires only their protection from the State and not the asymmetries of power between them.

This definition of the nature of human dignity, which draws heavily from liberalism and political democratic theory, has an atrophied understanding of the role of the State. Admittedly, the *thick welfare State* is an attempt to emphasize a more robust view of liberalism. In human rights doctrine, this fuller iteration of liberalism is ostensibly contained in the ICESCR. However, the flaccidity, impotency, and vagueness of the ICESCR are evidence of the bias of the corpus to the more limited vision<sup>44</sup>. As is the case with political democracy, the human rights regime appears to be more concerned with certain forms of human powerlessness, and not others. This has certainly been the practice of human rights by the most influential human rights NGOs and institutions. In fact, there does not exist a major human rights NGO in the West that focuses on economic, social, and cultural rights. The problem is not simply one of orientation, but a fundamental philosophical commitment by movement scholars and activists to vindicate "core" political and civil rights over a normative articulation that would disrupt vested class interests and require a different relationship between the State and citizens and between citizens. It seems to have been convenient for human rights NGOs to shy away from questions of economic powerlessness during the Cold War because charities and Western governments frowned upon them. If so, it was a bias that was more than strategic – it was ideological.

One of the more interesting pathologies of the human rights texts is their avoidance or reluctance to employ a certain vocabulary to describe powerlessness. What is striking about the key human rights documents is their failure to use some of the most important terms of

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<sup>43</sup> KLARE, K.: "Legal Theory and Democratic Reconstruction", *University of British Columbia Law Review* 25, 1991, p. 97.

<sup>44</sup> BENTHAM, D.: "What Future for Economic and Social Rights?", *Political Studies* 43, 1995, p. 41.

the modern era to describe and formulate societal responses. In terms of power or lack of it, and the consequent violations, there are no more important words than “capitalism”, “imperialism”, “colonialism”, and “apartheid”, among others. Yet, the UDHR – the single most important human rights document – sanctions the right to private property<sup>45</sup>. How plausible is a document that calls itself a “common standard of achievement for all peoples and nations”<sup>46</sup> if it does not recognize that at its writing the bulk of the global South was under European colonial rule and subject to the vilest economic exploitation by the merchants of capital? It is difficult to believe that such an omission was an oversight. At the time, there was an epochal contest between socialism and capitalism. This, too, appears to have been conveniently overlooked in the basic texts. Or was it? My submission is that there was a surreptitious recognition of secularism, capitalism, and political democracy through the guarantee of the rights that yield a society framed by those systems.

The failure to wrestle with the types of economic philosophies and systems that would best protect and nurture a fuller definition of human dignity has had a devastating effect on the human rights movement. From the start, the movement and its founders did not see themselves as charged with the responsibility to address economic powerlessness. Even though the UDHR addresses some economic, social, and cultural rights, it is clear that they are an afterthought and marginalized within the document. Only the last six articles at the end are devoted to these rights. But even so, the rights are not scripted in a way that directly confronts powerlessness and exploitation. The rights relating to work and labor assume, for example, the fact and legitimacy of capitalism and free markets<sup>47</sup>. Working people are therefore expected to fight for their rights *within* those systems and structures. The same logic is the basis for the ICESCR that presumably grants rights within a system of free enterprise that protects workers from the worst excesses of global capitalism. In this regard, the ICESCR should be understood as a normative project for a *thick welfare State* within a market economy. It is a document that seeks to mitigate the harshness of capitalism and give it a more human face.

This failure of imagination and acquiescence to a free market vision of political democracy has robbed the human rights corpus and the movement the impetus to think beyond markets and systems of

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<sup>45</sup> Article 17, UDHR.

<sup>46</sup> *Ibid.*, Preamble.

<sup>47</sup> *Ibid.*, Articles 23-25.

exploitation that produce ugly social structures. Fundamentally, the human rights corpus has no philosophy on money and whether, for example, the creation of a Bill Gates would itself be a violation of human rights norms. In political society, an absolute dictator would be impermissible under human rights norms and contemporary understandings of political democracy. Analogously, Bill Gates is the market equivalent of the political dictator although that is not how he is understood in a political democracy or by the human rights corpus. In fact, Gates is a celebrated and venerated individual, the pinnacle of *success* in society. Yet, the existence of his economic empire, which he personally holds, is a radical perversion of any egalitarian or equitable notions of human dignity. The multiplication of Gates by the number of other obscenely rich individuals and corporate interests yields a graphic over-concentration of power in the hands of a tiny majority. It is very difficult, if not impossible, to articulate a plausible argument of how a system that permits such vast differences among citizens does not violate basic notions of human dignity. In an era of globalization, where capital knows no borders and is virtually unaccountable, questions of economic justice and fairness should obsess the human rights corpus and the movement. It is not enough to decry, as human rights NGOs do, the worst excesses of globalization, or the most shocking practices such as sweatshops and cruel labor and slave-like conditions of work. The corpus must develop a defensible normative project to address economic and social arrangements and systems. Rather than treat the government simply as the regulator of markets – as is the case in a political democracy – human rights norms must do more.

Perhaps one way of addressing this pathology is to reassess the place and role of the individual in society relative to the greater public good of the community and the environment. One of the problems here is the elevation of the individual and his placement above society. This runaway notion of individualism, which is a central tenet to liberalism, has retarded the capacity of human rights thinkers to moderate selfishness with community interests. In other words, the individual should be placed within the society and constructed in a way that he does not overwhelm his fellow beings or the society itself. There is nothing natural, inevitable, or frozen in time about how the individual ought to be constructed. Nor should a reconstruction of the individual necessarily wreak havoc with more defensible notions of popular sovereignty, individual autonomy, and political freedom. But this is an exercise that will require thinkers to look beyond Eurocentric lenses to build a more universal vision of the individual. The individual needs not necessarily be

placed at the center of the moral universe. Otherwise, the vices and abominations of globalization are bound to overcome the human race.

Finally, the human rights corpus and movement focus too much on process and rights at the expense of politics and substance. This distinction is both a product of the rights idiom in which the corpus is expressed and tactical and strategic choices by movement activists. The movement sees itself as vindicating rights that are coded in positive law. In contrast, politics is partisan, sloppy, and lacking in neutrality. By casting themselves as doing the work of the law, movement activists perpetuate the myth of objectivity. In fact, during the Cold War, the human rights community in the West deliberately distanced itself from the overt promoters of democracy in the global South and the Soviet bloc<sup>48</sup>. Instead, human rights activists presented themselves as a community interested in process and the rule of law, not politics or the ideological project of democracy.

Partly, this was a reaction to the detriment of being seen as supporting the crusade of the West, particularly under President Ronald Reagan, of rooting out communism in favor of pro-Western market or political democracies. Even so, the human rights movement in the West relentlessly attacked Soviet bloc States and Third World countries for their closed or authoritarian political systems. In this, they worked with pro-democracy human rights advocates in those countries. Objectively, human rights groups were pursuing an agenda very similar to that of the Reagan Administration. Rather than play such a game, human rights groups should only advocate consequentialist and outcome-based agendas instead of hiding behind process and rights. Such a full disclosure approach would demystify human rights and offer a clearer basis for critical thought.

There is little doubt that in the last half century, the world has seen substantial progress in addressing State tyranny. Part of this success is clearly attributable to the human rights movement and its marketing of the liberal constitution and the values of political democracy. But the successful march against State despotism has been conducted as a cloak and dagger contest – pushing a value system without directly stating its normative and political identity. This is unfortunate and need not have been necessarily so, even if one were to allow for the tactical and strategic choices that the movement had to make. Lost in the translation was an opportunity to think more robustly about human

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<sup>48</sup> CAROTHERS, TH.: "Democracy and Human Rights: Policy Allies or Rivals?", *Washington Quarterly*, Summer 1994, p. 109.

rights as a political project and then question its broader prescriptions for the society of the future.

This diffidence has been limiting to the human rights movement. Why hide the ball? Everything should be placed on the open table so that we can openly debate questions of power and powerlessness, and how to reformulate the human rights corpus to address pressing crises. Perhaps we will decide that human rights is not the right language for this struggle. Perhaps it is. In any case, we will never know until we take off the veil. What is clear today is that the movement will lose its relevance unless it can address – seriously and as a priority – human powerlessness in all its dimensions.

## 6. Can Human Rights Recover the African State?

The limitations that curtail the ability of the human rights corpus to respond to Africa's crises are conceptual and normative. The first limitation is simply one of the idiom in which the rights discourse is formulated. The language of rights, which is central to liberalism, is fraught with limitations which could be detrimental to the project of transforming deeply distorted societies. Inherent in the language of rights are indeterminacy, elasticity, and the double-edged nature of the rights discourse. All these characteristics open the rights language to malleability, misuse by malignant social elements, and make them a tool in the hands of those opposed to reform. South Africa is a case in point where a rights-based revolution has been unable to fundamentally transform deeply embedded social dysfunction and the perverse legacy of Apartheid. The choice of the rights idiom as the medium of choice to unravel the ravages of Apartheid has been less than successful in spite of continued economic growth<sup>49</sup>.

Another problem of the liberal tradition, which has been inherited by the human rights movement, is its unrelenting focus on individualism. This arises from liberalism's focus on formal equality and abstract autonomy. The human rights corpus views the individual as the center of the moral universe, and therefore denigrates communities, collectives, and group rights. This is a particularly serious problem in Africa where group and community rights are deeply embedded both in the cultures of the peoples, and exacerbated by the

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<sup>49</sup> MUTUA, M.: "Hope and Despair for a New South Africa: the Limits of Rights Discourse", 10 *Harvard Human Rights Journal*, 1997.



multinational nature of the post-colonial State<sup>50</sup>. The concept of self-determination in Africa cannot simply be understood as an external problem: it must, of necessity, be understood as encompassing the many nations within a given post-colonial State. In reality, this means that individual rights of citizens within the State must be addressed in the context of group rights. Thus group rights or the rights of peoples become important entitlements if the State is to gain the loyalties of its diverse citizens.

I do not deny that individualism is a necessity for any constitutional democracy, but I reject the idea that we can, or should, stop there in Africa. That would be stunted understanding of rights from an African point of view. Indeed, for rights to make sense in the African context, one has to go beyond the individual and address group identities in the political and economic framework of the State. Even in South Africa, for example, one of the States with an avowedly liberal interpretation of the rights language, there was an accommodation of group rights to language, culture, and other forms of identity<sup>51</sup>. One way political democracy deals with the question of multiple nations within one State is to grant autonomy regimes for groups or to devolve powers through forms of federalism<sup>52</sup>. But the paradox for Africa is that autonomy regimes or federalist arrangements have not worked well wherever they have been tried<sup>53</sup>. These schemes have been unable to stem the combustible problem of ethnicity and reduce the legitimacy of the state. Ethnic groups retain a consciousness that stubbornly refuses to transfer loyalty from the group to the whole nation.

Secondly, the human rights movement's primary grounding and bias towards civil and political rights – and the impotence and vagueness of economic, social, and cultural rights – is one of its major weaknesses in the African post-colonial context. Political democracy alone – without at least a strong welfare State or a social democracy – appears to be insufficient to recover the African State. The bias towards civil and political rights favors vested narrow class interests and kleptocracies which are entrenched in the bureaucratic, political, and business sectors of society and represent interests that are not inclined to chal-

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<sup>50</sup> MUTUA, M.: "The Banjul Charter and the African Cultural Fingerprint: an Evaluation of the Language of Duties", *Virginia Journal of International Law* 35, 1995, p. 339.

<sup>51</sup> Republic of South Africa, *Constitution of South Africa*, 1996.

<sup>52</sup> STEINER, H.J.: "Ideals and Counter-Ideals in the Struggle over Autonomy Regimes for Minorities", *Notre Dame Law Review* 66, 1991, p. 1539.

<sup>53</sup> MUTUA, M.: "Why Redraw the Map of Africa: a Moral and Legal Inquiry", *Michigan Journal of International Law* 16, 1995, p. 1113.

lunge the economic powerlessness of the majority of post-colonial Africans. Yet the human rights movement assumes the naturalness of the market and the inevitability of employer/employee, capitalist/worker, and subordinated labor relations. It seeks the regulation of these relationships, but not their fundamental reformulation.

By failing to interrogate and wrestle with economic and political philosophies and systems, the human rights movement indirectly sanctions capitalism and free markets. Importantly, the human rights corpus wrongly equates the containment of State despotism with the achievement of human dignity so that it seeks the construction of a political society in which political tyranny – not economic tyranny – is circumscribed. Thus, it seeks to create a society in which political tyranny is circumscribed, or minimized. But in so doing, it sidesteps economic powerlessness – the very condition that must be addressed if the African State is to be recovered. Clearly, political freedoms are important, but as South Africa has demonstrated, these are of limited utility in the struggle to empower populations and reduce the illegitimacy of the State. It is an illusion to think of powerlessness and human indignity in the African context in purely political terms, as the human rights movement does, and to prescribe political democracy and the human rights doctrine as a panacea.

Real human powerlessness and indignity in Africa – the very causes of the illegitimacy of the African State – arise from social and economic conditions. That is why the human rights movement's recognition of secularism, capitalism, and political democracy must be discussed openly to unveil its true identity so that we can recalculate its uses, and the limitations of those uses, to the reconstruction of the African State. To be useful to Africa's reconstruction, human rights cannot simply be advocated as an unreformed Eurocentric doctrine that must be gifted to native peoples. Nor can it be imposed on Africa like an antibiotic, or be seen as a cure for the ills of a dark continent. I am afraid that this is how many in the West imagine what for them is a human rights crusade towards Africa. So far, this law and development model has not – and will not – work. Not only is it an imposition, but it would also deal mostly with symptoms, while leaving the underlying fundamentals untouched.

To be of utility to Africa, and fundamentally transform the continent's dire fortunes, human rights must address economic powerlessness and the scandalous international order. Otherwise, it will promise too much, while delivering too little, as it did in the case of Rwanda with the establishment of the International Criminal Tribunal for Rwanda and a false peace within the country. It will promise too much, while

delivering too little, as it did in the wave of the so-called Second Liberation. The challenge for us is to figure out how we can retool and re-think the human rights project as one of the vehicles for the reconstruction of the African post-colonial State. I am afraid that this is a task for which we have been found wanting.

## 7. Conclusion

Half a century is not a long time in the life of a country much less a continent. That is how long Africa has been free of colonial rule. It is within that time span that the African post colonial State has had an opportunity to revisit the project of modernity under the guidance of Africans themselves. There can be no doubt that the record of that period has been mixed, to put it hopefully. More often than not, the African State has labored under huge burdens of legitimacy and performance. In virtually every case, there have been huge disappointments. Rays of hope, whenever they have been possible, have been short and fleeting. Analysts have carried out numerous diagnoses of the African State. There is agreement on the general malaise, but not on the cure for them. At one level, there is consensus that the deficits of legitimacy, democracy, and development can be ameliorated by creating the open society. But does liberalism offer enough of a panacea for the African State, or do we need to imagine other solutions?

There is no doubt that the lessons of African history over the past several centuries have been discouraging. Since colonial rule, there has been a persistence and stubbornness to the crises facing the continent. There is a general consensus among proponents of liberalism that two variables, which are related, are at the center of these crises. The first, and perhaps the most important, is the African State itself. The illegitimacy and resistance of the African State to democratization are without question the key denominators in its dysfunction. Whether it is the repressive nature of the State, its disdain for civil society, its inability to perform the basic functions of statehood, or its proclivity for corruption, the African State stands at the center of the crisis. The second variable is Africa's relationship with the international legal, political, and economic order. International institutions, hegemonic States, and the culture of international law have at best been negligent, and destructive at worst.

How do African States become effective and enabling actors in the lives of their citizens, instead of objects of charity and pity by the West and the rest of the world? In other words, how does the continent

move from a humanitarian wasteland to developed, functioning, and democratic States? The suggestion is that the process of transformation has to be foundational and thoroughgoing. It is no longer tenable to simply prescribe cautious, band-aid, and unimaginative programs, the type that donors and multilateral organizations have historically promoted. Instead, African States must be re-engineered from the bottom up. This is a task that must begin at home, with the Africans themselves. The citizenry of each State, led by their elites, must the normative values and foundational compact on which the State is based, and then either renegotiate them, or restructure them to create a more viable and legitimate political society. Without such reform, the African State cannot be redeemed. Internationally, Africa needs need debt relief, direct foreign investment, aid, and better trade terms to couple political reforms with economic renewal.

But there are no shortcuts for Africa. African States must reconstruct their political orders, address ethnicity and group rights in political transitions, grow and nurture a vibrant civil society that is national in character, and expand the commitment of religious institutions to the full democratic project. In some countries, the constitution-writing framework provides the perfect opportunity to begin the political renaissance of the State on all these fronts at once. There will no doubt be different entry points for a variety of States. And each of these variables will require contextual emphasis depending on the particulars of the State in question.

But will these liberal prescriptions respond to the stubborn crises of the African State? Or do we need to re-imagine liberalism to make useful for the African reality? Based on historical evidence – and taking even the most successful cases such as South Africa into account – it is clear that even boiler-plate liberalism under the guise of human rights is an insufficient response to African post-colonialism. My proposal, however, is not to throw out the baby with bath water. Rather, it is reconstruct the liberal project and its human rights expression to reclaim the tortured soul of the African State.

## Part VII

# Comparison of regional human rights systems



## **A schematic comparison of regional human rights systems**

Christof Heyns,\* David Padilla\*\* and Leo Zwaak\*\*\*

Regional systems for the protection of human rights have become an important part of the international system for the protection of human rights, and a rich source of jurisprudence on human rights issues, also on the domestic level. This contribution, taking the form of a schematic exposition, attempts to provide an easy comparison of the most salient features of the three existing systems in terms of the institutions involved and the procedures followed. Except where otherwise indicated, it sets out the situation in respect of the African, Inter-American and European systems as at the end of 2007.

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\*\*\* The assistance of Desislava Stoitchkova is gratefully acknowledged.

Where two dates are provided after the name of a treaty, the first one indicates the date when the treaty was adopted, the second indicates the date when it entered into force.

	African
<b>Regional organisations of which the systems form part</b>	Organisation of African Unity (OAU), replaced by the African Union (AU) in July 2002 (53 members)
<b>General human rights treaties which form the legal base of the systems</b>	<p>African Charter on Human and Peoples' Rights (1981/86) 53 ratifications</p> <p>Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (1998/2004), 24 ratifications</p> <p>The Protocol entered into force in January 2004 and the process is underway to establish the Court. In July 2008 the AU Assembly adopted a Protocol on the Statute of the African Court of Justice and Human Rights. When established, this Court will replace the African Court on Human and Peoples' Rights</p>
<b>Specialised additional protocols and other prominent instruments that are part of/supplement the systems</b>	<p>OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969/74), 45 ratifications</p> <p>African Charter on the Rights and Welfare of the Child (1990/99), 41 ratifications</p> <p>Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003/2005), 23 ratifications</p>



Inter-American	European
<p>Organisation of American States (OAS) (35 members), established in 1948</p>	<p>Council of Europe (CoE) (47 members), established in 1949</p>
<p>Charter of the OAS (1948/51), 35 ratifications, read together with the American Declaration on the Rights and Duties of Man (1948)</p> <p>American Convention on Human Rights (1969/78), 24 ratifications (21 States accept the compulsory jurisdiction of the Court)</p>	<p>Convention for the Protection of Human Rights and Fundamental Freedoms (1950/53), 47 ratifications, and 14 additional protocols, the eleventh protocol created a single Court (1994/98)</p>
<p>Inter-American Convention to Prevent and Punish Torture (1985/87), 17 ratifications</p> <p>Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (1988/99), 14 ratifications</p> <p>Protocol to the American Convention on Human Rights to Abolish the Death Penalty (1990/91), 10 ratifications</p> <p>Inter-American Convention on Forced Disappearances of Persons (1994/96), 11 ratifications</p> <p>Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (1994/95), 32 ratifications</p> <p>Inter-American Convention on the Elimination of all forms of Discrimination against Persons with Disabilities (1999/2001), 18 ratifications</p>	<p>European Convention on Extradition (1957/60), 47 ratifications</p> <p>European Convention on Mutual Assistance in Criminal Matters (1959/62), 47 ratifications</p> <p>European Social Charter (1961/65), 27 ratifications</p> <p>European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987/89), 47 ratifications</p> <p>Framework Convention on the Protection of National Minorities (1995/98), 39 ratifications</p> <p>European Social Charter (revised) (1996/99), 24 ratifications</p> <p>Convention on Human Rights and Biomedicine (1997/99), 22 ratifications</p> <p>European Convention on Nationality (1997/2000), 16 ratifications</p>

	African
<b>Supervisory bodies in respect of general treaties</b>	Court: Judges elected in January 2006 Commission: established in 1987
<b>Supervisory bodies and seats</b>	Court seat: Arusha, Tanzania Commission: Banjul, The Gambia, but often meets in other parts of Africa
<b>Case load: Number of individual communications per year</b>	Court: No cases yet Commission: An average of 10 cases per year have been decided since 1988; 13 cases during 2000, four during 2001, three during 2002, 13 during 2003, 11 during 2004, five during 2005, seven during 2006 and four during 2007.
<b>Case load: Number of inter-State complaints heard since inception</b>	Commission: One
<b>Contentious/advisory jurisdiction of Courts</b>	Contentious and broad advisory
<b>Who may seize the supervisory bodies in the case of individual complaints</b>	Court: After the Commission has given an opinion, only States and the Commission will be allowed to approach the Court. NGOs and individuals will have a right of 'direct' access to the Court where the State has made a special declaration. Burkina Faso and Mali are the only States parties which have made this declaration. Commission: Not defined in Charter, has been interpreted widely to include any person or group of persons or NGOs

Inter-American	European
<p>The Court was established in 1979</p> <p>The Commission was established in 1960 and its statute was revised in 1979</p>	<p>A single Court was established in 1998, taking over from the earlier Commission and Court</p>
<p>Court: San Jose, Costa Rica. Periodically sits in other States Parties</p> <p>Commission: Washington DC, but also occasionally meets in other parts of the Americas</p>	<p>Strasbourg, France</p>
<p>Court: In 2006 the Court issued 23 decisions including judgments on 17 contentious cases. At the end of 2007 the Court had 16 contentious cases pending final disposition and 43 provisional measures in place</p> <p>Commission: In 2007 the Commission received 1 456 petitions of which 126 were transmitted to the member States of the OAS. Four case reports on the merits were issued. 14 cases were referred to the Court. 40 precautionary measures were issued. 1 251 case files were open and pending further action. Five friendly settlements achieved. 105 hearings conducted</p>	<p>The Court decides thousands of cases per year, with the case load rapidly increasing. In 2007 the Court delivered:</p> <p>28 793 decisions (1 735 chamber decisions including 17 decisions of the Grand Chamber and 25 803 committee decisions);</p> <p>1 503 judgments (including 15 judgments of the Grand Chamber);</p> <p>At the end of 2007, 103 850 applications were pending before the Court.</p> <p>Communications lodged: 54 000</p>
<p>Court: 0</p> <p>Commission: One</p>	<p>Court: 13</p>
<p>Contentious and broad advisory</p>	<p>Contentious and limited advisory</p>
<p>Court: After the Commission has issued a report only States and the Commission may approach the Court. As from 2001, the Commission sends cases to the Court as a matter of standard practice</p> <p>Commission: Any person or group of persons, or NGO</p>	<p>Any individual, group of individuals or NGO claiming to be a victim of a violation</p>

	African
<b>Number of members of the supervisory bodies</b>	Court: 11 Commission: 11
<b>Appointment of members of the supervisory bodies</b>	Judges and Commissioners are elected by the AU Assembly of Heads of State and Government.
<b>Meetings of the supervisory bodies</b>	Court: Regularity of sessions to be determined Commission: two regular two-week meetings per year. Three extraordinary sessions have been held.
<b>Terms of appointment of members of the supervisory bodies</b>	Judges appointed for six years, renewable only once. President full-time. Commissioners are appointed for six years, renewable, part time.
<b>Responsibility for election of chairpersons or presidents</b>	The Court elects its own President (two-year term). The Commission elects its own Chairperson (two-year term).
<b>Form in which findings on merits are made in contentious cases; remedies</b>	Court: Renders judgments on whether violation occurred, orders to remedy or compensate violation. Commission: Issues reports containing findings on whether violations have occurred and sometimes makes recommendations.
<b>Permission required from supervisory bodies to publish their decisions</b>	Court: No Commission: Requires permission of the Assembly. In practice permission has been granted by the Assembly as a matter of course. However, in 2004 the publication of the Activity Report was suspended due to the inclusion of a report on a fact-finding mission to Zimbabwe to which the government claimed it had not been given the opportunity to respond. Permission to publish the report was given in January 2005.

Inter-American	European
Court: 7 Commission: 7	Equal to the number of States Parties to the Convention (47)
Judges and Commissioners are elected by the General Assembly of the OAS.	The Parliamentary Assembly of the CoE elects judges from three candidates proposed by each government. There is no restriction on the number of judges of the same nationality.
Court: four regular meetings of two to three weeks per year.  Commission: Three two-week meetings per year and one to two short special sessions.	The Court is a permanent body.
Judges are elected for six-year terms, renewable only once, part time.  Commissioners are elected for four-year terms, renewable only once, part time.	Judges are elected for six-year terms, renewable, full-time.
Court: The President is elected by the Court (two-year term).  Commission: The Chairperson is elected by the Commission (one-year term).	The President is elected by the Plenary Court (three-year term).
Court: Renders judgments on whether violation occurred, can order compensation for damages or other reparations.  Commission: Issues reports containing findings on whether violations occurred and makes recommendations.	Declaratory judgments are given on whether a violation has occurred; can order 'just satisfaction'.
Court: No  Commission: No	No, decisions and judgments are public.

	African
<b>Power of supervisory bodies to issue interim/provisional/precautionary measures</b>	Court: Yes Commission: Yes
<b>Primary political responsibility for monitoring compliance with decisions</b>	Weak mandate: Executive Council and Assembly of the AU
<b>Country visits by Commissions</b>	A small number of fact-finding missions and a larger number of promotional country visits
<b>Commissions have own initiative to adopt reports on States Parties</b>	Yes, occasionally following fact-finding missions
<b>States Parties required to submit regular reports to the Commissions</b>	Yes, every two years
<b>Appointment of special rapporteurs by the Commissions</b>	Thematic rapporteurs: Prisons; women, freedom of expression, human rights defenders, refugees and displaced persons; older persons  Follow-up committee on torture (Robben Island Guidelines)  Working groups: economic, social and cultural rights; indigenous people or communities; death penalty  Country rapporteurs: None
<b>Clusters of rights protected in the general treaties</b>	Civil and political rights as well as some economic, social and cultural rights, and some 'third generation' rights
<b>Recognition of duties</b>	Yes, extensively
<b>Recognition of peoples' rights</b>	Yes, extensively
<b>Other bodies which form part of the regional supervisory systems</b>	Committee of Experts on the Rights and Welfare of the Child monitors compliance with the African Charter on the Rights and Welfare of the Child.

Inter-American	European
Court: Yes Commission: Yes	Yes
Weak mandate: General Assembly and Permanent Council of the OAS	Strong mandate: CoE Committee of Ministers
More than one hundred fact-finding missions conducted to date. Six on-site visits during 2007.	N/A
Yes, 56 country reports and six special reports adopted so far	N/A
No	N/A
Thematic rapporteurs: Freedom of expression; persons deprived of liberty; women; children; indigenous peoples; migrant workers; human rights defenders; Afro descendants and racial discrimination.  Country rapporteurs: Each OAS member State has a country rapporteur drawn from the Commission members.	N/A
Civil and political; socio-economic rights in the Protocol.	Civil and political, also education
In the American Declaration but not in the American Convention	No, except in relation to the exercise of freedom of expression
No	No
	CoE Commissioner for Human Rights (established in 1999): Monitors and promotes human rights in member States; may undertake country visits; assists member States (only with their agreement) to overcome human rights related shortcomings.

	<b>African</b>
<b>Approximate number of staff</b>	<p>Court: Staff complement of 46 approved by the AU Executive Council in July 2007.</p> <p>Commission: 23 permanent staff members (Secretary to the Commission, nine legal officers, financial/administrative manager, support staff (finance, administration, public relations, documentation officer, librarian)).</p>
<b>Physical facilities</b>	<p>Court: Provisional offices in the Arusha International Conference Centre</p> <p>Commission: Two floors used as offices</p>
<b>Annual budget</b>	<p>Court: US\$ 4.75 million (2007)</p> <p>Commission: US\$ 1.2 million (2007), US\$ 6 million (2008)</p> <p>The total budget of the AU for 2007 was US\$ 133 million of which US\$ 96.7 million assessed from member States and US 36.7 million from development partners for specific programmes.</p>
<b>Other regional human rights fora whose work draws upon/overlaps with the systems</b>	<p>The African Peer Review Mechanism (APRM) of the New Partnership for Africa's Development (NEPAD) reviews human rights practices as part of its mandate to review the state of democracy, political governance, economic and corporate governance and socio-economic development in participating countries. 28 AU member States have signed up to participate in the APRM.</p>



Inter-American	European
<p>Court: 15 lawyers, 3 administrative employees, 1 librarian, 1 driver and 1 security guard.</p> <p>Commission: 32 budgeted posts (2 non-lawyer professionals, 17 lawyers, 11 administrative employees (2 vacancies) plus 28 contract lawyers, 6 administrative contract employees, 10 fellows lawyers.</p>	<p>As of 30 June 2005, total registry staff is approximately 348 of which 187 permanent (including 76 lawyers) and 161 on temporary contracts (including 78 lawyers)</p>
<p>Court: Own building</p> <p>Commission: Offices in General Secretariat facilities. 16 individual offices, 1 library, 1 conference room, filing room,</p>	<p>Five storey building with two wings (16 500 m<sup>2</sup>), two hearing rooms, five deliberation rooms, library; approximately 600 computers</p>
<p>Court: US\$ 1.65 million</p> <p>Commission: US\$ 3.65 million and US\$ 3 million in external contributions</p> <p>The Court and Commission's combined budget of US\$ 5.3 million is 6.2 % of the total budget of the OAS of US\$ 81.5 million</p>	<p>41 million Euros</p> <p>The Court's budget is approximately 20% of the CoE core budget.</p>
	<p>European Union (EU): Membership of the CoE and adherence to the European Convention on Human Rights is a prerequisite for membership of the EU. The Convention constitutes general principles of European Union law.</p> <p>European institutions with roles that affect human rights, and which draw upon the Convention, include: The European Council, the Council of the European Union, the European Commission, the European Parliament, the European Court of Justice and the European Ombudsman.</p> <p>Organisation for Security and Co-operation in Europe (OSCE): Although its standards do not impose enforceable international legal obligations as they are mostly of a political nature, it draws heavily upon the principles of the European Convention. It does provide for a multilateral mechanism for the supervision of the human rights dimension of its work.</p>

	African
<b>Official websites</b>	<p>www.achpr.org</p> <p>www.africa-union.org</p>
<b>Other useful websites</b>	<p>www.chr.up.ac.za</p> <p>www.issafrica.org</p> <p>www1.umn.edu/humanrts/regional.htm</p>
<b>Sources (other than websites) where decisions are published</b>	<p>Annual Activity Reports</p> <p><i>African Human Rights Law Reports</i> published by the Centre for Human Rights, University of Pretoria and the Institute for Human Rights and Development in Africa, Banjul, The Gambia</p>
<b>Commonly cited secondary sources on system</b>	<p>M. EVANS &amp; R. MURRAY (eds): <i>The African Charter on Human and Peoples' Rights – The system in practice 1986-2006</i>, Cambridge University Press, 2008 (2<sup>nd</sup> ed)</p> <p>C. HEYNS (ed): <i>Human Rights Law in Africa</i>, Marthinus Nijhoff, 2004</p> <p>F. OUGUERGOUZ: <i>The African Charter on Human and Peoples' Rights : A comprehensive agenda for human rights</i>, Kluwer Law International, 2003</p> <p>F. VILJOEN: <i>International human rights law in Africa</i>, Oxford University Press, 2007</p>
<b>Some relevant academic journals</b>	<p><i>African Human Rights Law Journal</i></p> <p><i>East African Journal of Peace and Human Rights</i></p>

Inter-American	European
<p>www.corteidh.or.cr www.cidh.org</p>	<p>www.echr.coe.int</p>
<p>www.iidh.ed.cr</p>	<p>www.coe.int</p>
<p>Court: Annual report, decisions series, precautionary measures volume, yearbook (with Commission) Commission: Annual report, country reports, rapporteur reports, yearbook (with Court), CD-Rom</p>	<p>Since 1996 the official European Convention law reports are the <i>Reports of Judgments and Decisions</i>, published in English and French. Prior to 1996 the official law reports were the <i>Series A Reports</i>. The <i>Series B Reports</i> include the pleadings and other documents. From 1974, selected European Commission decisions were reproduced in the <i>Decisions and Reports Series</i>. The <i>European Human Rights Reports</i> series includes selected judgments of the Court, plus some Commission decisions. Decisions and judgments are also available on-line on the Court's official website through the HUDOC database at <a href="http://www.echr.coe.int/Eng/Judgments.htm">www.echr.coe.int/Eng/Judgments.htm</a>. The contents of HUDOC are also accessible via CD-ROM and DVD.</p>
<p>Th. BUERGENTHAL &amp; D. SHELTON: <i>Protecting Human Rights in the Americas</i>, NP Engel Publishers, 1995 F. MARTIN <i>et al</i> (eds): <i>International Human Rights Law and Practice</i> Kluwer, 1997</p>	<p>P. VAN DIJK &amp; G.J.H. VAN HOOF: <i>Theory and Practice of the European Convention on Human Rights</i>, Intersentia, 2006 C. OVEY &amp; R.C.A. WHITE: <i>Jacobs and White, the European Convention on Human Rights</i>, Oxford UP, 2002 M. BOYLE, D.J. HARRIS &amp; C. WARBRICK: <i>Law of the European Convention on Human Rights</i>, Butterworths, 1995 <i>Yearbook of the European Convention on Human Rights</i>, Kluwer</p>
<p><i>Revista del Instituto Interamericano de Derechos Humanos</i> (articles in English and Spanish)</p>	<p><i>European Human Rights Law Review</i> <i>Human Rights Law Journal</i> <i>Netherlands Quarterly of Human Rights</i> <i>Revue Universelle des Droits de l'Homme</i></p>



Part VIII

Human Rights in Asia



# Human Rights in the Asia-Pacific

Jonas Grimheden\*

**Summary:** 1. Regional Organisations in the Asia-Pacific. 2. Efforts towards an Asia-Pacific Organisation. 3. Supplementing Mechanisms at the National Level. 4. Actual and Perceived Reasons for the Non-Existence of a pan Asia-Pacific Regional Mechanism. 5. Conclusions.

With the various regional mechanisms supporting, supplementing, and even promoting the global human rights monitoring mechanism, it is striking that not the entire globe is covered by regional mechanisms. The Inter-American system stretches much of the American continent. The African Union is encompassing the lion share of the African continent. Europe is organized through in particular the Council of Europe<sup>1</sup>. The Asia-Pacific<sup>2</sup> region however, does not have a region-wide organisation. The Pacific and the Asian regions separately are also lacking such organisations. There is moreover not even a system of sub-regional mechanisms covering any substantive part of the Asia-Pacific. Is this just so? Are there reasons for the lack of a pan Asia-Pacific, or such, organization? Are there alternatives to the apparent non-existence? What are the existing organisations and potentials of these at the sub-regional level? What are the prospects for a regional human rights mechanism in the Asia-Pacific?<sup>3</sup>.

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<sup>1</sup> For a comparison of organizational and procedural aspects of the three existing main regional organizations, see HEYNS, C.; PADILLA, D. and ZWAAK, L. in this volume.

<sup>2</sup> "The Asia-Pacific" is in this text used as including all of Asia and the Pacific, meaning Australasia and Oceania. Elsewhere, "the Asia-Pacific" may exclude Southern, Western, and Central Asia.

<sup>3</sup> For a very good overview on this topic, see MUNTARBHORN, V.: "Human Rights Monitoring in the Asia-Pacific Region", in ALFREDSSON, G.; GRIMHEDEN, J.; RAMCHARAN, B. and DE ZAYAS, A. (eds.): *International Human Rights Monitoring Mechanisms*, Martinus Nijhoff Publishers, Leiden, 2008 (2<sup>nd</sup> edition).

In the following I will provide five steps in discussing the questions posed above. Firstly, an exposé over the existing organisations in the region with a human rights mandate is offered. Secondly, the efforts and the initiatives to establish an Asia-Pacific human rights mechanism will be developed. Thirdly, an overview is provided of mechanisms at the national level, that in network format is serving as a supplement to fractions of a region-wide organisation or as partial replacement. Fourthly, given the lack of a comprehensive system for the region, what may be actual and perceived causes? Fifthly, conclusions are offered on the preceding sections as well as an overall assessment of the future developments in the Asia-Pacific region of human rights monitoring mechanisms.

Before proceeding, a few disclaimers are called for. The emphasis of this piece is on Asia, in particular the Eastern part. Asia alone is a vast territory, and the Pacific covers another vast territory. Customarily the Asia-Pacific<sup>4</sup> is grouped as a region but in reality it is rather several regions. My usage of terms here will however be region (region-wide, pan-regional) when I am talking about the Asia-Pacific as a whole and sub-regional when talking about smaller entities within this region, such as the ten-member ASEAN in Southeast Asia.

## 1. Regional Organisations in the Asia-Pacific

Despite the apparent lack of an Asia-Pacific-wide organization, even one without a human rights mandate, there are several interesting entities at the sub-regional level, where some of the States in the region cooperate on various issues, including human rights<sup>5</sup>.

Starting with some examples with focus in the Westernmost part of the Asia-Pacific, we find the Organization of the Islamic Conference (OIC). Established in 1969, OIC organizes close to 60 members across the world, from Guyana and Suriname in South America, through most countries in North Africa and the Middle East, to Bangladesh and Indonesia. The OIC Charter from 1972 stipulates prominently cooperation for peace and security and the elimination of racial discrimination. A 1981 Universal Islamic Declaration of Human Rights (actually issued by the Islamic European Council, a private institute located in London) is ascribed to the organization as well as the 1990 Cairo Declaration on

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<sup>4</sup> On the scope of the Asia-Pacific, see note 2 above.

<sup>5</sup> Basic information for many of the organizations discussed is included in the web-based map-depiction available at: <[www.rwi.lu.se/tm/ThemeMaps.html](http://www.rwi.lu.se/tm/ThemeMaps.html)>.



Human Rights in Islam<sup>6</sup>. The League of Arab States, originally, in 1945, consisted of seven States in the Middle East, now comprises 22 member States, including States in North Africa and as far south as the Comoros, off the coast of Mozambique<sup>7</sup>. In 1994 an Arab Charter on Human Rights was adopted but received no ratifications and was subsequently revised (in 2004) and expanded. The seven ratifications required for the Charter to come into force were achieved in 2008. The Charter foresees a supervisory body for State reports and there have even been discussions of having an Arab Court of Justice with a human rights mandate<sup>8</sup>.

Similar to the OSCE (the Organization for Security and Co-operation in Europe) or even more to its predecessor, the CSCE, with its focus on security in Europe, the Conference on Interaction and Confidence-Building Measures was initiated in 1992. The now close to twenty member States from all of continental Asia, adopted in 1999 the Almaty Principles regulating the relations between the members<sup>9</sup>. Principle VII reconfirms the commitment to the UN Charter and to human rights. Another development, twelve former USSR entities formed in 1991 the Commonwealth of Independent States (CIS)<sup>10</sup>. The organization has adopted a Convention on human Rights (1995) and has established a human rights commission. The Convention has so far only been ratified by half of the member States. There are also other conventions adopted by the CIS, with various rates of ratifications, on for example migrant workers, rights of the child, rights of persons with disabilities, and minorities<sup>11</sup>.

Moving South, the South Asian Association for Regional Cooperation, composed of seven States: Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka, undertakes a number of activities, including annual summits since its launch in 1985<sup>12</sup>. In 1996, at the 10<sup>th</sup> Summit, a Social Charter was adopted, that among many other aspects, includes the protection of children and other vulnerable groups. Continuing South, and Southeast, in the Pacific, an example of an or-

<sup>6</sup> <[www.oic-oci.org/](http://www.oic-oci.org/)>.

<sup>7</sup> <[www.arableagueonline.org/](http://www.arableagueonline.org/)>.

<sup>8</sup> See e.g. RISHMAWI, M.: "The Revised Arab Charter on Human Rights: A Step Forward?", *5 Human Rights Law Review*, 2005, p. 361.

<sup>9</sup> <[www.kazakhembus.com/CICA.html](http://www.kazakhembus.com/CICA.html)>.

<sup>10</sup> <[www.cisstat.com/eng/cis.htm](http://www.cisstat.com/eng/cis.htm)>.

<sup>11</sup> <[www.cis.minsk.by/main.aspx?uid=74](http://www.cis.minsk.by/main.aspx?uid=74)>.

<sup>12</sup> <[www.saarc-sec.org/](http://www.saarc-sec.org/)>; see also e.g. MONJURAL KABIR, A.H.: "Establishing Human Rights Commissions in South Asia: A Critical Analysis of the Process and the Prospects", *2 Asia-Pacific Journal of Human Rights and the Law*, 2001, p. 1.

ganization is the Pacific Island Forum (PIF), founded in 1971, comprising 16 independent and self-governing States, including Australia, New Zealand, and Papua New Guinea. The vision of the organization includes defence and promotion of human rights<sup>13</sup>. PIF may seem like a small and irrelevant example on the large scene. Nevertheless there are some progressive developments worthy of note. In 2005 'The Pacific Plan' was adopted, which opens up for cooperation and integration for the member States in a number of areas, including good governance. Two features that PIF is currently looking into are a human rights mechanisms as well as an ombudsman<sup>14</sup>.

ASEAN, the Association of Southeast Asian Nations, is arguably the most interesting of the organizations listed here, at least in terms of recent human rights developments. Five original members founded ASEAN in 1967. This structure has now expanded to ten. ASEAN being first and foremost aimed at economic development nevertheless includes commitments to social and cultural development, peace and stability, justice, rule of law, and the UN Charter<sup>15</sup>. ASEAN is a very active entity, organizing several hundred meetings at various levels every year within virtually all fields: forestry, tourism, the environment, transport, health, counter-terrorism, education, et cetera. The reason for focusing on ASEAN as an example of a promising cooperation in the Asia-Pacific is however the increasing cooperation in the field of human rights.

As early as 1993, human rights was raised as a separate issue within ASEAN, proposing an appropriate regional mechanism. 1993 was the year of the World Conference on human rights in Vienna, and a likely inspiration for the inclusion of a regional human rights mechanism in the Asia region. Another cause may have been the frustration of many with the very weak response that ASEAN was able to provide to the clamp down on the student protest in Burma in 1988. Similarly, very little support was given to the demonstrators in East Timor in 1991. As the Asian financial crisis was reaching approaching, an informal working group on an ASEAN human rights mechanism was formed in 1996. The Working Group is composed of government, parliament, academic, and NGO representatives from the member States and with external funding is running a secretariat in Manila. In the following year, the working group was acknowledged by the ASEAN, a small but

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<sup>13</sup> <[www.forumsec.org](http://www.forumsec.org)>.

<sup>14</sup> <[www.forumsec.org/fj/pages.cfm/about-us/the-pacific-plan/](http://www.forumsec.org/fj/pages.cfm/about-us/the-pacific-plan/)>, see page 8 (IV Regional Priorities, Good Governance).

<sup>15</sup> From the ASEAN Declaration of 1967.

significant step. The strategy of the Working Group is clearly one of step-by-step, consultative approach<sup>16</sup>. Already in 2000, a Draft Agreement for Establishment of the ASEAN Human Rights Commission was submitted by the Working Group to ASEAN.

Contrary to previous incidents in member States, in response to events in Cambodia in 1998, ASEAN was actually able to be very critical of the situation<sup>17</sup>. In 2004, the so-called Vientiane Action Programme was adopted by ASEAN, a scheme to promote human rights, in particular in the area of human rights of children and women, and through support of national human rights commissions. 'Vientiane' also included the Working Group officially in the process, by ASEAN commissioning tasks by the Working Group related to the Action Programme, namely the development of a commission on human rights of children and women.

In 2005 the leaders of the member States agreed to adopt an ASEAN Charter, forging a closer cooperation within the organization. A background text was elaborated by an Eminent Persons Group (EPG). The EPG stressed "that ASEAN should continue to develop democracy, promote good governance, and uphold human rights and the rule of law" and promoted the idea of setting up a human rights mechanism<sup>18</sup>. A High Level Task Force then took over and drafted a text. The Charter was finally adopted in the end of 2007. The process of developing the Charter text was not very transparent. NGO-pressure led, however, to a first ASEAN regional consultation with civil society on human rights<sup>19</sup>. The Task Force was composed of a very senior representative from each member State and held several meetings during 2007, including a study visit to New York. Notably, the Charter included a clear reference to the development of a human rights mechanism.

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<sup>16</sup> <[www.aseanhrmech.org](http://www.aseanhrmech.org)>.

<sup>17</sup> For an insightful discussion of the link between events in members States and the development of a human rights conscience of ASEAN, see PETCHARAMESREE, S.: "Human Rights Policies, Practices and Mechanisms in the ASEAN Region", 2002 (unpublished paper on file with the author). For further discussions, see also e.g. THO, L.: "Implementing Human Rights in ASEAN Countries: 'Promises to Keep and Miles to go Before I Sleep'", 2 *Yale Human Rights and Development Journal*, 1999, p. 1; and Report of the Asian Human Rights Network, "Establishing a Regional Human Rights Mechanism for the Asia-Pacific Region", 2 *Asia-Pacific Journal on Human Rights and the Law*, 2003, p. 82.

<sup>18</sup> Paragraph 47, EPG Report on ASEAN Charter, December 2006, <[www.aseansec.org/19247.pdf](http://www.aseansec.org/19247.pdf)>.

<sup>19</sup> Memo dated 31 August 2007, by Johan Hallenborg, SIDA regional human rights and democracy advisor.

The EPG and indeed ASEAN as a whole, emphasized that for the organization to remain relevant, the traditional working methods had to give way to a stronger organization that would be able to take a stance on issues and make a real difference. Even though Vietnam, Myanmar, and Laos were reportedly very negative towards inclusion of a human rights mechanism in the Charter, through diplomatic and likely otherwise leverage, the majority opinion prevailed<sup>20</sup>. Incentives for the shift in the 'ASEAN-way' likely include the SARS-crisis in 2003, the Tsunami of 2004 and clearly the treatment of the demonstrators in Myanmar/Burma during the second half of 2007. These events played a role in fuelling the determination. On the very day that the Charter was adopted, the Chairman of the ASEAN Summit commented on Myanmar / Burma, by saying:

We had an extensive and open discussion on Myanmar. We [Singapore as ASEAN Chair] reiterated that the Myanmar Government should continue to work with the UN in order to open up a meaningful dialogue . . . towards a peaceful transition to democracy; . . . We emphasised that we will strive to prevent the Myanmar issue from obstructing ASEAN's integration efforts, especially the ASEAN Charter and the establishment of the ASEAN Community<sup>21</sup>.

The ASEAN Charter, adopted on 20 November 2007 in Singapore, starts out in Article 1 (Purposes), paragraph 4, "to ensure that the peoples and Member States of ASEAN live in peace with the world at large in a just, democratic and harmonious environment"; and continues in Article 2 (Principles), paragraph 2 (h, l, and j), by calling for "adherence to the rule of law, good governance, the principles of democracy and constitutional government; respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice; upholding the United Nations Charter and international law . . . ". ASEAN is thereby giving weight to human rights, the rule of law, etc... The human rights mechanism itself is prescribed in Article 14 (ASEAN Human Rights Body). Paragraph 1 then stipulates that "ASEAN shall establish an ASEAN human rights body" and paragraph 2 that the "body shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting". The ASEAN Charter is expected to be ratified by all ten member states in the course of 2008.

With the Charter now prescribing the establishment of a body of some sort, it is in the hands of the foreign ministers to negotiate rather

<sup>20</sup> *Nanyang Siang Pau* (Malaysia), 1 August 2007.

<sup>21</sup> <[www.aseansec.org/21093.htm](http://www.aseansec.org/21093.htm)>.

than design, the type of body it will be. Three schematic scenarios could be foreseen<sup>22</sup>. First, a relatively toothless commission composed of non-independent, non-experts. Second, a Vientiane Action Program-like commission focusing on human rights of children and women. Third, a committee of ministers that would oversee the implementation of findings by an independent expert commission. Admittedly, the third scenario is optimistic but not totally unrealistic. As stated by the EPG and supported by many of the member States, ASEAN needs to change in order to remain relevant. The first scenario would provide for very little in that direction. The second alternative would be a good step but would mean introducing nothing new, merely reinvigorating the Vientiane process<sup>23</sup>. The third option may even be attractive to the majority of member States in that they would be able to deflect sensitive decisions to an independent expert body while at the same time retain the final say through a more political process of a committee of ministers, proposed as the mechanism will be, by a group of ministers. Given also that foreign ministers are more inclined to consider the reputation of the governments, and the organization internationally, as opposed to, say, ministers of interior or the like, there are potentials for a relatively strong and independent body.

These were some examples of organizations in the Asia-Pacific with a clear human rights mandate. As the experience with the European Union clearly shows, also organizations with an economic focus may find themselves required if not willing to understand that also human rights have to be on the agenda. Other organizations in the region, such as the Asia-Pacific Economic Cooperation (APEC), the Cooperation Council for the Arab States of the Gulf (GCC), might be candidates for establishing human rights mechanisms, on their ways towards setting up various forms of trade-facilitating unions.

## 2. Efforts towards an Asia-Pacific Organisation

ASEAN was highlighted as a prominent candidate for what hopefully can develop into a series of sub-regional human rights mechanisms in lieu of a pan Asia-Pacific organization. Over the years, efforts

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<sup>22</sup> For a discussion of seven different models, see pp. 24 *et seq* in "Towards an ASEAN Human Rights Mechanism: Proposals, Declarations and Related Documents", Working Group for an ASEAN Human Rights Mechanism, Manila, 1999.

<sup>23</sup> Such a limited mandate would also be in conflict with the broad mandate prescribed by the Paris Principles.

have however been made to establish an Asia-Pacific human rights organization, akin to those developed in the Americas, Europe, and Africa. NGO-initiatives have been made as well as the undertaking of a series of UN sponsored conferences<sup>24</sup>. Only recently are there clear indications that these grand plans are given up, or at least taking the back seat, in favour of sub-regional solutions.

Already in 1964, at a UN conference in Kabul, Afghanistan, an Asian human rights convention was discussed. The International Commission of Jurists proposed an Asia-Pacific mechanism in the following year. The UN Commission on Human Rights even appointed an ad hoc study group for the promotion of regional human rights commissions in 1967. The African Charter on Human and People's Rights was adopted in 1981 (into force in 1986) and following that, the Asia-Pacific became the sole region without a similar instrument. Consequently, the following year, the UN General Assembly initiated a series of activities to promote human rights mechanisms in the Asia-Pacific. It was not until 1990 however, that a series of regular conferences commenced, that year with a meeting in Manila. A second conference in Jakarta (1993) actually discussed the possibility of aiming at a step-by-step approach towards sub-regional mechanisms. An almost annual sequence of conferences has followed: Seoul (3<sup>rd</sup>, 1994), Kathmandu (4<sup>th</sup>, 1996), Amman (5<sup>th</sup>, 1997), Teheran (6<sup>th</sup>, 1998), New Delhi (7<sup>th</sup>, 1999), Beijing (8<sup>th</sup>, 2000), Bangkok (9<sup>th</sup>, 2001), and Beirut (10<sup>th</sup>, 2002). In Beirut, there were also sub-regional group meetings to facilitate such developments.

The series continued with Islamabad (11<sup>th</sup>, 2003) and Doha (12<sup>th</sup>, 2004), Beijing (13<sup>th</sup>, 2005), and Bali (14<sup>th</sup>, 2007). Bali may prove to be a watershed in this development, where the UN High Commissioner for Human Rights, Louise Arbour, emphasized the sub-regional solutions, and even praised the establishment of an ASEAN human rights mechanism<sup>25</sup>. Doha, Qatar, in 2004, also emphasized a three-year Programme of Action that included for instance the promotion of national human rights action plans, and human rights education, but also the establishment of national human rights commissions. A similar scheme had also been launched several years earlier.

Yet another attempt is to promote the setting up of a preventive mechanism for issues related to rights of minorities. Established under the auspices of the OSCE, the High Commissioner on National Minori-

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<sup>24</sup> For an excellent overview, see YAN, J.: "Prospects for Regional Human Rights Machinery in Asia-Pacific", in ALFREDSSON *et al.* (eds.): *op. cit.*

<sup>25</sup> *The Jakarta Post*, 11 July 2007.

ties works preventively to avert eruption of conflict between minorities and the States of which they are a part. This model, based on a confidential process, has proven very effective in getting results on the ground: restraining dominant nationalist sentiments to be codified, introduced in policy, or actually implemented. Efforts at encouraging similar mechanisms in the other regions of the world have so far however, been unsuccessful.

### 3. Supplementing Mechanisms at the National Level

National human rights commissions, or more generically, national human rights institutions (NHRIs), are, as the name clearly indicates, not a regional mechanism! In the Asia-Pacific in particular however, maybe in part because the lack of a regional mechanism, NHRIs have developed at a rather successful rate and with comparatively high levels of independence<sup>26</sup>. The Asia-Pacific has also established a network of NHRIs – the Asia-Pacific Forum (APF), strengthening the impact of the institutions in the region by, not the least, a system of ranking of the NHRIs. The importance and indeed influence of the NHRIs in the Asia-Pacific as well as the APF, requires the consideration of also these mechanisms. A clear link between the APF and the ASEAN, was a joint statement by all the NHRIs of the ASEAN countries on the situation in Myanmar/Burma, in the second half of 2007<sup>27</sup>.

Well over twenty of the countries in the Asia-Pacific have a form of a NHRI. Not all of them are in compliance with what is known as the Paris Principles however. Adopted in 1991, the Paris Principles lay down the fundamental criteria for a NHRI: establishment by law, independence, as broad a human rights mandate as possible, composed of a collegiate body reflecting the composition of society, adequate resources, accessibility, and working cooperatively with civil society<sup>28</sup>. The Asia-Pacific Forum has granted full member status to NHRIs that have been

<sup>26</sup> BURDEKIN, B.: *National Human Rights Institutions in the Asia-Pacific Region*, Martinus Nijhoff Publishers, Leiden, 2006; see also BURDEKIN, B.: "National Human Rights Institutions", in ALFREDSSON, G. et al. (eds.): *op. cit.*

<sup>27</sup> <[www.forum-asia.org/index.php?option=com\\_content&task=view&id=1119&Itemid=132](http://www.forum-asia.org/index.php?option=com_content&task=view&id=1119&Itemid=132)>.

<sup>28</sup> The first International Workshop on National Institutions for the Promotion and Protection of Human Rights met in Paris 7-9 October 1991, and were subsequently adopted by the Human Rights Commission in its Resolution 1992/54 and by the UN General Assembly in its Resolution 48/134, 1993, as well as by the Human Rights World Conference in Vienna, 1993.

established in accordance with the Paris Principles to fourteen and associate membership to an additional three institutions. The associate membership is used for institutions that do not comply with the Paris Principles and are unlikely to do so within a near future. Also the associate members however, have to have a broad human rights mandate and be the sole institution from that particular country in the APF. Actually there is a three-tiered membership system, but for the time being there are no candidate members. Candidate members are those likely to be in compliance with the Paris Principles within a reasonable time.

Full Members		
Afghanistan	Australia	India
Indonesia	Jordan	Malaysia
Mongolia	Nepal	New Zealand
Philippines	Republic of Korea	Sri Lanka
Thailand	Timor Leste	
Associate Members		
Palestinian Territories	Qatar	Republic of the Maldives

*Members of the APF, as of 12 May 2008, < [www.asiapacificforum.net/](http://www.asiapacificforum.net/) >.*

Fiji used to have a member institution but following the military takeover in the country of December 2006 that led to an apparent irregular appointment of a chairperson of the Fijian Commission, the APF suspended the Fiji Commission and commenced a review of its compliance with the Paris Principles. In response to this, Fiji withdrew its membership of the APF in April 2007. Other countries in the region such as Japan, have at least what they call a human rights commission. Japan established already in 1948 a system of civil liberties commissioners at various levels but these lack independence and clout. A more effective body has been on the drawing board for several years but inter-party disagreement has stalled that process. In 2003 a draft law was tabled but all pending bills fell due to the dissolution of the lower house<sup>29</sup>. Ac-

<sup>29</sup> See e.g. YAMAKAZI, K.: 'The draft Human Rights Protection Bill in Japan: Discussions straying off course', 6 *Asia Pacific Journal on Human Rights and the Law*, No. 1, 2005; I am also grateful to Professor Koshi Yamazaki, Niigata University, for sharing his insight on the developments in Japan.



tually, the body as foreseen in the draft law would have had problems complying with the Paris Principles. Even Myanmar in a tokenistic way has adopted a law establishing a human rights commission but is yet to actually set one up. In China, processes are under way to seek to establish a Commission.

The APF, founded in 1996, had initially 4 members: Australia, New Zealand, India, and Indonesia and has since then expanded and continues to do so. Additionally ten or so NHRIs in the region are in the making. The APF coordinates annual meetings where representatives of the member NHRIs and also representatives of these countries governments and NGOs where membership status are determined, topical issues discussed, and further cooperation enhanced. Moreover, the APF offers various training courses, support missions, and other promotional activities. Apart from this regional coordination and strengthening of existing institutions, the APF also promotes establishment of new institutions<sup>30</sup>. There is also an Advisory Council of Jurists forming part of the APF<sup>31</sup>. It is an expert body advising the APF on the application of international human rights law with a view to develop region-wide interpretations. The Council members are appointed by the full members of the APF, one by each country, for a period of five years, renewable once. Interpretation by the Council has been done in a number of substantive areas, and it has been suggested that it is a precursor to a future human rights court. It is, according to Vitit Muntarbhorn, "the closest that the Asia Pacific region has come to a regional arrangement or machinery for the promotion and protection of human rights"<sup>32</sup>.

At the global level, an International Coordinating Committee (ICC), similarly to the APF, coordinates and ranks NHRIs world-wide. Some 80 of the countries in the world have institutions that are ranked by the ICC. In the Asia-Pacific, there are nineteen ICC-ranked NHRIs<sup>33</sup>. In addition to the seventeen of the APF, also the Equal Opportunities Commission in Hong Kong and the Islamic Human Rights Commission of Iran<sup>34</sup>. The Fiji Human Rights Commission is no longer a member<sup>35</sup>. Also the

<sup>30</sup> Presentation by the Director of APF, Kieren Fitzpatrick, Beijing, 1 October 2005.

<sup>31</sup> <[www.asiapacificforum.net/acj/](http://www.asiapacificforum.net/acj/)>.

<sup>32</sup> MUNTARBHORN, V.: "In Search the Rights Track: Evolving a Regional Framework for the Promotion and Protection of Human Rights in the Asian and Pacific Region", 10 *Thailand Law Journal*, No. 1, 2007.

<sup>33</sup> <[www.nhri.net](http://www.nhri.net)>.

<sup>34</sup> On ICC and APF discussions on Fiji, see e.g. briefly Radio New Zealand International, 2 April 2007, <<http://www.rnz.co.nz/news/news.php?op=read&id=31216>>.

<sup>35</sup> Fiji is however still listed on the webpage of the International Coordinating Committee, <[www.nhri.net](http://www.nhri.net)>.

ICC is using the Paris Principles as a basis for determining membership but generally the admission criteria seems to be lower than that of the APF. The APF members typically also have relatively strong powers to take action on human rights issues.

NHRIs are commonly also involved in interaction with the United Nations Human Rights Council, its special procedures and treaty bodies. NHRIs have for instance an access through the newly established (replacing the Sub-Commission) Advisory Committee under the Council, where the Committee has been given a clear mandate to interact with, *inter alia*, NHRIs. The role of NHRIs generally is also increasing through treaty developments. The Optional Protocol to the Convention against Torture of 2002 (into force 2006) has a part IV devoted to national preventive mechanisms. Article 17 stipulates that States Parties must establish an "independent national preventive mechanisms for the prevention of torture at the domestic level". Even though this mechanism may not necessarily be a NHRI, it is likely to become the case in many States. Also the recently adopted (2006) Convention on the rights of Persons with Disabilities, in its Article 33 (2), requires States to maintain "independent mechanisms,... to promote, protect and monitor implementation of the present Convention". Furthermore, paragraph 2 calls on States to take into account the Paris Principles. The UN treaty bodies are also increasingly encouraging establishment of NHRIs. For instance, the Committee on Economic, Social and Cultural Rights, in its Concluding Observations in relation to China in 2005, recommended that China "consider establishing a national commission or human rights on the basis of the Paris Principles"<sup>36</sup>. Parallel to that, the Committee on the Rights of the Child concluded that it was "concerned at the lack of an independent national human rights institution [in China] with a clear mandate to monitor the implementation of the Convention"<sup>37</sup>.

To a greater extent than ever, NHRIs individually and collectively are making a difference in the world, this is particularly true in the Asia-Pacific where they so far have shouldered a heavier burden given the lack of regional human rights mechanisms. There is surely a need for both strong monitoring at the national, as well as regional, and for that matter, also the global levels. What are the reasons then for the lack of a regional or even several effective sub-regional monitoring mechanisms in the Asia-Pacific?

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<sup>36</sup> E/C.12/1/Add.107, 13 May 2005.

<sup>37</sup> CRC/C/CHN/CO/2, 24 November 2005.

#### 4. **Actual and Perceived Reasons for the Non-Existence of a pan Asia-Pacific Regional Mechanism**

Some reasons for the lack of a regional mechanism or indeed then, effective sub-regional organizations in the Asia-Pacific seem to hold water, others do not. Arguments put forth against the possibility range from heterogeneousness to Asian particularities<sup>38</sup>. Let us scrutinize some of these opinions. The UN listing of UN member-States in the Asia-Pacific includes some 40 countries<sup>39</sup>. Of the total number of UN member States, to date, 192, the number of Asia-Pacific countries equals 20 percent. The Inter-American (I-A) system with 35 members, the African Union (AU) with 53, and the Council of Europe (CoE) with 47, equals 18, 28, and 24 percent respectively. If we would include also those countries in Asia that the UN Office of the High Commissioner for Human Rights has grouped from the Middle East and Central Asia we may reach some 60 entities. Even that, at 31 percent, does not seem to be the real hurdle, when compared to Africa's 28 percent.

So far in our analysis, the Asia-Pacific region might not be too large for a mechanism. If we rather take population into account, we get another picture: of the 6.6 billion inhabitants of the world, 60 percent live in the Asia-Pacific. Compare that with I-A at 10, AU at 11, and CoE at 7.5 percent and we get a more nuanced idea of the challenge with a pan Asia-Pacific entity. Moreover, the population in China as well as in India is greater than in all of Africa. Still, is that a real obstacle? Simply put, several 'branch-offices' could solve the problem of a large population, for instance, making claims to a regional monitoring body. The number of States is not much larger than in Africa so there seems to be potential for a political agreement among such a number of governments, should it be desired.

As for geography, admittedly, the Asia-Pacific spans a vast territory. With 30 percent of the world's land surface but also with a wide geographic spread with massive areas of water in-between, it is a diverse region: from Russia and Georgia to Yemen, from New Zealand and Fiji to Japan. Sizes of countries vary from that of Russia, China, and Aus-

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<sup>38</sup> See e.g. YAN, J.: "Prospects for Regional Human Rights Machinery in Asia-Pacific", *op. cit.*

<sup>39</sup> The grouping excludes however the Middle Eastern, as well as the Central Asian countries, that is sorted under the Middle East and Northern Africa Region and the Europe, North America, and Central Asia Region respectively, see <[www.ohchr.org/EN/Countries/Pages/HumanRightsintheWorld.aspx](http://www.ohchr.org/EN/Countries/Pages/HumanRightsintheWorld.aspx)>. If all of the geographical Asia would be included, another 20 countries could be added.

tralia, to Vanuatu and Tuvalu, making political 'tit-for-tat' across the board difficult, if not impossible. All the world's main religions, and more, are represented, languages groups vary widely, and history has far from always pulled the region together. The region is also heterogeneous in terms of level of economy, extent of rule of law, and development of democratic structures. All these are to some extent valid points in seeking to explain why there is less likelihood for an organization with a human rights mandate to develop in the region. But are these reasons really strong enough to actually prevent such a turn of events?

It is truly impossible to compare history, religion, ethnicity, geographic spread, level of democracy, et cetera, between regions of the world. Does Europe have more of a homogenous situation in these areas? Probably yes! Did we have that also 60 years ago when the cooperation was emerging? Still, probably yes, but much less so. Does Africa have that unity that could be crucial for the development of a regional mechanism? Arguably, Africa would have equal or even more diversity in many of the areas than that of the Asia-Pacific. Maybe this attempt of comparison is futile. What it does suggest nevertheless, is that there are likely to be other reasons than those discussed so far that explains the absence. Two further aspects deserve mentioning here: political determination and Asian particularities.

Political will may be a major if not the sole reason for lack of a regional mechanism. Even if States like the Democratic People's Republic of Korea (North Korea) and Myanmar/Burma are among the States in the region, many other governments seem to have a relatively positive attitude towards human rights so an agreement ought to be possible simply if there was political will to overcome the challenges. Most of the countries in the region are States Parties to the six core human rights conventions: on racial discrimination (ICERD); civil and political rights (ICCPR); economic, social and cultural rights (ICESCR); discrimination of women (CEDAW); torture (CAT); and rights of the child (CRC). CEDAW and CRC are those conventions most ratified and CAT is the one least. Even if the ratification record is quite positive, the additional 'features' that the conventions offer: individual complaints mechanisms through optional protocols (ICCPR and CEDAW) or an acceptance procedure (ICERD and CAT), inquiry procedures (CEDAW and CAT), enhanced monitoring (CAT), or the prohibition of the death penalty (ICCPR), have not been very attractive in the region. The two optional protocols to the CRC is the exception with many ratifications and several pending such. This is however representative of all regions of the world. These 'extra features' of the conventions are not opted for as

extensively as the conventions in any part of the world but arguably the region where they have been the least attractive, is the Asia-Pacific.

Asian particularities, other than possible claims above, include what is often referred to as Asian values. The debate on Asian values flared in the 1990's and has since diminished. Still, arguments are at times made for an alternative understanding of law and rights in Asia. Typically, the Asian particularities, especially those countries that have a Confucian tradition such as China, Vietnam, Singapore, South Korea, and Japan, would include four specificities related to: cultural, collectiveness, discipline, and an organic nature<sup>40</sup>. The cultural argument suggests that human rights are related to a specific culture, and that international human rights law emanate from the Western or even European culture. For this reason, human rights are simply not part of the Asian culture. The second argument is the collective, that Asian values focuses on duties towards society and family as the core of social life and that this is contrary to the supposedly individualistic society in the West. The third argument of the four is that of discipline. Societal order is therefore of utmost importance and through this, economic and social rights trump civil and political rights. Related to this argument is in law that of non-litigiousness, where the Asian culture is believed to foster people to be very reluctant to go to court to have their way in a dispute or to claim their rights. The fourth argument finally, is the organic. State and society is one, the leaders of a State can decide in all matters of the society, for the good of the State-society.

All four arguments can surely be questioned. All four relate to the uniqueness of the East, Asia as the special case. Noteworthy is that all four of them have been advocated by governments, with Malaysia and Singapore at the forefront, not by the people of any of the Asian countries. Kotaro Tanaka (田中耕太郎), the Japanese Judge of the International Court of Justice, 1961-1970, stated:

The principle of the protection of human rights is derived from the concept of man as a *person* and his relationship with society which cannot be separated from universal human nature. The existence of human rights does not depend on the will of a State; neither internally on its law or any other legislative measure, nor internationally on treaty or custom, in which the express or tacit will of a State constitutes the essential element<sup>41</sup>.

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<sup>40</sup> BRUUN, O. and JACOBSEN, M. (eds.): *Human Rights and Asian Values. Contesting National Identities and Cultural Representations in Asia*, Richmond, Surrey, 2000.

<sup>41</sup> Tanaka's dissenting opinion in *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 297.

Tanaka's elaboration on the universal nature of human rights is very clear: it is beyond treaty ratification and the will of States – persons simply have human rights. "A State or States [Tanaka continues] are not capable of creating human rights by law or by convention; they can only confirm their existence and give them protection". Tanaka states further on: "Human rights have always existed with the human being. They existed independently of, and before, the State". Wolfgang Friedmann, the renowned professor of public international law, said that "it is always tempting for the student of comparative religion, culture and history to extol or generalize cultural differences..."<sup>42</sup>. True that the international human rights movement after the Second World War was largely a Western initiative, and accurate that the drafters of for instance the Universal Declaration of Human Rights were mainly from Europe and North America, but was it a process of formulation and codification of Western values? In fact, the core group elaborating the UDHR included in addition to Charles Malik of Lebanon, also Pengchun Zhan (張彭春, PC Chang), a Chinese professor with a strong Confucian influence on 'his' philosophy.

More could be said about universality of human rights and the misperception of Asia being fundamentally different but in response to the cultural argument this suffices. Related however is the second argument, that of the assumed Asian collectivism. An early commentator on Japan, Percival Lowell, mostly known for his contributions to natural science, wrote a book in 1888 entitled *The Soul of the Far East*, where he argued forcefully that Eastern Asia was in diametrical opposition to the individualism of the West. He claimed furthermore that the 'far East' was unable to create something of its own, only recreate what others (the West) had created. Kazuo Okakura (岡倉覺三), the Japanese fine arts scholar, partly in response to Lowell's book, but also in an effort to resist the influx of Western ideas, wrote *The Ideals of the East* in 1903. Okakura's book meant to contradict Lowell's perception of Japan and Asia by arguing that 'the East' was actually original in its culture and was even opposite that of the West: collectivistic rather than individualistic.

The history of describing Asia is full of such dichotomization between the East and the West. Amartya Sen, the Nobel Laureate from India, details (1) how other cultures are defined in contrast to contemporary Western culture, (2) that the Western self-perception makes age-old

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<sup>42</sup> FRIEDMANN, W.: *The Changing Structure of International Law*, Columbia University Press, New York, 1964, p. 316.

institutions an indigenous part of the Western tradition, (3) how other cultures are defined to support the perception that the West is the main or even the soul source of rational and liberal ideas, and even with a monopoly on rights and justice, (4) and how other cultures are defined by what differs, and these aspects are taken to be what defines the indigenous tradition. Sen concludes by noting that once the viewer appreciate institutions and practices in other cultures as not being foreign, then it will dawn that these are not as culture-specific as perceived<sup>43</sup>.

The Euro-centrism that often dominates the various discourses both within and outside of the West shapes the very way we see regions like Asia. Over a long history we have in the West been using Asia as a counter polarity, at times as a positive example to promote change at home, and at times as a negative contrast, making Asia the exotic, the inexplicable, the opposite by which we could 'define' ourselves.

This part 4, on actual and perceived reasons for the non-existence of a pan Asia-Pacific regional mechanism, started out contrasting the region with those that do have regional human rights mechanisms. I argued that even though many seemingly large obstacles exist, they are still not of a nature that they could not be overcome with sufficient political will and commitment. If this apparent lack is hinging on some Asian particularities, I offered four characteristics that would capture what is commonly described as part of the Asian specificities: the cultural, that of collectiveness, that of discipline, and the organic nature.

That human rights would be Western is in line with the Euro-centrism that has dominated the thinking and teaching in the West for centuries. It would even be concomitant with Asian perceptions as I tried to exemplify above with Okakura's writings. Nevertheless, as the quote from Judge Tanaka sought to show above, human rights are universal. That Asian culture would be fundamentally different, not being able to encompass rights, or even be based rather on duties, is a convenient argument to make for leaders of States, rarely convincing for the people.

The collective argument, secondly, similarly contrasts the perceived individualistic West with a more caring and collectively concerned East. Again, dichotomous positioning as exemplified by that between Lowell and Okakura, has created or at least vastly exaggerated the differences. Surely, different understandings of the scope of 'family', dependence

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<sup>43</sup> SEN, A.: "East and West: The Reach of Reason", *The New York Review of Books*, XLVII, 2000, p. 36.

on a collective, and how we perceive ourselves in that web, has more to do with the societal structures such as availability of social protection in various forms, the level of development, and the nature of dominant trades such as an agricultural society versus an industrialized one.

The understanding that Asian people are highly disciplined, thirdly, was connected with the overarching focus on societal stability. This focus would lead to, it is argued, for example a focus on economic and social rights as opposed to civil and political rights. That the 'right to subsistence' would prevail over the 'right to vote' would be the thrust of this argument. As was noted above however, at least the ratification status of the Asian countries suggests that no such choices have been made. True, China has ratified the ICESCR but so far only signed the ICCPR. The United States of America, in contrast, has done the opposite, signed both but until now only ratified the ICCPR. What the pattern in Asia is showing is clearly a reluctance to accept as intrusive an international monitoring as in many other parts of the world. This reluctance is something that they get support in by the USA with its almost total refusal to submit to such scrutiny. These brief examples serves to indicate that it is the interests of the States or rather the governments that matters rather than some specific cultural phenomenon. Related to the discipline argument was also the understanding that Asian people were unwilling to go to court to settle disputes. This ascribed non-litigiousness can be contrasted with a quote such as the following: "A state can only be governed according to law. The law sets a standard for all. It is made to decide doubtful cases and to distinguish right from wrong. It is the very life of the people". These sentences were written down by a Chinese official in the 6<sup>th</sup> Century BCE, some 2,500 years ago.

This disciplinary stereotype is also closely related to the last of the four arguments, that the State and the people are organically one. The leaders of a State would therefore be perceived to always work in the best interest of the people. Much could be said to counter this argument but maybe it suffices to recall the various forms of corruption and misuse of government funds prevalent across the globe. Again, the argument strikes one as that of convenience from the perspective of the leaders of States: down playing different interests within a society, reducing the risk of criticism, and ultimately pacifying the people.

The reasons, again, for the non-existence as of yet, of a regional Asia-Pacific, or even an effective sub-regional human rights monitoring mechanism, should not be sought in the culture or in perceived particularities, but much more likely – simply – in the level of commitment of the leaders of States in the region. Political will and determination would go far.



## 5. Conclusions

This chapter has dealt with human rights in the Asia-Pacific. At the core of the exposé offered have been organizational matters – the existence and the lack of various monitoring mechanisms. The first section provided an overview of the sub-regional organizations in the region with a human rights mandate, some of which with a great potential and even track record and some with less so. As the prime example, ASEAN was highlighted with its very recent developments towards setting up a regional mechanism for at least the ten member States.

The second section gave an historical panorama, showing the various initiatives taken over the last decades towards establishing an Asia-Pacific human rights organization. Increasingly, sub-regional solutions have been on the agenda and most likely that process will continue. As an alternative or supplement to regional mechanisms, the third section discussed the existence of national human rights institutions in several of the countries in the region. Also stressed in that context, was the work of the Asia-Pacific Forum that functions in many ways as a sub-regional human rights organization. The absence of full-fledged regional human rights organization is maybe part of the reason why there are many good and strong national human rights commissions in the Asia-Pacific.

In the fourth section I ventured into possible explanations for the absence of a regional or several sub-regional human rights monitoring mechanisms. Basically, my main conclusion is that political will is what is lacking. My overall conclusions on the future of regional mechanisms in the Asia-Pacific would however be more positive.

There are more and more organizations in the region that are demanding attention and influence. The European Union as a model for several of them will also in all likelihood mean that fundamental rights will be claimed by member States in order to surrender sovereignty – just as has been the case in Europe. The process of taking human rights more seriously is also very much supported by the relatively strong and well-functioning national human rights mechanisms. The networking that the APF offers between its member institutions: sharing experiences, boosting capacity, and promoting further developments in other countries, is a model for other parts of the world. A more plausible development with sub-regional organizations and mechanisms, as opposed to an Asia-Pacific-wide, as exemplified with the increasingly vocal ASEAN also on rights-related matters and the creation within that organization of a human rights mechanism, calls for further optimism.

Certainly, once sub-regional entities are up and running, mergers and various forms of cooperation can lead to a more of a pan-regional solution<sup>44</sup>.

Europe, the Americas, and Africa have established regional mechanisms that continue to develop and improve their work of monitoring and thus promoting human rights. The global mechanisms of the United Nations with its somewhat different nature can not be the sole supra-national monitoring for those parts of the world that are not covered also by regional solutions. Several layers of monitoring are needed: global, regional, national, and even sub-national. Also for the Asia-Pacific this need is becoming increasingly apparent. The, until recently, excruciatingly slow progress made by the ASEAN has been replaced with a rapid pace towards what hopefully will be an effective monitoring mechanism. An ASEAN experience in this way will be a role model for the rest of the region, and will do away with many of the superficial arguments for Asian particularities through the main proponents of the Asian Values debate – Malaysia and Singapore – will be part of that very same role model.

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<sup>44</sup> Also the increased presence of the OHCHR is a factor worth noting; see further MUNTARBHORN, V.: "Human Rights Monitoring in the Asia-Pacific Region", *op. cit.*

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The international human rights system remains as dynamic as ever. If at the end of the last century there was a sense that the normative and institutional development of the system had been completed and that the emphasis should shift to issues of implementation, nothing of the sort occurred. Even over the last few years significant changes happened, as this book amply demonstrates. We hope that this Manual makes a contribution to the development of International Human Rights Law and is of interest for those working in the field of promotion and protection of human rights. The book is the result of a joint project under the auspices of HumanitarianNet, a Thematic Network led by the University of Deusto, and the European Inter-University Centre for Human Rights and Democratisation (EIUC, Venice).



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