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THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS[1]

INTRODUCTION

The origins of American Unity and a movement towards humanitarian and liberal notions date back to the nineteenth century.[2] One of the earliest attempts to forge inter-State cooperation was through the establishment of the International Union of American Republics in 1890. American unity had already been manifested by the proclamation of the so-called Monroe Doctrine, preventing any intervention from Europe in the affairs of the Americas.[3] These expressions of American unity were once more exhibited

[1] See D.J. Harris and S. Livingstone (eds), *The Inter-American System of Human Rights* (Oxford: Clarendon Press) 1998; C. Medina Quiroga, *The Battle of Human Rights: Gross, Systematic Violations and the Inter-American System* (Dordrecht: Martinus Nijhoff Publishers) 1988; T. Buergenthal, 'The Inter-American System for the Protection of Human Rights' in T. Meron (ed.), *Human Rights in International Law: Legal and Policy Issues* (Oxford: Clarendon Press) 1984, pp. 439–493; A.H. Robertson and J.G. Merrills, *Human Rights in the World: An Introduction to the Study of International Protection of Human Rights*, 4th edn (Manchester: Manchester University Press) 1996, pp. 197–237; S. Davidson, *Human Rights* (Buckingham: Open University Press) 1993, pp. 126–151; T. Buergenthal, 'The Advisory Practice of the Inter-American Human Rights Court' 79 *AJIL* (1985) 1; T. Buergenthal and D. Shelton, *Protecting Human Rights in the Americas: Cases and Materials*, 4th edn (Kehl, Arlington, Va., USA: N.P. Engel) 1995; L.E. Frost, 'The Evolution of the Inter-American Court of Human Rights: Reflections of Present and Former Judges' 14 *HRQ* (1992) 171; D. Shelton, 'The Jurisprudence of the Inter-American Court of Human Rights' 10 *AUJILP* (1994) 333.

[2] Robertson and Merrills, above n. 1, at p. 197.

[3] Ibid. p. 197.

with the establishment of the Pan-American Union at the end of the nineteenth century. However, it was at the end of the Second World War that significant steps were undertaken in so far as the promotion and protection of human rights was concerned. At the ninth International Conference of American States in Bogotá, Colombia (1948) it was decided to replace the Pan-American Union with the Organisation of American States (O.A.S.).[4] The O.A.S. is a body comparable to the Council of Europe in terms of its institutional work for the promotion and protection of human rights in the Americas.[5]

The constitutional texts of the O.A.S. are reflected through an array of documents. This includes the Charter itself as amended by its four protocols (Buenos Aires (1967),[6] Cartagena de Indias (1985)[7] Washington (1992)[8] and Managua (1993).[9] Further substantiation in the human rights field is provided by the American Declaration of the Rights and Duties of Man 1948,[10] the American Convention on Human Rights 1969,[11] the Inter-American Convention to Prevent and Punish Torture (1985),[12] the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Pact of San Salvador) (1988),[13] the Protocol to Abolish the Death Penalty (1990),[14] the Inter-American Convention on

[4] Also known as the 'Pact of San José' Charter of the O.A.S. (as amended). Signed 1948. Entered into force 13 December 1951. For integrated text 33 I.L.M. (1994) 981.

[5] For the Council of Europe see Chapter 6.

[6] 721 U.N.T.S. O.A.S.T.S. 1-A (entered into force 27 February 1970). This Protocol incorporated the Inter-American Commission on Human Rights as an organ of the O.A.S. (Article 51).

[7] O.A.S. Treaty Series No. 66, 25 I.L.M. 527 (entered into force 16 November, 1998).

[8] I-E Rev. OEA Documentos Officiales OEA/Ser.A/2 Add.3 (SEPF) 33 I.L.M. 1005 (entered into force 25 September 1997).

[9] I-E Rev. OEA Documentos Officiales OEA/Ser.A/2 Add.4 (SEPF) 33 I.L.M. 1009 (entered into force 29 January 1996).

[10] Resolution XXX, Final Act of the Ninth International Conference of American States, Bogotá, Colombia, 30 March–2 May 1948, 48. OEA/Ser/L.V/11.7, at 17 (1988).

[11] Signed November 1969. Entered into force 18 July 1978. O.A.S.T.S. Off. Rec. OEA/Ser.L/V/11.23, doc.21, rev. (1979). 9 I.L.M. (1970) 673.

[12] Signed 9 December 1985. Entered into force 28 February 1987. O.A.S.T.S. 67, GA Doc/Ser.P, AG/doc. 2023/85 rev.1 (1986) pp. 46–54, 25 I.L.M. (1986) 519. See F. Kaplan, 'Combating Inter-American Convention to Prevent and Punish Torture' 25 *Brooklyn Journal of International Law* (1989) 399; S. Davidson, 'No More Broken Bodies or Minds: The Definition and Control of Torture in the Late Twentieth Century' 6 *Canterbury Law Review* (1995) 25.

[13] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 'Protocol of San Salvador' O.A.S.T.S. 69 (1988), entered into force November 16 1999, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 67 (1992); 28 I.L.M. (1989) 156.

[14] Protocol to the American Convention on Human Rights to Abolish the Death Penalty, O.A.S.T.S. 73 (1990), adopted 8 June 1990, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 80 (1992); 29 I.L.M. (1990) 1447.

Forced Disappearance of Persons (1994)[15] and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1994).[16]

The Inter-American system is rather distinctive from other regional systems in that its origins lie in two distinct though interrelated instruments. First, there is the O.A.S. Charter system of human rights, which relies upon the O.A.S. Charter and the American Declaration of the Rights and Duties of Man. Secondly, human rights protection is provided by the American Convention on Human Rights to those States members of the O.A.S. which have voluntarily become parties to Convention.[17] The two institutional systems operate through an interrelated organ, the Inter-American Commission on Human Rights. In both instances, the Inter-American Commission is vested with authority to receive communications from individuals and groups alleging violations of human rights contained within the American Declaration or the American Convention on Human Rights.

THE O.A.S. CHARTER SYSTEM AND THE AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN

The O.A.S. is a regional Organisation and comes within the ambit of a regional Organisation as provided in Article 52 of the United Nations Charter. The O.A.S. Charter System has similarities with that of the UN System.[18] Like the UN Charter, the O.A.S. Charter contains a number of references to human or fundamental rights. According to Article 3(l) 'the American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex'. Article 17 of the Charter goes on to provide:

> Each State has the right to develop its cultural, political, and economic life freely and naturally. In this free development, the State shall respect the rights of the individual and the principles of universal morality.

The Charter does not elaborate upon the meaning of the term 'rights of the individual' as used in Article 3(l) and 17. The task of expanding on the meaning of human rights was undertaken by a declaration, the American Declaration of the Rights and Duties of Man, which was adopted at the same

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[15] Signed 9 June 1994. Entered into force 28 March 1996. 33 I.L.M. (1994) 1529.

[16] Signed 9 June 1994. Entered into force 3 March 1995. 33 I.L.M. (1994) 1534.

[17] It needs to be noted that there is no obligation on O.A.S. Member States to becoming parties to ACHR. Out of the 35 O.A.S. members, 10 have not become parties to the Convention.

[18] Davidson, above n. 1, at p. 127; also see V. Gomez, 'The Interaction between the Political Actors of the O.A.S., the Commission and the Court' in D.J. Harris and S. Livingstone (eds), above n. 1, pp. 173–211.

time as the adoption of the Charter.[19] This Declaration contains a variety of rights and also provides a set of duties of the individual to society. The following rights and duties are contained within the Declaration:

Article I	Right to life, liberty and personal security
Article II	Right to equality before law
Article III	Right to religious freedom and worship
Article IV	Right to freedom of investigation, opinion, expression and dissemination
Article V	Right to protection of honour, personal reputation, and private and family life
Article VI	Right to a family and to protection thereof
Article VII	Right to protection for mothers and children
Article VIII	Right to residence and movement
Article IX	Right to the inviolability of the home
Article X	Right to the inviolability and transmission of correspondence
Article XI	Right to the preservation of health and to well-being
Article XII	Right to education
Article XIII	Right to the benefits of culture
Article XIV	Right to work and to fair remuneration
Article XV	Right to leisure time and to the use thereof
Article XVI	Right to social security
Article XVII	Right to recognition of juridical personality and civil rights
Article XVIII	Right to a fair trial
Article XIX	Right to nationality
Article XX	Right to vote and to participate in government
Article XXI	Right of assembly
Article XXII	Right of association
Article XXIII	Right to property
Article XXIV	Right of petition
Article XXV	Right of protection from arbitrary arrest
Article XXVI	Right to due process of law
Article XXVII	Right of asylum
Article XXVIII	Scope of the rights of man
Article XXIX	Duties towards society
Article XXX	Duties toward children and parents
Article XXXI	Duty to receive instruction
Article XXXII	Duty to vote
Article XXXIII	Duty to obey the law
Article XXXIV	Duty to serve the community and the nation
Article XXXV	Duties with respect to social security and welfare
Article XXXVI	Duty to pay taxes

[19] American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1, 17 (1992).

Article XXXVII Duty to work
Article XXIX Duty to refrain from political activities in a foreign country.

The role and position of the Declaration is comparable to UDHR.[20] Both the documents were drafted after the atrocities of the Second World War and attempt to uphold liberal democratic traditions of fundamental human rights. Among the significant differences is the list of duties for the individual contained in the American Declaration. The American Declaration (like the UDHR) was not intended to be legally binding. Like the UDHR, the legal status of the American Declaration has been a matter of some debate.

Both the Inter-American Commission on Human Rights and Inter-American Court of Human Rights have treated the Declaration as being an authoritative interpretation of the Charter and thus having a binding effect. The Court in its Advisory Opinion No. 10 observed that:[21]

> by means of an authoritative interpretation, the member States of the Organization have signalled their agreement that the Declaration contains and defines the fundamental 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 reading its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration [and that] for the member States of the Organization, the Declaration is the text that defines the human rights referred in the Charter.[22]

The Court in this opinion was inclined to take this view primarily because of the recognised position of the American Declaration in the revised Statute of the Inter-American Commission, which places the Declaration on a par with ACHR.[23] At the same time, such an elevated status for the Declaration has generated criticism from States which accepted the Declaration as a political statement only rather than a legally binding instrument. The continuous objections from these States also make it difficult to establish the view that the Declaration represents regional customary law.[24]

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Background: one Commission for the two systems

The jurisdiction of the Inter-American Commission on Human Rights extends to all O.A.S. member States. The Commission which was established

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[20] See Chapter 2.

[21] *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*, Advisory Opinion OC-10/89, July 14, 1989, Inter-Am. Ct. H.R. (Ser. A) No. 10 (1989).

[22] Ibid. para 45.

[23] Article 2 provided 'for the purposes of the Statute human rights are understood to be set forth in the American Declaration of the Rights and Duties of Man'.

[24] For elaboration on customary law, see above Chapter 1.

in 1959 is a product not of a binding treaty agreement but of a resolution of ministers of foreign affairs.[25] The Commission started its work in May 1960 in pursuance of its Statute, which was adopted during the same year.[26] The Statute, as noted above, considered the American Declaration as providing a detailed expression to human rights. Although mandated since 1965 (with the addition of a new Article 9) to receive and deal with individual communications, the Commission concentrated on its advisory and recommendatory role. There remained a reluctance to move towards the consideration of individual applications and the justification presented was that the Commission's sources and influence could be more effectively utilised in identifying human rights violations, holding meetings in any member State of the O.A.S., and conducting on-site investigations leading to country studies.[27]

For several years after its creation the status and position of the Inter-American Commission remained unclear. The Statute of the Commission defines it as an 'autonomous entity' of the O.A.S. It therefore meant that the Statute failed to provide the Commission with any exact legal status. The position was rectified by the Buenos Aires Protocol of 1967 which in amending the O.A.S. Charter recognised the Commission as one of the 'principal organs'[28] of the organisation, through which it aimed to attain its purposes. The revised Charter came into operation in 1970.

With the Inter-American Commission becoming an institutional organ of the O.A.S. Charter, the debate on the content of human rights and, in particular, the value of the ADHR intensified.[29] It was also not clear whether there would be two Commissions in operation catering independently for the O.A.S. Charter system and the American Convention respectively. The Inter-American Commission's new Statute (which came into force in 1979, following the coming into operation of the ACHR) confirmed the existence

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[25] See Resolution VIII of the Fifth Meeting of Consultation of Ministers of Foreign Affairs, Final Act, Santiago, Chile (12–18) August 1959. O.A.S. Off Rec. OEA/Ser F/II.5 (Doc 89, English, Rev. 2) October, 1959 at 10–11.

[26] Statute of the Inter-American Commission on Human Rights, O.A.S. Res. 447 (IX-0/79), O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 88, Annual Report of the Inter-American Commission on Human Rights, OEA/Ser.L/V/II.50 doc.13 rev. 1 at 10 (1980), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 93 (1992).

[27] C. Cerna, 'The Inter-American Commission on Human Rights: Its Organisation and Examination of Petitions and Communications' in D.J. Harris and S. Livingstone (eds), above n. 1, 65–113 at p. 67.

[28] Article 52(2) O.A.S. Charter.

[29] Article 111 of the revised Charter provided that 'an inter-American Convention on human rights shall determined the structure, competence and procedure of the (Inter-American) Commission as well as those of other organs responsible for these matters'.

of a single Commission to serve both the OAS Charter and the American Convention.[30] Article 1(2) of the Commission's Statute provides:

> For the purposes of the present Statute, human rights are understood to be:
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> 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.

This meant, first, that all member States of O.A.S. not parties to ACHR continued to be bound by standards of the Charter. Secondly, the mechanisms established by the Commission as a Charter institution were preserved. This also endowed a rather treaty-like status to the American Declaration. The Commission also has a specific mandate to oversee all human rights obligations undertaken by O.A.S. States.[31]

Structure and organisation of the Commission

According to Article 34 of the ACHR, the Commission comprises seven members who are nationals of the O.A.S. The members of the Commission must be people with a 'high moral character with recognised competence in the field of human rights'.[32] They serve in their personal capacity for a period of four years and may be re-elected but on only one occasion. Members act in an independent capacity and not as State representatives.[33] Although not a requirement, most members have a legal background. The Commission represents all members of the O.A.S., and is not confined to the State parties of the ACHR.[34]

Members of the Commission are elected by the General Assembly of the O.A.S. The procedure for the election of members of the Commission requires that at least six months prior to the completion of the terms of office of the member, the Secretary General is required to request to each member of the O.A.S. in writing to propose its list of candidates within 90 days.[35] Each government may propose up to three candidates who may be nationals of

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[30] Statute of the Inter-American Commission on Human Rights, O.A.S. Res. 447 (IX-0/79), O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 88, Annual Report of the Inter-American Commission on Human Rights, OEA/Ser.L/V/11.50 doc.13 rev. 1 at 10 (1980), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 93 (1992). See R. Norris, 'The New Statute of the Inter-American Commission on Human Rights' 1 *HRLJ* (1980) 379.

[31] D. Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press) 1999, p. 122.

[32] Article 34 ACHR; Article 2(1) Statute of the Commission.

[33] Article 35 ACHR; Article 2(2) Statute of the Commission.

[34] Article 35 ACHR.

[35] Article 4 of Statute of the Commission.

their own State or any other member State. If three names are put forward then at least one is required to be a non-national.[36] Members are then elected by secret ballot, with candidates obtaining the highest number of votes being declared elected.[37] The Commission is supported by a secretariat, which carries out its day-to-day work. It prepares the working programme for each session and implements the Commission's decisions. It also prepares the draft reports and resolutions.

The Commission sessions are held generally in Washington, but may also be held in any other State member of the O.A.S. The ordinary sessions are held twice every year, each session lasting for three weeks; in the course of these individual communications are given consideration.[38] In addition there are also one or two extraordinary sessions each year. During the proceedings of the Commission oral hearings are conducted in which representations can be made by individuals and NGOs.[39] The role and functions of the Commission are described in Articles 41 of ACHR which provides that

> The main function of the Commission shall be to promote respect for and defense of human rights. In the exercise of its mandate, it shall have the following functions and powers:
>
> a) to develop an awareness of human rights among the peoples of America;
> b) to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favour of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights;
> c) to prepare such studies or reports as it considers advisable in the performance of its duties;
> d) to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights;
> e) to respond, through the General Secretariat of the Organisation of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request;
> f) to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention; and
> g) to submit an annual report to the General Assembly of the Organisation of American States.

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[36] Article 3(2) of Statute of the Commission.

[37] Article 5 of Statute of the Commission.

[38] C. Cerna, 'The Inter-American Commission on Human Rights: Its Organisation and Examination of Petitions and Communications' in D.J. Harris and S. Livingstone (eds), above n. 1, 65–113 at p. 74.

[39] Shelton, above n. 31, p. 122.

These are the functions which the Commission used to perform prior to the ACHR becoming effective. As is evident, these are of a promotional character which includes making recommendations to member governments and requesting information on the human rights issues. The Commission also has the authority to prepare reports on the human rights situation in any State of the O.A.S., and can use information from individuals and NGOs to prepare such reports. It submits annual reports to the O.A.S. General Assembly, which includes resolutions on individual cases, reports on various States and recommendations for progress in human rights situations.[40] Articles 44–47 relate to those functions which apply specifically to the States parties to the ACHR. They focus on the individual and inter-State complaints procedures.

Complaints procedure

The procedure for acting upon individual complaints from the O.A.S. Charter system and ACHR systems can be found in different sources. In the case of the O.A.S. Charter system the complaints procedure is provided by regulation 51–54 of the Commission's Regulations[41] whereas the complaint procedures under the ACHR are contained in Articles 44–55 of the Convention. Notwithstanding these sources the actual practice of the two bodies is similar, though differences can be found in the post-admissibility stages. The differences result from the institutional structuring of the two institutions. While in the case of ACHR, the Commission has the option of transmitting cases to the Court, providing the relevant State has accepted the jurisdiction of the Court,[42] no such possibilities exist in the case of O.A.S. Charter system. The absence of a Court also means that the final decisions in the O.A.S. Charter systems are made by the Commission. The Commission, unlike the Court, cannot dispense legally binding judgment. Secondly unlike the ACHR system, no obligations exist for the Commission to secure a friendly settlement.[43]

THE AMERICAN CONVENTION ON HUMAN RIGHTS (ACHR)

The ACHR, also known as the Pact of San José, along with its protocols represents the second part of the inter-American human rights system. ACHR was adopted in 1969 and entered into force in 1978. In 1988 an additional protocol was concluded extending the range of rights it covered. In 1990,

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[40] Ibid, p. 122.

[41] Regulations of the Inter-American Commission on Human Rights, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 Doc.6 rev.at 103 (1992).

[42] Article 14 ACHR.

[43] Davidson, above n. 1, at p. 135.

another protocol was adopted which aimed at the abolition of the death penalty. There have been several sources of inspiration for ACHR, including the International Covenants and the ECHR. In terms of the implementation mechanisms, similarities can be traced between the European Convention and its American counterpart. At the time of its inception, the ACHR followed the pattern of ECHR, being managed by a Commission and Court. However, whereas the European Commission was abolished after the 11th Protocol came into operation, the ACHR continues to rely upon its Commission and Court. The functions of the Inter-American Commission include admissibility and a possible friendly settlement. The recommendations of the Inter-American Commission are conducted on merit but are not legally binding. The functions of the Court are largely of a judicial decision-making nature. There are two processes of complaint allowed by the Convention. First, there is the contentious procedure, which allows both individuals (and other non-State actors) to institute proceedings against a State party to the Convention and an inter-State complaints procedure. Second, there is the possibility of invoking the advisory jurisdiction of the Court.

In the light of the influence of the comparable international and regional human rights instruments, it is not surprising that many of the rights contained in the American Convention overlap or relate very closely to those of other regional and international human rights treaties. The ACHR contains traditional civil and political rights as well as economic, social and cultural rights. Many similarities can be found within the rights contained in the Convention, the International Covenants and the ECHR, although there are a number of significant differences. The ACHR contains a number of rights, not found in either the International Covenants or the ECHR. Having said that, the anticipation with which they were implemented is more or less the same as in other international covenants.[44] The economic rights contained in the ACHR are supplemented by the Protocol. It is interesting to note that the differences in implementation follow the pattern of International Covenants and the European Human Rights System. According to Article 1(1) of ACHR, States parties are to 'respect the rights and freedoms' and to 'ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms'. By contrast, Article 1 of the Protocol provides that the States parties take appropriate measures 'for the purpose of achieving progressively ... the full observance of the rights recognised in the protocol'.

The following rights are contained in the Convention:

Article 3	Right to recognition before the law
Article 4	Right to life
Article 5	Right to humane treatment

[44] Ibid. pp. 136–137.

Article 6 Freedom from slavery and servitude
Article 7 Right to liberty and security
Article 8 Right to a fair trial
Article 9 Freedom from retroactively of the criminal law
Article 10 Right to compensation
Article 11 Right to privacy
Article 12 Freedom of conscience and religion
Article 13 Freedom of thought and expression
Article 14 Right to reply
Article 15 Freedom of assembly
Article 16 Freedom of association
Article 17 Freedom to marry and found a family
Article 18 Right to a name
Article 19 Rights of the child
Article 20 Right to nationality
Article 21 Right to property
Article 22 Freedom of movement and residence
Article 23 Right to participate in government
Article 24 Right to equal protection
Article 25 Right to juridical protection
Article 26 Economic, social and cultural rights

ANALYSIS OF SUBSTANTIVE RIGHTS

Right to life, liberty, the prohibition of enforced disappearances and torture

Article 4 protects the fundamental right to life; Article 4(1) provides that 'Every person has the right to have his life respected'. The remainder of the Article, however, raises a number of issues without providing any definitive statement. It notes that the right to life 'shall be protected by law, and in general from the moment of conception'. The question as to whether abortion is a violation of the Convention has been considered by the Inter-American Commission in a case arising from the US, which is not a party to the Convention. After considering the *travaux préparatoires* of the American Declaration, the Commission concluded that abortion of a foetus did not lead to a violation of the Declaration. The Commission also held obiter that the term 'in general' allowed a discretion to States to determine the validity of their respective abortion laws.[45]

Article 4(1), like Article 6(1) of ICCPR goes on to prohibit 'arbitrary' taking of life. The Inter-American Court has adopted a strict approach, defining 'arbitrary' to mean that any taking of life must not be the result of a

[45] See the *Baby Boy Case*, Case No. 2141 (United States), Res. 23/81, OEA/Ser. L/V/II.54, Doc. 9, rev. 1, Oct. 16, 1981. For commentary on the case see D. Shelton, 'Abortion and the Right to Life in the Inter-American System: The Case of "Baby Boy"' 2 *HRLJ* (1981) 309.

disproportionate use of force by public authorities.[46] In line with the ECHR, the Inter-American Court has pronounced on the existence of a positive and negative obligation on State parties.[47] Like the ICCPR, Article 4(2) represents what has been described as an 'abolitionist trend'.[48] It allows the death penalty for only the most serious offences, with the prohibition on reintroduction of this penalty in States which have already abolished capital punishment and the prohibition of its extension to crimes to which it currently does not apply. Enforced disappearances have been an unfortunate recurrent theme in the history of the States of Latin America. The Inter-American institutions have included the phenomenon of enforced disappearances as representing acts of torture or cruel, inhuman or degrading punishment or treatment.[49] Similarly, prolonged periods of detention incommunicado,[50] rape,[51] putting hoods on the victims so as to suffocate;[52] mock burials and mock executions;[53] enforcement of malnutrition and starvation[54] have all been categorised as torture.

As already noted, the O.A.S. system in recognising the significance of prohibiting, condemning and punishing all forms of torture adopted a regional convention in 1985.[55] Article 1 of the Convention defines torture as follows:

> For the purposes of this Convention, torture shall be 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. 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.
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> The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that

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[46] *Neira Alegria Case*, Judgment of January 19 1995, Inter-Am.Ct.H.R. (Ser. C) No. 20 (1995).
[47] *Velasquez Rodriguez Case*, Judgment of July 29 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).
[48] S. Davidson, 'The Civil and Political Rights Protected in the Inter-American Human Rights System' in D.J. Harris and S. Livingstone (eds), above n. 1, 213–288 at p. 222.
[49] See *Lissardi and Rossi* v. *Guatemala*, Case 10.508, Report No. 25/94, Inter-Am.C.H.R., OEA/Ser.L/V/II.88 rev.1 Doc. 9 at 51 (1995).
[50] *Velasquez Rodriguez Case*, Judgment of July 29 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).
[51] *Caracoles Community* v. *Bolivia*, Case 7481, Res. No. 30/82, March 8 1982, OAS/Ser.L/V/II.57, Doc. 6 Rev. 1, at 20 September 1982, at 36 and *Raquel Martí de Mejia* v. *Perú*, Case 10.970, Report No. 5/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 157 (1996).
[52] *Lovato* v. *El Salvador*, Case 10.574, Report No. 5/94, Inter-Am.C.H.R., OEA/Ser.L/V/II.85 Doc. 9 rev. at 174 (1994).
[53] *Barrera* v. *Bolivia*, Case No. 7824, Res. No. 33/82, Inter-Am.C.H.R., O.A.S./Ser.L/V/II.57, Doc. 6 rev. (1982) 44.
[54] *Roslik et al.* v. *Uruguay*, Case 9274, Res. No. 11/84, October 3 1984, O.A.S./Ser.L/V/II.66, doc.10 rev. 1, at 121.
[55] See Kaplan, above n. 12, at p. 399; Davidson, above n. 12, at p. 25.

they do not include the performance of the acts or use of the methods referred to in this article.

The Inter-American Commission (unlike the ECHR) has not distinguished between torture, inhuman and degrading treatment.[56] In a recent case relating to rape, in elaborating upon the meaning of torture, the Inter-American Commission has noted that there should be *mens rea* and *actus reas*, and that the act must be committed either by a public official or by an individual at the instigation of an officer.[57]

Enforced disappearances bear a strong relationship with torture but essential prerequisites to these disappearances are also loss of personal liberty and inhumane treatment. The ACHR protects both the right to personal liberty and security[58] and provides for a right to humane treatment.[59] Article 7, in according the right to personal liberty, prohibits arbitrary arrests, imprisonment and loss of liberty save for reasons established by law. Whereas the right to liberty is breached in the absence of lawful arrests[60] and for failure to comply with national laws,[61] the right to security is violated by threatening individuals with arbitrary arrests and detention.[62]

Equality and non-discrimination

Article 1(1) in placing obligations on States parties provides for the State to respect the rights of all persons and to ensure to all persons

> subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

The obligations in the article are further reinforced through the provisions of Article 24, which affirms that 'all persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law'. Equality, as is emphasised throughout this book, is the norm with the *jus cogens* character. This Article prohibits discriminatory practices in the

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[56] S. Davidson, 'The Civil and Political Rights Protected in the Inter-American Human Rights System' in D.J. Harris and S. Livingstone (eds), above n. 1, 213–288, at p. 230.

[57] *Raquel Marti de Mejia* v. *Perú*, Case 10.970, Report No. 5/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 157 (1996), at 182–5.

[58] Article 7.

[59] Article 5. According to Article 5(1) 'Every person has the right to have his physical, mental and moral integrity respected'.

[60] Article 5(1).

[61] *Gangaram Panday Case*, Judgment of January 21 1994, Inter-Am.Ct.H.R. (Ser. C) No. 16 (1994).

[62] *Garcia* v. *Peru*, Case 11.006, Report No. 1/95, Inter-Am.C.H.R., OEA/Ser.L/V/II.88 rev.1 Doc. 9 at 71 (1995).

provision of rights contained in the Convention and no derogations are permissible from the norm of non-discrimination. The value behind this principle of equality and non-discrimination was reiterated by the American Court in Advisory Opinion No. 4 Proposed Amendment to Naturalisation Provisions of the Political Constitution of Costa Rica[63] when it stated 'equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual'.[64] The Court went on to approve the affirmative action policies in order to generate de facto equality and cited with approval the European Court of Human Rights in the *Belgian Linguistic Case*.[65]

Equality before the law has a substantial association with principles of natural justice and most significantly to the right to fair trial, a right protected by Article 8 of the Convention. Article 8(1) in providing the right to fair trial states:

> Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

The right to fair trial also includes in criminal cases a right to be presumed innocent until proven guilty.[66] It also incorporates the right of the accused to be assisted, without charge, by an interpreter,[67] prior notification of the charge,[68] adequate time and means for the preparation of defence,[69] right of assistance through counsel,[70] the right to examine witnesses and to obtain the appearance of witnesses of experts,[71] the right not to be compelled to be a witness against himself[72] (or not to make confession through coercion),[73] a right to appeal.[74] The right to fair trial provides guarantees against the rule of double jeopardy,[75] and ensures that a trial should be held in public unless a closed trial is necessary to protect the interests of justice.[76] The right to fair trial is strengthened by Article 10 which provides that 'Every person has the

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[63] Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, January 19, 1984, Inter-Am. Ct. H.R. (Ser. A) No. 4 (1984).
[64] ibid. para 54.
[65] *Belgian Linguistic Case* (No. 2), Judgment of 23 July 1968, Series A. No. 6, cited ibid. para 57.
[66] Article 8(2).
[67] Article 8(2)(a).
[68] Article 8(2)(b).
[69] Article 8(2)(c).
[70] Article 8(2)(e).
[71] Article 8(2)(f).
[72] Article 8(2(g)).
[73] Article 8(3).
[74] Article 8(2)(h).
[75] Article 8(4).
[76] Article 8(5).

right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice'.

Privacy, religion, thought, expression, assembly and association

This section considers a number of rights which are distinct from one another but with overlapping features. Freedom of religion is inextricably related to freedom of thought and expression. A similar relationship could be found in cases of freedom of assembly and association. The right to privacy and honour is protected by Article 11 of the Convention. Violation of honour, according to the American Commission, represents not only moral and spiritual indignation but could also include physical abuse.[77] Article 11 bears similarities to Article 8 of the ECHR, and the Inter-American Commission has been influenced in its approach by the decisions of the European Court of Human Rights. Although unlike the ECHR the ACHR does not provide an explicit clause justifying restrictions based on public interest, national security or public safety, such restrictions are implied in the provisions of the Article and would be authorised by the Commission. Articles 12 and 13 in granting freedom of religion and thought are more explicit in recognising the authority of the State to place limitations. At the same time the Commission and Court have made it clear that any discretion given to the State has to be construed narrowly.[78] Pursing this narrowly construed discretion the Court found that the practice of compulsory licensing of journalists in Costa Rica could not be justified on grounds of public order.[79]

Specialist rights

The ACHR contains a number of rights which have been of special concern for States from the Americas. Among these can be included the right to reply

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[77] See *Rivas* v. *El Salvador*, Case 10.772, Report No. 6/94, Inter-Am.C.H.R., OEA/Ser.L/V/II.85 Doc. 9 rev. at 181 (1994). Discussed by S. Davidson, 'The Civil and Political Rights Protected in the Inter-American Human Rights System' in D.J. Harris and S. Livingstone (eds), above n. 1, 213–288 at p. 256.

[78] See *Steve Clark* v. *Grenada*, Case 10.325, Report No. 2/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 113 (1996).

[79] Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts 13 and 29 of the American Convention on Human Rights), Advisory Opinion OC-5/85, November 13 1985, Inter-Am. Ct. H.R. (Ser. A) No. 5 (1985). Also see *Nicolas Estiverne* v. *Haiti*, Case 9.855, Res. No 20/88, March 24 1988, OEA/Ser.L/V/II.74, Doc. 10 rev. 1, at 146; *Spadafora Franco* v. *Panama*, Case 9.726, Res. No 25/87, September 23 1987, OEA/Ser.L/V/II.74, Doc. 10 rev. 1, at 174.

and the right to a name. Article 18 represents an interesting provision and in conferring the right to a name, notes:

> Every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names if necessary.

Although the right to a name is provided for in other international instruments, the inclusion of this right has been campaigned for particularly strongly by Latin American States. As we shall consider in due course, the Article relating to the right to an identity was introduced by Argentina for incorporation into the Convention on the Rights of the Child. Argentina campaigned for the incorporation of the right to identity as a reaction to its so-called 'dirty war'.[80] These sentiments were no doubt the driving force for the incorporation of this right in the ACHR. The American Commission has confirmed the relevance of this Article for Argentina by holding irregular adoptions of the children of *desaparecidos*, disappearances and kidnapping as violating Article 18.[81]

The right to property as an important right is contained in Article 21. This right is contained in the UDHR, the first Protocol of the ECHR and the African Charter, although due to a number of controversies could not be included in the international covenants. The provision is extremely useful for a region which has been vulnerable to denial of property rights, expropriation and nationalisation. The American Commission has accorded this right a special significance and has regarded it as of great value for the enjoyment of other human rights.[82] While the overall rationale behind an Article dealing with the right to property appears acceptable, what is less certain is the inclusion of Article 21(3) which provides that 'Usury and any other form of exploitation of man by man shall be prohibited by law'. A possible reason for the inclusion of the provision may be to prevent usury on tangible property. Nevertheless, the article perhaps appears more in tune with the values put forward by Islamic States on the prohibition of *riba* than with the American States.[83]

The right to freedom of movement and residence also signifies a useful right, and is represented in other international human rights instruments. Of particular

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[80] D. Fottrell, 'Children's Rights' in A. Hegarty and S. Leonard (eds), *Human Rights: An Agenda for the Twenty First Century* (London: Cavendish Press) 1999, 167–179 at p. 172; D. Freestone, 'The United Nations Convention on the Rights of the Child' in D. Freestone (ed.), *Children and the Law: Essays in Honour of Professor H.K. Bevan* (Hull: Hull University Press) 1990, 288–323 at p. 290. See Chapter 14 below.

[81] See IACHR 'A Study about the Situation of Minor Children who were Separated from their Parents and are claimed by Members of their Legitimate Families' [1988] *Inter-American Year Book on Human Rights* 476 at 480.

[82] See *Marín* et al. v. *Nicaragua*, Case 10.770, Report No. 12/94, Inter-Am.C.H.R., OEA/Ser.L/V/II.85 Doc. 9 rev. at 293 (1994).

[83] See J. Rehman, 'Islamic Perspectives on International Economic Law' in A.H. Qureshi (ed.), *Perspectives on International Economic Law* (The Hague: Kluwer Law International) 2002, pp. 235–258.

value, in this regard in the context of the Americas is the provision of the right to seek and gain asylum.[84] The *Asylum Case (Columbia v. Peru)*[85] before the International Court of Justice confirms that the issues concerning asylum have formed a sensitive aspect in the complex political matrix of the region.[86]

Economic, social and cultural rights

The ACHR is one of the first civil and political rights treaties to explicitly incorporate economic, social and cultural rights.[87] Article 26 provides that:

> 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.

The provisions in this Article have been supplemented by the Protocol on Economic, Social and Cultural rights.[88] Although the overall picture in dealing with cultural rights has not been promising, particularly in relation to indigenous peoples, the Commission has taken the view that within international law there exists a prohibition on unrestricted assimilation of cultural and indigenous rights and that

> special legal protection is recognized for the use of language, the observance of their religion, and in general, all those aspects related to the preservation of their cultural identity. To this should be added the aspects linked to productive organization, which includes, among other things, the issue of the ancestral and communal lands.[89]

PROCEDURES UNDER THE AMERICAN CONVENTION ON HUMAN RIGHTS

State reporting

There is no reporting procedure under ACHR similar to the ones conducted by the treaty-based bodies. There are, however, limited provisions in relation

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[84] Article 22(7) provides 'Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the State and international conventions, in the event he is being pursued for political offenses or related common crimes'.

[85] *Asylum Case (Colombia v. Peru)*, Judgment 20 November 1950 (1950) ICJ Reports 266.

[86] See M.N. Shaw, *International Law*, 4th edn (Cambridge: Grotius Publication) 1997, p. 60.

[87] See M. Craven, 'The Protection of Economic, Social and Cultural Rights under the Inter-American System of Human Rights' in D.J. Harris and S. Livingstone (eds), above n. 1, at pp. 289–321.

[88] Ibid.

[89] See O.A.S. Docs. OEA/Ser. L/V/II.62, doc. 10 rev. 3 (1983) and OEA/Ser.LV/II.62, doc.26 (1984).

to reporting contained in Articles 42 and 43 of the treaty. These Articles provide as follows:

> Article 42
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> The States Parties shall transmit to the Commission a copy of each of the reports and studies that they submit annually to the Executive Committees of the Inter-American Economic and Social Council and the Inter-American Council for Education, Science, and Culture, in their respective fields, so that the Commission may watch over the promotion 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.
>
> Article 43
>
> The 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.

Individual complaints procedure

Petitions are to be submitted in writing, stating the facts of the case, the details of the victim, the name of the State alleged to have violated the rights, and the alleged breaches. It is also important for the petition to confirm that domestic remedies have been exhausted and the communication satisfies other admissibility requirements. It is equally significant to assess the financial implications of the petitioning to the Commission. For invoking the Inter-American procedure, legal aid is not generally available.[90]

Article 44 provides for the procedure for individual complaints. According to Article 44:

> Any person or groups of persons, or any non-governmental entity legally recognized in one or more member States of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violations of the Convention by a State party.

It must be noted that the States becoming parties to ACHR automatically recognise the competence of the Commission to receive complaints from persons alleging violation of their rights. The petitioning system is also automatic for the States of the O.A.S. Charter. The differences between the ACHR and the Optional Protocol of the ICCPR and the ECHR are worthy of consideration. While according to Article 34 of the ECHR only 'victims' may be authors of communications, Article 44 provides that 'any person or group of persons, or any non-governmental entity legally recognized in one or more member

[90] See C. Cerna, 'The Inter-American Commission on Human Rights: Its Organisation and Examination of Petitions and Communications' in D.J. Harris and S. Livingstone (eds), above n. 1, 65–113 at p. 79.

states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of victims of this convention by a State party'. Similarly since any person, NGO or legally recognised entity may lodge a petition regardless of their being a victim of a violation, the ACHR is generous in that *actio popularis* applications are permissible.[91] 'Person' means a person who is alive and does not include entities such as banks and corporations.[92]

Inter-State application

Like the ICCPR, the ECHR and the AFCHPR, the ACHR provides for an inter-State complaints mechanism. However, unlike ECHR (and in line with ICCPR), the State is required to make a declaration recognising the competence of the Commission to receive and examine communications from another State. Article 45(1) provides for this procedure, according to which:

> 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.

Communications under this procedure are only acceptable on the basis of reciprocity.[93] By way of contrast to the European human rights system, the inter-State application procedure has never been used.[94]

Admissibility requirements

The procedure for admissibility of individual and inter-State complaints is provided for in Articles 46–47. Article 46 provides as follows:

> Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:
>
> (a) that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;
> (b) that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment;

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[91] Shelton, above n. 1, at p. 342.

[92] See C. Cerna, 'The Inter-American Commission on Human Rights: Its Organisation and Examination of Petitions and Communications' in D.J. Harris and S. Livingstone (eds), above n. 1, 65–113 at p. 78.

[93] See Article 45(2).

[94] D. Harris, 'Regional Protection of Human Rights: The Inter-American Achievement' in D.J. Harris and S. Livingstone (eds), above n. 1, 1–29 at p. 3.

(c) that the subject of the petition or communication is not pending in another international proceeding for settlement; and

(d) that, in the case of Article 44, the petition contains the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition.

2. The provisions of paragraphs 1(a) and 1(b) of this article shall not be applicable when:

(a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;

(b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or

(c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

The admissibility requirements of Article 46 are supplemented by those of Article 47 which provides that:

> The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if:
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> (a) any of the requirements indicated in Article 46 has not been met;
>
> (b) the petition or communication does not state facts that tend to establish a violation of the rights guaranteed by this Convention;
>
> (c) the statements of the petitioner or of the state indicate that the petition or communication is manifestly groundless or obviously out of order; or
>
> (d) the petition or communication is substantially the same as one previously studied by the Commission or by another international organization.

As analysis throughout this book has shown, in order to invoke any international human rights procedure certain prerequisites must be met. The ACHR, in common with other human rights systems, contains certain conditions. According to the provisions of the ACHR, the petitioner must have pursued and exhausted all domestic remedies, although as Shelton points out this requirement is 'less stringent than other human rights systems'.[95] In accordance with the general principles of international law, the petitioner is only required to pursue and exhaust those remedies which would adequately and effectively redress his grievances. He is not obliged to apply to domestic courts where there are no adequate remedies or if there is an 'unwarranted delay'.[96] The Commission has developed in its jurisprudence the meaning of the term 'unwarranted delay'.[97] The petitioner is also not obliged to follow his case in the domestic courts where

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[95] Shelton, above n. 1, at p. 344.

[96] Article 46(2)(c).

[97] See *Fabricio Proano et al.* v. *Ecuador*, Case 9.641, Res. No 14/89, April 12 1989, OEA/Ser.L/V/II.76, Doc.10, at 104; see *Rojas DeNegri and Quintana* v. *Chile*, Case 9.755, Res. No. 01a/88, September 12 1988, OEA/Ser.L/V/II.74, Doc. 10 rev. 1, at 132.

he or she is being denied access to remedies[98] or is being prevented from exhausting domestic remedies,[99] or there has been a denial of justice because of lack of independent judicial determination of the case.[100]

As regards the burden of establishing whether adequate or effective domestic remedies exist and need to be pursued as a prerequisite, the Commission has tended to follow an approach favouring the petitioner.[101] This approach is closer in line to the one adopted by the Human Rights Committee, as opposed to the one adopted by the former European Commission on Human Rights. Such a liberal approach is probably due to the difficulties which an individual is likely to encounter in satisfying the principle, particularly regarding the provision of adequate evidence in his favour. The Inter-American Court has endorsed the Commission's approach. In the *Velasquez Rodriguez case*,[102] the Court noted 'a State claiming non-exhaustion of local remedies has an obligation to prove that domestic remedies remain to be exhausted and that they are effective'.[103]

The petitioner is also obliged to submit his claim to the Commission within a period of six months of the final decision within the domestic court.[104] The procedure has many similarities with those of the ECHR. Like the ECHR requirement, in the present instance the six months will start running from the date of final decision involving the exhaustion of all domestic remedies; the period starts from the actual notification of the judgment. The Commission may refuse to accept the petition under this heading if, after the initial letter to pursue the action, there is a substantial period of inaction before the applicant submits further information. On the other hand, the Commission has shown flexibility in the application of the six months rule where expiry of time limit is attributable to the State,[105] or in cases of continuing violations such as detention[106] or disappearances of the victims.[107]

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98 Article 46(2)(b).

99 Ibid.

100 C. Cerna, 'The Inter-American Commission on Human Rights: Its Organisation and Examination of Petitions and Communications' in D.J. Harris and S. Livingstone (eds), above n. 1, 65–113 at p. 87.

101 The Commission's Regulations provide 'When the petitioner contends that he is unable to prove exhaustion as indicated in this Article, it shall be up to the government against which this petition has been lodged to demonstrate to the Commission that the remedies under domestic law have not previously been exhausted, unless it is clearly evident from the background information contained in the petition'. The Commission's Regulation Article 37(3).

102 *Velasquez Rodriguez Case*, Judgment of July 29 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

103 Ibid. Preliminary Objections para 88.

104 Article 46(1)(b).

105 See Commission's Regulations Article 38(2).

106 See *Bustos* v. *Argentina*, Case 2.488, Res. No. 15/81, March 6 1981, OAS/Ser.L./V/II.54, Doc. 9 rev. 1, at 19 and *Cano* v. *Argentina*, Case 3482, Res. No. 16/81, March 6 1981, OAS/Ser.L/V/II.54, Doc. 9 rev. 1, at 23.

107 See *Mignone* v. *Argentina*, Case 2.209, Res. No. 21/78, November 18 1978; OEA/Ser.L/V/II.50, Doc. 13, rev. 1, at 49; *San Vincente* v. *Argentina*, Case 2.266, Res. No. 22/78, November 18 1978; OEA/Ser.L/V/II.50, Doc. 13, rev. 1, at 52. Resolution No. 21/78, 22/78.

Article 46(1)(c) requires that the 'subject of the petition or communication is not pending in another international proceeding'. This requirement is placed to avoid the petitioner instituting parallel proceedings under another international procedure. However, this limitation does not apply where the case is being considered by the United Nations Working Group on Enforced and Involuntary Disappearances,[108] or under the ILO Procedures[109] or simultaneous applications have been made by an unrelated third party.[110]

Procedure

If the communication is held admissible under Article 46 then the Commission goes on to consider whether it satisfies conditions in Article 47. The communication would fail if any of the requirements of Article 46 are not met. It would also fail if no violation of any of the rights in the Convention is found. Similarly there would be a failure if the petition is manifestly groundless or out of order. Finally it would be inadmissible if the communication is substantially the same as one already studied by the Commission or studied by any other international Organisation.

Once the communication is held to be prima facie admissible, there are two stages. In accordance with Article 48 the primary function of the Commission is to receive all necessary information and evidence up to and during the proceedings of the case.[111] On receipt of relevant information or after the passage of an established period, the Commission decides whether grounds exist for the consideration of the petition; and in cases where they do not, the Commission is authorised to close the case.[112] The second function for the Commission (which takes place if the case has not been closed[113] or if the petition has not been held admissible)[114] is to place itself at the disposal of parties with a view to reaching a friendly settlement.[115]

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[108] See *Munoz Yaranga et al.* v. *Peru*, Cases 9501–9512, Res. No 1–19/88. 24 March 1988, OEA/Ser.L/V/II.74, Doc. 10 rev. 1, pp. 235–274.

[109] See the Commission's report, fifty-fourth Session 1981.

[110] *Lilian Celiberti de Casariego* v. *Uruguay*, Communication No. 56/1979 (29 July 1981), UN Doc. CCPR/C/OP/1 at 92 (1984).

[111] Article 48(1)(a) and Article 48(1)(e) (ACHR). (For the provision of information, time limits are prescribed. See Article 34 of the Commission's Regulations.)

[112] Article 48(1)(b) (ACHR).

[113] Article 48(1)(b) (ACHR).

[114] Article 48(1)(e) (ACHR).

[115] Article 48(1)(f). While the Court has recognised that the Commission has some discretion in reaching for a friendly settlement (see *Velasquez Rodriguez*, Preliminary Objections para 42) it has been critical of the Commission for its reluctance in using the provision, since according to the provision, such action represents a mandatory requirement (see *Caballero Delgado and Santana Case*, Preliminary Objections, Judgment of January 21 1994, Inter-Am.Ct.H.R. (Ser. C) No. 17 (1994).

If a friendly settlement is reached, in accordance with Article 49, the Commission then needs to draw up a report consisting of a brief statement of facts and the solution reached, which is transmitted to the Secretary General of the O.A.S. However, if it is not possible to reach a settlement, the Commission must draw up a report under Article 50 stating the facts and its conclusions and transmit it to the relevant State party concerned within 180 days.[116]

Under Article 50(1) (and in cases where settlement is not reached) the Commission may make a recommendation or proposal which must not be published.[117] With the transmission of the report there commences a three-month period during which the parties could settle the case, or the case could be referred to the Court either by the Commission or the State party itself.[118] If any of these actions do not take place, then the Commission has the option of presenting its opinion and recommendations as to the remedial course of action. In making such recommendation, the Commission is required to prescribe a time frame within which these remedial actions need to be taken.[119] After the expiry of the three-month period, the Commission must decide whether the State has undertaken proper action and whether to publish its report.[120] There is no guidance in the rules of procedure as to when the Commission must refer a case to the Court. From the jurisprudence of the Court, it can be said that cases raising complex or controversial legal issues ought to be referred to the Court.[121]

THE INTER-AMERICAN COURT OF HUMAN RIGHTS[122]

The Inter-American Court of Human Rights was established in pursuance of the ACHR. The Court has its permanent seat in San José, Costa Rica. The provisions relating to the Court are provided in Chapter VIII of the ACHR. According to Article 52, the Court is to consist of seven judges. Only States parties to the O.A.S. Charter make the nominations, although the nominated person need not hold the nationality of the State proposing his or her appointment.[123]

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[116] See Article 50.

[117] See Article 50(2).

[118] Article 51(1).

[119] Article 51(1) and Article 51(2).

[120] See Article 51.

[121] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts 13 and 29 of the American Convention on Human Rights), Advisory Opinion OC-5/85, November 13 1985, Inter-Am. Ct. H.R. (Ser. A) No. 5 (1985).

[122] S. Davidson, *The Inter-American Court of Human Rights* (Aldershot: Dartmouth) 1992; C.A. Dunshee de Abranches, 'La Corte Interamericana de Derechos Humanos' in *La Convención Americana sobre Derechos Humanos* (Washington) 1990, pp. 91–147; C.M. Cerna, 'The Structure and Functioning of the Inter-American Court of Human Rights (1979–1992) 63 *BYIL* (1992) 135.

[123] Article 52(2) ACHR; Article 4(2) Statute.

Membership of the Court is limited to a maximum of one judge having the nationality of a given State.[124] The judges act in their individual capacity for a period of six years and are re-electable only once.[125] They are 'jurists of the highest moral authority and of recognised competence in the field of human rights, who possess qualifications required for the exercise of the highest judicial functions'. As noted above the judges are nominated and elected for a term of six years by States parties to the American Convention.

There remains the possibility of appointing ad hoc judges; the circumstances of such appointments are provided in Article 55:

1 If a judge is a national of any of the States Parties to a case submitted to the Court, he shall retain his right to hear that case.
2 If one of the judges called upon to hear a case should be a national of one of the States Parties to the case, any other State Party in the case may appoint a person of its choice to serve on the Court as an ad hoc judge.
3 If among the judges called upon to hear a case none is a national of any of the States Parties to the case, each of the latter may appoint an ad hoc judge.
4 An ad hoc judge shall possess the qualifications indicated in Article 52.
5 If several States Parties to the Convention should have the same interest in a case, they shall be considered as a single party for purposes of the above provisions. In case of doubt, the Court shall decide.

The Court does not sit throughout the year but has two regular sessions.[126] However there remains the possibility of asking for a special session and the Court has the power to order provisional measures and make an interim judgment. The quorum of the Court is five members and, unlike the ECHR, there is no possibility of formulating the Chambers.[127]

FORMS OF JURISDICTION

Contentious jurisdiction

The Court has two forms of jurisdictions: a contentious and an advisory jurisdiction. Contentious jurisdiction itself is of two types: inter-State or individual complaints although, as noted, the inter-State procedure has not yet been invoked. States may accept the contentious jurisdiction of the Court either unconditionally, conditionally or in specific cases.[128] In other words this

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[124] Article 52(2) ACHR.
[125] Article 54(1) ACHR; Article 5(1) of the Statute.
[126] Article 22(1) Statute; Article 11 Rules.
[127] Davidson, above n. 122, at p. 46.
[128] Article 62(2).

jurisdiction is optional.[129] It must also be noted that only States and the Commission may submit a case to the Court.[130] The individual (unlike the new procedure under the ECHR) has no *locus standi* before the Court although the lawyer for the petitioners has been listed in all stages. For the Court to exercise its contentious jurisdiction, the proceedings before the Commission must have been completed, and the case must be referred by the Commission or the State within three months after the initial report on the matter is transmitted to the parties. The Commission notifies the individuals if the case is submitted to the Court and the individual is given an opportunity to make observations. It needs to be noted that unlike the ECHR, the contentious jurisdiction of the Inter-American Court is very recent and the first case where breaches were found was decided in 1988. This leaves the position that a number of Articles within the Convention have yet to be tested before the Court.[131]

According to Article 62, the Contentious jurisdiction may only be initiated if the State party or States parties concerned have accepted the Court's jurisdiction in such matters.[132] As noted above, the Court's jurisdiction cannot be invoked unless the procedures before the Commission have been fully completed.[133] Proceedings before the Court can be instituted through the filing of a petition to the Secretary General of the Court stating, *inter alia*, the grounds and violations of human rights.[134] Once an application has been received the Secretary of the Court notifies the Commission and all concerned State parties.[135] There is, at this point, a possibility of filing preliminary objections. On the receipt of these objections the Court may, at its discretion, either deal with these preliminary objections or join these with the merits of the case.[136] After submission of written memorials, the Court allows the parties to make oral submission during the hearing of the case.

Once the case has been referred to the court, it has the competence of reviewing the Commission's factual as well as admissibility findings *de novo*.[137] Unlike the European Court of Human Rights, the Inter-American Court has addressed the issue of measuring damages for personal injury and wrongful death.[138] However, neither European nor the Inter-American Court

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129 Not all parties to ACHR have accepted the jurisdiction of the Court.

130 Article 61.

131 A.A.C. Trindade, 'The Operation of the Inter-American Court of Human Rights' in D.J. Harris and S. Livingstone (eds), above n. 1, 133–150 at p. 141.

132 Article 62(3).

133 *Viviana Gallardo et al. case*, Advisory Opinion No. G 101/81, Inter-Am.Ct.H.R. (Ser. A) (1984).

134 Articles 25(1) and 25(2) Rules of the Statute of the Court; Article 61 ACHR.

135 Article 26 Rules of the Statute of the Court.

136 Davidson, above n. 122, at p. 52.

137 See Shelton, above n. 1, at p. 342.

138 See *Velasquez Rodriguez Case*, Judgment of July 29 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988); *El Amparo Case*, Judgment of January 18 1995, Inter-Am.Ct.H.R. (Ser. C) No. 19 (1995).

has awarded punitive damages yet. The *Velasquez Rodriguez*[139] and *Godínez Cruz* cases[140] were the first contentious cases before the Court, thereby allowing it the opportunity to expand on the Convention's provisions for reparations. Both the cases were brought against Honduras for the disappearances of the aforementioned individuals. In expanding on the meaning of reparations the Court observed

> Reparation of harm brought about by the violation of an international obligation consists in full restitution (restitutio in integrum) which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification and patrimonial and non-patrimonial damages, including emotional harm.[141]

Having stated the general position, the Court articulated a number of important principles on reparations. It adopted the approach that international law (as opposed to national law) should provide the criterion for awarding reparations. It recognised the value in awarding damages for emotional harm in instances of human rights violations, which in its view should be based on principles of equity, although it rejected the claim for punitive damages. The Court emphasised a duty upon the States to punish those responsible for the disappearances and to prevent future recurrence of any such violations. In rejecting the contentions made by the Honduras government that damages should be paid out at a level equivalent to accidental death, the Court awarded damages including loss of earnings which the victim would have earned until the point of death. The salary was based upon what the victim was earning at the time of his disappearance inclusive of the progressive increase of salary. In relation to the payment of damages, the Court ordered a payment within 90 days as lump sum. Alternatively, the State could make the payment in six months, though it would be subject to interest. In subsequent proceedings the Court ordered Honduras to compensate the victim for the loss in value of *Lempira* from the point of judgment.[142]

In a later case the issue of awarding damages was further elaborated. In *Aloeboetoe et al. case*,[143] the State of Surinam accepted liability for the detention, abuse and murder of seven unarmed Bush men, suspected by the State

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[139] *Velasquez Rodriguez Case*, Judgment of July 29 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

[140] *Godínez Cruz Case*, Judgment of January 20 1989, Inter-Am.Ct.H.R. (Ser. C) No. 5 (1989).

[141] *Velasquez Rodriguez Case*, para 26.

[142] See D. Shelton, 'Reparations in the Inter-American System' in D.J. Harris and S. Livingstone (eds), above n. 1, 151–172 at p. 156.

[143] *Aloeboetoe et al. Case*, Reparations (Art. 63(1) American Convention on Human Rights) Judgment of September 10 1993, Inter-Am.Ct.H.R. (Ser. C) No. 15 (1994). Text in International Human Rights Reports, 1(2), 1994, 208. Also see S. Davidson, 'Remedies for violations of the American Convention on Human Rights' 46 *ICLQ* (1995) 405.

police of subversive activities. The Court in awarding damages also took the innovative step of identifying the victims' successors through the application of the tribal customary laws of the Saramcas tribe and also dealt with the issue of moral damage for psychological harm.[144] In the *Neira Alegria case*[145] the Court found a violation of Article 4 conducted by Peru. The case concerned the disappearance of three prisoners after a cell block in which they were detained was destroyed. The Court awarded compensation that was to be fixed by agreement with the Commission. The Court, however, reserved the right to review and approve the agreement and to determine the amount in case of failure of any agreements.

Article 63 deals with the judgments of the Court. Article 63(1) provides:

> 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 consequence 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.

✓ Like the ECHR, the American Court's decision are also of a declaratory nature, in that while the Court declares a violation of particular rights of the Convention, it does not institute the required changes at the domestic level. The decisions of the court are binding on State parties.[146] The Contracting parties agree to abide by its judgment[147] and compensatory damages can be executed in the country concerned in accordance with domestic procedures governing the execution of the judgments against the State.[148] The Court's judgment is final, and it is not possible to appeal against it.[149]

Unlike the Committee of Ministers (which operates within the ECHR system) there is no single body in charge of executing the judgment and supervising its enforcement. If a State refuses to abide by the judgment of the Court, the Court is limited to documenting it in its annual report. The Court also has the power to award Provisional measures.[150] It has the power to do so in emergency cases where there is a real threat of violation taking

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[144] See Shelton, above n. 1, at pp. 364–370.

[145] *Neira Alegria Case*, Judgment of January 19 1995, Inter-Am.Ct.H.R. (Ser. C) No. 20 (1995). American Society of International Law, *Human Rights Interest Group Newsletter*, 5(1), 1995, 29.

[146] Article 63(1).

[147] Article 68(1).

[148] Article 68(2).

[149] Article 66(1) and Article 67 ACHR.

[150] Article 63(2).

place in the imminent future – Article 63(2).[151] These provisions were invoked in the *Velasquez Rodriguez* case.

Advisory jurisdiction[152]

The second element of Court's jurisdiction is its Advisory jurisdiction. The rules regarding Advisory jurisdiction are provided in Article 64 of the Convention which provides:

1. The member states of the organisation may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organisation of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.
2. The Court, at the request of a member state of the organisation, may provide that state with opinion regarding the compatibility of any of its domestic laws with the aforesaid international instruments.

From the above provision it is clear that the Court may provide an advisory opinion on the interpretation of the ACHR and other human rights treaties, concerning the protection of human rights in American States.[153] Any State member of the O.A.S. may request an advisory opinion; such requests are not restricted to States parties to the Convention. While States not parties to the ACHR may be less interested in this particular Convention, nevertheless they do continue to have an interest in the interpretation of other human rights treaty obligations which they have incurred.[154] These opinions not only relate to the interpretation of instruments referred in Article 64, but any member State could also seek an opinion as to whether its domestic legislation is comparable or not. The only main requirement is 'legitimate institutional interest' in the questions posed to the Court by this request.[155] The advisory opinions of the Court are not restricted to parties of O.A.S. member States but also authorise any organ of O.A.S. listed in Chapter X of the Charter.[156]

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151 The Commission has asserted a similar power; see C. Cerna, 'The Inter-American Commission on Human Rights: Its Organisation and Examination of Petitions and Communications' in D.J. Harris and S. Livingstone (eds), above n. 1, 65–113 at p. 107; *Roach and Pinkerton v. United States*, Case 9.647, Res. No. 3/87, OEA/Ser.L/V/II.71, Doc. 9 rev. 1, at 147.

152 See T. Buergenthal, 'The Advisory Practice' above n. 1, at p. 1.

153 Article 64(1).

154 Davidson, above n. 122, at p. 101.

155 *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts 74 and 75)*, Advisory Opinion OC-2/82, September 24 1982, Inter-Am. Ct. H.R. (Ser. A) No. 2 (1982).

156 Ibid.

The Court, however, has emphasised that the organ petitioning for an advisory opinion must have a requisite *locus standi* to seek such a ruling.[157] The Inter-American Commission has been unequivocally recognised by the Court as having the competence to request advisory opinions,[158] and in practice has been the only organ to invoke the Court's advisory jurisdiction.[159] The procedure for invoking the advisory jurisdiction is initiated by making an application to the Court along with written observations. The Court then sets a date for a public hearing. The ultimate decision to provide an advisory opinion is at the discretion of the Court. By virtue of the Courts' *amicus curiae* provisions, NGOs, academics and private individuals have been involved in the process of the Court's jurisdiction.[160]

Technically these opinions are advisory; however, through examination of the competence of the Court and its powers to interpret a particular provision, it can be said that an opinion has considerable authority. For a State to disregard the advisory opinion of the Court is akin to breaching its obligations under the Convention. The Court's advisory jurisdiction has been used much more frequently than its contentious jurisdiction. A wide range of issues have been addressed by the Court in its advisory opinions. The Court has advised upon the relationship and interaction of various systems of human rights protection with the opinion that the Convention creates immediate binding obligations for the ratifying State.[161] It pronounced on the limitation of death penalty,[162] it has interpreted the provisions of the Convention[163] and has pronounced that the suspension of the remedies of *amparo* and habeas corpus (even in times of emergencies) as incompatible with the provisions of the Convention.[164]

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157 Ibid.

158 As the Court noted in *Entry into force of the American Convention for a State Ratifying or Adhering with a Reservation case* '[U]nlike some other OAS organs, the Commission enjoys, as a practical matter, an absolute right to request advisory opinions within the framework of Article 64(1) of the Convention' para. 16.

159 A.A.C. Trindade, 'The Operation of the Inter-American Court of Human Rights' in D.J. Harris and S. Livingstone (eds), above n. 1, 133–150 at p. 142.

160 See Shelton, above n. 1, at p. 342.

161 *'Other Treaties' Subject to the Consultative Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights)*, Advisory Opinion OC-1/82, September 24 1982, Inter-Am. Ct. H.R. (Ser. A) No. 1 (1982) and *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts 74 and 75)*, Advisory Opinion OC-2/82, September 24 1982, Inter-Am. Ct. H.R. (Ser. A) No. 2 (1982).

162 *Restrictions to the Death Penalty (Arts 4(2) and 4(4) of the American Convention on Human Rights)*, Advisory Opinion OC-3/83, September 8 1983, Inter-Am. Ct. H.R. (Ser. A) No. 3 (1983).

163 *The Word 'Laws' in Article 30 of the American Convention on Human Rights*, Advisory Opinion OC-6/86, May 9 1986, Inter-Am. Ct. H.R. (Ser. A) No. 6 (1986).

164 *Habeas Corpus in Emergency Situations (Arts 27(2) and 7(6) of the American Convention on Human Rights)*, Advisory Opinion OC-8/87, January 30 1987, Inter-Am. Ct. H.R. (Ser. A) No. 8 (1987) and *Judicial Guarantees in States of Emergency (Arts 27(2), 25 and 8 of the American Convention on Human Rights)*, Advisory Opinion OC-9/87, October 6 1987, Inter-Am. Ct. H.R. (Ser. A) No. 9 (1987).

In the first case considered by the Court, the *'Other Treaties' case*,[165] the issue concerned the actual scope of the advisory jurisdiction of the Court, particularly the meaning of the reference in Article 64(1) to 'other treaties concerning the protection of human rights in the American System'. Peru had asked for an advisory opinion, asking whether 'other treaties' meant treaties adopted within the framework of the Inter-American System or was more general and included, for example, the UN Covenants and other non-American human rights treaties to which States outside the Americas may be parties. The Court took the view that any human rights treaty may be the subject of an advisory opinion although according to the Court there may be circumstances where it could refuse such a request if the case involved a non-American State's obligations. In the *Restrictions to the Death Penalty case*[166] two primary issues were dealt with by the Court. Guatemala had made a reservation to Article 4(4) concerning the imposition of the death penalty, and the case emerged from a disagreement between the Commission and Guatemala. The first primary issue was whether, in the absence of Guatemala having accepted the jurisdiction of the Court, was it still open to the Court to address the question. The Court took the view that since the case fell within the scope and competence of the Commission, the Court had jurisdiction to deal with the case. Secondly, on the substantive matter the Court followed a much more traditional judicial approach. It held that Guatemala's reservations should be construed in a manner that was compatible with the objects and purposes of the Convention and at the same time leaving Guatemala's obligations under Article 4(4) intact.

In the *Interpretation of the American Declaration case*,[167] Columbia had asked for an advisory opinion of the Court regarding the status of the American Declaration on the Rights and Duties of Man posing the question whether, under Article 64(1) of the ACHR, it qualified as a treaty. The Court, reversing the Commission's earlier approach, took the view that it could not be regarded as a treaty. On the other hand, the Court did advance the position that the Declaration is an authoritative interpretation of the human rights provisions of the O.A.S. Charter and in that sense is a source of international obligations. The importance given to the Declaration is valuable when the human rights record of the non-State parties of the ACHR is to be considered.

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[165] *'Other Treaties' Subject to the Consultative Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights)*, Advisory Opinion OC-1/82, September 24 1982, Inter-Am. Ct H.R. (Ser. A) No. 1 (1982).

[166] *Restrictions to the Death Penalty (Arts 4(2) and 4(4) of the American Convention on Human Rights)*, Advisory Opinion OC-3/83, September 8 1983, Inter-Am. Ct. H.R. (Ser. A) No. 3 (1983).

[167] *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*, Advisory Opinion OC-10/89, July 14 1989, Inter-Am. Ct. H.R. (Ser. A) No. 10 (1989).

FACT FINDING MISSIONS OF THE INTER-AMERICAN COMMISSION

Article 18(g) of the Statute of the Inter-American Commission provides the Commission with a fact-finding investigative jurisdiction. It compares favourably to other fact-finding processes, in particular the UN fact-finding missions.[168] Since its establishment the Commission has conducted well over sixty *in loco* investigations of alleged violations of human rights in States belonging to the O.A.S. Commenting on the value of this investigation Trindade notes:

> the IACHR has undertaken extensive fact-finding exercises, probably to a larger extent than any other international supervisory organ at least in so far as *in loco* observations are concerned. These are of particular significance as *in loco* investigations in Chile of 1974, the report on forced disappearances in Argentina of 1979, the report on the population of Miskito origin in Nicaragua of 1984, and the reports on Haiti of 1993–1994, among others ... The reports resulting from these missions have been instrumental in asserting the facts of a situation. Moreover, the publicity given to the reports has served to achieve certain of the objectives of a reporting system such as the monitoring of human rights, public scrutiny of legislative measures and administrative practices, exchange of information and the fostering of a better understanding of the problems encountered.[169]

CONCLUSIONS

The promotion and protection of individual human rights within the Americas has been problematic. The region has witnessed substantial violations of human rights: torture, disappearances and mass killings. Repressive military regimes of the region violated human rights, and victimised and persecuted unashamedly their political opponents. Confronted by hostile or uncooperative regimes it is to the credit of the inter-American system not only to have remained operational but also, in a number of instances, to have produced positive contributions to the protection of human rights.

This chapter has traced the developments through which the two largely incoherent inter-American systems are gradually progressing towards greater consistency and regularisation. Having said that, reliance upon the two distinct systems is unsatisfactory. The unsatisfactory nature of human rights

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[168] See M.C. Bassiouni, 'Appraising UN Justice Related Fact-Finding Mission' 5 *Washington University Journal of Law and Policy* (2001) 37; T.M. Franck and H.S. Fairley, 'Procedural Due Process in Human Rights Fact-Finding by International Agencies' 74 *AJIL* (1980) 308; D. Weissbrodt and J. McCarthy, 'Fact-Finding by International Human Rights Organizations' 22 *Va.JIL* (1981) 1.

[169] A.A.C. Trindade, 'Reporting in the Inter-American System of Human Rights Protection' in P. Alston and J. Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press) 2000, 333–346 at p. 342.

protection is particularly evident in those States parties of the O.A.S. which have not ratified the ACHR. The refusal to accept the obligations under the American Convention results in the failure of the Inter-American court to deal with the cases and to provide legally binding judgments. As Trindade correctly notes:

> The basis of the Court's compulsory jurisdiction provides yet another illustration of the unfortunate lack of automatic application of international jurisdiction. The Inter-American System of human rights protection will considerably advance the day that all OAS member States can become parties to the American Convention (and its two Protocols) without reservations and all States Parties to the Convention accept unconditionally the Court's jurisdiction.[170]

Another important limitation is the lack of provisions in the Inter-American system to ensure compliance with the judgments of the Court. According to Article 65, the Court is required to submit to the General Assembly of the O.A.S. a report on its working during the previous year, in particular the cases which have not complied with the Court's judgment.[171] Non-compliance or inadequate compliance continues to remain a substantial problem in human rights law. In this respect, the largely political sanctions to ensure compliance represent an unsatisfactory feature of the Convention.[172]

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[170] A.A.C. Trindade, 'The Operation of the Inter-American Court of Human Rights' in D.J. Harris and S. Livingstone (eds), above n. 1, 133–150 at p. 136.

[171] Article 65 ACHR.

[172] See V. Gomez, 'The Interaction between the Political Actors of the OAS, the Commission and the Court' in D.J. Harris and S. Livingstone (ed.), above n. 1, 173–211 at pp. 191–192.

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AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS[1]

INTRODUCTION

Historically termed the 'Dark Continent', from pre-colonial to modern times Africa has witnessed substantial violations of human rights. In pre-colonial Africa, unfortunate practices such as human sacrifices, torture and infanticide were performed.[2] During the period of colonisation, Africa was economically and politically exploited and served as a ready source of produce for the slave trade and European expansionism.[3] For Africa, the transition from colonialism to independent Statehood has been a painful one. Post-colonial Africa has witnessed substantial violations of individual and collective rights. The repressive one-party political systems and the dictatorial regimes of men

[1] U.O. Umozurike, *The African Charter on Human and Peoples' Rights* (The Hague: Kluwer Law International) 1997; E.K. Quashigah and O.C. Okafor (eds), *Legitimate Governance in Africa: International and Domestic Legal Perspectives* (The Hague: Kluwer Law International) 1999; A.H. Robertson and J.G. Merrills, *Human Rights in the World: An Introduction to the Study of International Protection of Human Rights*, 4th edn (Manchester: Manchester University Press) 1996, pp. 242–266; S. Davidson, *Human Rights* (Buckingham: Open University) 1993, pp. 152–162; C. Flinterman and E. Ankumah, 'The African Charter on Human and Peoples' Rights' in H. Hannum (ed.), *Guide to International Human Rights Practice*, 3rd edn (New York: Transnational Publishers) 1999, pp. 163–174; H.J. Steiner and P. Alston, *International Human Rights in Context : Law, Politics, Morals: Text and Materials*, 2nd edn (Oxford: Clarendon Press) 2000, pp. 920–937; M. Mutua, 'The African Human Rights Court: A Two Legged Stool?' 21 *HRQ* (1999) 342.

[2] Umozurike, above n. 1, at pp. 15–18.

[3] See A. Cassese, *International Law in a Divided World* (Oxford: Clarendon Press) 1990, p. 52; R. Howard, 'Evaluating Human Rights in Africa: Some Problems of Implicit Comparisons' 6 *HRQ* (1984) 160 at p. 170.

like Idi Amin of Uganda (1971–1979), Francisco Marcias Nguema of Equatorial Guinea (1969–1979) and Jean Bokassa of the former Central African Empire (1966–1979) have been instrumental in the denial of all fundamental rights. Worst still, several African States notably Rwanda, Burundi and the Sudan have been overcome by waves of ethnic cleansing and genocide.

Amidst the gross violations of individual and collective rights, human rights have not been a noted strong point of African governments or African intergovernmental organisations.[4] Effective protection of human rights has only rarely influenced the policies of the Organisation of African Unity (OAU), the principal regional African organisation.[5] The OAU Charter, the primary constitutional document of the Organisation does not make any explicit references to human rights, although States parties do undertake to 'promote international co-operation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights'.[6] The absence of any specialised Commissions relating to human rights is also conspicuous but not accidental.[7] The apathy towards the effective promotion of human rights since its establishment confirms a genuine distaste on the part of the OAU for this subject.

One major exception has been the adoption by the OAU of the African Charter on Human and Peoples' Rights (AFCHPR).[8] The African Charter is

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[4] For a historical position see U.O. Umozurike, 'The African Charter on Human and Peoples' Rights' 77 *AJIL* (1983) 902; U.O. Umozurike, 'The Domestic Jurisdiction Clause in the O.A.U. Charter' 311 *African Affairs* (1979) at 199; R.M. D'Sa, 'Human and Peoples' Rights: Distinctive Features of the African Charter' 29 *JAI.* (1985) 72 at p. 73.

[5] The OAU is the regional organisation which represents the African States and was responsible for the adoption of the African Charter on Human and Peoples' Rights. The Charter of the Organisation of African Unity (OAU) was adopted by the Summit Conference of the Heads of States and Governments in 1963. The OAU is based on the principles of Sovereign equality, non-interference, absolute dedication to the total emancipation of the African territories which are still dependant and a policy of non-alignment with regard to all blocs. Article 2 of the OAU Charter includes among its aims *inter alia* 'to promote the unity and solidarity of the African States ... eradicate all forms of colonialism from the continent of Africa and to defend their sovereignty, their territorial integrity and independence. The legal basis for adopting the African Charter can be found in 21(b) of the OAU Charter which asks member States 'to coordinate and intensify their collaboration and efforts to achieve a better life for the peoples of Africa'. According to 21(e) which requires States to 'promote international co-operation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights'. The Organs of the OAU are the Assembly of Heads of States and Governments which is the Supreme organ and meets at least once a year; Council of Foreign Ministers meets at least twice a year and its main function is to prepare or execute decisions of the Assembly; the General Secretariat; and the Commission of Mediation, Conciliation and Arbitration. For the text of the OAU Charter see, I. Brownlie (ed.), *Basic Documents in International Law*, 2nd edn (Oxford: Oxford University Press) 1981, pp. 68–76.

[6] Ibid. Article 2(1)(e) OAU Charter.

[7] Ibid. Article 20 OAU Charter.

[8] Adopted on 27 June 1981. Entered into force 21 October 1986. OAU Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M (1982) 58; 7 *HRLJ* (1986) 403.

also known as the Banjul Charter after Banjul, Gambia's Capital city, where the Charter was drafted. The Charter was adopted in June 1981 at the eighteenth conference of Heads of State and Governments of the OAU. It came into operation in October 1986. All States parties to the OAU are eligible to become parties to the Charter.[9] This chapter deals with African human rights law, with its primary focus upon the protection accorded through the African Charter on Human and Peoples' Rights (the Charter).

DISTINCTIVE FEATURES OF THE CHARTER[10]

Incorporation of three generations of rights

Earlier chapters have considered the divisions and bifurcations between the three generations of rights. The Charter is the only human rights treaty to accord explicit protection to civil and political rights, social economic rights and collective groups rights. This Charter contains an elaborate list of traditional civil and political rights. These rights bear strong similarities to the ones contained in other international and regional treaties and include such fundamental rights as the right to equality before the law, the right to liberty, the right to a fair trial, freedom of conscience including religious freedom, freedom of association and freedom of assembly. In addition to the civil and political rights, there is a set of economic, social and cultural rights. These include the right to education, the right to participate in the cultural life of one's community, and the right of the aged and disabled to special measures of protection.

Furthermore, and more exceptionally, the Charter also contains a number of collective rights, the so-called 'third-generation' rights. The idea of people's rights, in particular, the right to economic and political self-determination forms a vital element within the constitutional workings of independent African States; it is also strongly represented within the African Charter, which as its title confirms is the only treaty upholding the rights of people alongside individual human rights. The Charter contains the important and well-established rights of peoples such as the right to existence and the right to self-determination. In addition there are other innovative (though equally valuable) rights such as the 'right to a general satisfactory environment'.[11]

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[9] C.A. Odinkalu and C. Christensen, 'The African Commission on Human and People's Rights: The Development of its Non-State Communication Procedures' 20 *HRQ* (1998) 235 at pp. 236–237.

[10] D'Sa, above n. 4, at p. 73.

[11] A. Boyle and M Anderson (eds), *Human Rights Approaches to Environmental Protection* (Oxford: Clarendon Press) 1996; P.W. Birnie and A.E. Boyle, *International Law and the Environment* (Oxford: Oxford University Press) 1992, pp. 188–214; J. Rehman, 'The Role and Contribution of the World Court in the Progressive Development of International Environmental Law' 5 *APJEL* (2000) 387.

Environmental rights are increasingly being associated as part of the framework of international human rights law. There is now a substantial jurisprudence on the right to a safe environment and the contribution of the African Charter to the subject must be acknowledged. As a pioneering treaty provision in international human rights law, Article 24 of the Charter has done much to highlight a generally satisfactory environment as being a human right.[12]

Duties of the individual

The idea of duties, once again a distinctive feature of African societies, is unprecedented in so far as human rights treaties are concerned.[13] Furthermore, the African Charter sets these out explicitly within Chapter II, Articles 27–29. It has been contended that the Charter includes a section on duties for the same reason as it includes a group of articles on economic and social rights. The primary reason had been that the States concerned wished to put forward a distinctive conception of human rights in which civil and political rights were seen to be counterbalanced by duties of social solidarity. Three general principles emerge from these provisions regarding the duties. First, that every individual has duties towards his family and society, towards State, 'other legally recognised communities', and the international community. Secondly, the rights and freedoms of each individual must be exercised with due regard to the rights of others, collective security, morality and common interests. Thirdly, that everyone has the duty to respect and consider others without discrimination and to promote mutual respect and tolerance. The individual also owes a duty to his family, national community, nation, and the African region as a whole.

'Claw-back' clauses

The provisions of the Charter, while distinctive in the manner described, have been the objects of criticism. Criticisms have been levelled against the vague nature of its provisions and its so-called 'claw-back' provisions, which authorise the State to deprive the individual of his or her rights.[14] The 'claw-back' clauses are used in relation to Articles 5–12 and have similarities

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[12] For regional environmental treaties within Africa see 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) www.lexmercatoria.org (20 March 2002).

[13] We have noted the existence of provisions on the duties of the individuals in the American Declaration of the Rights and Duties of Man (1948); see above Chapter 8.

[14] C.E. Welch. Jr., 'The African Commission on Human and Peoples' Rights: A Five Year Report and Assessment' 14 *HRQ* (1992) 43 at p. 46.

to derogations, save that in the case of the latter, circumstances are explicitly stated in which rights may be limited. In so far as 'claw-back' clauses are concerned, a wide range of discretion is conferred upon the State to exclude enjoyment of rights.[15] In each instance, the State is permitted to justify limitations on the rights by reference to its own domestic laws. As we shall consider, these 'claw-back' clauses feature in many of the rights within the Charter.

ANALYSING THE SUBSTANTIVE RIGHTS IN THE CHARTER

The Charter can be divided into three parts. Part one contains the rights and duties of the individual, part two considers the role and functions of the African Commission on Human and Peoples' Rights, (the Commission), and part three covers general procedural provisions. The principal executive organ for the implementation of the Charter has thus far been the Commission. However, it has recently been decided to establish an African Court on Human and Peoples' Rights.[16] The Court will complement the work of the Commission. According to Article 1, States parties recognise the rights, duties and freedoms in the Charter and undertake to adopt legislative or any other measures of compliance. The subsequent Articles provide a list of rights contained in the Charter. These are as follows:

Article 2	The right to non-discrimination
Article 3	The right to equality before the law
Article 4	The right to respect for life and the integrity of the person
Article 5	Freedom from exploitation and degradation, including slavery, torture and cruel, inhuman or degrading punishment
Article 6	The right to liberty and security of the person
Article 7(1)	The right to a fair trial
Article 7(2)	Freedom from retrospective punishment
Article 8	Freedom of conscience, the profession and free practice of religion
Article 9(1)	The right to receive information

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[15] See R. Higgins, 'Derogations under Human Rights Treaties' 48 *BYIL* (1976–77) 281; A. Kiss, 'Permissible Limitations on Rights' in L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press) 1981, pp. 290–310.

[16] See *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* adopted 10 June 1998, OAU. Doc. CAB/LEG/66/5. Not yet in force. Also see the *Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples Rights by the Assembly of Heads of State and Governments of the Organization of the African Unity, Conference of Ministers/Attorney-General on the Establishment of an African Court of Human and Peoples' Rights* OAU/LEG/MIN/AFCHPR/PROT (1) Rev. 2 (1997). Also see G.J. Naldi and K. Magliveras, 'Reinforcing the African System of Human Rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights' 16 *NQHR* (1998) 431.

Article 9(2)	The right to express and disseminate opinions
Article 10	Freedom of association
Article 11	Freedom of assembly
Article 12(1)	Freedom of movement
Article 12(2)	Right to leave any country and the right to return
Article 12(3)	Right to seek and obtain asylum
Article 12(5)	Prohibition of mass expulsion
Article 13(1)	The right to participate in government
Article 13(2)	The right to equal access to the public services
Article 13(3)	The right of equal access to public property and to public services
Article 14	The right to property
Article 15	The right to work
Article 16	The right to health
Article 17(1)	The right to education
Article 17(2)	The right to participate in the cultural life of one's community
Article 17(3)	The duty of the State to promote and protect the moral and traditional values
Article 18(1)	Recognition of family as the natural unity and basis of society
Article 18(2)	Family to be assisted as a custodian of morals and traditional values
Article 18(3)	Protection of the rights of women and children
Article 18(4)	Rights of the aged and disabled
Article 19	Peoples' right to equality
Article 20(1)	Peoples' right to existence
Article 20(1)–(3)	Peoples' right to self-determination
Article 21(1)	Peoples' right to dispose wealth and natural resources
Article 22	Peoples' right to economic, social and cultural development
Article 23	Peoples' right to national and international peace and security
Article 24	Peoples' right to a general satisfactory environment

Non-discrimination and equality

Article 2 of the Charter reiterates the right to non-discrimination. This right, as we have noted throughout this book, represents the core of modern human rights law. It is very correctly established as the leading right within the context of a region which has suffered from substantial acts of discrimination and from inequalities. Article 2 provides:

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

The terminology of the Article and the prohibited categories of discrimination are very similar to those employed in other human rights treaties. Like other

human rights instruments, distinctions based on race, ethnicity, colour, sex, religion, language, political opinions, national and social origins, or birth are not permitted. The analysis of the provisions of this Article allows us to make a number of specific comments. First, the terms used in the Article are not exhaustive; other possible grounds of discrimination, for example age, disability and sexual orientation are also covered though not stated. Secondly, the usage of the term 'fortune' represents an innovate basis of non-discrimination. From the *travaux préparatoires*, the rationale for employing this term is not fully established. According to the *Oxford Advanced Learners Dictionary*, 'fortune' means 'chance, especially regarded as a power affecting peoples' lives'.[17] It has been suggested by one commentator that its addition 'implied African recognition that enforcement of rights may depend upon a person's general circumstances or status in society'.[18] Thirdly, among this broad right to non-discrimination, certain sections of the community nevertheless deserve special attention. In the light of the frequent discrimination faced by women and children, protection of their rights on the basis of equality is an important concern.[19]

The right to non-discrimination is further reinforced by the provisions of Article 3 which emphasise equality of all individuals before the law,[20] and equal protection for everyone before the law.[21] As noted above, equality and non-discrimination represent fundamental principles of all international, regional and domestic frameworks. Equality includes *de jure* and de facto equality confirming Umozurike's point that 'the Charter refers to substantive or relative and not material, formal or absolute equality'.[22] The notion of equality, therefore, allows for reverse discrimination or affirmative action policies.

Non-discrimination and equality as broad overarching principles also encapsulate the concept of fairness in trial and freedom from retrospective punishment. The right to fair trial is covered by Article 7. Article 7(1) provides every individual with the right 'to have his cause heard'. This Article includes the right of appeal to competent national organs and affirms the right to be presumed innocent until proved guilty by a competent court or tribunal. It also affirms the right to a defence, including the right to be defended by counsel of his choice; and the right to be tried within a reasonable time by an impartial court or tribunal. Article 8 contains the cardinal principle of

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[17] *Oxford Advanced Learner's Dictionary of Current English* (Oxford: Oxford University Press) 1989, p. 486.

[18] Davidson, above n. 1, at p. 154.

[19] See G. Van Bueren, *The International Law on the Rights of the Child* (Dordrecht: Martinus Nijhoff Publishers) 1995, at p. 402.

[20] Article 3(1).

[21] Article 3(2).

[22] Umozurike, above n. 1, at p. 30.

natural justice that no one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. It provides that no penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

Right to life and prohibitions of torture and slavery

The right to life, as the supreme human right, has been protected by Article 4 of the Charter which provides as follows:

> Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

The Article in recognising the inviolability of human life confirms the entitlement of everyone to the right to life and integrity of person. At the same time, the Article is structured in an awkward manner and does not address some fundamental issues. There is no explanation of the meaning of the term 'life' and it is not clear as to the extent to which the rights of the unborn child are protected. Furthermore, following the ICCPR, the Charter does not prohibit all forms of deprivation of life. Only 'arbitrary' deprivation of life is prohibited, although the meaning of 'arbitrary' is not defined. Some guidance may be obtained from the jurisprudence of the Human Rights Committee, which has spelled out the meaning in its consideration of individual cases and State reports.[23] Unlike, the ICCPR, no limitations are placed on the usage of capital punishment. The imposition of the death penalty remains a controversial subject in international law, and a majority of African States retain this sentence within their territories.

Article 5 provides for the right to the respect of the dignity in human beings. It also prohibits slavery, the slave trade, and cruel, inhuman or degrading treatment or punishment. The prohibitions on torture, inhuman degrading treatment or punishment as norms of *jus cogens* and principles of customary international law, have been affirmed in all the international human rights instruments. The meaning of the term 'torture' and 'inhuman' or 'degrading treatment or punishment' has been expanded further by the Committee against Torture (CAT), and by regional human rights bodies (such as the European Commission and the European Court of Human Rights).[24] Cruel, inhuman and degrading treatment and punishment has been addressed in considerable detail by the European Court of Human Rights in the context of corporal punishment. While the jurisprudence of the African Commission on

[23] See above Chapter 4.
[24] See below Chapter 15.

this subject is not substantial, domestic African courts have relied upon the ECHR's prohibition on corporal punishment. The Zimbabwean Supreme Court decision in *State* v. *Ncube and Others*, represents the formulation of important principles. In this case, three persons had been found guilty of offences against children (rape of an unspecified number over a period of two and a half years). All three men were sentenced to significant terms of imprisonment with labour and were also each sentenced to a whipping of six strokes. Their appeal to the Supreme Court which concerned the sentence was upheld. According to the Court, whipping as a punishment violated s. 15(1) of the Zimbabwean Constitution, a provision which prohibits torture and inhuman or degrading treatment or punishment.[25] In arriving at this decision the Court considered Article 3 of ECHR, comparative criminal and other case law including *Tyrer* v. *UK*[26] and concluded that whipping was an affront to human dignity.[27]

It also needs to be appreciated that cruel, inhuman and degrading treatment is a subject impinging heavily upon cultural or religious relativism. For those States practising *Sharia*, punishments such as flogging, physical amputations and executions raise issues of compatibility with modern norms of human rights law. Some of the African States have been criticised for allowing such practices as female circumcision or for criminalising adult homosexuality.[28] The African Charter clearly prohibits slavery and slave trade. However various practices of servitude, in particular child labour, continue to take place. In addition to the prohibition of slavery and subjugation, the Charter provides for the right to liberty and security of person. Article 6 notes:

> Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

Right to liberty and security of person is an important human right, and forms an essential ingredient of the human rights corpus. The Article, while providing protection, is unsatisfactory because of its vague and uncertain terminology. The use of the term 'except for reasons and conditions previously

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[25] [1987] (2) ZLR 246 (SC) 267 B–C; 1988 (2) SA 702 (ZSC) 717 B–D; summaries of the case in International Commission of Jurists, *The Review*, No. 41 December 1988, 61; 14 *Commonwealth Law Bulletin* (1988) 593.

[26] *Tyrer* v. *United Kingdom*, Judgment of 25 April 1978, Series A, No. 26.

[27] 1988 LRC (Const) 442; also see *State* v. *A Juvenile* [1989] (2) ZLR 61 (Court of Appeal of Botswana holding Corporal punishment of Juveniles unconstitutional under Section 7 of the Constitution which prohibits inhuman or degrading punishment. Namibian Supreme Court held corporal punishment unconstitutional in *Ex parte Att. General in re Corporal Punishment by Organs of State* 1991(3) AS 76 NMSC.

[28] See *William Courson* v. *Zimbabwe*, Communication No 136/94, para 21.

laid down by law' represents an example of the 'claw-back' clause type referred to earlier. The 'reasons and conditions' are not provided anywhere in the Charter thus making it impossible to assess their conformity with other international human rights instruments. There is also the unhelpful employment of the concept of 'arbitrary' in the arrest and detention of individuals.

Freedom of religion, expression, association and movement

Article 8 of the Charter provides for the right to freedom of conscience and religion. According to the Article:

> Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

The right to freedom of religion constitutes an invaluable right in the context of a region which continues to suffer from serious persecutions based on religious differences.[29] Notwithstanding the value of this right, the provisions of the Article themselves have left a great deal to be desired. The meaning of 'free practice' is unclear as it does not establish whether it incorporates the freedom to change religion or if it allows proselytism. Furthermore the use of the 'claw-back' clause of 'subject to law and order' can lead to unreasonable and unacceptable restrictions upon this freedom. Article 9 provides for an interesting and rather unusual right, the right to receive information. The Article also provides for a right of expression and the freedom to disseminate one's opinion. At the same time, the provisions of the Article can be highly restrictive as the ultimate discretion to determine the boundaries of right to receive information and give expression is retained. Article 10 accords the right to association. Article 10(2) states that, subject to the obligation of solidarity provided for in Article 29, no one may be compelled to join an association. According to Article 11 all individuals have the right to assembly. This right again is subject to a 'claw-back' clause of being subject to 'necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others'.

Article 12 provides for freedom of movement and residence within the borders of a State. It also confirms that the individual has the right to leave any country including his own, and to return to his country.[30] Within this article

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[29] J. Maxted and A. Zegey, 'North Africa, West and the Horn of Africa' in Minority Rights Group (eds), *World Directory of Minorities* (London: Minority Rights Group) 1997, pp. 388–463; T. Hodges, *Jehovah's Witnesses in Africa* (London: Minority Rights Group) 1985; T. Parfitt, *The Jews of Africa and Asia: Contemporary: Anti-Semitism and Other Pressures* (London: Minority Rights Group) 1987; P. Verney et al., *Sudan: Conflict and Minorities* (London: Minority Rights Group) 1995.

[30] Article 12(2).

there is also the right to seek and obtain asylum and for non-nationals not to be expelled, unless due to a decision made in accordance with the law. Mass expulsion (aimed at expelling national, racial, ethnic or religious groups) is prohibited. This prohibition represents a highly valuable ordinance and is aimed at preventing recurrences similar to the expulsion of Asians from Uganda under Amin.[31]

Nationality has been a problematic area of international human rights law and denial of citizenship as a tool for discrimination has been applied by a number of States, including those from Africa. International Conventions, including the International Convention on the Elimination of All Forms of Racial Discrimination and the African Charter, do not specifically prohibit discrimination on the basis of nationality. However, mass expulsion as the most acute form of discrimination has been conducted against many ethnic, religious and racial groups in Africa. The induction of such a provision is a positive development of regional human rights law.

Property rights in the Charter

Article 14 of the Charter states that the right to property shall be guaranteed, and may only be restricted in the interest of public need or in the general interest of the community. In addition, expropriation of property would have to be in accordance with the provisions of the law. The grounds for expropriation are not elaborated upon nor are any examples provided. The right to property has been a controversial one.[32] The UDHR contains the right to property, as does Protocol 1 of the ECHR and the ACHR. The Right to property, however, proved too divisive and it was not possible to incorporate it within the International Covenants. Socialist and developing countries argued against providing absolute guarantees for property rights. They campaigned for a right to be able to expropriate and nationalise foreign assets and to restrict the rights of foreign nationals more generally. A confirmation of this view is provided by Article 2(3) of the ICESCR which provides:

> Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Issues regarding the disposal of property and natural wealth are further addressed within the Charter in the context of peoples' rights. Article 21

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[31] While traditional human rights instruments had not focused on expulsions it would now appear that mass expulsions on the basis of race, religion or ethnicity constituted a crime against humanity.

[32] See C. Krause and G. Alfredsson, 'Article 17' in G. Alfredsson and A. Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (The Hague: Kluwer Law International) 1999, pp. 359–378.

provides all peoples with a right freely to dispose of their wealth and natural resources. At the same time, as we shall consider in the next section, the term 'peoples' is used as being almost synonymous to that of the 'State', thereby allowing African governments an almost unquestionable discretion in relation to the usage, expropriation and exploitation of natural resources and property. Article 21 provides as follows:

(1) All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
(2) In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
(3) The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.
(4) States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.
(5) States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

Economic, social and cultural rights

In addition to civil and political rights, the African Charter also contains a number of economic, social and cultural rights. As we have already noted, the efforts to incorporate economic, social and cultural rights alongside civil and political rights within a single United Nations Covenant proved futile. It is therefore to the Charter's credit for having provided a combination of these rights, which also confirms the distinctive African concept of human rights.

Article 15 of the Charter provides for the right to work. This right is contained in the UDHR, and the ICESCR. Among regional instruments it can be found in the ESC and the TEU. Unlike any of the international and regional human rights instruments, Article 15 fails to deal with this right in any great detail. Furthermore, the right to work is not guaranteed *per se*, but guarantees that once employed a worker would have a right to work in equitable and satisfactory conditions and shall receive equal pay for equal work. Equal pay for equal work is also aimed at ensuring equality for women.

The Charter provides for the right to enjoy the best attainable state of physical and mental health. The provisions place State parties under an obligation to provide health and medical services for their population. The right to health

is an important right although compliance with this obligation remains problematic. Article 16, in providing for this right, states:

> (1) Every individual shall have the right to enjoy the best attainable state of physical and mental health.
> (2) States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

Article 17 covers a wide range of interrelated rights. According to the Article, individuals are accorded the right to education, though there is no specification of the content of this right. The Article provides individuals with the right to participate freely in the cultural life of the community and imposes an obligation on the State to promote and protect the morals and traditional values recognised by the community. The provision of free exercise in community life is presumably intended for minority groups within States; while there is no reference to minorities in the entire Charter, this provision is useful.

Article 18 is wide ranging and covers at least four rights. It recognises family as the natural unit and basis of society, and establishes a duty upon the State to take care of the physical health and morals of the family. In its acknowledgement of family as the natural and fundamental unit, the provisions draw upon Articles 23 ICCPR and Article 17 ACHR.[33] Article 18(2) reinforces these obligations with the duty on the State to assist the family unit in establishing it as the custodian of morals and traditional values. Article 18(3) is a comprehensive clause concerning prohibition of discrimination against women. According to this provision:

> The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the women and the child as stipulated in international declarations and conventions.

These provisions appear to place far-reaching obligations in relation to protecting the rights of women and children. In the light of the construction of the Article, it has been contended that parties to the Charter are automatically bound by treaty law on women and children regardless of whether or not they have been ratified by the State.[34] Although an ambitious interpretation, this is a step in the right direction and would also encourage the African Commission and the new African Court to draw inspiration from the jurisprudence of human rights bodies, in particular the CEDAW and CRC.

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[33] According to Article 17(1) of the ACHR 'The family is the natural and fundamental group unit of society and is entitled to protection by Society and the State'. For further consideration of ACHR see above Chapter 8.

[34] Davidson, above n. 1, at p. 154.

While the African Commission has not yet dealt with case law emerging from non-discrimination of women, the landmark decision remains of *Unity Dow v. The Attorney-General of Botswana*.[35] In this case the Court of Appeal of Botswana held that a Statute which discriminated against women was unconstitutional law. The Citizenship Act 1984 denied Botswana citizenship to Botswanaes women married to a foreign husband, but granted it to Botswanaes men who were married to foreign women. The Court held that the provision was discriminatory and thus contrary to the Constitution of Botswana.

Article 18(3) also provides for the protection of the right of the child and places an obligation to follow the principles enshrined in international treaty law. In order further to substantiate the legal regime in the rights of the child, African States themselves have entered a specialised treaty concerning children, the African Charter on the Rights and Welfare of the Child 1990.[36] In 1990, the OAU also adopted strategies for the African Decade for Child survival, Protection and Development 1990–2000. Article 18(4) provides that the aged and the disabled have the right to special measures of protection.

THE MEANING OF PEOPLES' RIGHTS IN THE AFRICAN HUMAN RIGHTS LAW[37]

The impact of the concept of Peoples' right to self-determination is nowhere more evident than in the African continent; Africa has emancipated itself from the shackles of colonialism, racial oppression and apartheid through a reliance upon this concept. The term 'peoples' and 'the right to self-determination' therefore forms a vital element within the constitutional working of independent African States as well as in the regional approach represented collectively. A number of State constitutions support the principle of peoples rights, and the regional approach is reflected through a wide range of treaties including the Charter of the OAU and the African Charter.

The preamble of the OAU Charter reaffirms the 'inalienable right of all people to control their own destiny'.[38] The purposes of the Charter includes a commitment to intensify the collaboration of African States to achieve

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[35] *Unity Dow v. The Attorney-General of Botswana*, Decisions of the High Court and Court of Appeal (Botswana), [1991] Law Reports of the Commonwealth (Const.) 574 (High Court's affirmed [1992] Law Reports of the Commonwealth 623 (Court of Appeal).

[36] Adopted in July 1990, entered into force 29 October 1999, O.A.U. Doc. CAB/LEG/TSG/Rev.1.

[37] For a detailed consideration see J. Rehman, 'The Concept of "Peoples" in International Law with Special Reference to Africa' in B.T. Bakut and S. Dutt (eds), *Development in Africa for the 21st Century* (London: Palgrave) 2000, pp. 201–214; R. Kiwanuka, 'The Meaning of "People" in the African Charter on Human and Peoples' Rights' 82 *AJIL* (1988) 80.

[38] Preamble OAU Charter.

'a better life for the Peoples of Africa'.[39] Even though the OAU Charter supports the principles enshrined in the UN Charter and UDHR, the OAU does not have any particular vision on individual human rights or collective group rights.[40] The references to peoples are framed largely in the context of the right to sovereign State equality, and moves to eradicate colonialism.[41] There is no consideration of the right to self-determination apart from an emphasis on non-interference in the domestic affairs of States, and the guarantee for the 'respect for the sovereignty and territorial integrity of each State and its inalienable right to independent existence'.[42]

The latter provision is the reconfirmation of the *uti possidetis juris* principle. The origins of the principle of *uti possidetis* could be traced back to the early nineteenth century, whereby the newly independent successor States of the former Spanish Empire in South and Central America were considered to have inherited the administrative divisions of the colonial empire as their new territorial boundaries.[43] The doctrine has come to be accepted as having universal significance and global application; in essence the application of the principle meant that the demarcations of boundaries under the colonial regimes corresponded to the boundaries of the new States that emerged.[44]

The *uti possidetis juris* principle received complete support from the African Heads of State at the time of adoption of the OAU Charter. Indeed, at the inaugural session of the Treaty, the Prime Minister of Ethiopia, echoing the sentiments of other heads of government, commented 'it is in the interest of all

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[39] Article 2(1)(b) OAU Charter.

[40] O. Ojo and A. Sesay, 'The OAU and Human Rights: Prospects for the 1980's and Beyond' 8 *HRQ* (1986) 89 at p. 96.

[41] Article 2(1)(c) and (d) OAU Charter.

[42] Article 3(3) OAU Charter.

[43] M.N. Shaw, *International Law*, 3rd edn (Cambridge: Grotius Publication) 1997, p. 302.

[44] See Article 3(3) of the *OAU Charter*; Principle III of the *Helsinki Final Act* 1975, 1975 ILM 1292; Article 62 2(2)(a) VCLT 1969, 58 U.K.T.S, 1980, Cmnd 7964; Article 2 of the Vienna Convention on the Succession of States in Respect of Treaties (1978) 17 I.L.M 1488, 72 *AJIL* 971. For judicial acknowledgement of the principles see *Frontier Dispute Case* (*Burkina Faso* v. *Mali*) 1986 ICJ Reports 554; G. Naldi, 'The Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali): *Uti Possidetis* in an African Perspective' 36 *ICLQ* (1987) 893; *Temple of Preah Vihear Case* (*Merits*) (*Cambodia*), 1962 ICJ Rep 6, 16, 29; *Rann of Kutch Arbitration* 1968, 50 ILR 2, 408; *Guinea-Guinea Bissau Maritime Delimitation Case* 77 ILR 1985. 635, 637; *Arbitration Tribunal in Guinea-Bissau* v. *Senegal*, 1990 83 ILR 1, 35; *Land, Islands and Maritime Frontier Case: El Salvador* v. *Honduras* (*Nicaragua Intervening*) 1992 ICJ Rep 351, 380; also see *Sovereignty over Certain Frontier Land* (*Belgium* v. *the Netherlands*) ICJ Rep 1959, 209, in particular Judge Moeno Quitana's dissenting opinion, 252; *Avis Nos. 2 and 3 of the Arbitration Commission of the Yugoslavia Conference*. 31 I.L.M. 1497, 1499; *Taba Award* (*Egypt*) 80 ILR 1989, 224 in particular arbitrator Lapidoth's dissenting opinion; also see J. Klabbers and R. Lefeber, 'Africa: Lost between Self-Determination and *Uti-Possidetis*', in C. Brölmann, R. Lefeber, M. Zieck (eds.), *Peoples and Minorities in International Law* (Dordrecht: Martinus Nijhoff Publishers) 1993, pp. 33–76. See also J. Rehman, 'Re-Assessing the Right to Self-Determination: Lessons from the Indian Experience' 29 *AALR* (2000) 454.

Africans now to respect the frontiers drawn on the maps, whether they are good or bad, by the former colonisers'.[45] Thus while the OAU Charter fails to elaborate on the subject of people's rights to self-determination, it nevertheless affirms the African position on the inviolability and sanctity of boundaries inherited by the new States.

In contrast to the OAU, the African Charter has a much stronger focus on the subject of the rights of peoples. As the rubric of the treaty reflects, there is a special position accorded to peoples' rights. Indeed, the African Charter has the distinction of being the only international instrument to provide a detailed exposition of the rights of peoples. The peoples' rights, according to the Charter are spelt out in Articles 19–24 of the Treaty. These are the right of all peoples to equality,[46] to existence[47] and self-determination,[48] to dispose freely of wealth and natural resources,[49]to economic, social and cultural development,[50] to national and international peace and security,[51] and to a 'general satisfactory environment'.[52]

Notwithstanding a detailed exposition of the rights of peoples, the drafters of the African Charter deliberately avoid the complex issue of the definition of the term 'peoples'. The only affirmative view that emerges from a close scrutiny of the provisions of the Charter is that there is no single uniform meaning that could be attributed to the term 'peoples'. The Charter presents a variable approach, depending on the issue in question. Thus, as we have already noted on the subject of the disposal of wealth and natural resources in Article 21, the overlap between State and peoples is so strong that the terms could be used almost interchangeably. Similarly, according to Article 23(1), 'All Peoples shall have the right to national and international peace and security' – a right normally assigned to States.[53]

On the other hand, the African Charter has provisions dealing with peoples' rights to equality and existence. As we have considered throughout this book, the right to equality and non-discrimination forms the basis of modern human rights law. The right to equality is an individual right, although it may also be applied to support particular group members qua individuals. In comparison to equality, the right to existence has a more direct application to groups within States. The right to existence is designed to protect 'national, ethnical

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[45] Cited in J. Klabbers and R. Lefeber, 'Africa: Lost between Self-Determination and *Uti-Possidetis*', in C. Brölmann, R. Lefeber, M. Zieck (eds), above n. 44, at p. 57.
[46] Article 19.
[47] Article 20(1).
[48] Article 20(1)–(3)
[49] Article 21.
[50] Article 22.
[51] Article 23.
[52] Article 24.
[53] Cf. The provisions contained in the Universal Declaration of Human Rights (1948).

or religious groups' from genocide and physical extermination.[54] Therefore in the context of the right to equality and existence, the only permissible view that could be formed is that 'peoples' represent collectivities such as ethnic, national or religious minorities within independent States.

Article 20 of the African Charter, which provides for the right to existence, also accords peoples 'the unquestionable and inalienable right to self-determination'. The contrasting nature of the two rights and the manner of their proposed application, however, needs some analysis. The references to self-determination are closely associated with colonialism and oppression. It is only colonised and oppressed peoples who have the 'right to free themselves from the bonds of domination'.[55] Although the term 'oppression' is not defined, the limitation of being under colonial or minority racist regimes is firmly engrained. It is certainly not permissible for minorities or indigenous peoples to seek foreign assistance to further any claims towards self-determination. This impermissibly of relating minorities or indigenous peoples with self-determination has been confirmed by the jurisprudence of the African Commission, which operates in pursuance of the Charter.

The African Commission, as we shall analyse in greater detail below, considers Communications concerning group and peoples' rights. However, Article 56(2) of the Charter implies that in order for the Communication to be admissible, allegations of violations of group rights must be compatible with the provisions of the Charter of the OAU relating to respect of sovereignty and territorial integrity of the member States of that organisation. In *Katangese Peoples' Congress* v. *Zaire*[56] Mr Gerard Moke, the author, was the President of the Katangese Peoples' Congress. He claimed that Zaire violated the Katangese peoples' right to self-determination. In its admissibility decision taken at its sixteenth ordinary session in October 1993, the Commission declared that the communication had 'no merit' under the African Charter because it was not compatible with Article 56(2) of the Charter. In its decision, the Commission first reasoned that the definition of 'peoples' and the content of the right are controversial, and then took the view that the issue in the present Communication was not self-determination for all Zairians as a people, but specifically for the Katangese. The Commission held that in these circumstances, it was obliged 'to uphold the sovereignty and territorial integrity of Zaire, a member of the OAU and a party to the African Charter on Human and Peoples' Rights.' Another case related to the situation in Senegal, where rebels were trying to secede from the State.[57] In this case, the

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[54] See below Chapters 11 and 12.

[55] Article 20(2).

[56] Communication 75/92.

[57] Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights 1996–1997, ACHPR/RPT/10th at 4.

Commission refused to uphold this claim *inter alia* on the basis that such a claim by the Casamance group may prompt other groups in the region to bring similar legal challenges. The Commission has made attempts to encourage the government to reach a settlement with the dissident group.

THE AFRICAN COMMISSION[58]

The African Commission is the main executive organ and is also in charge of implementing the provisions of the Charter.[59] The Commission consists of eleven members and are chosen from among 'African personalities of highest reputation known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights; particular consideration being given to persons having legal experience'.[60] The Commission members are elected by Heads of States and Governments of the OAU, for a renewable term of six years, from a list of persons nominated by State parties.[61] The Commission then appoints a chairman and a vice-chairman for a two-year term. The OAU is the parent body and the Commission is required to report to it.[62] The Commission holds a session twice each year: in spring and in autumn. The members of the Commission sit in their personal capacity. While each State party can nominate up to two individuals, no two members of the Commission may be nationals of the same State.[63] On 29 July 1987 an Assembly of Heads of State and Governments of OAU for the first time elected eleven members of the Commission.

While the OAU is responsible for financing the Commission,[64] the Commission has been assigned a role establishing its independence from its parent body. This independence of the Commission members is represented in various ways. The members make a solemn declaration of impartiality and faithfulness,[65] and the headquarters of the Commission are in a country other than the one having OAU organs. Members of the Commission also enjoy diplomatic privileges and immunities.[66] A number of Rules of Procedure have been set up to deal with the organisation of the Commission's work, conduct of business, publication of documents and participation in the Commission's

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[58] See R. Murray, *The African Commission on Human and People's Rights and International Law* (Oxford: Hart Pub.) 2000; Odinkalu and Christensen, above n. 9, at p. 235; Welch, Jr., above n. 14, at p. 42.

[59] Article 30.

[60] Article 31.

[61] Articles 33, 36.

[62] Article 34.

[63] Article 34.

[64] Articles 41 and 42.

[65] Article 31(1).

[66] Article 43.

sessions by State representatives. As a general rule sittings in the Commission are to be private although final summary minutes of sessions, public or private, shall be 'intended for general distribution unless. under exceptional circumstances, the Commission decides otherwise'.[67] The Commission's reports to the OAU Assembly are confidential unless the Assembly itself decides otherwise. while the annual report of the Commission is to be published following consideration by the Assembly.[68] The voting on draft resolutions, if a vote is requested, is by a simple majority. According to Article 41, the Secretary-General of the OAU is to appoint the Commission's Secretary.

It should be noted that the Commission's recommendations concerning protection activities require the endorsement of either the Assembly of Heads of State or OAU. However, no such approval is required in relation to promotional activities. The Commission is mandated to perform a number of functions. These are provided for in Article 45 and consist of:

(a) Promotional Role (Article 45(1)).
(b) Role of protecting human and peoples' rights (Article 45(2)).
(c) Interpreting the provisions of the Charter at the request of a State party, an institution of the OAU or an African Organisation recognised by the OAU (Article 45(3)).
(d) Performing any other tasks that may be entrusted to it by the Assembly of Heads of State and Government (Article 45(4)).

According to Article 45(1) the promotional functions of the Commission consist of promoting Human and Peoples' Rights and in particular:

(a) to collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to Governments.
(b) to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations.
(c) co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.

In the performance of its duties, the Commission 'may resort to any appropriate method of investigation' and may hear from the OAU Secretary-General 'or any other person capable of enlightening it'. In its promotional programme the Commission has formulated a Programme of Action which

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[67] Ibid. 51.
[68] Rules 78, 80.

consists of research and information for quasi-legislative cooperation.[69] A number of seminars have been organised involving such agencies and NGOs as UNESCO and the International Commission of Jurists.[70]

PROTECTING HUMAN AND PEOPLES' RIGHTS

The African Charter provides for a State reporting procedure, an inter-State complaints procedure, and what it terms as 'Other Communications' procedure. The State reporting procedure is contained in Article 62, the Inter-State procedure is dealt with in Articles 47–54, while the 'Other Communications' procedure is provided for in Articles 55–59.

State reporting procedure

The Commission obtains reports from State parties with a view to ascertaining whether or not each State party has taken administrative, legislative or other measures to implement the Charter. According to Article 62, each State party is obliged to submit every two years from the date of the Charter's enforcement 'a report on the legislature or other measures taken with a view to give effect to the rights and freedoms recognised and guaranteed' by the Charter. The reports are handled by Assembly of Heads of State and Governments of OAU. The reporting procedure has been treated as 'the back-bone of the mission of the Commission'.[71]

The Charter does not specify any details as to the body to which the reports are to be submitted or provide guidelines on the structure of these reports and what subsequent action is required regarding these reports. The African Commission has provided certain guidelines on reporting procedures.[72] The reports need to provide detailed legislative measures and actual implementation for human rights protection. After submission, the reports are examined in public by the Commission. The Commission and the State representatives engage in a dialogue with the purpose of assisting and encouraging States in implementation of the Charter. After consultation on a report, the Commission communicates its observations and comments to the relevant State party. Despite these guidelines and efforts for improvements, States have been reluctant to produce reports. The rules of procedure in the African

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[69] See the Activity Report of the African Commission on Human and Peoples' Rights 9 *HRLJ* (1988) 326.

[70] Murray, above n. 58, at p. 15.

[71] I. Badawi El-Sheikh, 'The African Commission on Human and Peoples Rights: Prospects and Problems' 7 *NQHR* (1989) 272 at p. 281.

[72] See F.D. Gaer, 'First Fruits: Reporting By States under the African Charter on Human and Peoples Rights' 10 *NQHR* (1992) 29.

Charter do not attach sanctions for non-compliance with reporting procedures.[73] The few reports that have been produced are not satisfactory.

Inter-State procedure

In addition to State reporting, the second principal function of the Commission is to ensure the protection of human rights through its complaints procedure. The Charter envisages two modes of inter-State complaints. First, under Article 47 of the Charter if one State party has reason to believe that another State party has violated its obligations under the Charter, it may refer the matter to the State concerned by written communication. According to Article 47, this communication shall also be addressed to the Secretary-General of OAU and Chairman of the Commission. Within three months of the receipt of the communication, the State to which communication has been addressed shall give the inquiring State written explanation or statement clarifying the issue. This should include all possible information and action on redress. If within three months from the date on which the original communication was received by a State the issue is not settled satisfactorily through negotiations or other peaceful means, then either State may bring the matter before the Commission.[74] The Commission then requests further information from the State against whom complaint has been made. Parties can appear before the Commission and/or present written or oral statements. There also remains the possibility of an on-site investigation. The Charter makes clear that the primary objective is to secure a friendly settlement. Not only is this the basic aim of the Commission but, under Article 47, a complainant is encouraged to approach the other party directly with a view to settling the matter without involving the Commission. In advance of the European and American Conventions, Article 47 reflects the African States' preference for informed methods of dispute settlement. However, such an approach is prone to criticism as being 'too State-centric'[75] with the Commission appearing to settle 'inter-State disputes rather than serving as a watchdog of human rights transgressions'.[76] The only State complaint received thus far has been from Libya against the United States concerning the removal of Libyan soldiers from Chad. The communication was held inadmissible as the USA is not a party to the treaty.

The alternative mechanism of inter-State complaints is contained in Article 49. According to this procedure, a State party may refer the matter directly to the Commission if it considers that another State party has violated any of the provisions of the Charter. The reference to the Commission would be by a

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[73] Umozurike, above n. 1, at pp. 71–72.
[74] Article 48.
[75] Ojo and Sesay, above n. 40, at p. 89.
[76] Ibid. p. 96.

communication to the Chairman of the Commission to the Secretary-General of the OAU and the relevant State party. In line with other international procedures the Commission can only deal with the matter if all local remedies have been exhausted.[77] However, there remains the usual exemption to those cases where remedies are 'unduly prolonged'.[78]

The Commission has wide powers. It can ask States to provide information and they are entitled to appear before it and submit oral and written representations. Article 52 provides that when the Commission has obtained from States concerned 'and from other sources' all the information it deems necessary, its task is to make attempts to reach 'an amicable solution based on the respect of Human and Peoples' Rights'.[79] Failing this, the Commission is required to prepare a report (containing facts and its findings) and send it to the States concerned and to Heads of State and Government. According to Article 53, while transmitting its report the Commission may make appropriate recommendations to the Assembly of Heads of State and Government. The Commission is also required to submit a general report on its activities to each ordinary session of Assembly of Heads of States and Government.[80]

Other communications

In addition to the inter-State mechanisms for protecting human rights, the African Charter also has another complaints procedure which is entitled 'Other Communications'. Much like its European Counterpart, this procedure has been more readily used. By the end of 2001, the Commission had received well over 200 communications. Article 55 of the Charter provides that the Commission's secretary is to prepare a list of non-State communications and to pass them to members of the Commission.[81] The decision on whether to consider the communication is conducted by the Commission members by a simple majority vote.[82]

The powers of the Commission under Article 55 are mandatory, that is the African Commission's Competence to deal with individual or other non-State Communications is accepted automatically, as soon as a State ratifies the Charter. The following are the conditions of admissibility:

- The Communication must indicate the author(s) even if they request anonymity.[83]

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[77] Article 50.
[78] Ibid.
[79] Article 52.
[80] Article 54.
[81] Article 55(1).
[82] Article 55(2).
[83] Article 56(1).

The Commission requires the authors to provide their names and addresses even if they desire to remain anonymous in respect of the State party concerned. It must be noted in the present context that there are no limitations regarding who may file a petition. Unlike the position in ECHR, there is no victim requirement. There is no requirement that the authors are the victims or family members of the victim.[84] The author does not need to be a national of the State party to the Charter[85] and does not even need to be based within the State against whom the complaint is made.[86] Several Communications have, unsurprisingly, been put forward by NGOs – a concession which carries the risk of opening floodgates. A number of communications have been held inadmissible as they were either instituted against non-African States, non-State parties or against non-State entities.[87]

- The Communications must be compatible with the Charter of OAU 'or' the African Charter.[88]

The difficulties in providing a literal reading to the term 'or' have been pointed out.[89] It would appear that a sensible construction of the provisions requires the communication to be compatible to both the Charter of the OAU and the African Charter. It also means that attempts on the part of minority groups or indigenous peoples to claim a right to self-determination would not be admissible since these arguably conflict with OAU provisions on the territorial integrity and sovereignty of the State. In this context our discussion earlier in the chapter needs to be recalled. The Commission has used these provisions to hold Communications inadmissible if they fail to show a prima facie violation of any of the Articles[90] or make a general allegation[91] or have failed to be specific.[92]

- The Communications must not be insulting, nor written in a disparaging manner which is directed against the State or its institutions or against the OAU.[93]

The Commission has used this requirement to hold Communications inadmissible where an allegation has been of the order, for example, of the

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[84] *Free Legal Assistance Group, Lawyers Committee for Human Rights, Union InterAfricaine des Droits de l'Homme, Les Temoins de Jehovah* v. *Zaire*, Communication Nos. 25/89, 47/90, 56/91, 100/93, 9th Annual Activity Report of the African Commission on Human and Peoples' Rights, 1995/96, ACHPR/RPT/9th reprinted 4 IHRR (1997) 89, 92.

[85] *Lawyers Committee for Human Rights* v. *Tanzania*, Communication No. 66/92.

[86] *Maria Baes* v. *Zaire*, Communication No. 31/89 (admissibility)

[87] See *Mohammed El-Nekheily* v. *OAU*, Communication No.12/88.

[88] Article 56(2).

[89] Odinkalu and Christensen, above n. 9, at p. 252.

[90] *Frederick Korvah* v. *Liberia*, Communication No. 1/88, (admissibility) (1988).

[91] *Hadjali Mohand* v. *Algeria*, Communication No. 13/88 (admissibility) (1988).

[92] Ibid.

[93] Article 56(3).

'President (of Cameroon) must respond to charges of crimes against humanity' or 'regime of torturers'. While the requirement of a Communication to be non-insulting is not uncommon, the Commission has nevertheless been criticised for showing bias and approaching the issues very subjectively.[94]

- Communications are not based exclusively on news disseminated through the mass media.

This is a rather unusual requirement, that the complaint must not be based exclusively on events as portrayed by the mass media. This requirement, while aimed at preventing spurious petitions, possibly represents a distinctly African approach.

- Communications are sent after exhausting all local remedies, unless the remedies are unduly prolonged.

We have already noted that exhaustion of all available remedies as an admissibility requirement is part and parcel of all international procedures. A number of exceptions apply to this general rule. There would be no requirement to exhaust local remedies where all opportunities of redress have been closed[95] or where the procedures are excessively prolonged or cumbersome.[96] In a number of instances, however, the approach adopted by the African Commission has been much narrower. This position is reflected by the case of the *Kenya Human Rights Commission* v. *Kenya*.[97] In this case the University staff in Kenya decided to form an umbrella trade union named the Universities Academic Staff Union (UASU) and submitted the application for registration in May 1992. Not having heard from the University authorities for six months they decided to go on strike. Their application for registration was rejected by the University Registrar in 1993. The University Staff instituted legal proceedings to challenge the decision made by the Registrar. Although, the proceedings were still before the Kenyan courts, President Moi alleged that the Kenyan government would never allow the registration of UASU, a statement that was repeated a number of times. Despite this almost confirmed position of the government, in October 1995 the Commission decided that although 'the President gave indication that any challenge would not be effective' the complainant had to await the outcome of national procedures and thus declared the Communication inadmissible. Such an attitude is unfortunate

[94] Odinkalu and Christensen, above n. 9, at p. 255.
[95] *Civil Liberties Organization* v. *Nigeria*, Communication No. 67/91 (1995) (Section 4 of the State Security (Detention of Persons) Decree barring an legal challenge.
[96] *Louis Emgba Mekongo* v. *Cameroon*, Communication No. 59/91 (1994) (case pending for twelve years). *Lawyers' Committee for Human Rights* v. *Tanzania*, Communication No. 66/92 (1994) (rejection of bail applications and delay in appeal procedures).
[97] Communication 135/94 *Kenya Human Rights Commission* v. *Kenya* (admissibility) 4 IHRR (1997) 86.

and fails to comply with the recognised exceptions whereby the authors of the Communication are exempted from utilising those remedies which would prove to be 'inadequate' or 'ineffective'.

The Commission's more recent jurisprudence tends to be more in line with that of other international bodies. The Commission has pronounced on occasions the meaning of 'effective' remedies. Thus in one case where appeal against death sentence lay before the Governor, it was held that such an appeal created 'a discretionary, extraordinary remedy which was of a non-judicial nature'. The Commission therefore held that it was not necessary to exhaust such a remedy.

The Commission has, in line with other international procedures, required the author of communication to adduce prima facie evidence that he has either exhausted all domestic remedies, or that the existing remedies are inadequate and ineffective. Once the author can establish the prima facie evidence, then the burden of proof shifts on to the defendant State.

- Communications are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter.[98]

The Commission has not directly provided the details of the time frame in which communications are to be submitted after the exhaustion of domestic remedies requirement has been met, although some guidelines are available in the light of decisions. Thus in one case a Communication was held admissible despite the author having spent more than twelve years pursuing a discretionary remedy.[99] Similarly in another case a Communication was held admissible even though fifteen years had elapsed since the conclusion of the domestic proceedings.[100] This approach although apparently hugely favourable to the author is a realistic one and must be commended.

- Communications do not deal with cases which have been settled by the States involved in accordance with the principles of the United Nations Charter, or Charter of the OAU or the African Charter.[101]

In so far as restrictions relate to international procedures these limitation apply only to those Communications which have actually been *settled* by use of another procedure. Therefore, presumably, concurrent Communications are not barred from consideration by the Commission. Cases therefore have been held inadmissible when a decision has been made by such international

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[98] Article 56(6).
[99] *Louis Enigba Mekongo* v. *Cameroon*, Communication No. 59/91 (1994).
[100] *John Modise* v. *Botswana*, Communication No. 97/93 (1997).
[101] Article 56(7).

bodies as the Human Rights Committee.[102] The Commission has decided to hold a communication inadmissible which received attention under UN ECOSOC Resolution 1503 procedure.[103] However, a change brought about in the rules of procedure, allowing the Commission only to preclude consideration 'to the extent to which the same issue has been settled by another international investigation or settlement body'[104] would arguably allow it to be more flexible in its approach.[105]

Article 58 communications

The Charter makes reference and elaborates upon the procedure regarding cases that are 'special'. According to Article 58(1), when it appears after deliberations of the Commission that one or more Communications relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of the Heads of State and Governments of the OAU to these special cases. The Assembly of Heads of State and Government may then request the Commission to undertake a detailed study. This would result in making a report on the facts of the case, the findings of the Commission and its recommendations on the particular situation.[106]

According to Article 58(3) the Chairman of the Assembly is authorised to request an in-depth study in all the cases of emergency. However, there is no discussion of the position relating to those cases that are 'not special'. Two views can be put forward here. First, that the Commission has no role to play in these instances, thereby confirming the situation that the role of the Commission is to identify special cases and refer them to the Assembly in the hope that they will be passed back for further investigation. Hence any other case which does not fall within this category would be inadmissible. The second, more positive and forthright view is that in 'non-special' cases the Commission has the same functions as under Inter-State procedure, that is to conduct an investigation, attempt a reconciliation, and report the conclusions to the Assembly.

Article 59(1) establishes the requirement of confidentiality. It notes that all the measures undertaken in accordance with the provisions of Chapter III shall remain confidential until such time that the Assembly of Heads of State

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[102] *Mpaka-Nsusu Alphonse* v. *Zaire*, Communication No. 15/88 (1993).

[103] See *Amnesty International* v. *Tunisia*, Communication No. 69/92 (1993); on Resolution 1503 procedure see above Chapter 2.

[104] Rules of Procedure R 104(1)(g).

[105] See Odinkalu and Christensen, above n. 9, at p. 268.

[106] Article 58(2).

and Government decides to disclose the measures. A report shall nevertheless be published by the chairman of the Commission upon the decision of the Heads of State and Government.[107] The report on the activities of the Commission is also published by its chairman after it has been considered by the Assembly of Heads of State and Government.[108]

Procedure

The procedure adopted by the Commission is that it brings any Communication received to the attention of the State party concerned. On receipt of a Communication, the Commission informs the concerned State party that a complaint has been lodged against it and requests the submission of the State party's comments as regards admissibility.[109] The rules of procedure allow the State party three months from the date of notification to respond.[110] Communications are considered in closed or private meetings.[111] Failing any response from the State concerned, at the end of three months, the Commission has the authority to hold the communication admissible. In practice, however, the Commission has not been particularly efficient, with the issue of admissibility being decided in a matter of years rather than months. The Commission has also shown a willingness to review the decision on admissibility if the State subsequently does decide to provide relevant evidence or information.

The Rules of Procedure require the Commission to notify both the author and the State party concerned if a decision has been made to hold a Communication admissible.[112] The Rules also allow for the seeking of additional supplementary information.[113]

If a Communication is held to be inadmissible, the case is closed with the parties being informed of such a decision.[114] However, upon being admissible, there is a time limit of three months provided to the State party to submit its views.[115] All submissions made by the States are to be disclosed to the author. The Assembly of Heads of State and Government is also entitled to receive information regarding the Communications that have been declared admissible.[116] More recently the Commission has decided to invite

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[107] Article 59(2).
[108] Article 58(3).
[109] Rule 112.
[110] Rule 117(4).
[111] Rule 106.
[112] Rule 119(1).
[113] Rule 117(4).
[114] Rule 118.
[115] Rule 117(4).
[116] See Rules 113, 117.

State representatives as well as the author for oral hearings. It is also encouraging to note that States are attending the sessions of the Commission as a matter of routine and participating in the proceedings. After the presentation of all the available evidence and any oral hearings, the Commission deliberates in private, in accordance with the provisions of Article 59 of the Charter.[117]

ANALYSIS OF THE COMMISSION'S WORK AND THE PROBABLE CONTRIBUTIONS OF THE AFRICAN COURT OF HUMAN RIGHTS

From a survey of the existing jurisprudence, it would appear that the emphasis of the Commission has been on the amicable resolution of disputes. While such an emphasis is acceptable in the light of the provisions of the Charter, there have been occasions when this eagerness has led the Commission to overlook the admissibility and merit procedures altogether. The Commission has decided cases as being amicably resolved without consulting the author,[118] on the assumption that a new administration was likely to resolve the matter satisfactorily,[119] and in case of withdrawal of the case.[120] Another unsatisfactory aspect of the Commission's work is the reporting of its decisions. The approach taken by the Commission in a number of instances shows a considerable margin for improvement, particularly in relation to the substance and reasoning of the Communication. A survey of the Commission's work tends to suggest that in recent years some improvement has been made. Nevertheless:

> they do not make reference to jurisprudence from national and international tribunals, nor do they fire the imagination. They are non-binding and attract little, if any, attention from governments and the human rights community.[121]

Although the Commission has adopted a quasi-legal approach, as noted above, its decisions are non-binding.[122] Furthermore the Charter does not provide for any legally enforceable remedies nor have any procedures been established to obtain these remedies. The aforementioned weaknesses in the functions of the Commission and the desire to improve the system of protecting human rights, led to a widespread call for the establishment of the

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[117] Odinkalu and Christensen, above n. 9, at p. 274.
[118] *Kalenga* v. *Zambia*, Communication No. 11/88 (admissibility) (1990).
[119] *Comité Cultural pour la Democratie au Benin, Hilaire Badjogoume, El Hadj Boubacare Diawara* v. *Benin* (merits), Communication Nos. 16/88, 17/88, 18/88 (1994).
[120] *Civil Liberties Organization* v. *Nigeria*, Communication No. 67/91
[121] Mutua, above n. 1, at p. 348.
[122] Naldi and Magliveras, above n. 16, at p. 432.

African Court.[123] The existence and successes of the European and Inter-American Courts also provided strong precedents to establish a regional human rights court for Africa.

The African Court represents the fruition of a process consisting of various meetings and draft protocols. The final Protocol (also known as the Addis Protocol) establishing the Court was adopted in June 1998.[124] The Court is granted substantial and in some senses unusual jurisdiction. According to the Protocol adopting the Court, actions may be brought before the Court based upon any instrument, including international human rights treaties, that has been ratified by the relevant State party. There is thus a major innovative feature. In its adjudication, in addition to the African Charter, the Court has the power to consider other human rights instruments accepted by the State concerned.[125] The Court will have the authority to decide whether it has jurisdiction in the case of a dispute.[126]

The Court has been granted contentious, conciliatory as well as advisory jurisdiction. In its advisory capacity it may issue opinions on 'any legal matters relating to the Charter or any other relevant human rights instruments'. This provision appears to be similar to Article 64(2) of the ACHR. A range of bodies including States parties to the OAU, the OAU or any of its organs, or African NGOs (provided they are recognised by the OAU) shall have the capacity to invoke the court's advisory jurisdiction.[127] The Court's advisory opinions would not be of a binding nature but, like the ICJ, it is assumed that they would carry substantial persuasive authority.

Upon ratification, the Protocol provides automatic access to the Court for the African Commission, State parties, and African intergovernmental organisations under Article 5(1).[128] However, no such 'automatic' facility is provided to individuals or the NGOs; their access is severely limited. Instead individuals and NGOs need to establish certain criterion before they may be granted access before the Court. The access is dependant in the first instance on the State party having made a declaration accepting the Court's jurisdiction to hear such cases. The jurisdiction to receive petitions from such complainants derives from Article 5(3).[129] Individuals and NGOs must also overcome the admissibility requirements as stated in Article 56 of the Charter. According to Article 6(2) of the Protocol,

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[123] Ojo and Sesay, above n. 40, at p. 102.

[124] See *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* adopted 10 June 1998, OAU. Doc. CAB/LEG/66/5. Not yet in force. The Protocol requires 15 ratification before it came into force.

[125] Naldi and Magliveras, above n. 16, at pp. 434–435.

[126] Article 3(2) of the Protocol.

[127] Articles 3 and 10.

[128] See Article 34 of the Protocol.

[129] Article 34(6).

the Court shall rule on the admissibility of cases taking into account Article 56 of the Charter. One interpretation of this Article is that the admissibility requirement need not be satisfied in every case and that the Court would have a discretion to admit Communications with minor technical errors.[130]

The Court will consist of eleven judges, nationals of OAU member States[131] who will be elected in their individual capacity by the OAU Assembly of Heads of State and Government from among 'jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human and peoples' rights'. Judges would serve for a six-year term and be eligible for re-election only once. All judges other than the President of the Court would work on a part-time basis. The judges would act in an independent capacity and would benefit from the international laws of diplomatic immunity. A judge of the court could only be removed by the unanimous decision of all the other judges of the Court.

The Court shall examine cases with a quorum of seven judges and would constitute a single chamber.[132] The Court's judgments, which will be final and without appeal, will be binding on States.[133] The OAU Assembly is authorised to monitor the execution of judgments delivered by the Court.[134] In its annual report to the OAU, the Court is to list specifically those States that have not complied with its judgments.

CONCLUSIONS

The continent of Africa represents a serious test for those wanting to ensure an effective system of protecting individual and collective group rights. The modern history of Africa has been an unfortunate one, and the transition from repressive colonial regimes to independent Statehood has not been satisfactory. In many instances, soon after independence, dictatorial and authoritarian regimes took charge of the newly independent States and showed little regard for human dignity and human rights. At the beginning of the twenty-first century, Africa continues to witness substantial violations of human rights; the recurrent genocidal campaigns in Burundi, Rwanda and Sudan confirm the existence of a major human tragedy.

[130] Naldi and Magliveras, above n. 16, at pp. 440–441.
[131] Article 11(1).
[132] Article 23.
[133] Article 28.
[134] Article 29(2). The actual monitoring would be conducted by the Council of Ministers on behalf of the Assembly. See Naldi and Magliveras, above n. 16, at p. 452.

This chapter has presented an overview of the African human rights law, which has been aptly described as:

> the newest, the least developed or effective ... the most distinctive and most controversial of the three [i.e. the European, the Inter-American and the African] established human rights regimes.[135]

The African human rights system is primarily based on the African Charter which, as our analysis has revealed, contains a number of weaknesses. These weaknesses and limitations are derived not only from the substantive provisions of the Charter but also from the mechanisms of implementation. The African Commission, the principal executive organ, has performed a commendable task, although its work remains limited in many respects. More significantly the need for a body to deliver authoritative and binding judgments led to demands for the establishment of a Court of human rights.

The establishment of a Court is a very positive feature, although there continue to be many concerns. First there is a major question mark over the relationship between the African Commission and the new African Court. The (Adis) Protocol does not elaborate or clarify the situation and limits itself to noting that the Court will complement the protective role of the Commission. It will probably be the case that the Commission will have the initial more conciliatory jurisdiction, with the Court deciding the actual disputes. The precedents of the ECHR, with the merger of Commission and the Court, may indicate a long-term possibility. At the same time, a careful approach needs to be taken so as not to provoke conflicts similar to those generated between the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.[136]

The issue of the seat of the Court has been contentious; particularly after the *coup d'état* in Gambia.[137] An overarching concern about the African human rights system relates to the limitations of resources. Since its establishment, the African Commission has been under severe financial strain, with a lack of adequate equipment and supplies, and paucity of staff.[138] Similar financial difficulties are likely to be encountered by the new Court. The fate of the Rwanda tribunal, which was mandated by the United Nations' Security Council to hold trials for genocide and crimes against humanity, confirms that lack of financial backing can seriously hamper

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[135] Steiner and Alston, above n. 1, at p. 920.
[136] D. Harris, 'Regional Protection of Human Rights: The Inter-American Achievement' in D.J. Harris and S. Livingstone (eds), *The Inter-American System of Human Rights* (Oxford: Clarendon Press) 1998, 1–29 at p. 3.
[137] Murray, above n. 58, at p. 29.
[138] Welch. Jr., above n. 14, at pp. 54–55.

efforts to vindicate human rights.[139] The requirement of confidentiality and privacy accorded to the deliberations has been a subject of criticism. According to two authorities:

> given the fact, that the decisions of the Assembly are often influenced by personal friendships and shared ideologies, it is possible that the matter may die in the Assembly. What the Commission needs are statutory provisions to enable it to carry out 'on-site' observations independent of the Assembly as is the case in Latin America.[140]

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[139] See UN S.C. Res. 955, UN SCOR (3453rd mtg.) UN Doc S/RES/955. Reprinted 33 I.L.M. (1994) 1600. Discussed below Chapter 11.

[140] Ojo and Sesay, above n. 40, at p. 98.

IV

GROUP RIGHTS

10

EQUALITY AND NON-DISCRIMINATION[1]

INTRODUCTION

> Respect for human rights and fundamental freedoms without any distinction of any kind is a fundamental rule of international human rights law. The speedy and comprehensive elimination of all forms of racism and racial discrimination, xenophobia and related intolerance is a priority task for the international community.[2]

The principles of equality and non-discrimination represent the twin pillars upon which the whole edifice of the modern international law of human rights is established. The claim to equality 'is in a substantial sense the most fundamental of the rights of man. It occupies the first place in most written constitutions. It is the starting point of all liberties'.[3] This chapter considers the various mechanisms adopted by the international community to develop equality and non-discrimination as an established principle of international and constitutional law.

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[1] See W. McKean, *Equality and Discrimination under International Law* (Oxford: Clarendon Press) 1983; N. Lerner, *Group Rights and Discrimination in International Law* (Dordrecht: Martinus Nijhoff Publishers) 1991; M. Banton, *International Action against Racial Discrimination* (Oxford: Clarendon Press) 1996; E.W. Vierdag, *The Concept of Discrimination in International Law–With Special Reference to Human Rights* (The Hague: Martinus Nijhoff Publishers) 1973; V. Van Dyke, *Human Rights, Ethnicity and Discrimination* (Westport, Conn. and London: Greenwood Press) 1985; N. Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination*, 2nd edn (Alphen aan den Rijn: Sijthoff and Noordhoff) 1980; S. Skogly, 'Article 2' in G. Alfredsson and A. Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (The Hague: Kluwer Law International) 1999, pp. 75–87.

[2] *Vienna Declaration and Programme of Action* (1993) UN Doc. A/49/668 (adopted 25 June, 1993) para 15.

[3] H. Lauterpacht, *An International Bill of the Rights of Man* (New York, Columbia University Press) 1945, p. 115.

Notwithstanding the enormous significance of the norm of equality and non-discrimination within general international law, this chapter recommends a cautious and critical approach for a variety of reasons. First, 'equality' and 'non-discrimination' are in themselves controversial terms with immense uncertainty as to their precise scope and content. Thus according to one authority 'equality is a notion exposed to different philosophical interpretations; its meaning in the various legal systems is not always the same'.[4] Secondly, there is a substantial debate as to the means of creating real and meaningful equality. Should affirmative action policies be approved or even enforced as a means of overcoming past inequality? Thirdly, it is important to realise that international law has not progressed dramatically to eradicate all forms of discrimination. Various facets of discrimination, in particular discrimination on the basis of religion or belief and gender remain neglected. The position in relation to gender-based discrimination is considered in Chapter 13. The position in relation to discrimination on the grounds of religion or belief is most unfortunate. Although there are references to religious non-discrimination in the United Nations Charter and the International Bill of Rights,[5] (unlike racial or gender discrimination) it has not been possible to draft a specific treaty condemning discrimination based on religion or belief.

EQUALITY AND NON-DISCRIMINATION WITHIN INTERNATIONAL LAW

Since the adoption of the United Nations Charter, the principles of equality and non-discrimination have proved to be the linchpins of the human rights regime. As noted earlier the references contained within the Charter concentrate on equality and non-discrimination – references which have been given meaning through the Universal Declaration on Human Rights.[6] Equality and non-discrimination are prominent features of both the ICCPR (1966) and the ICESCR (1966).[7] In addition to the general pronouncement condemning discrimination and upholding the norm of equality, the United Nations has also dealt with specific forms of discrimination through various treaties and instruments. The norms of racial equality and non-discrimination have been further strengthened by the International Convention on the Elimination of All Forms of Racial Discrimination (1966).[8] As we discuss in detail in due course,

[4] Lerner, above n. 1, at p. 25. M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Clarendon Press) 1995, p. 154. Also see Judge Tanaka's dissenting opinion in *South West Africa* (Second Phase) 1966 ICJ Report 6.

[5] See above Chapters 1–5.

[6] See above Chapters 3–4.

[7] See above chapters 4–5.

[8] Adopted 21 December 1965. Entered into force, 4 January 1969. 660 U.N.T.S. 195, 5 I.L.M (1966) 352.

discrimination against women and against children has been condemned and outlawed by the Convention on Elimination of All Forms of Discrimination against Women[9] and the Convention on the Rights of the Child (1989)[10] respectively. Inequality and discrimination in education has been addressed by the UNESCO Convention against Discrimination in Education.[11] The theme of equality and non-discrimination has been most forcefully asserted by the United Nations in its more recent Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities[12] and the United Nations World Conference on Human Rights, Vienna Declaration and Programme of Action of the World Conference.[13]

Again as has been analysed already, equality and non-discrimination also form the critical mass of the regional instruments. These include the ECHR,[14] the EU[15] the Charter of the OAS,[16] the ADHR,[17] the AFCHPR.[18] Non-discrimination and equality has also been main concerns in the instruments adopted by the International Labour Organisation (ILO).

RELIGIOUS DISCRIMINATION AND INTERNATIONAL LAW[19]

Freedom of religion is a subject which throughout human history has been the source of profound disagreements and conflict.[20] The chronicles of humanity

[9] Adopted at New York, 18 December 1979. Entered into force 3 September 1981. UN GA Res. 34/180(XXXIV), GA. Res. 34/180, 34 GAOR, Supp. (No. 46) 194, UN Doc. A/34/830 (1979), 2 U.K.T.S. (1989); 19 I.L.M (1980) 33. See below Chapter 13.

[10] Adopted at New York, 20 November 1989. Entered into force 2 September 1990. UN GA Res. 44/25 Annex (XLIV), 44 UN GAOR Supp. (No. 49) 167, UN Doc. A/44/49 (1989) at 166; 1577 U.N.T.S. 3. 28 I.L.M (1989) 1448.

[11] Adopted 14 December 1960. Entered into force 22 May 1962. 429 U.N.T.S. 93.

[12] UN Doc. A/Res/47/35 Adopted by the General Assembly, 18 December 1992. See the Preamble, Articles 1, 2, 3(1), 4(1) of the Declaration. See below Chapter 11.

[13] *Vienna Declaration and Programme of Action* (New York: United Nations Department of Public Information) 1993 para 5 (pt 1). Adopted by the United Nations World Conference on Human Rights, 25 June, 1993.

[14] See above Chapter 6.

[15] See above Chapter 7. 261 UNTS 140; Cmnd 7461.

[16] See above Chapter 8.

[17] See above Chapter 8.

[18] See above Chapter 9.

[19] See B.G. Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (The Hague: Martinus Nijhoff Publishers) 1995; E. Benito, *Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief* (New York: United Nations) 1989; B. Dickson, 'The United Nations and Freedom of Religion' 44 *ICLQ* (1995) 327; R.S. Clark, 'The United Nations and Religious Freedom' 11 *NYUJILP* (1978) 197; D.J. Sullivan, 'Advancing the Freedom of Religion or Belief through the UN Declaration on the Elimination of Religious Intolerance and Discrimination' 82 *AJIL* (1988) 487; J. Rehman, 'Accommodating Religious Identities in an Islamic State: International Law, Freedom of Religion and the Rights of Religious Minorities' 7 *IJMGR* (2000) 65.

[20] See A. Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices*, UN Publication Sales E. 60.X.IV.2 1960; E. Benito, above n. 19; S.C. Neff, 'An Evolving International Legal Norm of Religious Freedom: Problems and Prospects' 7 *Cal. West ILJ* (1973) 543.

have seen the growth and extinction of many religions and beliefs. A promise of eternity, and of absolute truth and providence – hallmarks of many of the world religions – has acted as the great determinant of human existence. The overpowering nature of religion, however, has also been used as a weapon for generating intolerance, and as an instrument for the persecution and ultimate destruction of religious minorities. Religious intolerance and repression were the great predisposing factors of history.[21] Within the texts of religious scriptures, forms of genocide of religious minorities were sanctioned. The tragic wars of medieval times and the Middle Ages, the Crusades and the *Jihads*, translated these religious ordinances to complete and thorough effect.[22]

Religious intolerance is, unfortunately, not simply a historical phenomenon. Intolerance based on religious beliefs continues to pose a clear and serious threat to the possibility of congenial human relationships.[23] During the modern era of the United Nations, the international community of States has made tremendous strides in formulating standards regarding the promotion of individual human rights. It is recognised that freedom of religion represents an essential concern for modern human rights law. Discrimination on the grounds of religion or belief is condemned and forms a necessary feature of the United Nations human rights regime.[24] The UDHR and the ICCPR contain specific provisions relating to freedom of religion. The United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief (1981) is dedicated entirely to the issue of religious freedom.[25] Freedom of Religion is also recognised by regional human rights instruments such as Article 9 of the ECHR,[26] Article III of the ADHR and Article 12 of ACHR;[27] and Article 8 of the AFCHPR.[28]

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[21] See B. Whitaker, *Report on the Question of the Prevention and Punishment of the Crime of Genocide*, UN Doc E/CN.4/Sub.2/1985/6, pp. 6–7.

[22] L. Kuper, *International Action Against Genocide* (London: Minority Rights Group) 1984, p. 1; L. Kuper, *Genocide: Its Political Use in the Twentieth Century* (New Haven and London: Yale University Press) 1981, pp. 12–14; J. Kelsay and J.T. Johnson (eds), *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions* (New York: Greenwood Press) 1991.

[23] For examples of religious intolerance and repression of religious minorities see K. Boyle and J. Sheen (eds), *Freedom of Religion and Belief: A World Report* (London: Routledge) 1997; Minority Rights Group (eds), *World Directory of Minorities* (London: Minority Rights Group) 1997.

[24] See Articles 1(3) and 13 of the United Nations Charter; Articles 1, 2, 18, Universal Declaration on Human Rights (1948); Article 2, Convention on the Prevention and Punishment of the Crime of Genocide (1948); Articles 2, 18, 26 and 27 of the International Covenant on Civil and Political Rights (1966); Article 2, International Covenant on Economic, Social and Cultural Rights (1966); UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992).

[25] GA Res. 36/55, 36 UN GAOR Supp (No. 4) at 171 UN Doc A/36/51 1981.

[26] See above Chapter 6.

[27] See above Chapter 8

[28] See above Chapter 9.

INCONSISTENCIES WITHIN INTERNATIONAL STANDARDS AND DIFFICULTIES IN IMPLEMENTATION

The aforementioned provisions from the international instruments represent strong commitments undertaken by the international community. Alongside the provisions of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) and the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities (1992), they give an appearance of a strong consensus on issues regarding freedom of religion and protecting the rights of religious minorities. However, in reality, much of this consensus is superficial, as there are serious inconsistencies and disagreements regarding both the meaning and the substance of the right to freedom of religion.

Notwithstanding persistent references to the term 'religion' or 'belief' within international and national instruments, it has not been possible to explain the terms in a definitive manner. Attempts to incorporate a definition in the United Nations Declaration on the Elimination of All Forms of Intolerance based on Religion or Belief (1981) did not succeed.[29] The text of the Declaration represents a fragile compromise between States pursuing widely different ideological bases. Thus, at the insistence of the Eastern European States, the term 'whatever' was inserted between the words 'religion' and 'belief' in the third perambular paragraph as well as in Article 1. This insertion was aimed at extending the scope of the protection to theistic and non-theistic, and atheistic beliefs and values.[30] The lack of consensus on the definition of 'religion' or 'religious minorities' has produced unfortunate consequences. In some instances, States have denied the existence of religions and persecuted religious minorities as heretics and political enemies of the State. In other cases, certain groups have been forcibly excluded from mainstream religious faith and declared a religious minority. Thus, for example, the constitution of the Islamic Republic of Iran affords recognition to Jews, Christians and Zoroastrians as minorities. However, there is a complete refusal to accord any official and constitutional recognition to more than

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[29] The European Commission on Human Rights has treated pacifism as a philosophy coming within the ambit of the right to freedom of though and conscience, *Arrowsmith* v. *United Kingdom*, App. No. 7050/75, 19 DR 5 (1980). Also see the United States Supreme Courts in *Davies* v. *Beason* 1889, 133 USS.Ct Report 333, at p. 342 and *The Commissioner, Hindu Religious Endowments Madras* v. *Sri Lakshmindra Thiratha Swamiar of Sri Shirur Mutt*, AIR 1954 SC 282. For scholarly views see Y. Dinstein, 'Freedom of Religion and the Protection of Religious Minorities' in Y. Dinstein and M. Tabory (eds), *The Protection of Minorities and Human Rights* (Dordrecht, London: Martinus Nijhoff Publishers) 1992, 145–169 at p. 146.

[30] See UN Doc A/C.3/SR. 43 (1981).

300,000 Bahais.[31] Conversely, notwithstanding a firm belief and insistence on the part of the Ahmaddiyyas of Pakistan that they are followers of Islam, they have been denounced as non-Muslims and relegated to the status of a religious minority.[32]

The next area of substantial controversy where international law has faltered is the issue of 'freedom to change one's religion or belief'. As noted earlier, the UDHR (1948) expressly authorises the right to change religion or belief.[33] The International Covenant on Civil and Political Rights, while not in a position to make as explicit a statement as the Universal Declaration, nevertheless grants the 'freedom to have or to adopt' a religion or belief.[34] The text of the 1981 Declaration, the most recent of the international instruments on religion, fails however to make any reference to the 'right' to change religion or belief.[35] The omission of such a provision is unfortunate, and represents what one commentator has termed as 'a downward thrust in the drafting process'.[36] The fact of the matter, however, is that during the drafting stages of the 1981 Declaration there had arisen major disagreements between various blocs; in order for this Declaration and subsequent treaties such as the Convention on the Rights of the Child to be adopted, it became necessary to omit all references to freedom to change religion or belief. The *travaux préparatoires* of the Convention on the Right of the Child and the reservations drawn to Article 14 of the Convention dealing with the issue of freedom of religion confirm this point.[37]

In terms of substance, a religion or belief often tends to be a conglomeration of various values, claims and rights. Religious freedom has several dimensions.

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[31] According to Article 13 of the Iranian Constitution 'Zoroastrian, Jewish and Christian Iranians are the only recognised religious minorities, who within the limits of law, are free to perform their religious rites and ceremonies and to act according to their own canons in matters of personal affairs and religious education'. Constitution of the Islamic Republic of Iran of 24th October 1979, as amended to 28th July 1989. See A.P. Blaustein and G.H. Flanz, *Constitutions of the Countries of the World* (Dobbs Ferry: Oceana Publications) 1973 – Vol. viii.

[32] See C.H. Kennedy, 'Towards the Definition of a Muslim in an Islamic State: The Case of the Ahmaddiyya in Pakistan' in D. Vajpeyi and Y. Malik (eds), *Religious and Ethnic Minority Politics in South Asia*, (Glenn Dale: Riverdale Company Publishers) 1989, pp. 71–108; Dr. I. A. Ayaz, *Submission Made before the Working Group on Minorities* (Geneva) May 1998.

[33] Article 18 of the Universal Declaration of Human Rights. See above Chapter 3. It is important to note that tensions arose during the drafting of the UDHR. Proposals to incorporate the term 'nature' were eventually dropped because of anti-religious lobbying.

[34] Article 18 of the International Covenant on Civil and Political Rights.

[35] Article 8 of the 1981 Declaration however states that 'Nothing in the present Declaration shall be construed as restricting or derogating from any right defined in the Universal Declaration of Human Rights and the International Covenants on Human Rights'.

[36] B.G. Ramcharan, *Towards a Universal Standard of Religious Liberty in Commission of the Churches on International Affairs* (Geneva: 1987), 9.

[37] See D. Johnson, 'Cultural and Regional Pluralism in the Drafting of the UN Convention on the Rights of the Child' in M. Freeman and P. Veerman (eds), *Ideologies of Children's Rights* (Dordrecht: Martinus Nijhoff Publishers) 1992, 95–114 at p. 98. See Chapter 14 below.

A religion is not simply a personal belief but invokes teachings, practices, worship, observance and private as well as public manifestations of these beliefs and values.[38] There is a strong tendency among religions to invoke complete and absolute submission, and in the process they are likely to affect many aspects of human life including matrimonial and family affairs, family planning, care of children, inheritance, public order, food and diet, and freedom of expression and association.[39] The collective dimension of religious freedom raises complex issues within the individualistic framework of human rights in domestic and international law.[40]

A particularly serious difficulty arises from the claims made by religions or beliefs to have a complete and absolute 'monopoly of truth'.[41] It is this claim to a monopoly of the truth which has served 'as a basis of countless "holy, divine or just wars" and "crusades" waged against so-called "heretics" or "infidels"'.[42] Religions and beliefs also have the tendency of becoming rigid, and their followers intolerant towards other 'competing' religious values and philosophies. This intolerance, as Macaulay puts it, can lead a follower to the view that:

> [I] am in the right and you are wrong. When you are stronger, you ought to tolerate me; for it is your duty to tolerate truth. But when I am stronger, I shall persecute you; for it is my duty to persecute you.[43]

International law, like national laws, is confronted by the problem of religious extremism and rigidity. In view of the variance in State practices, international law has faced substantial difficulties in formulating established principles governing freedom of religion and non-discrimination for all religions. As one commentator has remarked:

> [t]he question of religion takes international law to the limits of human rights, at least in so far as the law functions in a community of States. It is quite meaningless, for example, to the adherents of a religion to have their beliefs or practices declared to be contrary to 'public morality'. To the believer, religion is morality

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[38] See the General Comment by the Human Rights Committee, General Comment 22 on Article 18 of the ICCPR (48th Session). 20th July 1993.

[39] *Kokkinakis* v. *Greece*, Judgment of 25 May 1993, Series A, No. 260-A (proselytism); European Commission on Human Rights in *X* v. *UK*, App. No. 8160/78, 22 DR 37–38 (1981) (Time off work for Friday prayers); European Commission on Human Rights *Choudhury* v. *United Kingdom*, App. No. 17439/90, 12 HRLJ (1991) 172 (Blasphemy). See also IACHR Annual Report 1978–9, 251 (prosecution of Jehovah's witnesses for unwillingness to swear oath to military service, to recognise the State and symbols of the State). Also see the US Supreme Court in *Church of Lukimi Babalu Aye, Inc. & Ernesto Pichardo* v. *City of Hialeah*, 124 L.Ed.2d 472 (1993) (rituals) and the Indian Supreme Court in *Mohammed Ahed Khan* v. *Shah Bano*, 1985 AIR SC 945 (Muslim Personal Laws).

[40] See G. Gilbert, 'Religious Minorities and their Rights: A Problem of Approach' 5 *IJMGR* (1997) 97.

[41] Tahzib, above n. 19, at p. 30.

[42] Ibid. p. 31.

[43] T.B. Macaulay, *Cultural and Historical Essays* (London) 1870, 336.

itself and its transcendental foundation grounds it more firmly in terms of obligations than any secular rival, or the tenets of other religions. All religions are to a greater or lesser extent 'fundamentalist' in character in that they recognise that theirs is the just rule, the correct avenue to truth.[44]

The difficulties inherent in the issue of freedom of religion become prominent when contrasted with the international developments in relation to the prohibition of racial discrimination and apartheid. While in its early years the United Nations approached the issue of racial and religious discrimination with equal vigour, with the emergence of new States it was the issue of racial (not religious) discrimination which attracted international concern.[45] The abolition of racial discrimination and the demolition of colonialism, apartheid and racial oppression were less controversial subjects and suited the interests of the majority of the member States of the United Nations. On the other hand, the issue of freedom of religion and religious non-discrimination was extremely sensitive; even an inquiry into the treatment of religious practice within the General Assembly provoked angry responses. In its Resolution 1510 (XV) of 12 December 1960, the General Assembly condemned all manifestations and practices of racial, religious and national hatred in the political, economic, education and cultural spheres of the life of society as violations of the Charter of the United Nations and the provisions of the Universal Declaration of Human Rights. However, serious differences emerged in relation to possible action to combat racial and religious discrimination. In the end, as a compromise, it was decided to create separate instruments dealing with race and religion. According to Tahzib:

> [t]he decision to separate the instruments on religious intolerance from those on racial discrimination constituted a compromise solution designed to satisfy a number of conflicting viewpoints. Western states insisted on addressing both matters in a joint instrument. Communist states were not anxious to deal with religious matters. Arab states were eager to displace the question of anti-Semitism. African and Asian states considered the question of religious intolerance a minor matter as compared with racial discrimination. By separating the issues, the Communist, Arab, African and Asian states could obviously delay, if not prevent, the adoption of special instruments of religious intolerance.[46]

In 1962, the General Assembly requested the Economic and Social Council to prepare a draft declaration and convention on the elimination of all Forms of racial discrimination. The General Assembly in its Resolution 1904 (XVIII) adopted on 20 November 1963, proclaimed the Declaration on the

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[44] P. Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press) 1991, at p. 324.

[45] Lerner, above n. 1, at p. 75.

[46] Tahzib, above n. 19, at p. 142.

Elimination of All Forms of Racial Discrimination. Two years later, the United Nations General Assembly adopted, with overwhelming support, the Convention on the Elimination of All Forms of Racial Discrimination. Efforts to draft an international treaty on the elimination of discrimination based on religion or belief have had a very difficult response.[47] The farthest the United Nations has gone in terms of drafting a specific instrument on religious freedom is a General Assembly Declaration adopted in 1981. In its capacity as a General Assembly Resolution, the Declaration is not a binding document *per se*. Even as a political and moral expression, the image of the Declaration has been tarnished by many deviations and disagreements among States.

It is probably the case that the constitutional provisions and legislation overwhelmingly satisfy the broad and generalised requirements of a non-discriminatory stance on the basis of religion, though even here a number of cases point in the opposite direction.[48] Freedom of religion or belief itself is a conglomeration of various rights and values and is capable of manifestation in innumerable ways.[49] 'Religion' or 'belief' is in many instances regarded as providing a complete code of life, determining every pattern of social behaviour. Its pronouncements affect every aspect of life, including matrimonial and family affairs, public order, freedom of expression and association, freedom to preach and freedom to manifest one's religion as matter of conscience and faith.[50] Domestic and international tribunals have often been confronted by the faithfuls of different religions and sects, all raising questions of a serious nature.[51] Therefore, although the plethora of international treaties since 1945 clearly reflects the view that the fundamental principle of the international law of human rights is that all individuals are to be treated equally and ought not

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[47] P. Alston, 'The Commission on Human Rights' in P. Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press) 1992, p. 134.

[48] Article 19 of the Iranian Constitution provides as follows 'the People of Iran, regardless of their ethnic, family or tribal origins shall enjoy equal rights. Colour, race, language or the like shall not be a cause for privilege'. Thus the Constitution excludes religion as a criterion for non-discrimination, an action which cannot be treated as non-deliberate. See Blaustein and Flanz, above n. 31.

[49] See the Human Rights Committee, *General Comment 22, Article 18*, 48th Session, 1993.

[50] See the cases before the Human Rights Committee e.g. *Karnel Singh Bhinder* v. *Canada*, Communication. No. 208/1986 (28 November 1989), CCPR/C/37/D/208/1986; *Coeriel et al.* v. *The Netherlands*, Communication No. 453/1991 (9 December 1994), UN Doc. CCPR/C/52/D/453/1991 (1994).

[51] See the US Supreme Court in *Church of Lukimi Babalu Aye, Inc.* & *Ernesto Pichardo* v. *City of Hialeah*, 124 L.Ed.2d 472 (1993); also see the jurisprudence under the European Convention on Human Rights (1950) e.g. *Kokkinakis* v. *Greece*, Judgment of 25 May 1993, Series A, No. 260-A; *Otto-Preminger Institute* v. *Austria*, Judgment of 20 September 1994, Series A., No. 295-A. Note also Pakistani and Indian case law see e.g. *Narendra* v. *State of Gujrat* AIR 1974 SC 2098; *Jagdishwar Anand* v. *P.C.*, Calcutta (1984) S.C 51; *Ratilal Panchad Ghandhi and Others* v. *State of Bombay and Others* AIR (SC.) (1954), 388; *Rev. Stainsislans* AIR 1975 MP 163; *Saifuddin Saheb* AIR 1962 SC 853; *Commissioner of Hindu Religious Endowments Madras* v. *Sri Lakshmandra* AIR (1954) SC 388; *Sarwar Hussain* AIR (1983) All 252; *State of Bombay* v. *Narasu Appa Mali* AIR 1952 Bombay 1984; *Mohammed Ahed Khan* v. *Shah Bano Begum* 1985 AIR SC 945.

to be discriminated against merely on the basis of their belonging to a certain ethnic, religious or linguistic group, it is argued that the strength of the prohibition in each case differs. Hence, while the legal norms in relation to the prohibition of racial discrimination are regarded as a fairly uncontroversial example of *jus cogens*,[52] the same cannot be said with equal conviction in relation to the prohibition of discrimination based on religion.

In view of the existing dissensions it is difficult to expect the emergence of a greater measure of consensus. There are no immediate prospects for the adoption of a specific treaty focusing on the elimination of religious discrimination. Having said that, while a radical shift in the existing position seems impossible to attain, the ingenuity of a number of human rights processes has led to positive developments towards reducing discrimination and intolerance on the grounds of religion. These processes include a more constructive usage of existing procedures, as well as a greater consciousness of the issues of religious discrimination in group rights discourses and standard-setting mechanisms. Using Article 18 of the ICCPR as its base, the Human Rights Committee has invoked the Reporting, individual Communication and General Comment procedures within the Covenant to elaborate upon the meaning and scope of the right to religious non-discrimination. Religious communities are the beneficiaries of the emerging jurisprudence on group rights. The United Nations General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities 1992 places a special emphasis on non-discrimination and equality for members of religious minorities. The ILO Convention No. 169 on Indigenous and Tribal Peoples 1989 presents undertakings from States to protect and preserve the beliefs and spiritual well-being of indigenous peoples.[53] The States parties to the Convention on the Rights of the Child 1989 commit themselves not to discriminate against the child, irrespective of religious beliefs and his or her minority or indigenous background.[54]

A significant element in furthering the human rights norms has been the use of Rapporteurs, focusing on a thematic, geographical or territorial basis.[55] The role of institution of Rapporteurs has been particularly valuable not only in publicising instances of violations based on religious intolerance but also in persuading governments to follow the guidelines provided by the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992).

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[52] I. Brownlie, *Principles of Public International Law*, 4th edn (Oxford, Clarendon Press) 1990, p. 513. See above Chapter 1.

[53] See Articles 5(a), 7(a) and 13. See below Chapter 12.

[54] See Articles 2 and 30. See below Chapter 14.

[55] See above Chapter 2.

In this regard the contributions made by the Special Rapporteur on Religious Intolerance, of the United Nations Commission on Human Rights, are of enormous significance and deserve fuller analysis. The initial appointment of the Rapporteur had been authorised by the Commission on Human Rights in its Resolution 1986/20.[56] This appointment was to last for a period of one year, during which period the Rapporteur was mandated *inter alia* to examine incidents and governmental actions in all parts of the world inconsistent with the provisions of the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief. Resolution 1987/15 extended the mandate of the Rapporteur for a further year. This mandate has since been extended by subsequent Resolutions of the Commission.[57]

From 1988, the Special Rapporteur has submitted yearly reports which are extremely instructive not only in highlighting incidents of religious intolerance but also in providing constructive solutions and making valuable recommendations.[58] The work of the Special Rapporteur is characterised by a number of activities – these include sending Communications to various States and analysing their responses in the light of the prevalent human rights standards. The Communications also include urgent appeals where a particular individual or a group is under imminent threat. Another significant feature of Special Rapporteur's work is *in situ* visits and their follow-ups, which are valuable

> both for gathering opinions and comments on all alleged incidents and government action incompatible with the Declaration and for analysing and passing on the experience and positive initiatives of States pursuant to General Assembly Resolution 50/183 and Commission on Human Rights Resolution 1996/2B.[59]

The current Special Rapporteur, Professor Abdelfattah Amor, has made important visits to countries including China,[60] Pakistan,[61] Greece[62] and India.[63] Several meaningful objectives have been attained through these visits. Not only have they allowed the Special Rapporteur to form a clearer view of the nature and extent of the violations of the rights of religious communities,

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[56] 10 March 1986 (42nd Session).

[57] See the Commission's Resolutions 1988/55; 1990/27; 1995/23.

[58] See E.CN.4/1988/45 and Add. 1; E.CN.4/198/44; E.CN.4/1990/46; E.CN.4/1991/56; E.CN.4/1992/52; E.CN.4/1993/62 and Corr and Add.1; E.CN.4/1994/79; E.CN.4/1995/91 and Add.1; E.CN.4/1996/95 and Add.1 and 2; E.CN.4/1997/91 and Add.1 and also the General Assembly at the 50th 51st and 52nd and 53rd Sessions (A/50/440; A/51/542 and Add.1 and 2; A/52/477 And Add.1) E.CN.4/1998/6.

[59] *Report submitted by Mr Abdelfattah Amor, Special Rapporteur in accordance with the Commission on Human Rights Resolution* 1996/23E/CN.4/1997/91, para 44.

[60] See E/CN.4/1995/91; November 1994.

[61] See E/CN.4/1996/95.Add.2 December 1995.

[62] See A/51/542/Add.1. June 1996.

[63] See E/CN.4/1997/91/Add.1. December 1996.

but in some instances the Rapporteur has been able to extract valuable concessions on religious equality from the governments concerned.[64]

RIGHT TO RACIAL EQUALITY AND NON-DISCRIMINATION IN INTERNATIONAL LAW

The international Covenants

As noted above, the underlying theme of the international bill of rights is the concept of equality and non-discrimination. The comment is particularly apt in its application to ICCPR. As one commentator has aptly stated 'equality and non-discrimination constitute the most dominant single theme of the [Civil and Political Rights] Covenant'.[65] According to Article 2(1) of ICCPR each States party undertakes to:

> Respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant, without distinction of any kind, such as race, colour, sex, language, and religion, political or other opinion, national or social origin, property, birth or other status.[66]

Article 3, while providing for equality for men and women, states:

> The States Parties to the present Covenant undertake to ensure the equal rights of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 25 provides that:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:
>
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
> (c) To have access, on general terms of equality, to public service in his country

One of the primary articles on equality and non-discrimination is Article 26 according to which:

> All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against

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[64] On the role of Rapporteurs see above Chapter 2.

[65] B.G. Ramcharan, 'Equality and Non-Discrimination', in L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press) 1981, 246–269 at p. 246.

[66] See above Chapter 4.

discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2(2) of the ICESCR provides that:

> 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.[67]

Article 2(1) and 26 of ICCPR vary in their terminology. Article 2(1) uses the term 'distinction' while Article 26 invokes the phrase 'discrimination'. It also needs to be noted that Article 2(2) of the ICESCR relies upon the term 'discrimination'. The ambiguity generated by the differential use of the terms 'distinction' and 'discrimination' is exacerbated by the fact that there is no concerted attempt to define either of these terms,[68] although it is probably the case that the terms have been used interchangeably. While analysing the *travaux préparatoires*, Craven takes the view that the usage of the term 'discrimination' in the ICESCR (as opposed to 'distinction') was more suitably applied for setting into operation affirmative action policies.[69] Within the Covenants there is also an absence of any explicit provisions relating to policies of affirmative action, which tends to reinforce the anti-collective stance. The Human Rights Committee has, however, taken the view that affirmative action policies are provided for by the articles of the Covenant.[70]

International Convention on the Elimination of All Forms of Racial Discrimination (the Race Convention)

The adoption and entry into force of the Race Convention provided a significant step forward in the attempt to combat racial discrimination at the global level.[71] The Race Convention was adopted on 21 December 1965[72] and entered into force on 4 January 1969. The Convention was adopted by 106 votes to none. Although Mexico abstained initially, it later declared an affirmative vote in support of the provisions of the Convention.[73] The speed and number of State ratifications indicates the general consensus on

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[67] GA Res. 2200 A, 21 UN GAOR, (Supp.No 16) 49–50.

[68] McKean, above n. 1, at pp. 148–152.

[69] Craven, above n. 4, at p. 161.

[70] See D. McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press) 1991, pp. 275–276.

[71] See T. Meron, 'The Meaning and Reach of the International Convention on the Elimination of all Forms of Racial Discrimination' 79 *AJIL* (1985) 283 at p. 283.

[72] UN GA Res. 2106A (XX).

[73] Thornberry, above n. 44, at p. 259.

the issues relating to the prohibition of Racial Discrimination. It currently stands as one of the most widely ratified treaties in the international arena.[74]

While the Declaration on the Elimination of Racial Discrimination provided the driving force for the incorporation of both substantive and normative articles of the Convention, it would be fair to suggest that the adoption of the Convention within two years of the Declaration had its roots in the political support of the newly emerging States of Africa and Asia, who have been particularly strong in condemning racial discrimination and apartheid.[75] The provisions of the Convention, although undeniably a major advance in the cause of eliminating racial discrimination, nonetheless raise a number of complex questions reflecting the existent weaknesses in international law relating to the prohibition of discrimination.

Complications in the definition of 'discrimination' and the scope of the Convention

The preamble to the Convention while introducing the matters under consideration, places emphasis on equality and upon the importance of removing racial barriers. Unlike the Declaration, the Convention does contain a definition of 'racial discrimination' which is:

> 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.[76]

The importance of the contents of the definition need to be noted. 'Racial discrimination' is given a broad meaning; according to the terms of the Convention, it may be based on a variety of factors like race, colour, descent, and national or ethnic origin. According to the definition, four kinds of acts could be regarded as discriminatory: any distinction, exclusion, restriction or preference. For any of these acts to constitute discrimination they must be based on (a) race; (b) colour; (c) descent; (d) national origin or (e) ethnic origin and should have the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise on an equal footing of human rights and fundamental freedoms in the political, economic, social, cultural or any other

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[74] For the table of ratification see appendix II.

[75] See J.P. Humphrey, 'The UN Charter and the Universal Declaration of Human Rights' in E. Luard (ed.), *The International Protection of Human Rights* (London: Thames & Hudson) 1967, 39–56 at p. 56.

[76] Article 1(1).

area of public life.[77] The definition has been used as the basis of other human rights treaties.[78]

The Race Convention appears to have a broader perspective than the ICCPR, which is limited to rights addressed in that particular instrument. Article 1(1) of the Race Convention, in contrast, applies to racial discrimination 'which has the purpose or effect of nullifying or impairing, recognition, enforcement or exercise of all human rights and fundamental freedoms'.[79] However, in another respect the scope of the Race Convention is far more limited as it only deals with racial discrimination and any discrimination based on grounds of religion, sex or political opinion is prima facie outside its scope. The definition of racial discrimination raises a number of intriguing though controversial issues.[80] There is a constant debate over the nature of equality that is aspired to: how far is the separation of different groups on the basis of ensuring equality compatible with the provisions of the Covenant? How far does the Convention impose obligations or extend itself in prohibiting discrimination in private life as opposed to public life – with the meaning of what actually constitutes 'public life' itself being a subject of controversy.[81]

It is equally important to note the situations where the Convention (as provided in other paragraphs of Article 1) is not applicable. The Convention is not applicable in cases of 'distinctions, exclusions, restrictions or preferences' made by a State party between citizens and non-citizens and cannot be interpreted as affecting the laws regulating nationality, citizenship[82] or naturalisation, 'provided that such provisions do not discriminate against any particular nationality'.[83] Hence, while distinctions made solely on the basis of race, colour, descent, national or ethnic origin are not permissible,[84] the provisions of Article 1(2) appear objectionable as permitting de facto discrimination on the basis of nationality. The provisions of the Article represent the unfortunate reality that non-nationals can be denied equal treatment under international

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[77] Ibid. p. 28.

[78] See the Convention on Elimination All forms of Discrimination Against Women (1979) below Chapter 13.

[79] Meron, above n. 71, at p. 286.

[80] See Vierdag, above n. 1.

[81] At first sight the usage of the terminology may restrict the activities contained therein to public life (see Article 1(1)). However a number of other provisions indicate a broader approach e.g. see Article 2(1)(d). Similarly Article 5 provides for a number of rights not necessarily coming within the ambit of public life. To reconcile these apparently conflicting approaches it has been suggested that the term public life is used in the wider sense encompassing all sectors of organised life of community, an interpretation presented in support of the rejection of draft proposal of the limiting of the scope of Article 1(1) of the Convention. See M.S. McDougal, H.D. Lasswell and L-C. Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (New Haven, Conn.: Yale University Press) 1980, p. 593.

[82] Article 1 para 2.

[83] Ibid. para 3.

[84] Article 1(3).

law. The denial of citizenship as a tool for discrimination has been applied in several States.

Article 2 of the Race Convention sets out State obligations in detail with the aim of pursuing 'by all appropriate means and without delay, a policy of eliminating racial discrimination in all its forms and promoting understanding among all races'. The parties not only undertake to refrain from permitting discriminatory acts, but promise to take positive steps through legislative and administrative policies to prohibit and condemn racial discrimination. Article 2(1) reads as follows:

> States parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end
>
> (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
> (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any person or organisations;
> (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
> (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any person, group or organisation;
> (e) Each State Party undertakes to encourage, where appropriate, integrationist multi-racial organisations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

Article 2(1) imposes a twofold obligation on parties: one positive and the other negative. The negative obligation prevents parties or their agents from undertaking acts or practices of racial discrimination against persons or institutions. The second – positive – obligation is conducted through effective, concrete measures to bring to an end any form of racial discrimination. Hence, while Article 2(1)(b) prevents a State party from sponsoring, defending or supporting racial discrimination by any persons or organisations, Articles 2(1)(c) and (d) impose on State parties positive obligations to take effective measures to eradicate the possibility of racial discrimination by any person, group of persons or organisation. Article 2(1)(e) perhaps reveals the essence of the whole section, stating that the aim of each State party is to encourage the integration of racial groups in the nation-State.

One of the most significant features of the Convention is the exception to the general rule of equality for all individuals. The provisions relating to affirmative action find expression in Articles 1(4) and 2(2).[85] According to Article 1(4):

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure to such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

This is complemented by Article 2(2), which represents a detail of the obligations undertaken by the States parties, who:

> Shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

The two provisions are of potentially considerable significance for attempts to establish regimes of genuine equality for individuals. The insertion of these provisions are necessary as the Convention [aims] 'not only to achieve *de jure* equality but also de facto equality, allowing the various ethnic, racial and national groups to enjoy the same social development. The goal of de facto equality is considered to be central to the Convention'.[86] The essence of both these articles of the Race Convention is that, although they allow for special measures, they are designed to be of a temporary nature. Their essential purpose is to generate equality in real terms. McKean's view is that Articles 1(4) and 2(2) provide a synthesis

> which incorporates the notion of special temporary measures, not as an exception to the principle but as a necessary corollary to it, demonstrates the fruition of the work of the Sub-Commission and the method by which the twin concepts of discrimination and minority protection can be fused into the principle of equality.[87]

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[85] For similar provisions see Article 2(3) of the Declaration, Article 5 of the ILO Convention 328 U.N.T.S 247; Cmnd. 328. According to *UNESCO Convention* provision of separate schools by States parties will not be deemed discriminatory. Also see the 1978 *UNESCO Declaration on Race and Racial Prejudice* Article 9(2).

[86] A. Eide, *Possible Ways and Means of facilitating the Peaceful and Constructive Solution of Problems Involving Minorities* E/CN.4/Sub.2/1993/34, para.95.

[87] McKean, above n. 1, p. 159.

A number of provisions of the Convention have a very broad scope, and in practice may seem rather over-ambitious. For instance Article 4, primarily for this reason, has been regarded as one of the most controversial of Articles within the Convention.[88] According to it, State parties:

> Condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this convention *inter alia*:
>
> (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement or racial discrimination, as well as acts of violence or incitement of such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
> (b) Shall declare illegal and prohibit organisations, and also organised and all other propaganda activities, which promote and incite racial discrimination, and shall recognise participation in such organisations or activities as an offence punishable by law;
> (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

The provisions of Article 4 carry far-reaching implications. State parties not only take upon themselves only the prohibition of discriminatory acts, but also undertake to declare illegal and prohibit organisations and activities which attempt to disseminate opinions of racial superiority inciting racial discrimination. The scope of the obligations imposed are also far wider than those of other international provisions such as 20(2) of ICCPR. Article 4 uses a very wide and strong terminology and a question arises regarding the resolution of any conflict of rights which is inherent in the provisions of the Article.[89]

According to Article 5, States undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone without distinction as to race, colour or national or ethnic origin to equality before the law. The article then goes on to enumerate a number of rights, including both civil and political rights as well as economic, social and cultural rights. Article 6 provides remedies for those who have been involved in racial discrimination, be it in their official or unofficial capacity. It provides:

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[88] M. Korengold, 'Lessons in Confronting Racist Speech: Good Intentions, Bad Results and Article 4(a) of the Convention on the Elimination of All Forms of Racial Discrimination' 77 *Minnesota Law Review* (1993) 719.

[89] Which right is to be given priority (freedom of expression as against non-discrimination) UN Docs E/CN.4/837, paras 73–83; E/3873, paras.144–188; A/6181, paras 60–74.

> State Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other States institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

It has been suggested that a liberal interpretation of the provisions of the article, particularly bearing in mind the phrase 'just and adequate reparation or satisfaction' for any damage suffered as a consequence of racial discrimination, would be a considerable advance on previous instruments such as Article 8 of the UDHR, Article 2 of the ICCPR, and Article 7(2) of the Declaration on the Elimination of All Forms of Racial Discrimination, that have dealt with the subject previously.[90] In accordance with Article 7, States parties undertake to adopt immediate and effective measures, particularly in the field of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination; State parties also agree to promote understanding, tolerance and friendship among nations and racial or ethnic groups.

Issues of implementation

We have already noted that there exists a broad consensus on the issue of the prohibition of racial discrimination. This consensus is evidenced through an analysis of international treaty law as well as customary law. As far as the Race Convention is concerned, its unique position is reflected through the degree of its ratifications and by the readiness of States to endorse its provisions by the necessary amendments to their domestic legislation. A closer analysis of even the issue of racial equality, however, discloses a number of weaknesses in implementation. Discrimination based on race, colour, ethnicity, language, religion and culture is a historical as well as a contemporary phenomenon. The consequences of traditional practices of discrimination have produced complex problems in contemporary terms; it is largely recognised that legal prohibitions *per se* would not be completely effective in societies with an ancient history of rivalries between communities or where there are vast economic, educational and cultural differences among various groups.

The differences are generally a result of prejudice and past acts of discrimination. As Meron rightly points out:

> Past acts of discrimination have created systematic patterns of discrimination in many societies. The present effects of past discrimination may be continued or even exacerbated by facially neutral policies or practices that, though not purposely discriminatory, perpetuate the consequences of prior, often intentional

[90] Lerner, above n. 1, at pp. 57–58.

discrimination. For example, when unnecessarily rigorous educational qualifications are prescribed for jobs, members of racial groups who were denied access to education in the past may be denied employment.[91]

Craven makes a similarly valid point, that 'the concept of discrimination in international law, while requiring strict scrutiny of any differential treatment based on a suspect classification does not automatically prohibit differential treatment if justified by some socially relevant objective'.[92]

In order to overcome past disabilities, a strong case can be made for affirmative action. However, if there is logic in the argument for overcoming past acts of discriminatory behaviour, there is also a strong lobby which would not be in favour of prima facie discriminatory treatment in order to compensate for previous acts. In order to overcome past acts of discrimination going back to earlier generations, would it be fair and just to give priority to contemporary, less meritorious claims?

The Race Convention, as has been seen, provides for affirmative action policies. On the other hand, a closer analysis of the *travaux préparatoires* and the reservations entered against the articles relating to the provisions of affirmative action adds complexity to the issues. It remains unclear whether the broad consensus which is vested in the general principles of the Convention is also reflected in support of the provisions related to affirmative action. It may well be that at present, in view of the lack of clarity as to State practice, it is difficult unequivocally to accept the view that the principles relating to affirmative action exist in customary international law. Another recurrent problem which deserves attention is the nature of the political and administrative structures in various States. There are a number of patently undemocratic regimes which perpetuate themselves and retain control by the exploitation of conflicts within their society. One has only to consider the problems confronted by such States as Nigeria, Rwanda, Burundi and a number of other African, Latin American and Asian States to appreciate the problems faced.[93]

The problems of racial, ethnic and religious tensions are confronted by most States, regardless of their official admission. Whereas these tensions are evident in the advanced industrialised States of North America and Western Europe,[94] extreme forms of racial and ethnic divisions have taken place in States which have recently gained their independence. Tribal, ethnic and racial antagonism has been witnessed in many of the States of Africa. Similarly, acute divisions have been evident in Asia, with the prime examples of Sri Lanka, and India. In Malaysia for instance, as Van Dyke explains in some

[91] Meron, above n. 71, p. 289 (footnotes omitted).
[92] Craven, above n. 4, at p. 184.
[93] For a coverage of the pertinent issues see Minority Rights Group (eds), above n. 23.
[94] Consider e.g. the recent ethnic tensions and riots in Bradford, UK.

detail, the issues of religion, race and linguistic identity are intertwined and discrimination by the Malays, 'the Bumiputras', persists against the Chinese, Indians and others.[95] In Sri Lanka, through a culmination of discriminatory legislation and governmental policies, there has been a sustained effort to discriminate against the Tamils. The early restrictive and discriminatory laws relating to citizenship, and the linguistic and religious policies which continue to work against the Tamils, present an unfortunate picture.[96] In view of the socio-economic, political and historical difficulties it is not surprising that bringing about a complete end to all forms of racial discrimination remains an enduring and painstaking task. The implementation mechanisms which exist in pursuance of States' obligations under the Convention certainly provide a reflection of the difficulties inherent in combating racial discrimination.

The Committee on the Elimination of All Forms of Racial Discrimination (CERD)[97]

The key international implementation mechanism which has been devised as far as the elimination of racial discrimination is concerned is the procedure adopted under the Race Convention. The main vehicle for reviewing the performance of the Convention and measures of implementation is CERD. The rules providing for the constitution and the functions of the CERD are stated in Article 8 and supplemented by the Committee's Rules of Procedure. The CERD consists of eighteen individuals serving for a period of fours years. They are elected from a list of persons nominated by the State parties from among their own nationals. The experts are of high moral standing, elected by State parties from their nationals but acting in their personal capacity.[98] The Committee is involved in all the procedures concerned with implementation. These systems consist of (a) a reporting procedure, (b) an inter-State complaints procedure, (c) an ad hoc conciliation commission to deal with inter-State complaints, (d) petitions by individuals or groups on an optional basis, and (e) petitions by inhabitants of colonial territories. The key mechanism to

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[95] Van Dyke, above n. 1, at p. 111.

[96] E. Nisan, *Sri Lanka: A Bitter Harvest* (London, Minority Rights Group) 1996; P. Hyndman, 'The 1951 Convention Definition of Refugee: An Appraisal with Particular Reference to the Case of Sri Lankan Tamil Applicants' 9 *HRQ* (1987) 49.

[97] See K.J. Partsch, 'The Committee on the Elimination of Racial Discrimination' in P. Alston (ed.), above n. 47, at pp. 339–368; N. Bernard-Maugiron, '20 Years After: 38th Session of the Committee on the Elimination of Racial Discrimination' 8 *NQHR* (1990) 395; N. Lerner, 'Curbing Racial Discrimination–Fifteen Years CERD' 13 *IYHR* (1983) 170; A.F. Bayefsky, 'Making the Human Rights Treaties Work' in L. Henkin and J.L. Hargrove (ed.), *Human Rights: An Agenda for the Next Century* (Washington, DC: American Society of International Law) 1994, pp. 229–296; T. Buergenthal, 'Implementing the UN Racial Convention' 12 *Texas International Law Journal* (1977) 187.

[98] Article 8(1).

date remains that of State reporting, upon which we shall focus our attention. Article 9(1) provides:

> State 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 and which give effect to the provisions of this convention:
>
> (a) within one year after the entry into force of the Convention for the State concerned; and
> (b) thereafter every two years and whenever the Committee so requests. The Committee may request further information from the State Parties

According to Article 9(2):

> The Committee shall report annually, through the Secretary-General, to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of the reports and information received from State Parties. Such suggestions and general recommendations shall be reported to the General Assembly together with comments, if any, from the State Parties.

States who are overdue in their submission of reports can produce consolidated reports. CERD has insisted that the reporting obligation is a substantial one and imposes an obligation on State parties to provide detailed information on a range of governmental activities. Reports should be sufficiently exhaustive to inform of situations or circumstances which are outside of the ambit of the governmental activities.[99]

Procedure

The reporting procedure is designed to obtain information regarding legislative and administrative practices of the States parties. Reports also help in the identification of the overall policies which affect the position of racial or other less advantaged groups. Once a report is submitted it may take up to 12 months before it is considered. A confirmed list of reports due for consideration can be provided three months before the session. The Committee meets for two sessions a year, each of three weeks.[100] These sessions take place in March and August and are held in Geneva. There are two three-hour meetings each day. Once received by the Committee, each report is assigned to a Country Rapporteur. The Country Rapporteur may have specialist knowledge

[99] General Guidelines for the preparation of State Reports; see M. O'Flaherty, *Human Rights and the UN: Practice before the Treaty Bodies* (London: Sweet and Maxwell) 1996, p. 90.

[100] See M. Banton, 'Decision-taking in the Committee on the Elimination of Racial Discrimination' in P. Alston and J. Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press) 2000, pp. 55–78.

about the state of affairs of the particular country and will undertake a detailed study of the report and identify key issues arising from it. He also prepares a list of questions to be put to the State representative.

State reports are considered in public sessions. Reports are normally introduced by the representative of the State. After the report has been introduced by the State representative, the Country Rapporteur addresses the Committee and presents his (or her) views of the report. Then it is up to the discretion of the members of CERD to make comments on the report. Once comments have been made by members of CERD, it is conventional for the State representative to provide answers or brief explanations of the issues raised. Alternatively he may offer to provide answers to outstanding issues either in the form of additional information or in the next report.[101]

After having considered the report from the State, CERD adopts its 'Concluding Observations'. The concluding observations comprise a critique of the State report and of the response of the State representative to the scrutiny of the Committee, noting positive and negative features, and presenting suggestions and recommendations. Since 1995 the Committee has adopted 'Concluding Observations' in meetings which are open to the public. Despite the often considerable delay in receiving State reports, with frequent and significant omissions or lack of information, the flexibility and ingenuity with which the Committee has performed its task has made the reporting procedure a success. Its flexibility in receiving delayed reports, the use of a variety of sources of information alongside the content of the report, providing guidance as to the content of the State reports, and accommodating a system of examination of reports have all contributed towards a positive element.

The experience of CERD has revealed that a number of States regularly misconceive their obligations under the Convention. While some States have perceived no reporting obligations if they claim that racial discrimination does not exist within their States,[102] many others have felt under no obligation to report periodically if they have not instituted any further measures to combat discrimination.[103] Confusion has also been reported where a State declares that the ratification of treaty provisions is self-executory and the State party itself does not have to take any action to make changes in the constitutional or legal framework.[104] A frequent occurrence noted by CERD has been the delay in the preparation and submission of these reports. Thus, for example, Bangladesh's Seventh, Eighth and Ninth periodic reports have been due from July 1992–July 1996. Nepal submitted its (9–13) consolidated reports after

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[101] See O'Flaherty, above n. 99, at p. 90.

[102] Note e.g. the position adopted by the Yemen and the comments given to its reports by CERD A/47/18 para 178. Banton, above n. 1, at p. 300.

[103] See generally Lerner, *The UN Convention*, above n. 1.

[104] Ibid. p. 116.

a delay of nine years. Concerns regarding incomplete and unsatisfactory information about legislative, judicial and administrative mechanisms relating to implementation have regularly been put forward by CERD.

Inter-State complaints procedure

The inter-State procedure under Articles 11–13 is supervised by CERD, with provisions for subordinate ad hoc conciliation commissions in the case of more serious disputes.[105] The provisions of the aforesaid Article are similar in nature to that of the ICCPR[106] and other regional human rights instruments. In the case of the ICCPR, however, the inter-State procedure applies only to States which have specifically recognised the competence of the Committee to receive reports.[107] This procedure has not been used frequently, although some States have made allegations against other States (non-parties) of having generated difficulties in their implementation obligations.

Individual or group Communications

Individual or group Communications under the Convention operate on the basis of an optional system, with States parties being required to make a Declaration accepting the procedure. In contrast to the Human Rights Committee, CERD has thus far considered very few Communications. Since 1984, the Article 14 mechanism has been in operation although its significance has not matched that of the first Optional Protocol under ICCPR. Article 14(1) provides for a provision whereby a State party:

> may at any time declare that it recognises the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.[108]

According to Article 14(1) individuals or groups may submit communications. 'Groups of individuals', however, does not mean organisations.[109] However according to Article 14(2) a State party agreeing to this procedure 'may establish or indicate a body within its national legal order which shall be competent to receive and consider petitions or group of individuals within its jurisdiction who claim to be victims'. Hence there exists the probability

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[105] Articles 12 and 13.

[106] See Articles 41 and 42 of the ICCPR.

[107] Article 41.

[108] See the Optional Protocol to ICCPR 1966, Article 44 of ACHR 1969.

[109] See S. Lewis-Anthony, 'Treaty-Based Procedures for Making Human Rights Complaints within the UN System' in H. Hannum (ed.), *Guide to International Human Rights Practice*, 3rd edn (New York: Transnational Publishers) 1999, 41–59 at p. 50.

'of a double safeguard against the embarrassments which may be caused to a State party by individual or group petitions'.[110] The attenuated nature of the provisions of the Article are reflected through a careful reading, and the usage of the term 'petition' rather than 'communication' has led cynics to point out that the provisions are meant only 'to deliver the message'.[111] The Committee obtains all relevant information largely through written Communications. CERD, after having considered this information then decides, first, whether the complaint is admissible and if so it provides an 'opinion' on the merits of the case. CERD is not a court and does not provide binding judgments. All steps under Article 14 are confidential until the Committee adopts its opinion. Opinions are reported in CERD's annual report together with a summary of the information made available to the Committee. First, the applicant has to communicate the case through the Secretariat. Once a Communication has been submitted then the case is appointed a special rapporteur or a working group. The object of this exercise is to prepare the case for the admissibility process. A special rapporteur or a working group may seek further information and clarifications.

After the submission of a Communication, the special rapporteur or the working group undertakes a preliminary enquiry into the admissibility of the Communication. The admissibility requirements have strong similarities with other international procedures: the applicant must have exhausted all domestic remedies, and the Communication must not be an abuse of the right of petition. At the time of considering admissibility the government concerned is invited to comment on any relevant issues. The final decisions on admissibility are made in the plenary session of the Committee. An admissibility decision is sent to both the State and the individual.

In so far as the submission of the Communication is concerned, a duly appointed representative can bring an application on behalf of an alleged victim or victims. All (reasonable) domestic remedies must have been exhausted before a communication can be declared admissible. Article 14 stipulates a unique provision in that it has established national bodies to consider the petitions. It would appear that this provision is not obligatory; thus an application could still be successful even where such a procedure was not followed. There is no time limitation provided in the provisions of the Article itself although, according to the Rule of Procedure, the Communication must be submitted within six months after all domestic remedies have been exhausted, except in exceptional circumstances.[112]

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[110] Thornberry, above n. 44, at p. 270.

[111] V. Bitker, 'The International Treaty against Racial Discrimination' 53 *Marquette Law Review* (1970) 68 at p. 79; 'According to the Canadian representative Article 14 could not be more optional than it was' UN Doc. A/C.3/SR.1357.

[112] Rules of Procedure of the Committee on the Elimination of Racial Discrimination, Rule 91(f) UN Doc CERD/C/65/Rev.3.

In line with recognised rules of international treaty law, a case can only be brought against a State party to the Convention, and the jurisdictional rules need to be complied with. While the identity of the applicant may be kept confidential, applications must not be anonymous. Similar Communications would be rendered inadmissible if they are deemed to be an abuse of the right to petition or are incompatible with the provisions of the Convention. The Committee may consider admissibility and merit at the same time.

Once deemed admissible, the State concerned is requested to offer its views on the Communication within three months.[113] There is also the possibility of interim measures to safeguard the individual concerned. Once CERD establishes a view that there is sufficient evidence to proceed on the merits of the case, it formulates its opinion and makes any recommendations.

The general practice of CERD has been to adopt opinions through consensus. Members are, however, entitled to append individual opinions if they wish to do so. CERD has no power to make pecuniary or non-pecuniary awards. However, it is entitled to – and does – make recommendations to the relevant State party. The State party is asked to inform CERD of the measures it has taken to comply with its opinions.

While the wording of the Article indicates the provisional nature of the presence of such a body with the obvious hurdle of State sovereignty, the provisions relating to petitioning provide a considerable advance since the procedure allows racial or ethnic groups the right to petition before an international tribunal. Although unlike the Optional Protocol group petitions are acceptable, the scope is narrow in comparison both to Article 34 of ECHR (as amended by Protocol 11) and Article 44 of ACHR, which allow any person, non-governmental organisation or group of individuals to address petitions to them.

CONCLUSIONS

Discrimination exists in various forms and its potentially evil manifestations are capable of affecting every member of society. As far as racial discrimination is concerned, it is highly persuasive to argue that there is now an absolute prohibition of it in international law. Discrimination based on race or ethnic origin is, however, only one facet of a wider phenomenon. Religious or linguistic discrimination, although associated with discrimination in general and categorised in the same bracket alongside racial discrimination, are evils in their own right with far-reaching implications.

It may well be possible to argue that the general prohibition existing in international law against discrimination on the grounds of *inter alia* sex, race, ethnicity, religion and language belongs to the category of peremptory norms

[113] Ibid. Rule 94, para 2, UN Doc CERD/C/Rev 3.

of *jus cogens*. However, in reality the consensus reached on the issue of the prohibition of discrimination based on the grounds of race and ethnicity cannot be said to be matched with similar concern regarding discrimination on the grounds of religion or sex. The issue of religion remains a difficult one in international law, as has been demonstrated.

Even in the case of racial discrimination, the apparent international consensus may have many elements of superficiality. We have already noted that, while unanimity lies in the ideal of equality and a non-discriminatory society, considerable differences exist in achieving genuine equality and overcoming previous discrimination. Despite the large number of ratifications to the Race Convention, the issue of affirmative action has remained divisive. It is submitted that State practice is equivocal without giving any firm guidelines on the position as regards customary law. The Race Convention makes explicit provisions regarding affirmative action and the issue is highly significant if progress is to be made in the direction of attaining genuine equality.

A number of tensions are precipitated when the matter of taking measures to prohibit racial discrimination is considered, more particularly that of obligations on the part of States to outlaw organisations which incite racial hatred. Article 4 of the Race Convention has already generated debate, controversies and reservations. There can often be a fine dividing line between racist expressions as opposed to rightful expressions based on freedom of speech. The liberties which a tolerant society bestows would surely include as much a right to free expression of views and values as it would aim to prevent racial abuse and violence. Despite the limitations of the Race Convention, CERD has adopted a number of positive and innovative procedures. Thus, for example, CERD has devised an early warning and urgent procedure. According to this system the Committee can examine a case which is a serious cause for concern. The procedure is not dependant on the State party having submitted a report. It has been invoked in a number of cases and allows the CERD to name the relevant party in public session and then, or later in the session, the situation is considered in public. Requests for further information can also be made. After its review of the situation CERD expresses its opinion and usually asks the relevant State to submit a report. It may also bring events to the attention of the High Commissioner for Human Rights, the Secretary-General of the United Nations or to the General Assembly, the Security Council and so on. Once a State is placed under this procedure it continues to remain under scrutiny for an apparently indefinite period.[114]

The role of CERD is in some ways analogous to that of the Human Rights Committee working under the auspices of the ICCPR, and the responses

[114] O'Flaherty, above n. 99, at p. 104.

which the States make to these two Committees are also similar.[115] However, in contrast to the individual petitions before the Human Rights Committee, the individual and group petitions before CERD have not so far been rigorously invoked. CERD only became competent to receive Communications in 1982.[116] Hence it still remains speculative as to what role these petitions might play in the enforcement procedures.

[115] See above Chapter 4.

[116] See S. Lewis-Anthony, 'Treaty-Based Procedures for Making Human Rights Complaints within the UN System' in H. Hannum (ed.), above n. 109, at p. 50.