

Felipe Gómez Isa and Koen de Feyter (Eds.)

# International Protection of Human Rights: Achievements and Challenges



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Development Studies



International Protection  
of Human Rights:  
Achievements  
and Challenges



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

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*To Julia González*





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## Preface

At the beginning of the nineties, there was an expectation within the human rights community that the next decade would be a period of consolidation for the international human rights regime. This did not happen. In fact, the human rights regime underwent dramatic changes in response to new challenges —many of which are highlighted in this Manual.

The UN human rights system is in turmoil. In 2005 the UN Secretary-General in his report *In larger freedom* argued that the UN Commission on Human Rights, the organisation's central human rights body, suffered from a credibility deficit, and should be replaced by an upgraded "smaller standing Human Rights Council". Although criticism of the Commission was widespread, there was less agreement about future directions, and some fear that what was valuable in the UN human rights architecture would be lost. At the time of writing, the UN General Assembly adopted resolution 60/251 (15 March 2006) establishing the new Human Rights Council as a subsidiary body of the General Assembly. The new Council will have a somewhat reduced membership as compared to its predecessor (from 53 member States to 47), and will be based on equitable geographical distribution but with a possibility for the General Assembly to suspend Council members committing gross violations. The new body "shall meet regularly throughout the year and schedule not fewer than three sessions per year, including a main session for a total duration of no less than ten weeks". At the same time, it shall be able to hold special sessions when needed. Last, but not least, the Council will undertake a "universal periodic review", based on objective and reliable information, of the fulfilment by each member State of the United Nations of its human rights obligations. The effectiveness of the new body just created to address the urgent challenges of human rights worldwide remains to be seen.

In the meantime, Louise Arbour, the current UN High Commissioner for Human Rights, stressed the importance of increased in-country and regional presence of her officers as a high priority. As she sees it, her office should pursue two major overarching goals: protection and empowerment. The empowerment dimension, in particular, should allow closer cooperation in the field between UN officers and both rights holders and domestic governments that show at least minimal commitment to human rights.

Another major institutional development was the creation of the International Criminal Court, the first permanent international court entrusted with determining

individual responsibility for grave human rights violations. The Court's Statute entered into force on 1 July 2002. The Prosecutor's office is currently engaged in various proceedings dealing with situations in Darfur (Sudan), Uganda and the DR Congo.

At the regional level, the major event was the entering into force on January 1 2004 of the treaty setting up the African Court on Human and Peoples' Rights. At the time of writing, the Court had still to be established. In July 2004 the African Union decided that the African Human Rights Court was to be merged with the African Court of Justice, the charter of which has not yet come into force. Work on the draft instrument establishing the merged court is on-going. Nevertheless, the African Union elected the judges of the African Court on Human and Peoples' Rights in January 2006.

At the normative level, four optional protocols were adopted relating to core international human rights instruments. The Optional Protocol to the Convention on the Elimination of Discrimination against Women was adopted on 10 December 1999, and entered into force on 22 December 2000. The Protocol recognized the competence of the Committee on the Elimination of Discrimination against Women to receive and consider communications and to conduct an inquiry in countries where gross or systematic violations of women's rights are taking place. Two protocols were added to the Convention on the rights of the child on 25 May 2000: on the involvement of children in armed conflict (entered into force 12 February 2002), and on the sale of children, child prostitution and child pornography respectively (entered into force 18 January 2002). On 18 December 2002, an Optional Protocol was added to the UN Torture Convention, establishing a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty. This treaty has still to enter into force. Regretfully, year-long discussions on the addition of an optional protocol to the International Covenant on Economic, Social and Cultural Rights had not yet resulted in the adoption of a text that would enable individuals to complain to a monitoring body.

Significant developments occurred in the area of the right to reparation for victims of violations of human rights. After a lengthy negotiation process, the UN General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law on 16 December 2005. The International Court of Justice referred to entitlements of victims of human rights violations in two recent instances. In its judgement concerning armed activities on the territory of the Congo (*DRC v. Uganda*) (19 December 2005), the Court found that Uganda had caused injury to the DRC *and to persons on its territory*, and was under an obligation to make reparation accordingly. In the advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (9 July 2004), the Court found that Israel had the obligation to make reparation to all the natural or legal persons who had suffered damage as a consequence of the construction of the wall in occupied Palestinian territory. At the International Criminal Court, another important novelty was the establishment of the Trust Fund for Victims that aims to offer compensation either to individuals or to collectivities.

Mainstreaming human rights in the whole of international relations became a major theme in the last decade. Many human rights challenges require a response outside of the UN Geneva human rights system, and this will remain so even if the

operation of that system is improved. Discussions flared up in particular on the relationship between human rights and peace and security, and between human rights and economic globalisation.

Disagreement continued on the legitimacy and appropriateness of the use of armed force to stop gross and systematic violations of human rights, particularly when such interventions occurred without clear assent from the UN Security Council. Even more heated debates occurred after the 11 September attacks. One side of the debate focussed on the need to develop instruments to hold non-State actors accountable for such large-scale indiscriminate attacks on civilians across borders. The other side of the debate queried the compatibility with human rights law of counter-terrorism measures, envisaged both at the UN Security Council and by individual States. Advances that had seemingly been made in the areas of prohibition of torture or freedom of expression in the previous decade, proved tenuous.

The impact of economic globalisation on human rights resulted in new developments in holding corporations accountable for human rights abuses, particularly at the domestic level. There was a growing concern about the human rights responsibility of intergovernmental organisations given the increased impact of these organisations on living conditions particularly in conflict-ridden and least developed countries. A degree of self-regulation in the area of human rights both by the corporate world and intergovernmental organisations took place, but the human rights community remained divided about the usefulness of such an approach. At the normative level, the problem of how to deal under international treaty law with conflicting State obligations stemming from on the one hand human rights treaties, and on the other hand from international economic law remained as contentious as ever.

The Manual you hold is the result of a joint project under the auspices of HumanitarianNet, a Thematic Network on Humanitarian Development Studies led by the University of Deusto (Bilbao, the Basque Country, Spain), and the European Inter-University Center for Human Rights and Democratisation (EIUC, Venice, Italy). We would like to take the opportunity to thank all people that participated in the long and hard process of completion of this book. First of all, we would like to thank Julia González, Vice-Rector of International Relations at the University of Deusto and the real *alma mater* of HumanitarianNet and the different projects that came out from this challenging network. Kevin Villanueva, project officer of HumanitarianNet, showed great interest in this book from the beginning and offered unrelenting support. We also want to express our gratitude to Horst Fischer and George Ulrich, President and Secretary-General of EIUC, respectively, for their warm support to carry out this project. Finally, we would like to mention Julia Angell and Enrique Pinilla for their endless job in the process of translating and editing some of the contributions.

We hope that this Manual makes a contribution to the development of International Human Rights Law and is of interest for those working in the field of promotion and protection of human rights.

Felipe Gómez Isa and Koen de Feyter  
Deusto-Bilbao and Antwerp  
April 2006





Part I

# General Introduction



# International Protection of Human Rights

Felipe Gómez Isa

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

The concept of human rights, based on the notions of the dignity of the human being and the limitation of the power of the State, is a phenomenon that has, although in many different manifestations, been present practically throughout the whole of history. The fight for the recognition of the dignity of people has been a constant throughout historical evolution, from the tentative recognition of the rights of Indians during the time of the Spanish *Conquista* of America, to the modern expression of the rights of man and the citizen following the French Revolution. We are currently experiencing a phase of internationalisation of human rights; in other words, once the majority of internal legal instruments have proceeded towards the recognition of fundamental rights and freedoms, a period has begun in which human rights have been objects of discussion within international organisations, both worldwide and regional. In this process, which is progressive, and which we are still undergoing, the promotion and protection of all types of human rights has moved from being an issue which is part of the sphere of responsibility that belongs exclusively to States, and has become "a legitimate concern of the international community", as is stated in the Vienna Declaration resulting from the second World Conference on Human Rights<sup>1</sup>. In any case, as we will analyse below, this process of internationalisation has not in any way been a simple process, but rather has been, and continues to be, plagued by obstacles and difficulties, which makes the achievement of a true culture of human rights even more of a desire than a reality.

## 1. Antecedents of international protection of human rights

The key date on which we can base our witnessing of the internationalisation of human rights is 1945, after the end of the Second World War and the creation

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

of the Organisation of the United Nations. However, during the inter-war period and principally at the hands of the League of Nations, we witnessed the upsurge of a significant movement in favour of the international recognition of human rights, a movement which, as we shall see, united both academics and public opinion, so as to eventually capture the attention of politicians once the fight against fascism had begun in 1939<sup>2</sup>.

Classic International Law (that is, International Law prior to 1945) was conceived as those legal norms which regulate relations between States exclusively; only States were subjects of International Law and, as such, only States were capable of being subject to laws and rules within the international sphere. Following the First World War and the creation of the first general international organisation, the League of Nations, the definition of the subjects of International Law began to undergo a tentative expansion, with the recognition of a certain amount of legal personality for the international organisations. Individuals, however, had no rights; they were not subjects of International Law, but its objects<sup>3</sup>. This meant that the way in which States treated their nationals was a question which fell exclusively under the internal jurisdiction of each State. This principle denied other States the right to intercede or intervene so as to help nationals of the State in which they were being mistreated<sup>4</sup>. The only exception made was the institution of *humanitarian intervention*: the theory of humanitarian intervention is based on the assumption that States have an international obligation to guarantee certain basic rights to their nationals. These rights are so fundamental, and of such value to the human being, that violations of them by one State cannot be ignored by other States. If it was believed that very serious, large-scale, or brutal violations of those basic human rights had taken place, the use of force by one or more States was permitted so as to bring them to an end<sup>5</sup>. As we can see, there were beginning to be limits to the absolute sovereignty of States.

It is also true that even before the internationalisation of human rights, classic International Law did encounter some institutions which protected certain groups of people and which, as a result of this, can be cited as close antecedents of the aforementioned international protection of human rights. With regards to this, and also taking into account the above-mentioned institution of humanitarian intervention, we can mention the following:

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

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

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

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

- The area of the international responsibility of States for the treatment of aliens: a State was deemed not to have been responsible if its treatment of a national of another State fell below a minimum standard of civilisation and justice.
- Certain international treaties from the XIX<sup>th</sup> century aimed at the protection of Christian minorities in the Ottoman Empire, while other instruments, also of a related nature, were leading towards the prohibition of slavery and the traffic of slaves; the ones which, of many, most stand out, are the Brussels General Agreement (1890), the Saint-Germain-en-Laye Convention (1919), and the International Convention for the Abolition of Slavery and the Slave Trade (1926)<sup>6</sup>.
- In turn, *International Humanitarian Law*, which arose chiefly because of the Conventions of Geneva of 1864 and The Hague of 1899 and 1907, and which deals with the protection of the victims of armed conflicts, has also been considered as one of the most significant antecedents of current international protection of human rights<sup>7</sup>. Ultimately, International Humanitarian Law seeks to preserve the most basic human rights of individuals in situations of conflict.

In any case, the most important factor in the creation of conditions which made a progressive internationalisation of human rights possible was the foundation of the League of Nations, an international organisation which, as we shall see below, performed a task which was crucial in the generalisation of the protection of the rights of the person.

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

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

- a) will endeavour to secure and maintain fair and humane conditions of labour for men, women, and children..., and, for that purpose will establish and maintain the necessary international organisations;

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

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

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

- b) undertake to secure just treatment of the native inhabitants of territories under their control;
- c) will entrust the League with the general supervision over the execution of agreements with regard to the traffic in women and children...;
- f) will endeavour to take steps in matters of international concern for the prevention and control of disease“.

A direct consequence of this Article was the foundation, within the framework of the League of Nations, of the International Labour Organisation (ILO), which performed a task, and continues to do so, which was unprecedented in the area of workers' rights, equality between men and women at work, the exploitation of child labour<sup>9</sup>, the protection of indigenous peoples<sup>10</sup>...

The Peace Treaties which brought an end to the first great military conflict of the last century established a system of protection of national minorities, a system which would remain under the protection of the League of Nations. This legal regulation for the protection of minorities, based on the principles of equality of treatment and lack of discrimination, afforded ample rights to minorities with regards the conservation of their language, their religion, their schooling system, and even foresaw certain political rights<sup>11</sup>. As Professor Carrillo Salcedo states regarding these legal standards for the protection of the rights of minorities, “despite its deficiencies and limits (...) it nevertheless constituted a mechanism for the safeguard and protection of human rights”<sup>12</sup>. It is very significant that neither in the United Nations Charter (1945) nor in the Universal Declaration of Human Rights (1948) were the rights of minorities given as much recognition as they were in the period of the League of Nations, a fact which was to become one of the principle failings of the Universal Declaration.

In conclusion, we should state that Classic International Law developed various doctrines and institutions with the aim of protecting various groups of people: slaves; religious, ethnic, and cultural minorities; indigenous peoples; foreigners; victims of massive human rights violations; combatants in wars etc. These institutions and doctrines have influenced the creation of International Human Rights Law, given that, at their most basic levels, they recognised that individuals had rights as human beings and that those rights should be protected by International Law. However, what they did not deal with was a general and systematic protection of human rights; it was only the rights of certain categories of people that were protected, and not those of human beings in general. This global protection of human rights was to come once

<sup>9</sup> The work of the ILO concerning the protection of human rights can be seen in SAMSON, K.: “The Standard-Setting and Supervisory System of the International Labour Organization”, in HANSKI, R. and SUKSI, M. (Eds.): *An Introduction to the International Protection of Human Rights. A Textbook*, Abo Akademi University-Institute for Human Rights, Turku, 1998, pp. 149-180.

<sup>10</sup> For the role of the ILO in the field of indigenous peoples' rights see RODRIGUEZ PIÑERO, L.: *Indigenous Peoples, Postcolonialism, and International Law. The ILO Regime*, Oxford University Press, Oxford, 2005.

<sup>11</sup> An interesting contribution concerning the system for the protection of minorities established by the peace treaties can be found in MANDELSTAM, A.: *La protection internationale des minorités*, Sirey, Paris, 1931.

<sup>12</sup> CARRILLO SALCEDO, J.A.: *El Derecho internacional en perspectiva histórica*, Tecnos, Madrid, 1991, p. 57.

the Second World War had finished, on the approval of the United Nations Charter and the Universal Declaration of Human Rights.

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

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

Motivated by the advances which were being brought about by the League of Nations, many different organisations began to launch initiatives inspired by the need for an international guarantee of the rights and freedoms of the human being. Proposals of this type came about at the International Diplomatic Academy, the International Legal Union, the International Law Association, the Grotius Society, the Inter-American Conference of Jurists, the American Institute of International Law etc<sup>13</sup>. As Jan Herman Burgers, one of the people who has studied the evolution of human rights following First World War, states, “while in the period between the First and the Second World Wars most governments were unwilling to accept obligations under International Law regarding the treatment of their own citizens, a far more positive attitude developed among the *scholars* of International Law”<sup>14</sup>.

One of the most serious initiatives was set in motion by the International Law Institute, which in 1921 created a Commission presided over by André Mandelstam, for the study of the protection of minorities and of human rights in general. The fruit of this work by the Commission was the elaboration of a project on the Declaration of Human Rights, which was presented to a meeting held by the Institute in New York in 1929. Eventually, following various discussions, the *Declaration of the International Rights of Man*<sup>15</sup> was approved on the 12<sup>th</sup> of October 1929, with 45 votes in favour, 11 abstentions, and only one vote against it. In this very important Declaration, the International Law Institute considered that “the juridical conscience of the civilised world demands the recognition for the individual of rights preserved from all infringement on the part of the State”, and that “it is necessary to extend international recognition of human rights across the whole world”<sup>16</sup>. Likewise, in the concluding part of the Declaration, which is not, incidentally, very long, rights are established to life, freedom, property, and the principle of non discrimination (Article 1); freedom of religion (Article 2); the right to a nationality (Article 6) etc.

<sup>13</sup> These and other views have been collected in CASSIN, R.: “La Déclaration Universelle et la mise en oeuvre des droits de l’homme”, *Recueil des Cours de l’Académie de Droit International de La Haye*, 1951 - II, p. 272.

<sup>14</sup> BURGERS, J.H.: “The Road to San Francisco: the Revival of the Human Rights Idea...”, *op. cit.*, p. 450.

<sup>15</sup> *Annuaire de l’Institut de Droit International*, New York session, October 1929, vol. I, pp. 730-732.

<sup>16</sup> This idea had been put forward one year previously, in 1928, by the International Diplomatic Academy, presided over by an ardent defender of the internationalisation of human rights, A.F. Frangulis. In a resolution approved on the 8<sup>th</sup> of November 1928, the Academy stated that international protection of human rights “responds to the legal feelings of the contemporary world” and that, as such, “a generalisation of the protection of the rights of man and of the citizen is highly desirable”. The text of this resolution can be found in MANDELSTAM, A.: “La protection internationale des droits de l’homme”, *Recueil des Cours de l’Académie de Droit International de La Haye*, 1931 - IV, p. 218.

In the words of its most significant mentor, the aforementioned Mandelstam, this Declaration of the International Rights of Man meant "the starting point of a new era... , a solemn challenge to the idea of the absolute sovereignty of States and, at the same time, the consecration of the legal equality of all members of the international community"<sup>17</sup>. The most relevant feature of this Declaration was not its content, which was not revolutionary, but the fact that it opened the door to an irreversible process of internationalisation of human rights. As of this moment, and based on this New York Declaration, many different initiatives with one sole objective arose: to remove all the issues related to human rights and freedoms from the sovereignty of States<sup>18</sup>.

### 1.3. Human rights during the Second World War

From the start of the Nazi regime in Germany in the 1930s, the international community began to be conscious of the fact that this was not a regime which respected the most basic human rights<sup>19</sup>. These suspicions were resoundingly confirmed with the start of the war in 1939. This all meant that human rights became one of the objectives of the Allies in the battle against fascism, as well as coming to be one of the centres of the attention of both intellectuals and the general public. According to the very appropriate words of René Brunet,

"a strong movement of public opinion, born in Great Britain and the United States at the beginning of hostilities, grew incessantly in both strength and influence as the war progressed. Hundreds of political, academic, and religious organisations, through publications, requests, protests, and interventions, spread the idea that the protection of human rights should be one of the objectives of the Allies"<sup>20</sup>

This was the background against which Franklin Delano Roosevelt's famous State of the Union speech<sup>21</sup> to the North American Congress took place on the 6<sup>th</sup> of January 1941. In this speech<sup>22</sup>, the President of the United States outlined which were the fundamental freedoms which should be guaranteed for every human being. There are four such freedoms: freedom of speech and expression; freedom of worship; freedom from want, and freedom from fear. And the truth is that Roosevelt "was

<sup>17</sup> MANDELSTAM, A.: "La protection internationale...", *op. cit.*, p. 206.

<sup>18</sup> Some of these initiatives can be found in BURGERS, J.H.: "The Road to San Francisco", *op.cit.*, pp. 453 ff.

<sup>19</sup> MORSINK, J.: "World War Two and the Universal Declaration", *Human Rights Quarterly*, Vol. 15, 1993, p. 360. A very interesting analysis of the collusion of German society with the excesses of Nazism can be found in GELLATELY, R.: *No sólo Hitler. La Alemania nazi entre la coacción y el consenso*, Crítica, Barcelona, 2002.

<sup>20</sup> BRUNET, R.: *La Garantie Internationale des Droits de l'Homme...*, *op. cit.*, pp. 93-94.

<sup>21</sup> A very comprehensive review of Franklin D. Roosevelt's and Eleanor Roosevelt's contributions to discussions on human rights can be found in JOHNSON, M.G.: "The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection for Human Rights", *Human Rights Quarterly*, Vol. 9, 1987, pp. 19-48.

<sup>22</sup> This speech has been reproduced in GOOD, M.H.: "Freedom from Want: the Failure of United States Courts to protect Subsistence Rights", *Human Rights Quarterly*, Vol. 6, 1984, pp. 384 and 385.



personally convinced that internationalization of the care for human rights was the proper idea for uniting the American people against the forces of totalitarianism"<sup>23</sup>. What is undeniable is that this speech of Roosevelt constituted "the driving force which was to set in motion the proclamation of human rights on a world-wide level and, afterwards, the development of the Universal Declaration of Human Rights"<sup>24</sup>.

A few months later, on the 14<sup>th</sup> of August 1941, the *Atlantic Charter* expressed the desire to arrive at a peace which "will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all lands may live out their lives in freedom from fear and want". Along the same lines, also incorporating human rights as objectives of the war, on the 1<sup>st</sup> of January 1942, the allied countries, in the *United Nations Declaration*, stated that "complete victory over their enemies is essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands"<sup>25</sup>. What is crystal clear in this statement is that human rights burst onto the political scene in a fairly early stage of the war, as there existed the clear conviction that peace necessarily came from the establishment of political regimes which protected human rights.

In September and October of 1944, when the so-called "Big Four" (China, United States, Great Britain, and the Soviet Union) met at Dumbarton Oaks to plan the structure of international society once the war had finished, and decided on the creation of the United Nations Organisation, human rights were one of the main objects of discussion. The debate was fierce, with passionate disagreements between the superpowers. The strongest opposition to the fact that human rights were to figure in the Dumbarton Oaks Proposal on the creation of the United Nations came from the British delegate, Sir Alexander Cadogan. In his opinion, it could "open up the possibility that the Organisation could criticise the internal organisation of Member States", a clear allusion to the colonial question, a particularly sensitive issue for the British. As we can see, the question of sovereignty will always be present when coming to compromises regarding human rights. Nor was the Soviet Union in favour of human rights occupying a privileged position among the principles of the organisation that was to be founded, although it did not put up insurmountable hurdles<sup>26</sup>. Faced with these problems, the United States had to lower its hopes, as a result of which the Dumbarton Oaks proposal eventually only came to include "a vague reference to human rights"<sup>27</sup>. In the section dealing with international economic and social co-operation, one of the objectives of the United Nations was to be "to facilitate

<sup>23</sup> BURGERS, J.H.: "The Road to San Francisco...", *op. cit.*, p. 469.

<sup>24</sup> CASSESE, A.: *Los derechos humanos en el mundo contemporáneo*, Ariel, Barcelona, 191, p. 37.

<sup>25</sup> Extracts from these important international statements, together with a brief analysis of them, appear in RABOSI, E.: *La Carta Internacional de Derechos Humanos*, EUDEBA, Buenos Aires, 1987, pp. 10 ff.

<sup>26</sup> It is interesting to note the fact that, at this time, the attitude of the Soviet Union towards human rights was fairly moderate. This attitude is in contrast to that expressed at the United Nations from 1945, when the Cold War was intensifying. As of this time, human rights became an ideological weapon in the conflict between the United States and the Soviet Union.

<sup>27</sup> SAMNOY, A.: *Human Rights as International Consensus. The Making of the Universal Declaration of Human Rights, 1945-1948*, CHR, Michelsen Institute, Bergen-Norway, 1993, p. 12.

solutions of international economic, social and other humanitarian problems and to promote respect for human rights and fundamental freedoms". Despite the fact that human rights were only a superficial element in the Dumbarton Oaks proposal, they were nevertheless to play a far more important role at the San Francisco Conference. It was at this conference that those involved moved towards the adoption of the United Nations Charter, the constituent document of the international organisation created following Second World War, the United Nations Organisation.

## 2. The United Nations and human rights

The phenomenon of the internationalisation of human rights following World War Two can be attributed to the monstrous abuses which took place during Hitler's time in power, and to the conviction that many of these abuses could have been avoided had there been an effective international system for the protection of human rights while the League of Nations was in existence. However, the horrors of the Second World War are not the only factor, although they are perhaps the most important, in bringing about the existence of this process of international consecration of human rights<sup>28</sup>. As we saw in the previous chapter, a far-reaching movement in favour of human rights was developing. The tragedy experienced with regards human rights during World War Two served as a catalyst for all these forces which were calling for recognition of human rights in the international sphere. All this means that human rights were at the forefronts of the minds of those present at the San Francisco Conference.

### 2.1. *The San Francisco Conference*

The San Francisco Conference was to play a fundamental role in the inclusion of human rights in the United Nations Charter. As an expert on the process of the production of the Charter at San Francisco said,

"there was great interest, particularly among the lesser powers and the host of private organizations which had consultant status with the US delegation, in broadening and strengthening the proposed organization's role in economic and social matters, including the area of human rights"<sup>29</sup>.

In this respect, various Latin American delegations played incredibly significant roles at the San Francisco Conference, which have come to be known as "Latin

<sup>28</sup> BURGERS, J.H.: "The Road to San Francisco...", *op. cit.*, p. 448. On the other hand, for Manfred Nowak, the recognition which is made of human rights in the Universal Declaration of Human Rights "can only be completely understood as a reaction to the atrocities committed by the Nazi government and its absolute attack on human rights and human dignity", NOWAK, M.: "The Significance of the Universal Declaration 40 years after its adoption", in *The Universal Declaration of Human Rights: Its Significance in 1988*, Report of the Maastricht/Utrecht Workshop held from 8<sup>th</sup> to 10<sup>th</sup> December 1988 on the occasion of the 40<sup>th</sup> anniversary of the Universal Declaration, p. 67.

<sup>29</sup> JHABVALA, F.: "The Drafting of the Human Rights Provisions in the UN Charter", *Netherlands International Law Review*, Vol. XLIV, 1997, p. 4.

American activism"<sup>30</sup>. Some of these delegations wanted a *Bill of Rights* in the Charter (that is, a Declaration of Human Rights as an appendix). Countries such as Mexico, Chile, Cuba, Panama, and Uruguay, encouraged by the Chapultepec Conference<sup>31</sup>, made very advanced proposals with regards this. While Mexico and Panama were proposing a Declaration within the text of the United Nations Charter, Uruguay and Cuba were content with the General Assembly approving a Declaration of human rights as soon as possible after the creation of the UN. Panama's proposal was, without doubt, the most audacious, introducing as it did the "Draft Declaration of Essential Rights of Man"<sup>32</sup> as an amendment, which included both civil and political rights, and also economic, social, and cultural rights, and was to form an integral part of the United Nations Charter.

However, these proposals were completely rejected by the Superpowers that were present in San Francisco. There were various reasons for this. Firstly, an aspect which worried the big powers was that human rights should not interfere with internal matters, an issue which mattered to them because of the fact that at that time they all had serious problems with some of the inhabitants of their territories. The United States was having to face up to the issue of racial discrimination against the people we now know as African Americans; the Soviet Union, for its part, continued to have its *Gulags*, in which human rights were starkly conspicuous in their absence; finally, both the United Kingdom and France continued to benefit from their colonial empires, where it could hardly be said that human rights were scrupulously respected. Secondly, it would have been very difficult to produce a Declaration of Human Rights at an international conference that lasted several weeks, like that of San Francisco where, in addition, there were many other problems to solve, such as delicate questions related to peace and international security. Finally, another issue which was dealt with throughout the entire San Francisco Conference was "the ghost of the US Senate's refusal to give its "advice and consent" to the ratification of the League Covenant"<sup>33</sup>, which, among other factors, contributed to the relative failure of the organisation created after First World War. The fact that the United States had been forced to accept a United Nations Charter with a Declaration of Human Rights at its heart would perhaps have given more strength to its desire for "international isolation", a situation which it was desirous to avoid at all cost.

Despite the fact that, in the end, it was impossible to include a Declaration of rights in the United Nations Charter, important references to human rights were included, in provisions which were much stronger than those that had been included

<sup>30</sup> SAMNOY, A.: *Human Rights as International Consensus...*, *op. cit.*, p. 15.

<sup>31</sup> At the *Inter-American Conference on Problems of War and Peace*, Chapultepec Conference (Mexico, March 1945), the Latin American States declared that the future United Nations Organisation should take on responsibility for the international protection of human rights through a catalogue of rights and duties in a declaration which would take the form of convention. See GARCIA BOWER, C. with regards this: *Los Derechos Humanos. Preocupación Universal*, Editorial Universitaria, Guatemala, 1960, especially pp. 25 ff., where there is analysis of the growth of human rights in Latin America.

<sup>32</sup> This Declaration had been produced by jurists from 24 Latin American countries between 1942 and 1944, under the auspices of the American Law Institute.

<sup>33</sup> JHABVALA, F.: "The Drafting of the Human Rights Provisions...", *op. cit.*, p. 11.

in the Dumbarton Oaks Proposals<sup>34</sup>. This relative force regarding human rights which was a part of the United Nations Charter is basically due to the lobbying of certain smaller countries, such as those in Latin America, and of the NGOs which were a part of the North American delegation at the San Francisco Conference<sup>35</sup>. As John P. Humphrey, Director of the Human Rights Division of the United Nations at the time of the writing of the Universal Declaration, has said,

“the relatively strong human rights provisions of the Charter were largely, and appropriately, the result of determined lobbying by nongovernmental organizations and individuals at the San Francisco Conference. The United States Government had invited some forty-two private organizations representing various aspects of American life —the churches, trade unions, ethnic groups, peace movements, etc.— to send their representatives to San Francisco, where they acted as consultants to its delegation. These people, aided by delegations of some of the smaller countries, conducted a lobby in favour of human rights for which there is no parallel in the history of international relations, and which was largely responsible for the human rights provisions of the Charter”<sup>36</sup>.

On the other hand, Panama, when faced with the rejection of its initiative to include a Declaration of Human Rights in the United Nations Charter, proposed that the report produced by the committee which had written the Charter should recommend that, once the United Nations Organisation had been created, it should immediately embark on the production of a Declaration of human rights. This proposal was accepted<sup>37</sup>, as it was the wish of all the different delegations present in San Francisco that one of the first tasks of the recently created organisation should be the adoption of a human rights related instrument which was in accordance with the provisions of the Charter.

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

In the preamble of the Charter, the countries of the United Nations had already stated their support for the reaffirmation of “... faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small...”. It should be noted, as has been done by one of the principal commentators on the United Nations Charter, that, together with maintaining peace and international security, the other key point

<sup>34</sup> BURGERS, J.H.: “The Road to San Francisco...”, *op. cit.*, p. 475.

<sup>35</sup> On the role of NGOs at the San Francisco Conference, see KOREY, W.: *NGOs and the Universal Declaration of Human Rights*, St. Martin's Press, New York, 1998, especially pp. 29 ff.

<sup>36</sup> HUMPHREY, J.P.: *Human Rights & United Nations: A Great Adventure*, Transnational Publishers, New York, 1984, p. 13.

<sup>37</sup> The proposal reads as follows: “The Committee received the idea [of a Bill of Rights] with sympathy, but decided that the present Conference, if only for lack of time, could not proceed to realize such a draft in an international contract. The Organization, once formed, could better proceed to consider the suggestion, and to deal effectively with it (...). The Committee recommends that the General Assembly consider the proposal and give it effect”, quoted in JHABVALA, F.: “The Drafting...”, *op. cit.*, p. 13.

of this preamble was the respect of human rights<sup>38</sup>. In the final paragraph of this preamble, the countries of the United Nations reaffirm their determination “to promote social progress and better standards of life in *larger freedom*” (emphasis added). This statement which, as we shall see, also appears in the preamble to the Universal Declaration of Human Rights, will be of exceptional importance in the widening of the traditional concept of human rights. This traditional concept was centred exclusively on civil and political rights, support for which arose as a result of the liberal revolutions of the XVIII<sup>th</sup> century; with the statement regarding *larger freedom*, the United Nations Charter, influenced up to this point by the “Four Freedoms” speech of Roosevelt, began to open up to second generation rights: economic, social, and cultural.

With this in mind, Article 1.3 of the Charter signals that one of the proposals of the organisation was “to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”. As we can confirm from looking at the programmatic section of the United Nations Charter, a crystal clear commitment is being made with regards human rights. In addition, the *principle of non discrimination* is being confirmed as a basic principle in this instrument. The inclusion of this principle in such an important section of the Charter, as it is the section in which the aims of the new international organisation are established, was not at all peaceful, generating intense debate, mainly between the United States and the Soviet Union. Although the Cold War was yet to begin, some of its most destructive effects could already be felt, a situation which had a great deal of influence on the way which human rights were dealt with in the United Nations Charter. Finally, following lengthy discussions, the United States, where racial problems continued to be harshly significant, accepted that the principle of non discrimination be included, on the condition that the Soviet Union retract its desire for the inclusion in the Charter of a clear reference to the right to work and the right to education, rights which were particularly important to the socialist concept of human rights. Great Britain, which continued to express suspicions motivated by fears that references in the Charter to human rights could interfere with its internal affairs, had no choice but to agree with the consensus which had been arrived at by the United States and the Soviet Union<sup>39</sup>.

The duties taken on by States for the achievement of the objectives stated in the aforementioned Article 1.3 of the Charter are brought together in Articles 55 and 56 of the same legal instrument, provisions which begin chapter IX of the Charter, given the title of “International Social and Economic Co-operation”. In Article 55, the Organisation again takes on the commitment of promoting universal respect for human rights without making any type of distinctions. In addition, the principle of self-determination of peoples is also established in Article 55, a principle which, as

<sup>38</sup> COT, J-P. and PELLET, A.: “Préambule”, in COT, J-P. and PELLET, A. (sous la direction de): *La Charte des Nations Unies, Commentaire article par article*, Economica, Paris, 1985, p. 7.

<sup>39</sup> Details of all these discussions can be found in SAMNOY, A.: *Human Rights as International Consensus...*, *op. cit.*, pp. 19 ff.

we shall see, is not even mentioned in the Universal Declaration of Human Rights<sup>40</sup>. In accordance with Article 55,

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

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

Although the mandate taken on by the UN in this Article 55 is extensive, the powers conferred to it are very limited. The task of moving ahead with the commitment is assigned to the General Assembly (Article 13.1.b<sup>41</sup>) and to the Economic and Social Council (Article 62.2<sup>42</sup>), bodies whose decisions concerning these issues are not legally binding. It must be said that on the basis of this Article of the United Nations Charter, incredibly significant tasks with regards the promotion of and respect for human rights were assigned to the Commission on Human Rights and the General Assembly<sup>43</sup>.

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

Having briefly analysed these norms, we can now, without any doubt, confirm that the obligations of Articles 55 and 56 of the United Nations Charter set out *actual legal obligations* with regards human rights, both for the Organisation and for each and every one of its Member States, and not merely programmatic recommendations, as certain States have chosen to believe. Nevertheless, right from the very start of the United Nations, both from doctrine and from different States, questions have arisen concerning the point to which human rights are an issue which can be classed as matters “which are essentially within the domestic jurisdiction of any

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<sup>40</sup> A thought-provoking analysis of the inclusion of the principle of self-determination of peoples in the United Nations Charter can be found in DOEHRING, K.: “The Right of Self-Determination as Expressly Mentioned in the United Nations Charter”, in SIMMA, B. (Ed.): *The Charter of the United Nations. A Commentary*, Oxford University Press, Oxford, 1995, pp 56-72.

<sup>41</sup> As article 13.1.b of the United Nations Charter states, “the General Assembly shall initiate studies and make recommendations for the purpose of:... promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”.

<sup>42</sup> According to what is set out in Article 62.2, the Economic and Social Council “may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all”.

<sup>43</sup> MARIE, J-B. and QUESTIAUX, N.: “Article 55: alinéa c”, in COT, J-P. and PELLET, A. (Sous la direction de): *La Charte des Nations Unies...op. cit.*, pp. 870 ff. In addition, a detailed description of the main developments, both normative and institutional, which have taken place at the United Nations with regards human rights can be found in VILLAN DURAN, C.: *Curso de Derecho Internacional de los Derechos Humanos*, Trotta, Madrid, 2002.

State" (Article 2.7 of the Charter) and that, as a result of this, interventions are not to be permitted, either from the United Nations, or from other States that are part of the international community. Although at first there existed doubts on the topic, these doubts were very soon cleared up, and human rights entered into a process of internationalisation which was to progressively move them away from the internal jurisdiction of Member States<sup>44</sup>. As Jean-Bernard Marie and Nicole Questiaux have said regarding this, Article 2.7 of the Charter is a regulation with "evolutionary geometry", which means that human rights have gradually escaped from the dominion of States and have now become issues "of international concern"<sup>45</sup>. This same line of argument has been maintained in Spain by Professor Carrillo Salcedo, for whom "practice has clearly confirmed this interpretation of Article 2.7 of the United Nations Charter, in accordance with which human rights have ceased to belong to the category of matters which are essentially under the internal jurisdiction of States"<sup>46</sup>. Nor does the opinion of a relevant resolution of the International Law Institute at its session in Santiago de Compostela, which took place in September of 1989, differ, confirming that no State which violates its international obligation to protect human rights "will be able to avoid its international responsibility on the pretext that this issue is essentially one that falls under its internal jurisdiction"<sup>47</sup>. The culmination of this process came about due to the Vienna Declaration of 1993, which stated that human rights are the "legitimate concern of the international community"<sup>48</sup>, as we saw earlier.

However, it should not escape our notice that there exist serious and important gaps in the generic references to human rights which can be found in the United Nations Charter. In the first place, there is no definition of what we should understand by human rights. Secondly, nor does the Charter include a list of these rights, except with its express reference to the principle of non discrimination. And, finally, concrete mechanisms for the guarantee of human rights are not established. But, despite these deficiencies, "the inclusion of human rights provisions in the Charter changed the parameters of the debate and introduced radically new principles into world politics and International Law"<sup>49</sup>. In 1945, the United Nations Charter became the legal and conceptual basis for the process of the internationalisation of human rights.

A final relevant provision in the Charter regarding human rights, which should not be forgotten, is Article 68. This Article<sup>50</sup> allows the Economic and Social Council of the United Nations (ECOSOC) the power to create all the commissions necessary

<sup>44</sup> GANJI, M.: *International Protection of Human Rights*, *op. cit.*, pp. 133 ff.; CASSIN, R.: "La Déclaration Universelle et la mise en oeuvre des droits de l'homme", *op. cit.*, p. 253.

<sup>45</sup> MARIE, J-B. and QUESTIAUX, N.: "Article 55: alinéa c", *op. cit.*, p. 870.

<sup>46</sup> CARRILLO SALCEDO, J.A.: *Soberanía de los Estados y Derechos Humanos...*, *op.cit.*, p. 42.

<sup>47</sup> "La protección internacional de los derechos humanos y el principio de no intervención en los asuntos internos de los Estados", *Annuaire de l'Institut de Droit International*, vol. 63-II, 1990, pp. 338 ff.

<sup>48</sup> *Vienna Declaration and Programme of Action...*, *op. cit.*, Part I, para. 4.

<sup>49</sup> JHABVALA, F.: "The Drafting of the Human Rights Provisions of the United Nations Charter", *op. cit.*, p. 2.

<sup>50</sup> Thoughts on the problems and contents of this Article can be found in PARTSCH, K-F: "Article 68", in SIMMA, B. (Ed.): *The Charter of the United Nations...*, *op.cit.*, pp. 875-892.

for the performance of its functions. The really significant fact with regards what we are considering is that in this Article 68 it is expressly stated that ECOSOC “shall set up commissions in economic and social fields and *for the promotion of human rights...*” (emphasis added). The italicisation of the previous words is due to the fact that the phrase appears to give the impression that the Economic and Social Council should establish a commission for the promotion of human rights. The fact is that the inclusion of this phrase in Article 68 was the result of a huge amount of intense pressure in favour of the formation of a human rights commission. Here again the 42 NGOs which played a consultative function in the North American delegation at the San Francisco Conference played a determining role. Their pressure finally bore fruit, given that they had to persuade the North American delegation to overcome the reticence shown by Great Britain, the Soviet Union, and China, who were not in favour of such an explicit provision, which would facilitate the creation of a human rights commission<sup>51</sup>. In addition, it was understood that this human rights commission which was to be created on behalf of ECOSOC would take on the task of drawing up a Declaration of Human Rights which was to specify the regulations concerning human rights that appear in the Charter<sup>52</sup>. And so everything developed as has been described and planned, and one of the first acts of the Economic and Social Council was to create the *Commission on Human Rights* in February 1946, a body which would have as the main task of the first few years of its existence the production of the Universal Declaration of Human Rights and other international human rights instruments.

### 2.3. Post-1945 legal developments

Once the activities of the new Organisation that had risen from the ashes of the Second World War started, it became clear that its first moments were to be dedicated to making concrete the somewhat vague and generic provisions concerning human rights that appeared in the United Nations Charter. With this aim, the Commission on Human Rights was entrusted with the task of passing a document including the most fundamental human rights, along with appropriate mechanisms for their protection. However, given the fact that the Superpowers at that time were completely occupied with the Cold War, it was not possible to proceed on this matter as much as was desirable, and only the Universal Declaration of Human Rights was approved in 1948<sup>53</sup>. The problem that the Universal Declaration had to face up was that it was approved as a result of a resolution of the General Assembly of the United Nations; such resolutions are only recommendations for Member States, and not legally binding obligations. As such, it was vital to proceed to the approval of a number of human rights instruments which were fully legal in character, and binding to those States which had ratified them. However, as was to occur with the approval of the Universal Declaration of Human

<sup>51</sup> See on this subject see SAMNOY, A.: *Human Rights as International Consensus. The Making of the Universal Declaration...*, op. cit., pp. 23 ff.

<sup>52</sup> HUMPHREY, J.P.: *Human Rights and United Nations...*, op. cit., p. 13.

<sup>53</sup> On this topic, see Jaime Oraá's work, also in this volume.



Rights, this was to be a hugely complicated task. The East-West conflict was again to influence the production of international treaties concerning human rights<sup>54</sup>. To give a better idea of the issue, it had initially been foreseen that only one human rights covenant would be approved, a sole covenant which would include the full gamut of rights and fundamental freedoms. Eventually, due to the conflict between the Western bloc and the Socialist bloc, two human rights covenants were approved. This means that, at the current moment in time, we have the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights, both, paradoxically, approved on the same day and in the same session of the General Assembly of the United Nations, on the 16<sup>th</sup> of December 1966. Nevertheless, a wait of another ten years, until 1976, was necessary for these covenants to come into force following ratification by a sufficiently large number of States. And so, these three basic instruments of the United Nations with regards human rights, the Universal Declaration and the two Covenants, make up what is known as the *International Bill of Human Rights*.

In addition to the adoption of these three documents, the United Nations Organisation has played a crucial role in the process of codification and progressive development of the International Human Rights Law<sup>55</sup>, approving a whole range of instruments on topics as diverse as children's rights, discrimination against women, the fight against torture, etc. The most significant instruments will be object of more specific study in other chapters of this book.

Nor should we forget to analyse the advance of international protection of human rights and the developments that have occurred within the framework of regional international organisations, such as the Council of Europe, the Organisation of American States, and the Organisation for African Unity<sup>56</sup>. In these areas we have seen not only an exemplary regulatory development, but also the appearance of jurisdictional mechanisms which are sufficiently perfected as to be able to protect human rights, such as the European Court of Human Rights, the Inter-American Court of Human Rights<sup>57</sup>, or the recently established African Court on Human and Peoples' Rights.

#### 2.4. *Indivisibility and interdependence of all human rights*

Despite the existence and historical appearance of two different categories or generations of human rights, on the one hand, civil and political rights, and, on the other, economic, social, and cultural rights, and the fact that these have conventionally been recognised as two separate entities, as we have just seen, these two types of rights do not go into watertight compartments as two completely autonomous

<sup>54</sup> Regarding this issue, see ALVAREZ MOLINERO, N.: "La evolución de los derechos humanos a partir de 1948: hitos más relevantes", in INSTITUTO DE DERECHOS HUMANOS: *La Declaración Universal de Derechos Humanos en su cincuenta aniversario*, Universidad de Deusto, Bilbao, 1999, pp. 93-178.

<sup>55</sup> FERNÁNDEZ DE CASADEVANTE ROMANI, C.: "El Derecho Internacional de los Derechos Humanos", in FERNÁNDEZ DE CASADEVANTE ROMANI, C. (Coord.): *Derecho Internacional de los Derechos Humanos*, Dilex, Madrid, 2000, pp. 49-73.

<sup>56</sup> From July 2002 the OAU has become the *African Union*.

<sup>57</sup> An in-depth study appears in CANÇADO TRINIDADE, A.A.: *El acceso directo del individuo...*, op. cit.

categories; both categories are extensively inter-related<sup>58</sup>. This inter-relationship between civil and political rights and economic, social, and cultural rights had already been made manifest at the First International Conference on Human Rights, which took place in Teheran in 1968. In the Final Declaration of this Conference<sup>59</sup>, the indivisibility and interdependence of both types of rights was stated. This idea, one of enormous importance in putting human rights into practice, was reiterated in resolution 32/130 of the General Assembly of the United Nations, on the 16<sup>th</sup> of December 1977. In this resolution it was confirmed that

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

This indivisibility and interdependence of all human rights has again been stated at the Second World Conference on Human Rights, held in Vienna from the 13<sup>th</sup> to the 24<sup>th</sup> of June 1993. In the Final Declaration, it is confirmed that “all human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis”.

As such, despite the fact that this distinction between, on the one hand, civil and political rights, and on the other, economic, social, and cultural rights, still makes some sense in this day and age, it should be looked at in the light of the provisions we have already mentioned regarding the profound inter-relationship that should exist between the two types. The defence of human dignity needs both types of rights. It supposes that “in no case should States be able to hide behind the promotion and protection of a certain type of rights and be able to avoid the promotion and protection of others,...; we should pay the same level of attention and urgency to both types of rights”<sup>60</sup>.

However, we should acknowledge that economic, social, and cultural rights have been “rhetorically praised but never truly dealt with at the United Nations, where the topical and the commonplace is to emphatically proclaim the indivisibility of human rights when it would really be more appropriate in accordance with the facts, as Professor Philip Alston has critically proposed, to talk of the *invisibility* of economic, social, and cultural rights”<sup>61</sup>.

<sup>58</sup> Regarding this, see MEYER-BISCH, P.'s in-depth study: *Le corps des droits de l'homme. L'indivisibilité comme principe et de mise en oeuvre des droits de l'homme*, Editions Universitaires Fribourg, Fribourg, 1992.

<sup>59</sup> *Recopilación de instrumentos internacionales*, ST/HR/1Rev. 5 (Vol. I, Part 2).

<sup>60</sup> BLANC ALTEMIR, A.: “Universalidad, indivisibilidad e interdependencia de los derechos humanos a los cincuenta años de la Declaración Universal”, en BLANC ALTEMIR, A. (Ed.): *La protección internacional de los derechos humanos a los cincuenta años de la Declaración Universal*, Tecnos, Madrid, 2001, p. 33.

<sup>61</sup> CARRILLO SALCEDO, J.A.: *Soberanía de los Estados...*, op. cit., p. 24.

### 2.5. *The emergence of third generation human rights*

Since the 1970s, we have been witnessing the appearance of a set of new human rights, new rights which try to deal with the most urgent challenges that the international community finds itself faced with<sup>62</sup>. Among the human rights which have been suggested for forming a part of this "new frontier in human rights" we can find the following: the right to development<sup>63</sup>; the right to peace<sup>64</sup>; the right to the environment<sup>65</sup>, the right to benefit from the Common Heritage of Mankind<sup>66</sup>, or the right to humanitarian assistance<sup>67</sup>.

And the truth is that, as Karel Vasak tells us, "the list of human rights is not, nor will it ever be, a finished list"<sup>68</sup>. Along the same lines are the opinions of Philip Alston, an expert on human rights, when he states that this new generation of human rights represents "the essential dynamism of the human rights tradition"<sup>69</sup>.

There are many different factors which have brought about, and continue to bring about, the appearance of these new human rights. In the first place, the decolonisation process of the 1960s meant that a revolution occurred in international society and, as a result, in the legal order called to regulate it, the International Law. This change also made its influence felt on human rights theory, which every day leans more towards the concrete problems and needs of the new category of countries that have appeared on the international scene, the developing countries<sup>70</sup>. If it was the bourgeois and socialist revolutions which gave rise to the first and second generations of human rights respectively, it will be this anti-colonialist revolution which will, according to Stephen Marks, give rise to the appearance of third generation human rights<sup>71</sup>.

<sup>62</sup> RODRIGUEZ PALOP, M.E.: *La nueva generación de derechos humanos. Origen y justificación*, Dykinson, Madrid, 2002.

<sup>63</sup> On the growth of this new right, see, among others, M'BAÏE, K.: "Le droit au développement comme un droit de l'homme", *Revue des Droits de l'Homme*, 1972, pp. 505-534.

<sup>64</sup> See the *Declaration on the right of peoples to peace*, adopted by the General Assembly in its resolution 39/11, of the 12th of November 1984.

<sup>65</sup> FRANCO DEL POZO, M.: "El derecho humano a un medio ambiente adecuado", *Cuadernos Deusto de Derechos Humanos*, n.º 8, 2000.

<sup>66</sup> On the innovative concept of the Common Heritage of Mankind, see: KISS, A. CH.: "La notion de patrimoine commun de l'humanité", *RCADI*, t. 172, 1982-II, pp. 99-256; BLANC ALTEMIER, A.: *El Patrimonio Común de la Humanidad. Hacia un régimen jurídico internacional para su gestión*, Bosch, Barcelona, 1992; GÓMEZ ISA, F.: "Patrimonio Común de la Humanidad", *Estudios de Deusto*, Vol. 41/2, julio-diciembre 1993, pp. 119-192.

<sup>67</sup> Concerning this problematic right see ABRISKETA, J.: "El derecho a la asistencia humanitaria: fundamentación y límites", in UNIDAD DE ESTUDIOS HUMANITARIOS: *Los desafíos de la acción humanitaria*, Icaria, Barcelona, 1999, pp. 71-100.

<sup>68</sup> VASAK, K.: "Les différentes catégories des Droits de l'homme", in *Les dimensions universelles des Droits de l'Homme*, UNESCO-Bruylant, Brussels, 1990, p. 297.

<sup>69</sup> ALSTON, P.: "A third generation of solidarity rights: progressive development or obfuscation of International Human Rights Law?", *Netherlands International Law Review*, 1982, p. 314.

<sup>70</sup> With this in mind, it is no surprise that the right to development had its origins in Africa, and that jurists from the Third World have been its most ardent defenders.

<sup>71</sup> MARKS, S.: "Emerging Human Rights: a new generation for the 1980s?", *Rutgers Law Review*, Vol. 33, 1981, p.440.

Other factors which have been notable in their influence on the growth of these rights dealing with solidarity are the interdependence and globalisation which have been a part of international society since the 1970s. States are becoming more and more conscious of the fact that there exist global problems whose solutions require coordinated responses; they require, in short, participation on processes of international cooperation<sup>72</sup>. As a consequence of this global change, third generation rights are rights which emphasise the need for international cooperation, and which basically have a bearing on the collective aspects of these rights; they are “community-oriented rights”<sup>73</sup>, to use Gros Espiell’s expression—in other words, they are rights which reveal the urgent need to make decisions and take joint actions within the framework of the international community, not only in the sphere of nation-States.

The key word with regards these new rights is *solidarity*<sup>74</sup>, but this does not mean simply that these rights are the vehicles for the promotion of solidarity. Human rights of the first two generations should also serve to give expression to this value which is so needed in an international society as divided as the one in which we live today. But what certainly *is* true is that “perhaps third generation rights require a higher degree of solidarity”<sup>75</sup>.

However, this new generation of human rights has not been accepted peacefully either by scholars or by the States themselves, which has caused a series of intense debates. In the words of Angustias Moreno,

“new currents pose sufficient risk to the international protection of human rights that we have to approach them with great care; it might even, perhaps, be more profitable for us to consolidate what we have already achieved with regards respecting human rights, before crossing new frontiers”<sup>76</sup>.

A similar opinion is held by Professor Kooijmans, for whom the introduction of the idea of third generation human rights “does not only muddy the issue, it also constitutes a danger to what was at the root of the internationalization of human rights, strengthening the protection of the individual from breaches of his most fundamental human rights by the State”<sup>77</sup>.

One of the most frequent objections to these rights is that the excessive proliferation of human rights can weaken the protection offered to already existing human rights. This criticism has been countered by those who support these new rights. Gros Espiell, among others, argues that this risk of weakening previous gen-

<sup>72</sup> As such, there has been talk of the emergence of an International Law of Cooperation: FRIEDMANN, W.: *La nueva estructura del Derecho Internacional*, Ed. Trillas, Mexico, 1967, p. 90.

<sup>73</sup> GROS ESPIELL, H.: “Introduction” in BEDJAOUI, M. (Ed.): *International Law: Achievements and Prospects*, UNESCO- Martinus Nijhoff Publishers, Dordrecht, 1991, p. 1167.

<sup>74</sup> MARKS, S.: “Emerging Human Rights...”, *op. cit.*, p. 441.

<sup>75</sup> GROS ESPIELL, H.: *op. cit.*, p. 1169.

<sup>76</sup> MORENO LOPEZ, A.: “Los derechos humanos de la solidaridad”, in *IV jornadas de profesores de Derecho Internacional y Relaciones Internacionales*, 4th-6th July 1979, Universidad de Granada, 1980, p. 50.

<sup>77</sup> KOOIJMANS, P.H.: “Human Rights - Universal Panacea? Some reflections on the so-called human rights of the third generation”, *Netherlands International Law Review*, 1990, p. 329.

erations' rights does not exist, but rather solidarity rights "are a prerequisite for the existence and exercise of all human rights"<sup>78</sup>. In other words, more than weakening or diluting, these human rights hope to strengthen the indivisibility and interdependence of all human rights. But the truth is that, as Alston correctly states, "the challenge is to achieve an appropriate balance between, on the one hand, the need to maintain the integrity and credibility of the human rights tradition, and, on the other hand, the need to adopt a dynamic approach that fully reflects changing needs and perspectives, and responds to the emergence of new threats to human dignity and well-being"<sup>79</sup>.

Another common criticism of these third generation rights is that the term "generation" seems to imply that previous generations' rights are already out-of-date or antiquated; they have been bettered. This criticism has also been contested. With regards this, Karel Vasak agrees that these new rights are *synthesis rights*, or rights which "cannot be realised unless other human rights, which are, in some way, their constituent parts, have been set in motion"<sup>80</sup>. And the truth is that one of the essential parts of these rights is the protection and safeguarding of all individual rights, of which they form a part.

One criticism which has been fairly justified, though, is that the demand for these solidarity rights can, on occasion, serve to justify massive violations of civil and political rights, mainly in the Third World. This situation has occurred frequently across Africa, where there are many countries suffering under dangerous dictatorships. Many African leaders came to the defence of solidarity rights, mainly the right to development, as a way of lengthening their period in power, ignoring individuals' rights, and defending their desire to not have internal affairs "interfered" with<sup>81</sup>. The truth is that if we truly do want these new rights to be credible and accepted by the international community, they should entail a scrupulous respect for individual human rights, especially those that are civil and political.

However, the main objection which can be levelled against these emerging rights is, without doubt, the fact that, apart from the right to benefit from the Common Heritage of Mankind<sup>82</sup>, none of the new rights has been recognised by a conventional instrument with universal scope; in other words, by an international treaty that is binding to those States which have ratified it. Recognition of these new rights has mainly been brought about as a result of the General Assembly of the United

<sup>78</sup> GROS ESPIELL, H.: *op. cit.*, p. 1168.

<sup>79</sup> ALSTON, P.: "Conjuring up new Human Rights: a proposal for quality control", *American Journal of International Law*, Vol. 78, 1984, p. 609.

<sup>80</sup> VASAK, K.: "Les différentes catégories des Droits de l'homme", in *Les dimensions universelles...*, *op. cit.*, p. 305.

<sup>81</sup> This "perversion of solidarity rights" has been discussed by many different writers, among them: MAHMUD, S.S.: "The State and Human Rights in Africa in the 1990s: perspectives and prospects", *Human Rights Quarterly*, Vol. 15, no. 3, 1993, pp. 488 ff.; HOWARD, R.E.: *Human Rights in Commonwealth Africa*, Rowman and Littlefield Publishers, New Jersey, 1986.

<sup>82</sup> The concept of the Common Heritage of Mankind has been expressly dealt with in two international treaties. The first of these is the *Agreement Governing the Activities of States on the Moon and other Celestial Bodies*, 14th December 1979. The second is the *UN Convention on the Law of the Sea*, signed in Montego Bay on the 30th of April 1982, and which has only recently come into force in November of 1994.

Nations, which brings about the need for consideration of the thorny issue of the legal value of such resolutions<sup>83</sup>.

For one part of international lawyers, mainly in the West, the legal value of the resolutions of the General Assembly of the United Nations is "relative", depending on the circumstances in which each individual resolution is adopted (whether it is unanimously approved, whether its terms are sufficiently precise and concrete, States' opinions regarding the issue, etc.). On many occasions, the norms contained in these resolutions become what is known as *soft-law*, or regulations which cannot be classed as fully legal<sup>84</sup>.

However, other scholars, more committed to the transformation of *the* international legal order, believe that such resolutions have full legal effect<sup>85</sup>.

As such, we find ourselves facing new human rights which are in the process of being formed, or are human rights in *statu nascendi*, given that States, main creators of international law, are showing themselves to be wary of the recognition of these new rights within any instrument that is not a resolution of the General Assembly of the United Nations.

However, we should bear in mind the fact that older human rights were also up against fierce resistance when they were first proclaimed as rights. This should serve as an encouragement to us to redouble our efforts regarding these new solidarity rights, rights which try to reply to the main challenges the international community has to face: development, peace, the environment, humanitarian catastrophes etc.

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

The Vienna Conference on Human Rights was the second world conference on the issue, and took place 25 years later than the first world conference, which was held in Tehran in 1968. High hopes had been placed on this conference regarding the extent to which it could become a turning point for issues concerning the universal respect for human rights. However, the results of the conference left a bittersweet taste in the mouths of those attending it, both for governmental delegations and for the many non-governmental organisations which were taking part

<sup>83</sup> There exists abundant literature on this topic. Among the most significant pieces are: VIRALLY, M.: "La valeur juridique des recommandations de Organisations Internationales", *Annuaire Française de Droit International*, 1956, pp. 66-95; PÉREZ VERA, E.: "Algunas consideraciones sobre el valor jurídico de las Resoluciones de la Asamblea General en el 26 aniversario de la ONU", *Boletín de la Universidad de Granada*, no. 105, Vol. V, 1973, pp 37-52; CASTAÑEDA, J.: "La valeur juridique des résolutions des Nations Unies", *RCADI*, 1970-I, t. 129, pp. 205-332.

<sup>84</sup> On the notion of *soft-law*, see: WEIL, P.: "Vers une normativité relative en Droit International?", *Revue Générale de Droit International Public*, 1982, pp. 6 ff.; ISA, R.: "Formation des normes internationales dans un monde en mutation: critique de la notion de *Soft-law*", in *Le Droit International au service de la paix, de la justice et du développement. Mélanges Michel Virally*, Paris, Pedone, 1991, pp. 334 ff.

<sup>85</sup> BEDJAQUI, M.: *Hacia un Nuevo Orden Económico Internacional*, UNESCO-Sígueme, Salamanca, 1979, pp. 157 ff; BEKHECHI, M.A.: "Les résolutions des Organisations Internationales dans le processus de formation de normes en Droit International", in FLORY, M.; MAHIOU, A. and HENRY, J.-R.: *La formation des normes en Droit International du Développement*, Table Ronde franco-maghrébine Aix-en-Provence, October 1982, Office des Publications Universitaires, Alger et Centre National de la Recherche Scientifique, Paris, 1984, pp. 181-196.

in the discussions<sup>86</sup>, although there are some who express views which are not so pessimistic, even coming to the conclusion that the Vienna Conference “was a huge success for the human rights cause”<sup>87</sup>.

The central theme of the Vienna Conference without doubt concerned consideration of whether human rights are universal, or applicable to all countries in the international community, or whether, conversely, they must be understood in the light of different circumstances, be these historical, cultural, religious, etc. There were two theories battling it out on this issue: the universalist theory and the theory of cultural relativism. The two positions were quite far apart; while Western countries defended the universality of human rights, the Islamic countries and a significant proportion of Third World countries were staunch supporters of cultural relativism, viewing the theory of universality as being a new form of colonialism, but this time in the form of human rights. What is true is that following the debates concerning this thorny issue, the conclusions which were reached were not particularly satisfactory, given that, as we shall see below, the Final Declaration of the Vienna Conference is extremely ambiguous with regards the problem of the universality of human rights<sup>88</sup>. In the Final Declaration of the conference, a special consensus was reached which, in my opinion, has still not yet solved the problem. As the Vienna Declaration states, after its first paragraph, in which it declares that “the universal nature of these rights and freedoms is beyond question”,

“... the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind”<sup>89</sup>.

It is easy to see how this ambiguous paragraph does not openly take the side either of the universality of human rights or of the theory of cultural relativism; it aims to please, as far as it is possible, the defenders of both views. And, as has already been commented on, it was clearly shown at the World Conference on Human Rights that the two opinions were very much opposed, and that those involved were far from

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<sup>86</sup> More than 3.500 NGOs working in the field of human rights took part in a *Parallel Conference* which took place in Vienna for the duration of the official conference. It should also be noted that the discussions which took place at the parallel conference had an influence on the Final Declaration of the official conference.

<sup>87</sup> These are the words of Julián Palacios, Director of the Office of Human Rights of the Spanish Ministry for Foreign Affairs at the time of the official conference, in PALACIOS, J.: “Más luces que sombras en la Conferencia Mundial de Derechos Humanos”, *Tiempo de Paz*, n.º. 29-30, Autumn 1993, p. 6.

<sup>88</sup> Clear proof of the fact that the two positions were separated by a considerable distance can be found if the final documents of the preparatory Regional Meetings are compared with those of the Vienna World Conference. The first of these regional meetings was the African Regional Meeting, which took place in Tunisia from the 2<sup>nd</sup> to the 6<sup>th</sup> of November 1992, *Report of the Regional Meeting for Africa of the World Conference on Human Rights*, A/CONF.157/AFRM/14, of the 24<sup>th</sup> November 1992. The second meeting was the Regional Meeting for Latin America and the Caribbean, *Report of the Regional Meeting for Latin America and the Caribbean of the World Conference on Human Rights*, A/CONF.157/LACRM/15, of 22<sup>nd</sup> January 1993. The third was the Regional Meeting for Asia, *Report of the Regional Meeting for Asia of the World Conference on Human Rights*, A/CONF.157/ASRM/8, of 7<sup>th</sup> April 1993. The European Union, for its part, also held a preparatory meeting prior to the conference, *Note verbale dated 23 April 1993 from the Permanent Mission of Denmark to the United Nations Office at Geneva, transmitting a position paper by the European Community and its member States*, A/CONF.157/PC/87, of 23<sup>rd</sup> April 1993.

<sup>89</sup> *Vienna Declaration and Programme of Action*, *op. cit.*, Part 1, para. 5.

reaching any kind of consensus<sup>90</sup>. The only "middle road" through which it will be possible, if there is sufficient political will on the part of the States, to achieve universality for at least the most fundamental human rights, will be to open up an intercultural dialogue<sup>91</sup>, which is sincere and open between the Western States and those which have shown their support for cultural relativism. Both groups of States will need to put aside dogma and preconceived ideas in order to be prepared, as of the beginning of this dialogue, to make some concessions in their aims. And the fact is that we find ourselves facing one of the principal problems which are currently being faced by those who deal with the theory of human rights. The future evolution of human rights in a world of conflict will greatly depend on an adequate response to this problem.

The second question dealt with at the Vienna Conference was the growing link between human rights, democracy, and development. This is one of the aspects of human rights theory that has most developed. The indivisibility and interdependence between human rights, democracy, and development have been openly defended in recent times. The fact is that in order for there to be active defence of human rights and fundamental freedoms, it is vital that people be living in democratic States, and that these States should have reached minimum levels of economic, social, cultural, and political development (thus, the fact that people live in democratic States, and that these States have reached certain minimum level of economic, social, cultural and political development constitutes a necessary condition for the existence of an active defence of human rights).

This aspect did not give rise to as many discussions as the issue of universality, and this is reflected in the Final Declaration of the conference. It is paragraph 8 of the Vienna Declaration which states that

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

An issue that is intimately related to this link between human rights, democracy, and development is the recognition in the Vienna Declaration of the right to development. This recognition is very important, given the fact that, as we have already shown, this right met with across-the-board opposition from Western countries at the time when it was first suggested. It is significant that, years later, in 1993, all the countries present in Vienna came to an agreement concerning recognition of the right to development. As the Final Declaration states, "the World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a *universal and inalienable right and an integral part of fundamental human rights*"<sup>92</sup> (emphasis added). Through this

<sup>90</sup> On the issue of the universality of human rights at the Vienna Conference and in its Final Declaration, see VILLAN DURAN, C.: "Significado y alcance de la universalidad de los derechos humanos en la Declaración de Viena", *Revista Española de Derecho Internacional*, Vol. XLVI, no. 2, 1994, pp. 505-532.

<sup>91</sup> ETXEBERRIA, X.: "El debate sobre la universalidad de los derechos humanos", in INSTITUTO DE DERECHOS HUMANOS: *La Declaración Universal...*, op. cit., p. 385.

<sup>92</sup> *Vienna Declaration and Programme of Action*, op. cit., Part 1, para. 10.



relevant reference, we can see how the right to development occupies a relatively important position in the Vienna Declaration, a fact which encouraged the already-quoted Julián Palacios to state that “recognition of the principle of the right to development...constitutes an unprecedented success which, *ab initio*, it appeared impossible to achieve”<sup>93</sup>.

Similarly, another of the questions which was discussed in Vienna, and which at the end of discussions achieved the success of being included in the Final Declaration, was the taking on by the international community of a firm commitment to make the human rights of women one of the priorities of the international human rights agenda. What is true is that the lobbying of movements in favour of the rights of women in Vienna certainly made its presence felt for the duration of the conference, achieving significant recognition in the Final Declaration. As the Vienna Conference states regarding this issue,

“The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights (...) The human rights of women should form an integral part of the United Nations human rights activities, including the promotion of all human rights instruments relating to women”<sup>94</sup>.

A final aspect of the dealings of the Vienna Conference which should be noted is the importance given to the non-governmental organisations which work in the sphere of human rights. Firstly, as we have already mentioned, the NGOs participated very actively in the discussions, both at the official conference and at the NGO parallel conference. Additionally, the Final Declaration of the Vienna Conference recognises the important role which NGOs must play with regards the protection and promotion of human rights. With respect to this, paragraph 38 of the Final Declaration states that

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

### 3. Human rights under the current process of globalisation

The current process of globalisation is characterised by the fact that it is a process which generates exclusion and huge inequalities, resulting in very serious consequences for the protection of human rights, both those which are civil and political, and, above all, those which are economic, social, and cultural<sup>95</sup>. This fact had already been verified by the Heads of State and Heads of Government who met at the

<sup>93</sup> PALACIOS, J.: “Más luces que sombras...”, *op. cit.*, p. 8.

<sup>94</sup> *Vienna Declaration...*, *op. cit.*, Part 1, para. 18.

<sup>95</sup> MARTÍNEZ DE BRINGAS, A.: “Globalización y Derechos Humanos”, *Cuadernos Deusto de Derechos Humanos*, n.º. 15, 2001.

United Nations headquarters in New York at the famous *Millennium Summit*, which took place in September of 2000. In their opinion,

“the central challenge we face today is to ensure that globalization becomes a positive force for all the world’s people. For while globalization offers great opportunities, at present its benefits are very unevenly shared, while its costs are unevenly distributed. We recognize that developing countries and countries with economies in transition face special difficulties in responding to this central challenge. Thus, only through broad and sustained efforts to create a shared future, based upon our common humanity in all its diversity, can globalization be made fully inclusive and equitable”<sup>96</sup>.

As we can see, the General Assembly itself is clamouring for a globalisation that is “fully *inclusive and fair*”, which makes it clear that the current process of globalisation is not progressing down that road. We find ourselves faced with a process of globalisation which is having such consequences that we have come to the point where we refer to a *biased* globalisation<sup>97</sup>, given that it is dramatically accentuating disparities, both within countries<sup>98</sup> as well as between them. What is true is that global inequality is increasing at a rate “which has never before been known”<sup>99</sup>. Clear proof of this growing inequality can be found in the figures of the United Nations Development Programme (UNDP), which states that “the difference in income between the fifth of world population that lives in the richest countries and the fifth that lives in the poorest countries was 74 to 1 in 1997, higher than the figures of 60 to 1 in 1990 and 30 to 1 in 1960”<sup>100</sup>. As we can see, during the passing of 30 years, from 1960 to 1990, the gap between the fifth of world population living in the developed countries and the fifth living in the most underdeveloped countries doubled, and the figures continue to move towards an even further increase of this gap. Continuing down this road puts us at risk of the world becoming a stage for a true *Global Apartheid*<sup>101</sup>, where rich people, on the one hand, and poor people, on the other, live every day more separated by a real barrier of poverty, with few possibilities for finding common areas and space for cooperation.

<sup>96</sup> *United Nations Millennium Declaration*, Resolution adopted by the General Assembly, UN Doc. 55/2 (18 Sept. 2000) para. 5.

<sup>97</sup> Dubois, A.: “Una globalización sesgada”, *Mientras Tanto*, n.º 70, 1997, pp 67-84.

<sup>98</sup> A very interesting analysis of the effects of globalisations within countries themselves, with a special mention of what is the case in Spain, can be found in NAVARRO, V.: *Globalización económica, poder político y Estado del Bienestar*, Ariel, Barcelona, 2000. Similar analysis relating to Latin America can be found in RUIZ VARGAS, B.: “Globalización de la economía y ampliación de la pobreza”, *El Bordo*, Universidad Iberoamericana, Tijuana, 20, pp. 41-50; URQUIDI, V. (Coord.): *México en la globalización. Condiciones y requisitos de un desarrollo sustentable y equitativo*, FCE, Mexico, 1997.

<sup>99</sup> This growing inequality does not limit itself to macro-economic figures, but also affects issues such as schooling, the percentage of scientists and technicians, and investment in research and development while, however, “life expectancy, nutrition, infant mortality, access to drinking water have got worse...”; see BERZOSA, C.: “El Subdesarrollo, una toma de conciencia para el siglo XXI”, in *Derechos Humanos y Desarrollo*, Mensajero-Alboan, Bilbao, 199, pp. 22 ff.

<sup>100</sup> PNUD: *Informe sobre Desarrollo Humano 1999*, Mundi-Prensa, Madrid, 1999, p. 3.

<sup>101</sup> This is the expression used by Professor José Manuel Pureza, in PUREZA, J.M.: *El Patrimonio Común de la Humanidad. ¿Hacia un Derecho Internacional de la Solidaridad?*, Trotta, Madrid, 2002, pp. 60 ff.

As well as the main consequence that we have analysed, which is the vertiginous increase of inequality both on an internal level and on an international panorama, which has become a characteristic feature that is inherent to the current process of neo-liberal globalisation, we should also note other consequences which also have the potential to have significant repercussions as regards the enjoyment of human rights. I am referring to, in the first place, the reduction of the role played by the State which is part and parcel of globalisation, and, secondly, to the roles which transnational corporations are beginning to play in the current globalisation process.

With reference to the reduction of the role of the State, it is clear that the liberalisation and deregulation supported by neo-liberal globalisation have had as their main objective the aim of reducing the role of the State with regards economic and social systems, leaving sectors which until then had been fundamentally controlled by the public sector in the hands of the private sector<sup>102</sup>. We can see that one of the consequences of this process has been a progressive debilitation of the protection of human rights in many States, basically affecting economic, social, and cultural rights. As we know, these rights depend mainly on the State for their effective realisation. They are rights which demand the provision of services by the State: rights such as the right to health, education, food and clothing, basic social services, a public social security system, etc. At the same rate as that at which States have begun to cease to be involved in certain sectors, surrendering their duties, economic, social, and cultural rights have been suffering. This true "privatisation of human rights" has had harmful consequences for the effective protection of many of them<sup>103</sup>. This shrinking of the role of the State has been especially intense in many developing countries, due to the Structural Adjustment Programmes imposed by the World Bank and the International Monetary Fund, which has contributed still further, if this is possible, to the situation faced by economic, social, and cultural rights in these countries, and also has had an influence on the fulfilment of civil and political rights. The indivisibility and interdependence of all human rights means that when one category of right suffers, the others are also affected. The repercussions of these plans devised by the Bretton Woods institutions have been very important from the point of view of the satisfaction of human rights<sup>104</sup>.

Secondly, transnational corporations have become one of the most significant vehicles for the current process of globalisation, taking part in activities which are beginning to raise serious doubts from those involved in human rights, especially those involved in economic, social, and cultural rights, and the right to development<sup>105</sup>. As

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<sup>102</sup> On the impact privatisation can have on the enjoyment of basic human rights see DE FEYTER, K. and GÓMEZ ISA, F. (Eds.): *Privatisation and Human Rights in the Age of Globalisation*, Intersentia, Antwerp-Oxford, 2005.

<sup>103</sup> BARRIOS MENDIVIL, R.: "Obstáculos para la vigencia de los derechos económicos, sociales y culturales", in TERRE DES HOMMES: *El derecho a la equidad, Ética y mundialización social*, Icaria, Barcelona, 1997, pp. 83-116.

<sup>104</sup> PRIGAU I SOLE, A.: "Las políticas del FMI y del Banco Mundial y los Derechos de los Pueblos", *Afers Internacionals*, no. 29-30, 1995, pp. 139-175.

<sup>105</sup> On this topic, the following, among others, can be consulted: GÓMEZ ISA, F.: "Las Empresas Transnacionales y sus obligaciones en materia de derechos humanos", *Cursos de Derechos Humanos de Donostia-San Sebastián*, Servicio Editorial de la UPV, Bilbao, 2005, pp. 171-201; RATNER,

Mary Robinson, former UN High Commissioner for Human Rights, has stated when presenting a report on *Business and Human Rights*, "business should support and respect the protection of internationally proclaimed human rights within their sphere of influence and make sure they are not complicit in human rights abuses"<sup>106</sup>. Not unrelated to this preoccupation are certain scandals in which particular multinational companies have been involved, where proof of abuse of even the most basic workers' rights, exploitation of child labour, interference in the internal affairs of certain States, serious environmental consequences as a result of the companies' production etc. has been obtained<sup>107</sup>. In response to all this, there have been various United Nations initiatives since the 1970s, which have attempted to adopt a code of conduct for multinational companies, in which certain principles to which these companies should be subject to will be set out<sup>108</sup>. In one of the last versions of this draft code of conduct<sup>109</sup>, (which has, unfortunately, not yet been approved due to the opposition of the industrialised countries where the majority of these multinational companies have their headquarters), Article 14 sets out that "transnational corporations shall respect human rights and fundamental freedoms in the countries in which they operate...". Against all this background, the Sub-Commission for the Prevention of Discrimination and the Protection of Minorities<sup>110</sup> has decided to set up a working group, charged with the task of examining the working practices and activities of multinational companies so as to see the impact they have on the extent to which people enjoy human rights. This working group has already held several periods of sessions since August 1999, and has confirmed that there are some serious dangers to human rights caused by certain working practices and activities of particular multinational companies<sup>111</sup>.

On the other hand, the Sub-Commission has just adopted in August 2003 a *Project on Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*<sup>112</sup>, in which it proclaims the princi-

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S.R.: "Corporations and Human Rights: a Theory of Legal Responsibility", *The Yale Law Journal*, Vol. 111, 2001, pp. 443-545.

<sup>106</sup> *Business and Human Rights: A Progress Report*, OHCHR, Geneva, January 2000, p. 2.

<sup>107</sup> One of a great many examples is the fact that Amnesty International has, at various times, denounced various multinational petrol companies for the incredibly serious human rights violations which were occurring in Sudan. These companies were even benefiting from these human rights violations, as they were opening the way for the exploitation of oil; see AMNESTY INTERNATIONAL: *Sudan: The Human Price of Oil*, AFR 54/04/00, 3<sup>rd</sup> May 2000.

<sup>108</sup> Two Codes of Conduct of a general nature have been adopted so far: the *OECD Declaration on International Investment and Multinational Enterprises* (21 June 1976), and the *ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (16 November 1977). On these initiatives, see A. KOLK; R. VAN TULDER AND C. WELTERS, "International Codes of Conduct and Corporate Social Responsibility: can transnational corporations regulate themselves?", 8 *Transnational Corporations* n.º 1, April 1999, pp. 143-180.

<sup>109</sup> UN Doc. E/1990/94 (12 June 1990).

<sup>110</sup> UN Doc. Resolution 1998/8 (20 August 1998).

<sup>111</sup> UN Doc. E/CN.4/Sub.2/1999/9 (12 August 1999) 5. See also the reports on the second, third, fourth and fifth periods of sessions, in UN Doc. E/CN.4/Sub.2/2000/12 (28 August 2000); UN Doc. E/CN.4/Sub.2/2001/9 (14 August 2001); UN Doc. E/CN.4/Sub.2/2002/13 (15 August 2002) and UN Doc. E/CN.4/Sub.2/2003/13 (6 August 2003).

<sup>112</sup> UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003).

ple of *co-responsibility*. The Preamble of the Project of Norms recognizes that “even though States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights, *transnational corporations and other business enterprises*, as organs of society, *are also responsible* for promoting and securing the human rights set forth in the Universal Declaration of Human Rights...” (emphasis added). This idea of co-responsibility is developed with much more precision in Part A of the Project, devoted to General Obligations. According to Article 1, “... within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups”. As we can see very clearly, transnational corporations and other enterprises assume the obligation to respect and ensure basic human rights within their spheres of influence, paying special attention to vulnerable groups like indigenous peoples. The main problems that this Project will have to face in the near future is the question of its legal nature and means of implementation, aspects that still are not totally defined in the text. Unfortunately, the Commission on Human Rights, in its decision 2004/116 of 20 April 2004, expressed the view that while the Norms contained “useful elements and ideas” for its consideration, as a draft proposal had no legal standing. Instead of insisting in continuing working in the development of the Norms, the Commission requested the Secretary-General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises<sup>113</sup>. The special representative has submitted an interim report to the Commission at its sixty-second period of sessions in which the Draft Norms are considered having incurred in “doctrinal excesses” and comes to the conclusion that “the flaws of the Norms make that effort a *distraction* from rather than a basis for moving the special representative’s mandate forward”<sup>114</sup> (emphasis added). As we can see, the future of the Norms is quite uncertain.

Up until now, we have focussed on the detrimental effects of globalisation on human rights. However, globalisation can also provide possibilities and opportunities for the universal extension of human rights. This means that not only markets and communications are globalised, which is what has happened until now, but also elemental human rights, thus contributing to their true universalisation.

Firstly, a truly universal culture of human rights would demand the globalisation of all human rights, not only those which are civil and political, but also those of an economic, social, or cultural nature. The seed of this globalisation of human rights was already planted in the Universal Declaration of Human Rights of 1948, where Article 28 states that “everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized”. As we can see, this Article sets out what has been called the *structural approach to human rights*, or the need for structural changes, both internal and international, in order

<sup>113</sup> Resolution 2005/69. On 25 July 2005, the ECOSOC adopted decision 2006/273 approving the Commission’s request and, three days later, on 28 July 2005, the Secretary-General appointed John Ruggie, Professor of International Affairs at Harvard University, as his special representative.

<sup>114</sup> UN Doc. E/CN.4/2006/97 (22 February 2006), paras. 59 and 69.

that all human rights might be fully effective<sup>115</sup>. An extension of this structural focus, which has been the safest bet for the globalisation of solidarity, development, and human rights, has been the fact that the General Assembly of the United Nations proclaimed the right to development in 1986. As Article 1 of the Declaration on the right to development states, “the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized”. In addition, it will be the States which have “the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development” (Article 3.1). The basic problem with which this attempt at universalising and globalising human rights and development has met is a lack of political will to recognise this right to development on the part of the main developed countries, and, even more important, a lack of desire to carry out concrete measures which would lead to its realisation<sup>116</sup>. This is one of the main faults of Western discourse regarding the universality of human rights. When the majority of these countries fight for universality, they are thinking exclusively of the universality of civil and political rights, completely forgetting the fact that the dignity of the human being also demands the universality of economic, social, and cultural rights, and the right to development<sup>117</sup>.

Another of the aspects onto which globalisation can breathe fresh air is the progressive introduction of the principle of *universal jurisdiction* to the international protection of human rights. Since the Peace of Westphalia (1648) the principle of territorial jurisdiction has been an undisputed issue in international law; in other words, the exercise of jurisdiction by a State was absolutely limited by the limits of State borders. As a result of growing interdependence and globalisation, this principle has been eroding and giving way, at the moment still in a very limited manner, to the principle of universal jurisdiction, in accordance with which certain crimes which disgust humanity as a whole (genocide, torture, terrorism, etc.) could be pursued not only in the country in which they took place, but also in other countries<sup>118</sup>. This

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<sup>115</sup> An in-depth analysis of Article 28 of the Universal Declaration appears in EIDE, A.: “Article 28”, in ALFREDSSON, G. and EIDE, A. (Eds.): *The Universal Declaration of Human Rights*, Martinus Nijhoff Publishers, Dordrecht, 1999, pp. 597-632.

<sup>116</sup> Taking this into consideration, we should not forget that the Declaration on the right to development is only a resolution of the General Assembly of the United Nations, which means that its legal force is only that of a recommendation. We should also remember that this resolution gained a negative vote from the United States, and abstentions from Denmark, the Federal Republic of Germany, the United Kingdom, Finland, Iceland, Sweden, Japan, and Israel. A detailed analysis of the issues of the right to development and its main obstacles can be found in GÓMEZ ISA, F.: *El derecho al desarrollo como derecho humano en el ámbito jurídico nacional*, Universidad de Deusto, Bilbao, 1999.

<sup>117</sup> A radical criticism of this Western suggestion of universality is made by Ignacio Ellacuría, for whom “the offer of humanisation and freedom which rich countries make to poor countries is not universalisable, and consequently not human... The practical ideal of Western society is not universalisable, not even materially, as there are not sufficient resources on Earth for all countries to reach the same levels of production and consumption...”, in ELLACURIA, I.: “Utopía y profetismo”, in *Mysterium Liberationis*, Trotta, Madrid, 1991, pp. 393 ff.

<sup>118</sup> The *National Audience*, the highest Spanish Court holding jurisdiction in cases of genocide and terrorism, is based on Article 23.4 of the Organic Law on Judiciary (1985) to request the extra-

is exactly what happened at the attempt to prosecute Augusto Pinochet in Spain on behalf of the *Audiencia Nacional* during his time in power in Chile. Despite the fact that, for "humanitarian" reasons, the British Home Office Minister prevented his extradition to Spain, the fact of the matter is that the decisions of the House of Lords backing his extradition leave no doubt as to the fact that this case has meant a great deal for the advancing of the principle of universal jurisdiction, and even of International Law itself. As has been said as regards this, "Pinochet's arrest was a clear indicator of the fact that the process of globalisation, until that time restricted to issues of international trade, the Internet, and the freedom of multinational companies to eliminate barriers to their international activities, could also be extended to other areas of life"<sup>119</sup>. Other cases have followed in the wake of that of Pinochet and, for the sake of example, the Rigoberta Menchú Foundation has attempted to ask the *Audiencia Nacional* for justice regarding the genocide, torture, and State terrorism that took place in Guatemala in the 1980s, a request which has so far been denied by the latter body. The other representative case is the Mexican government's decision to agree to the extradition of Ricardo Miguel Cavallo, for him to be tried in Spain for the crimes of genocide, torture, and terrorism, which he was accused of committing during the dictatorship in Argentina<sup>120</sup>. As we can see, globalisation is also linking itself with universal justice and the fight against impunity, and has now borne its first fruits, fruits which will be consolidated when the International Criminal Court comes fully into operation, once the Rome Statute entered into force in July of 2002.

In conclusion, following the brief analysis which has been conducted we can say that the current process of neo-liberal globalisation is raising serious doubts from the point of view of human rights, although, on the other hand, we should also allow that we are beginning to see some lights at the end of the tunnel, and hopes that allow us to firmly believe that another form of globalisation is possible, that of the universal culture of human rights.

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dition of Pinochet. In this provision it is ordered that "the Spanish jurisdiction will likewise have the authority to hear the crimes committed by Spaniards or by aliens outside national territory which may be classified, according to Spanish penal law, as one of the following crimes: genocide, terrorism, hijacking airplanes..., and any other which, in accordance with international treaties or agreements, should be prosecuted in Spain".

<sup>119</sup> O'SHAGHNESSY, H.: *Pinochet. The Politics of Torture*, New York University Press, New York, 2000.

<sup>120</sup> As regards this, see the Mexican Ministry of External Affairs' (Ministro de Asuntos Exteriores) analysis of the repercussions of this case on the future of the international protection of human rights in CASTAÑEDA, J.G.: "La extradición de Cavallo a España. Un precedente internacional", *EL PAIS*, 21<sup>st</sup> March 2001, p. 4.





Part II

# Foundation of Human Rights



# Toward a multicultural conception of Human Rights\*

Boaventura de Sousa Santos

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

## 1. Introduction

For the past few years I have been puzzled by the extent to which human rights have become the language of progressive politics. Indeed, for many years after the Second World War human rights were very much part and parcel of Cold War politics, and were so regarded by the Left. Double standards, complacency towards friendly dictators, the defense of tradeoffs between human rights and development—all this made human rights suspect as an emancipatory script. Whether in core countries or throughout the developing world, the progressive forces preferred the language of revolution and socialism to formulate an emancipatory politics. However, with the seemingly irreversible crisis of these blueprints of emancipation, those same progressive forces find themselves today resorting to human rights to reconstitute the language of emancipation. It is as if human rights were called upon to fill the void left by socialist politics. Can in fact the concept of human rights fill such a void? My answer is a qualified yes. Accordingly, my analytical objective here is to specify the conditions under which human rights can be put at the service of a progressive, emancipatory politics.

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

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

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

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

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

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

the religious at the end of the century. But to speak of culture and religion is to speak of difference, boundaries, particularity. How can human rights be both a cultural and a global politics?

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

## 2. On Globalizations

I shall start by specifying what I mean by globalization. Globalization is very hard to define. Most definitions focus on the economy, that is to say, on the new world economy that has emerged in the last three decades as a consequence of the globalization of the production of goods and services, and financial markets. This is a process through which the transnational corporations and multilateral financial institutions have risen to a new and unprecedented preeminence as international actors.

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

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

The most important implications of this definition are the following. First, in the conditions of Western capitalist world system there is no genuine globalization. What we call globalization is always the successful globalization of a given localism. In other words, there is no global condition for which we cannot find a local root, a specific cultural embeddedness. The second implication is that globalization

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

entails localization. In fact, we live in a world of localization, as much as we live in a world of globalization. Therefore, it would be equally correct in analytical terms if we were to define the current situation and our research topics in terms of localization, rather than globalization. The reason why we prefer the latter term is basically because hegemonic scientific discourse tends to prefer the story of the world as told by the winners. Many examples of how globalization entails localization can be given. The English language, as *lingua franca*, is one such example. Its expansion as global language has entailed the localization of other potentially global languages, namely, the French language.

Therefore, once a given process of globalization is identified, its full meaning and explanation may not be obtained without considering adjacent processes of relocalization occurring in tandem and intertwined with it. The globalization of the Hollywood star system may involve the ethnicization of the Hindu star system produced by the once strong Hindu film industry. Similarly, the French or Italian actors of the 60's—from Brigitte Bardot to Alain Delon, from Marcello Mastroianni to Sofia Loren—who then symbolized the universal way of acting, seem today, when we see their movies again, as rather ethnic or parochially European. Between then and now, the Hollywoodesque way of acting has managed to globalize itself.

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

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

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

The first one I would call *globalized localism*. It consists of the process by which a given local phenomenon is successfully globalized, be it the worldwide operation

of TNCs, the transformation of the English language in *lingua franca*, the globalization of American fast food or popular music or the worldwide adoption of American intellectual property law and new *lex mercatoria*.

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

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

However, the intensification of global interactions entails two other processes that are not adequately characterized either as globalized localisms or localized globalisms. The first one I would call *cosmopolitanism*. The prevalent forms of domination do not exclude the opportunity for subordinate nation-states, regions, classes or social groups and their allies to organize transnationally in defense of perceived common interests and use to their benefit the capabilities for transnational interaction created by the world system. Cosmopolitan activities involve, among others, South-South dialogues and organizations, new forms of labor internationalism, transnational networks of women's groups, indigenous peoples and human rights organizations, crossborder alternative legal services, North/South anticapitalist solidarity, transformative advocacy NGOs, networks of alternative development and sustainable environment groups, literary, artistic and scientific movements in the periphery of the world system in search of alternative, non-imperialist cultural values, engaging in postcolonial research, subaltern studies, and so on. In spite of the heterogeneity of the organizations involved, the contestation of the World Trade Organization meeting in Seattle (November 30, 1999) was a good example of what I call cosmopolitanism.<sup>4</sup>

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

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

For me, cosmopolitanism is the crossborder solidarity among groups that are exploited, oppressed or excluded by hegemonic globalization. Either as hiper-localized populations (e.g. the

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

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

For my purpose in this paper, it is useful to distinguish between globalization from above and globalization from below, or between hegemonic and counter-hegemonic globalization. What I called *globalized localism* and *localized globalisms* are globalizations from above; *cosmopolitanism* and the *common heritage of humankind* are globalizations from below.

### 3. Human Rights as an emancipatory script

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

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indigenous peoples of the Andean cordillera) or as hiper-transnationalized populations (e.g. indigenous peoples in Brazil, Colombia or India displaced by "development projects", illegal immigrants in Europe and North America), these groups experience a space-time compression over which they have no control.



global competence and local legitimacy, the two attributes of a counter-hegemonic human rights politics in our time.

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

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

If we look at the history of human rights in the post-war period, it is not difficult to conclude that human rights policies by and large have been at the service of the economic and geo-political interests of the hegemonic capitalist states. The generous and seductive discourse on human rights has allowed for unspeakable atrocities and such atrocities have been evaluated and dealt with according to revolting double standards. Writing in 1981 about the manipulation of the human rights agenda in the United States in conjunction with the mass media, Richard Falk spoke of a "politics of invisibility" and of a "politics of supervisibility"<sup>7</sup>. As examples of the politics of invisibility he spoke of the total blackout by the media on news about the tragic decimation of the Maubere People in East Timor (taking more than 300.000 lives) and the plight of the hundred million or so "untouchables" in India. As examples of the politics of supervisibility Falk mentioned the relish with which post-revolutionary abuses of human rights in Iran and Vietnam were reported in the United States. Actually, the same could largely be said of the European Union countries, the most poignant example being the silence that kept the genocide of the Maubere people hidden from the Europeans for a decade, thereby facilitating the ongoing smooth and thriving international trade with Indonesia.

But the Western and indeed the Western liberal mark in the dominant human rights discourse could be traced in many other instances: in the Universal Declara-

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

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

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

tion of 1948, which was drafted without the participation of the majority of the peoples of the world; in the exclusive recognition of individual rights, with the only exception of the collective right to self-determination which, however, was restricted to the peoples subjected to European colonialism; in the priority given to civil and political rights over economic, social and cultural rights, and in the recognition of the right to property as the first and, for many years, the sole economic right.

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

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

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

The third premise is that all cultures are incomplete and problematic in their conceptions of human dignity. The incompleteness derives from the very fact that there is a plurality of cultures. If each culture were as complete as it claims to be, there would

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

be just one single culture. The idea of completeness is at the source of an excess of meaning that seems to plague all cultures. Incompleteness is thus best visible from the outside, from the perspective of another culture. To raise the consciousness of cultural incompleteness to its possible maximum is one of the most crucial tasks in the construction of a multicultural conception of human rights.

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

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

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

#### 4. Towards a diatopical hermeneutics

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

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

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

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

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

According to Panikkar, *dharmā* “is that which maintains, gives cohesion and thus strength to any given thing, to reality, and ultimately to the three worlds (*triloka*). Justice keeps human relations together; morality keeps oneself in harmony; law is the binding principle for human relations; religion is what maintains the universe in exist-

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

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

<sup>13</sup> Ashis Nandy has been one of the most influential and consistent critics of Western secularism applied to the Indian context; he has shown how the recent revival of religious ideology in India (Hindutva and the Bharatiya Janata Party) is part and parcel of a secularized politics, in NANDY, A.: “The Politics of Secularism and the Recovery of Religious Tolerance”, *Alternatives*, Vol. XIII, 1988, pp. 177-194; NANDY, A.: “The Twilight of Certitudes: Secularism, Hindu Nationalism and Other Masks of Deculturation”, *Postcolonial Studies*, Vol. 1, n.º 3, 1998, pp. 283-298. Bhargava provides a detailed and insightful analysis of the concept of secularism. He highlights the complex issues raised by the concept in the Indian context and offers a new and innovative perspective on secularism in Western societies, in BHARGAVA, R.: “Religious and Secular Identities”, en PAREKH, B. and BAKSHI, U. (Eds.): *Crisis and Change in Contemporary India*, Sage, New Delhi, 1995, pp. 317-349; BHARGAVA, R. (Ed.): *Secularism and its Critics*, Oxford University Press, New Delhi, 1998. For a discussion of secularism and the rights of religious minorities, see also CHANDHOKE, N.: *Beyond Secularism. The Rights of Religious Minorities*, Oxford University Press, New Delhi, 1999.

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

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

At another conceptual level, the same diatopical hermeneutics can be attempted between the *topos* of human rights and the *topos* of *umma* in Islamic culture. The passages in the Qur'an in which the word *umma* occurs are so varied that its meaning cannot be rigidly defined. This much, however, seems to be certain: it always refers to ethnical, linguistic or religious bodies of people who are the objects of the divine plan of salvation. As the prophetic activity of Muhammad progressed, the religious foundations of *umma* became increasingly apparent and consequently the *umma* of the Arabs was transformed into the *umma* of the Muslims. Seen from the *topos* of *umma*, the incompleteness of the individual human rights lies in the fact that on its basis alone it is impossible to ground the collective linkages and solidarities without which no society can survive, and much less flourish. Herein lies the difficulty in the Western conception of human rights to accept collective rights of social groups or peoples, be they ethnic minorities, women, or indigenous peoples. This is in fact a specific instance of a much broader

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<sup>14</sup> PANIKKAR, R.: *op. cit.*, p. 39. See also HALBFASS, W.: *op. cit.*; INADA, K.: "A Buddhist Response to the Nature of Human Rights", en WELCH, C. and LEARY, V. (Eds.): *Asian Perspectives on Human Rights*, Wetsview Press, Boulder, 1990, pp. 91-101; MITRA, K.: "Human Rights in Hinduism", *Journal of Ecumenical Studies*, Vol. 19, n.º 3, 1982, pp. 77-84; THAPAR, R.: "The Hindu and Buddhist Traditions", *International Social Science Journal*, Vol. 18, n.º 1, 1996, pp. 31-40. According to Knipe, *dharma* is "the spiritual duty in accord with cosmic law and order; perhaps the closest Sanskrit word for "religion", in KNIPE, D.M.: *Hinduism. Experiments in the Sacred*, Harper, San Francisco, 1991, p. 156.

difficulty: the difficulty of defining the community as an arena of concrete solidarity, and as a horizontal political obligation. Central to Rousseau, this idea of community was flushed away in the liberal dichotomy that set asunder the state and civil society.

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

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

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

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

<sup>16</sup> Besides AN-NA'IM, A.: *Toward Islamic...*, *op. cit.*, see DWYER, K.: *Arab Voices. The Human Rights Debate in the Middle East*, University of California Press, Berkeley, 1991; MAYER, A.E.: *Islam and Human Rights. Tradition and Politics*, Westview Press, Boulder, 1991; LEITES, J.: "Modernist Jurisprudence as a Vehicle for Gender Role Reform in the Islamic World", *Columbia Human Rights Law Review*, Vol. 22, 1991, pp. 251-330; AFKHAM, M. (Ed.): *Faith and Freedom. Women's Human Rights in the Muslim World*, Syracuse University Press, Syracuse, 1995; HASSAN, R.: "On Human Rights and the Qur'anic Perspective", *Journal of Ecumenic Studies*, Vol. 19, n.º 3, 1982, pp. 51-65; AL FARUQUI, I.: "Islam and Human Rights", *The Islamic Quarterly*, Vol. 27, n.º 1, 1983, pp. 12-30. On the broader issue of the relationship between modernity and Islamic revival, see, for instance, SHARABI, H.: "Modernity and Islamic Revival: The Critical Tasks of Arab Intellectuals", *Contention*, Vol. 2, n.º 1, pp. 127-147; SHARIATI, A.: *What is to be done. The Enlightened Thinkers and an Islamic Renaissance*, The Institute for Research and Islamic Studies, Houston, 1986.

and confrontations may be unavoidable. Concerning women, there is no question of equality; the Shari'a commands the segregation of women and, according to some more strict interpretations, even excludes them from public life altogether.

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

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

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

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

In India a similar *via permezzo* is being pursued by some human rights groups and, particularly, by untouchable social reformers. It consists in grounding the struggle of the untouchables for justice and equality in the Hindu notions of *karma* and *dharma*, revising and reinterpreting them or even subverting them selectively in such a way as to turn them into sources of legitimacy and strength for contestations and protests. An illustration of such revisions is the increasing emphasis given to “*common dharma*” (*sadharana dharma*) in contrast with the “*specialized dharma*” (*visesa dharma*) of caste rules, rituals and duties. According to Khare, the common dharma,

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

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

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

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

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

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



## 5. Difficulties of a progressive multiculturalism

The diatopical hermeneutics offers a wide field of possibilities for debates going on, in the different cultural regions of the world system, on the general issues of universalism, relativism, cultural frames of social transformation, traditionalism, and cultural revival.<sup>19</sup> However, an idealistic conception of cross-cultural dialogue will easily forget that such a dialogue is only made possible by the temporary simultaneity of two or more different contemporaneities. The partners in the dialogue are only superficially contemporaneous; indeed each of them feels himself or herself only contemporaneous with the historical tradition of his or her respective culture. This is most likely the case when the different cultures involved in the dialogue share a past of interlocked unequal exchanges. What are the possibilities for a cross-cultural dialogue when one of the cultures *in presence* has been itself molded by massive and long lasting violations of human rights perpetrated in the name of the other culture? When cultures share such a past, the present they share at the moment of starting the dialogue is at best a *quid pro quo* and at worst a fraud. The cultural dilemma is the following: since in the past the dominant culture rendered unpronounceable some of the aspirations of the subordinate culture to human dignity, is it now possible to pronounce them in the cross-cultural dialogue without thereby further justifying and even reinforcing their unpronounceability?

Cultural imperialism and epistemicide are part of the historical trajectory of Western modernity. After centuries of unequal cultural exchanges, is equal treatment of cultures fair? Is it necessary to render some aspirations of Western culture unpronounceable in order to make room for the pronounceability of other aspirations of other cultures? Paradoxically — and contrary to hegemonic discourse — it is precisely in the field of human rights that Western culture must learn from the South,<sup>20</sup> if the false universality that is attributed to human rights in the imperial

<sup>19</sup> For the African debate, see OLADIPO, O.: "Towards a Philosophical Study of African Culture: A Critique of Traditionalism", *Quest*, Vol. 3, n.º 2, 1989, pp. 31-50; ORUKA, H.O.: "Cultural Fundamentals in Philosophy", *Quest*, Vol. 4, n.º 2, 1990, pp. 21-37; WIREDU, K.: "Are There Cultural Universals?", *Quest*, Vol. 4, n.º 2, 1990, pp. 5-19; WAMBA DIA WAMBA, E.: "Some Remarks on Culture, Development and Revolution in Africa", *Journal of Historical Sociology*, Vol. 4, 1991, pp. 219-235; WAMBA DIA WAMBA, E.: "Beyond Elite Politics of Democracy in Africa", *Quest*, Vol. 5, n.º 1, 1991, pp. 28-42; PROCEE, H.: "Beyond Universalism and Relativism", *Quest*, Vol. 6, n.º 1, 1992, pp. 45-55; RAMOSE, M.B.: "African Democratic Traditions: Oneness, Consensus and Openness", *Quest*, Vol. 6, n.º 1, 1992, pp. 63-83. A sample of the rich debate in India is in NANDY, A.: "Cultural Frames for Social Transformation: A Credo", *Alternatives*, Vol. 12, 1987, pp. 113-123; NANDY, A.: *Traditions, Tyranny and Utopias. Essays in the Politics of Awareness*, Oxford University Press, Oxford, 1987; NANDY, A.: "The Politics of Secularism and the Recovery of Religious Tolerance", *Alternatives*, Vol. 13, 1988, pp. 177-194; CHATTERJEE, P.: "Gandhi and the Critique of Civil Society", en GUHA, R. (Ed.): *Subaltern Studies III: Writings on South Asian History and Society*, Oxford University Press, New Delhi, 1984, pp. 153-195; PANTHAM, T.: "On Modernity, Rationality and Morality: Habermas and Gandhi", *The Indian Journal of Social Science*, Vol. 1, n.º 2, 1988, pp. 187-208; BHARGAVA, R. (Ed.): *op. cit.*, 1998; BHARGAVA, R.; BAGCHI, A. and SUDARSHAN, R. (Eds.): *Multiculturalism, Liberalism and Democracy*, Oxford University Press, New Delhi, 1999. A bird's-eye view of cultural differences can be found in GALTUNG, J.: "Western Civilization: Anatomy and Pathology", *Alternatives*, Vol. 7, 1981, pp. 145-169.

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

context is to be converted into the new universality of cosmopolitanism in a cross-cultural dialogue. The emancipatory character of the diatopical hermeneutics is not guaranteed *a priori* and indeed multiculturalism may be the new mark of a reactionary politics. Suffice it to mention the multiculturalism of the Prime Minister of Malaysia or Chinese gerontocracy, when they speak of the "Asian conception of human rights."

One of the most problematic presuppositions of diatopical hermeneutics is the conception of cultures as incomplete entities. It may be argued that, on the contrary, only complete cultures can enter the inter-cultural dialogue without risking being run over by and ultimately dissolved into other, more powerful cultures. A variation of this argument states that only a powerful and historically victorious culture, such as the Western culture, can grant itself the privilege of proclaiming its own incompleteness without risking dissolution. Indeed, cultural incompleteness may be, in this case, the ultimate tool of cultural hegemony. None of the non-Western cultures are allowed today such a privilege.

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

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

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

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

ing the standards for inter-cultural dialogue to a threshold high enough to minimize the possibility of cultural conquest, but not so high as to preclude the possibility of dialogues altogether (in which case it would revert into cultural closure and, hence, into cultural conquest).

## 6. Conditions for a progressive multiculturalism

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

### 6.1. *From completeness to incompleteness*

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

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

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

As I mentioned above, far from being monolithic entities, cultures comprise rich internal variety. The consciousness of such variety increases as the diatopical hermeneutics progresses. Of the different versions of a given culture, that one must be chosen which represents the widest circle of reciprocity within that culture, the version that goes farthest in the recognition of the other. As we have seen, of two different interpretations of the Qur'an, An-na'im chooses the one with the wider circle of reciprocity, the one that involves Muslims and non-Muslims, men and women alike. In the same way and for the same reason, the untouchable social reformers emphasize "*common dharma*" to the detriment of "*specialized dharma*". I think the

same must be done within Western culture as well. Of the two versions of human rights existing in our culture — the liberal and the social-democratic or marxist — the social-democratic or Marxist one must be adopted for it extends to the economic and social realms the equality that the liberal version only considers legitimate in the political realm.

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

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

If the time to enter an inter-cultural dialogue must be agreed upon by the cultures and social groups involved, the time to end it provisionally or permanently must be left to the unilateral decision of each culture and social group involved. There should be nothing irreversible about the diatopical hermeneutics. A given culture may need a pause before entering a new stage of the dialogue; or feel that the dialogue has brought it more damage than advantage and, accordingly, that it should be ended indefinitely. The reversibility of the dialogue is indeed crucial to defend the latter from perverting itself into unassumed reciprocal cultural closure or unilateral cultural conquest. The possibility of reversion is what makes the inter-cultural dialogue into an open and explicit political process. The political meaning of a unilateral decision to terminate the inter-cultural dialogue is different when the decision is taken by a dominant culture or by a dominated culture. While in the latter case it may be an act of self-defense in the former case it will be most probably an act of aggressive chauvinism. It is up to the politically progressive forces inside a given culture and across cultures — what I called above cosmopolitanism — to defend the emancipatory politics of diatopical hermeneutics from reactionary deviations.

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

No culture will possibly enter a dialogue with any other possible culture on any possible issue. The inter-cultural dialogue is always selective both in terms of partners and of issues. The requirement that both partners and issues cannot unilaterally be imposed and must rather be mutually agreed upon is probably the most demanding condition of diatopical hermeneutics. The specific historical, cultural and political process by which the otherness of a given culture becomes significant for another culture at a given point in time varies widely. But, in general, colonialism, liberation struggles, and postcolonialism have been the most decisive processes behind the

emergence of significant otherness. Concerning issues, the agreement is inherently problematic not only because issues in a given culture are not easily translatable into another culture, but also because in every culture there are always non-negotiable or even unspoken about issues, taboos being a paradigmatic example. As I discussed above, diatopical hermeneutics has to focus, rather than on "same" issues, on isomorphic concerns, on common perplexities and uneasinesses from which the sense of incompleteness emerges.

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

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

### 7. **Conclusion**

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



## Part III

# United Nations and Universal Protection of Human Rights

Conventional protection of human rights  
Extra-conventional protection of human  
rights





# The Universal Declaration of Human Rights

Jaime Oraá Oraá

**Summary:** 1. Writing the Universal Declaration. 2. The content of the Universal Declaration. 2.1. The Preamble and Articles 1 and 2: the ideological basis of the Declaration. 2.2. Analysis of the main body of the Universal Declaration. 3. The universality of the Universal Declaration of Human Rights. 4. The legal value of the Universal Declaration. 4.1. The Current Legal Value of the Universal Declaration. 4.2. Theories Explaining its Current Legal Value. 4.3. Analysis of the articles in the Declaration which would have acquired the status of peremptory norms in International Law. 5. Conclusions.

Before beginning a detailed analysis of the Universal Declaration of 1948, it should be made clear that the Declaration, together with other human rights instruments, forms a part of what is known as the *International Bill of Human Rights*. In using the expression "International Bill of Human Rights", which is not a technical name from an international legal point of view, we are recognising three international documents of particular importance: the Universal Declaration of 1948, and the two International Covenants on human rights of 1966, which completed the regulations of the Declaration, making up the basic international code of human rights. The object of this study is, obviously, the Universal Declaration of Human Rights, and it is to this topic that we will now turn.

We have already seen how, at the San Francisco Conference, there were more daring proposals regarding human rights than those which were eventually included in the United Nations Charter. However, reference has also been made to the particular importance of Article 68 of the Charter, where the Economic and Social Council of the United Nations was ordered to create a commission for human rights. This commission for human rights was created immediately, in the February of 1946, entrusting itself with the task of preparing a project dealing with "an international bill of human rights". The Commission very soon recognised that it would be relatively easy to come to an agreement concerning a text whose character was declarative and programmatic, but that acceptance of an international and legally binding treaty, which would define in detail the obligations of States with regard each of the rights, would be a much longer process, and one which would be much harder to accomplish. Problems regarding the sovereignty of States would, again, condition the whole process of the internationalisation of human rights, which had begun with the United Nations Charter. The Commission, very cleverly, consequently decided to work in the first place on a Declaration so that, immediately following its approval, they could move on to the preparation of a treaty. This decision shaped the work of the Commission in the following years, leading to the Universal Declaration in 1948 and, 18 years later, to the International Covenants of human rights of 1966, which were to come into force ten years later, in 1976.

The Universal Declaration of Human Rights is the first general legal and international instrument of human rights proclaimed by an international organisation with a universal character<sup>1</sup>. As Thomas Buergenthal, former President of the Inter-American Court of Human Rights, states, "because of its moral status and the legal and political importance it has acquired over the years, the Declaration ranks with the *Magna Carta*, the French Declaration of the Rights of Man and the Citizen (1789), and the American Declaration of Independence (1776), as a milestone in mankind's struggle for freedom and human dignity"<sup>2</sup>.

## 1. Writing the Universal Declaration

Right from the beginning of the United Nations, the production of a human rights instrument that could concrete and define the regulations of the Charter was one of its fundamental aims. It was the Commission on Human Rights, created in 1946 as a subsidiary body to the Economic and Social Council (ECOSOC), that took on the most important part of this task. However, from the beginning, the Commission Human on Rights was aware of the problems of this venture, given the fact that the positions of those involved were, as we shall see below, very opposed.

Initially, the Commission on Human Rights set itself three targets. These were, firstly, the approval of a Declaration so as to provide adequate international protection for human rights, a human rights Covenant, and, finally, a series of measures for the putting into practice of the rights recognised in the two aforementioned instruments. These three documents were to form what René Cassin called the "Human Rights Charter"<sup>3</sup>. However, it very soon became clear that these aims were too ambitious; States were not prepared to make compromises of this nature and, eventually, a much more modest aim was decided on, which was the production of a single document which would consecrate the most relevant human rights. However, there was still a problem, namely to clarify whether what was going to be produced would be a mere declaration of the General Assembly of the United Nations, without full legally binding value for States or, conversely, an International human rights Covenant, a truly international treaty of an obligatory nature<sup>4</sup>. The less stringent option, which was less binding for States, came again to the fore, and it was decided that a human rights Declaration would be written, a type of manifesto which was political and programmatic in character, leaving for later the writing of an instrument which

<sup>1</sup> We should take into account the fact that, a few months prior to the Universal Declaration, the *American Declaration of the Rights and Duties of Man* (2nd May 1948) had been approved at the IX International American Conference in the Americas, a Declaration which had a certain amount of influence on the Universal Declaration.

<sup>2</sup> BUERGENTHAL, T.: *International Human Rights in a Nutshell*, West Publishing Co., Minnesota, 1988, pp. 25 and 26.

<sup>3</sup> CASSIN, R.: "La Déclaration Universelle et la mise en oeuvre des droits de l'homme", *op. cit.*, p. 270.

<sup>4</sup> While the United States was in favour of producing a Declaration, other countries, such as Great Britain and Australia, were in favour of approving a document which was binding to a much stronger degree. See VERDOOT, A.: *Naissance et Signification de la Déclaration Universelle des Droits de L'Homme*, Société d'Etudes Morales, Sociales et Juridiques, Louvain, Editions Nauwelaerts, Louvain-Paris, 1964, pp. 54 ff.

bound States to a greater extent, along with the adoption of concrete measures for the putting into practice of recognised human rights.

In any case, the writing of a human rights Declaration would not be simple either, but rather the opposite; it was to be a process plagued with obstacles and difficulties<sup>5</sup>. The main problem which faced the Commission on Human Rights in the carrying out of this task was the huge ideological-political conflict which was present at that time in international society and, of course, within the United Nations. We are here referring to the East-West conflict, and its ideological, political, and economic battles, between the United States and its Western allies, on the one hand, and, on the other hand, the Socialist bloc led by the Soviet Union. For the Soviet Union and the Socialist bloc countries, the Universal Declaration of Human Rights was not a fundamental objective; rather, it expressed an "uncompromising hostility"<sup>6</sup>. In its opinion, a person is, above all, a social being and, as such, the rights which must be guaranteed are those which are economic, social, and cultural in nature, not awarding such importance to those of a civil and political nature. However, the socialist countries gave huge importance to the principle of state sovereignty. As regards this, human rights could not pass over the sovereignty of States; in other words, questions relating to human rights were considered issues that essentially fell under the domestic jurisdiction of States and, as a result, the international community could not intervene and criticise the human rights situation in a given country. Conversely, the stance defended by Western countries, especially France, the United States, and Great Britain was distinguished by its decided defence of rights of a civil and political nature, the classic freedoms of Western democracies. As such, these countries were in favour of human rights becoming issues which escaped the internal jurisdiction of States; in other words, the international community being involved in them.

As we can see, the controversy had begun, and human rights became yet another tool for the battles between the greater powers, which were already very involved in the Cold War, which was to last from the end of the Second World War until the beginning of the 1990s. Human rights are an issue which has been completely politicised, bringing into play both factors external to what could be considered to be their true essence, and the very *raison d'être* of human rights: the defence of the dignity of the human being. As John Foster Dulles, former North American Secretary of State, has said as regard this (in a speech at the American Bar Association in 1949), "the Universal Declaration, like the French Declaration of the Rights of Man and the Citizen, is an important element in the great ideological fight which is currently being fought in the world, and, in this sense, Mrs. Roosevelt has made a significant contribution to the defence of North American ideals"<sup>7</sup>. As we can see, Mr. Dulles saw the Universal Declaration as yet another element in the ideological

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<sup>5</sup> The difficulties which had to be overcome before the eventual approval of the Universal Declaration are related in an autobiographical tone by John P. Humphrey who, being as he was at that moment Director of the Division of Human Rights at the United Nations, is able to relay the information first-hand. See HUMPHREY, J.P.: "The Universal Declaration of Human Rights: its History, Impact and Juridical Character", en RAMCHARAN, B.G. (Ed.): *Human Rights. Thirty Years after the Universal Declaration*, Martinus Nijhoff Publishers, Dordrecht, 1979, pp. 21-37.

<sup>6</sup> CASSIN, R.: "La Déclaration Universelle...", *op. cit.*, p. 267.

<sup>7</sup> Quoted in CASSESE, A.: *Los derechos humanos en el mundo contemporáneo...*, *op. cit.*, p. 42.

battle against the USSR, making a special mention of the work of the United States representative in the committee for the writing of the Declaration, Mrs. Eleanor Roosevelt, which had consisted in a tooth-and-nail defence of American ideals and principles<sup>8</sup>.

Despite these extreme opinions, it should be said that, in the end, the Universal Declaration was a balance, a type of consensus, as we shall see when we analyse its content, between the different positions being taken among the international community on the controversial topic of human rights. As Professor Antonio Casese has correctly stated, the Universal Declaration was, more than a triumph for one or other side, "a victory (not complete, though) for all of humanity"<sup>9</sup>. We found ourselves, without doubt, facing an "ideological compromise between the liberal Western conception of rights and freedoms and the Marxist Soviet conception of the socialist States"<sup>10</sup>.

As we have already stated, it was to be the Commission on Human Rights of the United Nations that was to take on the complicated task of the project of drawing up the Universal Declaration of Human Rights<sup>11</sup>. However, before the Commission on Human Rights could begin its work, the first measure taken by ECOSOC as regards the Universal Declaration was the naming of those to make up an initial committee (also known as the *nuclear committee*), made up of nine people<sup>12</sup> who would perform their tasks in their personal capacity. Following the first work of this nuclear commission, a drafting committee was named, made up of delegates from eight countries, from which we can begin to form an idea as regards those who were the principal influences on the Universal Declaration. The eight countries involved

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<sup>8</sup> In any case, it appears that there exists clear evidence that Eleanor Roosevelt's personal opinions were more open than is suggested by the speeches in which she defends the position of the North American government. It is certain the Mrs. Roosevelt expressed herself as hugely critical of the racial discrimination of her country which, in her opinion, made her feel ashamed at international conferences she attended. On the enormous influence of Mrs. Roosevelt on the Universal Declaration, see JOHNSON, M.G.: "The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection for Human Rights", *op. cit.*, pp. 27 ff. Also see MOWER, A.G.: *The United States, the United Nations and Human Rights: the Eleanor Roosevelt and Jimmy Carter Eras*, Westport, Greenwood Press, 1979.

<sup>9</sup> CASSESE, A.: *Los derechos humanos...*, *op. cit.*, p. 53.

<sup>10</sup> DE CASTRO Cid, B.: "La Declaración Universal de los Derechos Humanos: Balance en un Aniversario", in *Los derechos humanos cuarenta años después: 1948-1988*, Universidad Internacional del Atlántico, Santiago de Compostela, 1990, p. 78.

<sup>11</sup> On the different stages through which the production of the Universal Declaration of Human Rights passed, see the summary produced by MOLLER, J.T.: "The Universal Declaration of Human Rights: How the Process Started", in EIDE, A.; ALFREDSSON, G.; MELANDER, G.; REHOF, L.A. and ROSAS, A. (Eds.): *The Universal Declaration of Human Rights: A Commentary*, Scandinavian University Press, Oslo, 1992, pp. 1-3.

<sup>12</sup> The nine people who were to perform their work were as follows: Paul Berg (Norway); René Cassin (France); Fernand Dehousse (Belgium); Víctor Haya de la Torre (Peru); K.C. Neogy (India); Eleanor Roosevelt (United States); John C.H. Wu (China), later replaced by C.L. Hsia; Jerko Radmilovic (Yugoslavia), replaced by Dusan Brkish; and Nicolai Krioukov (USSR), replaced by Mr. Borisov. It should be noted as regards these nine members of the nuclear commission that René Cassin and Eleanor Roosevelt, two of the main driving forces and significant influences for the Universal Declaration, were already involved. On Cassin's and Roosevelt's roles see EIDE, A. and ALFREDSSON, G.: "Introduction", in EIDE, A.; ALFREDSSON, G.; MELANDER, G.; REHOF, L.A. and ROSAS, A. (Eds.): *The Universal Declaration of Human Rights: A Commentary*, *op. cit.*, p. 11.

in this drafting committee were Australia, Chile, China, United States, France, Lebanon, Great Britain, and the Soviet Union. This drafting committee, following its first meetings and discussions, charged Professor René Cassin with the task of preparing a Declaration project. Following the drafting committee's approval of this project written by René Cassin, it was presented at the second session of the Commission on Human Rights, which took place between November and December of 1947. However, the project was still not sufficiently developed, and as such again had to be discussed at the third session of the Commission on Human Rights, which took place in May and June of 1948. In the expert opinion of Albert Verdoot, this third session of the Commission was the most decisive for the final project of the Declaration, raising very important debates at its very heart, such as, for example, that regarding the inclusion of economic, social, and cultural rights<sup>13</sup>.

Once the Universal Declaration project had been approved by the Commission on Human Rights, this same body passed it on to ECOSOC so that, in turn, ECOSOC could present it to the General Assembly of the United Nations, the body which had to finally approve the project. In September 1948, the General Assembly sent the Declaration project to its Third Committee, the Committee for Social, Humanitarian, and Cultural Affairs, so that this body could examine it. Following 24 work sessions, the latter Committee completed the Declaration project, recommending its approval by the General Assembly with 29 votes in favour and none against but, however, seven abstentions. The countries which abstained in the voting which took place at the Third Committee of the General Assembly were the six countries of socialist Europe and Canada although, as we shall see, this last country voted in favour at the General Assembly. What is undoubtedly true is that the majority of opposition came from the socialist bloc countries.

Finally, on 10th December 1948 in the Chaillot Palace in Paris the Universal Declaration of Human Rights was approved by the General Assembly of the United Nations<sup>14</sup>. The final voting which took place at the General Assembly is rather revealing as to where the main problems had been regarding the approval of the Universal Declaration. With this in mind, it should be noted that the Declaration gained 48 votes in favour, eight abstentions, and not one vote against<sup>15</sup>, which can only be seen as a triumph. However, the definitive text had eight abstentions. These abstentions came from the following countries: the Soviet Socialist Republic of Belarus; Czechoslovakia; Poland; Yugoslavia; the Soviet Socialist Republic of the Ukraine; the Union of Soviet Socialist Republics; South Africa, and Saudi Arabia. As we can see, the socialist bloc countries abstained *en masse*, due to the fact that they did not agree with certain parts of the Declaration. For its part, as we shall see below, Saudi Arabia expressed certain doubts based on its religious and family traditions, and South Africa was completely against the inclusion of economic, social, and cultural

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<sup>13</sup> VERDOOT, A.: *Naissance et Signification de la Déclaration Universelle des Droits de L'Homme...*, *op. cit.*, pp. 67 ff.

<sup>14</sup> It should be noted that, from then on, 10th December has become the *International Human Rights Day*.

<sup>15</sup> Honduras and Yemen were not present at the final vote, and as such their votes were not counted.

rights in the Declaration. However, what is far more important from our point of view is the fact that there was not even one vote against the Universal Declaration of Human Rights, and because of this it has become a vital reference point for the human race as regards human rights.

It is certain that the writing and approval of the Universal Declaration of Human Rights was produced relatively quickly, if we compare it with other, subsequent, human rights instruments; it took advantage of the favourable momentum which could be felt in international society just after the end of the Second World War. If it had not been approved in the December of 1948, the problems which were beginning to appear on an international scale would have made it very difficult to reach a consensus on an issue as controversial as that of a Human Rights Declaration. In many of the delegations which took part in the preparatory debates for the Universal Declaration, there existed the opinion that if it was not approved at that precise moment, it would never be approved. Many factors contributed to this, among them the following: firstly, that the horrors of war were beginning to be less prominent in people's minds, and no longer had the influence that they had had at the first sessions of the Commission on Human Rights; secondly, the effects of the Cold War were beginning to be felt, intensifying as of 1948, meaning that human rights were beginning to be at the mercy of the great ideological battle; third, the question of self-determination began to rear its head as regards human rights, with its accompanying wildly opposing views; and finally, the United States was beginning to lose the favourable position it had towards human rights which had come from President Roosevelt<sup>16</sup>. It is as a result of all these factors that the approval of the Universal Declaration held such importance. As Ashild Samnøy has said on the topic, "the drafting of the Universal Declaration of Human Rights was a struggle against time and the erosion of memory"<sup>17</sup>, becoming a more important achievement than anyone had imagined in 1948<sup>18</sup>.

## 2. The content of the Universal Declaration

As regards the content of the Universal Declaration of Human Rights, this will be a faithful reflection of the challenges and ideological battle which took place between, fundamentally, the socialist bloc, led by the Soviet Union, and the Western bloc, led by the United States. As Antonio Cassese, the great expert on human rights, has said, "the discussion at the United Nations concerning the Universal Declaration was wholly a fragment of the Cold War"<sup>19</sup>, with each side of the argument trying to express its own conception of human rights and political,

<sup>16</sup> The radical changes which took place regarding human rights from 1950 with the Eisenhower Administration are significant, with a return to the cyclic "isolation" which the United States falls into on this and other topics. On this, see JOHNSON, M.G.: "The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection of Human Rights" ..., *op. cit.*, p. 46.

<sup>17</sup> SAMNØY, A.: *Human Rights as International Consensus...*, *op. cit.*, p. 108.

<sup>18</sup> HUMPHREY, J.: *Human Rights & United Nations...*, *op. cit.*, p. 74.

<sup>19</sup> CASSESE, A.: *Los derechos humanos en el mundo contemporáneo...*, *op. cit.*, p. 42.

social, and economic order in the Declaration. We found ourselves, at the time of modelling the content of the Universal Declaration, faced with “the confrontation of two human rights messianisms”<sup>20</sup>, the capitalist and the socialist. While one of them, the capitalist, placed the accent on the “classic” individual freedoms, or the civil and political rights that came about as a result of the bourgeois revolutions of the eighteenth century, the other put the emphasis on the economic and social circumstances in which individuals and social groups must exercise their rights, affording a greater importance to the economic, social, and cultural rights which were born at the end of the nineteenth century and in the first third of the twentieth. It must not be forgotten that, at this time, the United Nations Organisation was still only made up of a reduced number of States, due to the fact that vast colonial empires were still in existence<sup>21</sup>. It was for this reason that most of the group of countries we now know as the *Third World* was absent from the debate concerning the Universal Declaration of Human Rights, and the most serious conflict took place between the Western countries and those belonging to the socialist bloc; there were also significant contributions from Latin American countries<sup>22</sup>.

In spite of everything already mentioned, and against all expectations, the final content of the Declaration constitutes a delicate and healthy equilibrium between the different ideologies and conceptions of human rights and society which were in existence at the time of its writing. Although it is only right to recognise the fact that in certain passages of the Declaration the influence of predominantly Western theories can undoubtedly be felt, it cannot be said that the final result was an imposition of one ideology over another. In the insightful words of the eminent Latin American jurist Héctor Gros Espiell,

“the Universal Declaration aimed to present a universal conception, an ideal common to the whole of humanity, of human rights, rising, in a divided world, above the different ideologies and opposed opinions on their origin and nature...”<sup>23</sup>.

Below, we will proceed to a deeper study of the main elements of the content of the Universal Declaration of 1948. For this, we will firstly analyse the preamble and Articles 1 and 2 of the aforementioned text, which is where the underlying ideology is consecrated, so as to later be able to study the different rights proclaimed in the Declaration, both civil and political rights, and economic, social, and cultural rights, this latter group being the main novel elements of the Declaration.

<sup>20</sup> VERDOOT, A.: *Naissance et Signification de la Déclaration Universelle...*, *op. cit.*, p. 13.

<sup>21</sup> An interesting approach to the historical circumstances in which the United Nations and, consequently, International Law, have evolved can be found in CARRILLO SALCEDO, J.A.: *El Derecho Internacional en perspectiva histórica*, Tecnos, Madrid, 1991.

<sup>22</sup> For a good summary of the different positions maintained as regards the content of the Universal Declaration by the different groups of countries present, see CASSESE, A.: *Los derechos humanos...*, *op. cit.*, pp. 40 ff.

<sup>23</sup> GROS ESPIELL, H.: *Estudios sobre Derechos Humanos II*, Instituto Interamericano de Derechos Humanos-Civitas, Madrid, 1988, p. 30.

### 2.1. *The Preamble and Articles 1 and 2: the ideological basis of the Declaration*

The preamble of the text under analysis is exceptionally important, given that it is where the main themes and guidelines regarding the conception of human rights that the Universal Declaration hopes to express are contained. In other words, it contains the ideological framework of the Declaration. According to the wise words of René Cassin, the French representative in the working group which drew up the Declaration, and one of the principal sources of its ideology,

“the Universal Declaration has been compared to the vast portico of a temple, where the pediment is built of the preamble which affirms the unity of the human family, and where the columns are made up of the general principles of freedom, equality, non-discrimination, and fraternity proclaimed in Articles 1 and 2”<sup>24</sup>.

It should also be noted that the preamble was written at the end, once all the human rights which were to appear in the text of the Declaration were known, and, as such, it reinforces the theory that it is a synthesis of the ideology of the Universal Declaration of Human Rights. As Jan Marteson, who has specifically analysed the preamble under discussion, has said as regards this, the preamble “states unequivocally that the foundation of freedom, justice, and peace, in the world is the recognition of the inherent dignity and the equal and inalienable rights of all members of the human family”<sup>25</sup>. As we shall see later, the basis for the human rights consecrated in the Declaration is none other than the *dignity of the human being*. In the words of Niceto Blázquez, who has taken the time to analyse what exactly is the significance of the reference to dignity in the text of the Universal Declaration, “the whole Declaration is based on the philosophical-legal principle of the dignity of the human being. From this come the postulates of liberty, equality, and fraternity”<sup>26</sup>. Such is the sense of the statement which opens the text of the preamble. In it, the General Assembly of the United Nations considers that

“recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.

Another important pronouncement regarding the placing of dignity as the basis for recognised human rights in the Declaration can be found in Article 1 of the same document. According to this Article, which goes into detail about what has just been

<sup>24</sup> CASSIN, R.: “La Déclaration Universelle et la mise en oeuvre des droits de l’homme”, *op. cit.*, pp. 277 and 278. René Cassin, winner of the Nobel Prize for Peace in 1968, has undoubtedly been one of the great sources of inspiration for the Universal Declaration of Human Rights, and of later United Nations work on the matter. For a personal and academic profile of this great French thinker, see GROS ESPIELL, H.: “René Cassin, los derechos del hombre y la América Latina”, in GROS ESPIELL, H.: *Estudios sobre Derechos Humanos I*, Instituto Interamericano de Derechos Humanos-Editorial Jurídica Venezolana, Caracas, 1985, pp. 95-104.

<sup>25</sup> MARTESON, J.: “The Preamble of the Universal Declaration of Human Rights and the United Nations Human Rights Programme”, en EIDE, A.; ALFREDSSON, G.; MELANDER, G.; REHOF, L.A. and ROSAS, A. (Eds.): *The Universal Declaration of Human Rights...*, *op. cit.*, p. 19.

<sup>26</sup> BLAZQUEZ, N.: “El recurso a la dignidad humana en la Declaración Universal de Derechos Humanos de las Naciones Unidas”, in *Dignidad de la Persona y Derechos Humanos*, Instituto Pontificio de Filosofía, Madrid, 1982, p. 110.



established in the preamble, “all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.

Finally, we find a reference to dignity in Article 22 of the Universal Declaration of Human Rights, an article where the right to social security is recognised, and which serves as a framework for the recognition of economic, social, and cultural rights. The mention of dignity in Article 22 is very important, given that it is saying that without the satisfaction of rights which are economical, social, and cultural in nature, then life cannot be dignified<sup>27</sup>. Paraphrasing Article 22, every human being has the right to social security and the satisfaction of the economic, social, and cultural rights, “*indispensable for his dignity and the free development of his personality*”<sup>28</sup> (emphasis added). As we can see, the dignity of the human being depends as much on civil and political rights as it does on economic, social, and cultural rights. We find ourselves, as we will see again in other passages of the Declaration, facing a crystal clear affirmation of the *indivisibility and interdependence* of all human rights.

However, the Declaration offers us no definition of what it means by dignity, expressly rejecting any allusion of a metaphysical character as a foundation for dignity<sup>29</sup>. According to some, “it is implied that dignity is the quality of being recognised as a person”, from which the notions of freedom and equality necessarily derive. We could find ourselves, a position which has been defended, facing a “descriptive-psychological definition of human dignity, which is only understandable at a common sense level, and comprehensible to a degree, standing at the precise moment of the end of the Second World War, when the most urgent thing to do was to ensure a minimum level of peace and calm following the conflict”<sup>30</sup>.

These difficulties regarding the definition of the term ‘dignity’, used in the Universal Declaration as the basis of human rights, lead us to a problem of much greater magnitude, which consists in trying to find the inspiring philosophy, if such a thing could be said to exist, of the Declaration. Right from the start of the process of the writing of the Universal Declaration it was clear that an attempt to base human rights on a single philosophical foundation was to be an incredibly arduous task. At this time there were many different, and on occasion irreconcilable, cultural, religious, and philosophical traditions represented at the United Nations. It is certain that “the unilateral philosophical or political imposi-

<sup>27</sup> OLINGA, A.D.: “Le droit à des conditions matérielles d’existence minimales en tant qu’élément de la dignité humaine (Articles 2 et 3 de la CEDH)”, in MORIN, J.-Y. (sous la direction de): *Les Droits Fondamentaux*, Bruylant, Bruxelles, 1997, pp. 91-104.

<sup>28</sup> Equally, in Article 23 of the Declaration, which is dedicated to the right to work, a reference to dignity also appears. According to what is set out in Article 23.3, “everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity...”.

<sup>29</sup> An attempt at defining the concept of dignity can be found in MAURER, B.: “Essai de définition théologique et philosophique de la dignité humaine”, in MORIN, J.-Y. (sous la direction de): *Les Droits Fondamentaux*, op. cit., pp. 223-252. See also ZAJADLO, J.: “Human Dignity and Human Rights”, in HANSKI, R. and SUKSI, M. (Eds.): *An Introduction to the International Protection of Human Rights...*, op. cit., pp. 15-24; DONNELLY, J.: “Human Rights and Human Dignity: An Analytic Critique of Non Western Conceptions of Human Rights”, *The American Political Science Review*, Vol. 76, 1982, pp. 303-316.

<sup>30</sup> BLÁZQUEZ, N.: “El recurso a la *dignidad humana* en la Declaración...”, op. cit., p. 111.

tions would, without doubt, have generated irresolvable discussions within the pluralist framework of the United Nations<sup>31</sup>. The Declaration is, in many regards, the result of compromise, and the question of its philosophical basis was one of the aspects where agreements had to be reached between those holding differing points of view, points of view which fundamentally were either in favour of a naturalist view regarding human rights, or in favour of a purely positivist way of looking at them. As Joaquín Ruiz-Giménez, a respected expert on human rights, has said, the drafters of the Declaration “came to be convinced that it was useless to continue arguing all the way to the final foundation of human rights, and that what was important was realising the need for a consensus on a number of basic rights”<sup>32</sup>. It is for this reason that any too explicit reference to the foundation of the Declaration was omitted from it. It is certainly true, however, and in this there is a certain amount of doctrinal consensus, that the philosophy of the Universal Declaration is basically inspired by the philosophy of human rights in the eighteenth century, but with some very important qualifications<sup>33</sup>, as we shall see below.

To begin with, there is no explicit mention in the Declaration of “nature” as the ultimate basis for human rights, a difference compared with the Declarations of Rights of the eighteenth century<sup>34</sup> or the American Declaration of the Rights and Duties of Man<sup>35</sup>. Following an intense debate, and, seeing that it was very difficult to reach a consensus on this point, the idea in favour of leaving a reference to nature out of the Declaration prevailed. In the words of the Chinese delegation, “this measure would obviate any theological question, which could not and should not be raised in a declaration designed to be universally applicable”<sup>36</sup>.

<sup>31</sup> RABOSI, E.: *La Carta Internacional de Derechos Humanos*, op. cit., p. 14.

<sup>32</sup> RUIZ-GIMÉNEZ, J.: “Intervención de D. Joaquín Ruiz-Giménez”, in *Alocuciones sobre Derechos Humanos. Cuarenta Aniversario de la Declaración Universal de Derechos Humanos*, Ministerio de Asuntos Exteriores, Madrid, 1989, p. 177.

<sup>33</sup> MORSINK, J.: “The Philosophy of the Universal Declaration”, *Human Rights Quarterly*, Vol. 6, 1984, p. 333.

<sup>34</sup> With this in mind it is important to discuss Article 2 of the *French Declaration of the Rights of Man and the Citizen* (26th August 1789). According to this provision, “the aim of all political association is the preservation of the *natural* and imprescriptible *rights* of man...” (emphasis added). In the same vein is Article 1 of the *Declaration of Rights of the Good People of Virginia* (12th June 1776), where it is set out that “all men are *by nature* equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity...”. The texts of these two important Declarations appear in PÉCES-BARBA, G. (Dir.): *Derecho Positivo de los Derechos Humanos*, Debate, Madrid, 1987.

<sup>35</sup> As is shown in the first paragraph of its preamble, “all men are born free and equal, in dignity and in rights, and, being endowed *by nature* with reason and conscience, they should conduct themselves as brothers one to another” (emphasis added). This statement is practically identical to Article 1 of the Universal Declaration of Human Rights, except that in the American Declaration there is an explicit mention of nature, an aspect which is lacking in the Universal Declaration. As Gros Espiell has said on the matter, “the American Declaration of the Rights and Duties of Man is in keeping with an American historical process in which the human being is the holder of rights which are essential as to its nature, inalienable and imprescriptible...”, in GROS ESPIELL, H.: “La Declaración Americana: raíces conceptuales y políticas en la Historia, la Filosofía y el Derecho Americano”, *Revista del Instituto Interamericano de Derechos Humanos*, N.º Especial, 1989, p. 42.

<sup>36</sup> Quoted in SAMNOY, A.: *Human Rights as International Consensus...*, op. cit., p. 100.

Secondly, this same statement from the Chinese government was applied to the attempt by some delegations to include a reference to the divine origin of human rights, such as appears in the eighteenth century Declarations<sup>37</sup>. The most insistent proposal for this came from Brazil, with strong support on the matter coming from Argentina and from Charles Malik, the Lebanese representative. The Brazilian government proposed in Article 1 of the Declaration the expression "created in the image and likeness of God". Eventually, faced with the certainty that the proposal had little chance of prospering, Brazil chose to withdraw it<sup>38</sup>. The Soviet Union, justifying its negative stance against the inclusion of any mention of divinity in the Declaration, stated that it was a fact that "many people do not believe in God, and the Declaration should be aimed at mankind as a whole"<sup>39</sup>. Many delegations criticised this secularisation of the Universal Declaration, but it must be admitted, as René Cassin has done, that "the Declaration could not have been universal if there had been a desire to impose a single official doctrine"<sup>40</sup>.

We must, therefore, conclude with the statement that there is no single philosophical foundation to the Universal Declaration, with the horrors which took place during the Second World War being used as "the epistemic foundation of the Declaration"<sup>41</sup>. And so, as Sonia Picado has rightly said, "the text of the Declaration reveals a resurgence of the theory that there are fundamental principles, higher than ideological discrepancies, which the positive legal requirements of each State should look to"<sup>42</sup>.

Another significant aspect of the preamble is the clear and undeniable support for *all members of the human family*, a unit which has as its base the fundamental rights of the human being; it could not be any other way. With this in mind, it is the first paragraph of the preamble that considers that "recognition of the inherent dignity and of the equal and inalienable rights of *all members of the human family* is the foundation of freedom, justice and peace in the world" (emphasis added). In this article and what we have chosen to highlight in it, the desire for universality for the 1948 Declaration is clear. The Declaration attempts to be aimed at and to recognise the human rights of "all members of the human family", regardless of their race, religion, gender, nationality, etc. This desire for universality which can be found in the Declaration, which calls itself "Universal", is confirmed in Articles 1 and 2 of the Declaration itself. Article 1 states that "all human beings are born free and equal in

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<sup>37</sup> In the *French Declaration of the Rights of Man and the Citizen* the National Assembly recognises and proclaims human rights "in the presence and under the auspices of the Supreme Being". In turn, the *Declaration of Rights of the Good People of Virginia* in its sixteenth Article refers to "the duty which we owe to our Creator".

<sup>38</sup> The details of these discussions, with different opinions, can be found in DE LA CHAPPELLE, P.: *La Déclaration Universelle des Droits de l'Homme et le Catholicisme*, Librairie Générale de Droit et de Jurisprudence, Paris, 1967, p. 88.

<sup>39</sup> For the opinions of the USSR on this topic, see VERDOOT, A.: *Naissance et Signification de la Déclaration Universelle des Droits de l'Homme...*, *op. cit.*, p. 276.

<sup>40</sup> CASSIN, R.: "La Déclaration Universelle...", *op. cit.*, p. 284.

<sup>41</sup> MORSINK, J.: "World War Two and the Universal Declaration", *Human Rights Quarterly*, Vol. 15, 1993, p. 358.

<sup>42</sup> PICADO SOTELO DE OREAMUNO, S.: "Artículo 2", in ASOCIACION COSTARRICENSE PRO-NACIONES UNIDAS: *La Declaración Universal...*, *op. cit.*, p. 27.

dignity and rights”, and Article 2.1 tells us that “everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

This same second Article extends the enjoyment of the rights proclaimed in the Declaration to all countries, whether these be independent States or those under colonial rule, thus contributing to the clear support for universality which the Declaration provides. This section is very important, given that at the time when the Declaration was first proclaimed vast colonial empires were still in existence, which has been referred to as an enormous “contradiction in terms”<sup>43</sup>, as, on the one hand universal human rights were being proclaimed, and on the other, some States continued to maintain colonial empires<sup>44</sup>. It is the second paragraph of Article 2 which states that “no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty”.

In relation to the *principle of non-discrimination* which is proclaimed both in the preamble and in Articles 1 and 2 of the Universal Declaration, the role played by the Commission on the Status of Women should be made clear; it was, like the Commission on Human Rights, created in 1946<sup>45</sup>, and has at all times defended the inclusion of the particular and specific perspectives of women in the text of the Declaration. As regards this, Mrs. Begtrup, the President of this Commission, played an undeniably praiseworthy role, achieving significant improvements in the final text of the Declaration, as we shall see below.

An important achievement was that the Preamble to the Universal Declaration of Human Rights reaffirmed its faith in “the equal rights of men and women”, exactly as had been set out in the Preamble to the United Nations Charter. Article 1 of the Declaration, for its part, was exceptionally important from the point of view of women’s rights, as it states that

*“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.*

The expression “all human beings” is highlighted in italics because it was an expression which caused great controversy in the negotiations which led to the approval of the Universal Declaration. One of the initial proposals for this Article 1

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<sup>43</sup> CLAVERO, B.: “De los ecos a las voces, de las leyes indigenistas a los derechos indígenas”, in *Derechos de los Pueblos Indígenas*, Servicio Central de Publicaciones del Gobierno Vasco, Vitoria-Gasteiz, 1998, p. 37.

<sup>44</sup> This contradiction was solved, in part, in 1960, with the General Assembly of the United Nations’ approval of the Declaration on the Granting of Independence to Colonial Countries and Peoples, resolution 1514 (XV), of 14th December 1960. In this Declaration, as well as for the first time proclaiming the right of self-determination for all peoples, the General Assembly states that “the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights...”.

<sup>45</sup> John P. Humphrey has discussed the lobbying in favour of the rights of women performed by this Commission. In his opinion, “there was no more independent body in the United Nations” in HUMPHREY, J.P.: *Human Rights & United Nations: A Great Adventure*, op. cit., p. 30.

used the expression “all men”, which would have been disastrous from a women’s point of view, and a very bad start for the Universal Declaration of Human Rights, consecrating as it would have done a sexist language in the very article which was to head the Universal Declaration. Finally, faced with pressure from the Commission on the Status of Women, and from some of the States more supportive to women’s demands, such as some of the socialist countries, the expression, which is much more respectful as regards the feelings of half of the human race, and which figures in Article 1 of the Declaration, was achieved<sup>46</sup>.

For its part, Article 2 of the Universal Declaration is dedicated to consecrating the principle of non-discrimination. This second Article in its first paragraph states that,

“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

As we can see, this contains an extension of the circumstances in which discrimination is prohibited in relation with Article 1.3 of the United Nations Charter, which referred to non-discrimination “as to race, sex, language or religion”.

Another triumph for the women’s movement was the inclusion in all the articles of the Universal Declaration of expressions such as “everyone” and “no one”, thus expressing that the principle of non-discrimination should play a part in all the human rights recognised in the Universal Declaration.

There are, however, some references in the Universal Declaration that are fairly negative as regards the rights of women. Article 23.3, which discussed the recognition of the right to work, states that “everyone who works has the right to just and favourable remuneration ensuring for himself *and his family* an existence worthy of human dignity...” (emphasis added). This sentence supposes that there exists only one working income in the family, and that this income is, obviously, earned by the man. This assumption is concredited by the fact that the English version of the Universal Declaration uses the pronoun “his”<sup>47</sup>.

Despite these points in the Declaration that are negative for women, Johannes Morsink has come to state that “the internal history of the drafting process and the struggles involved in reaching the final product, show that from the point of view of the rights of women the Declaration is a remarkably progressive document”<sup>48</sup>. This optimistic view of the document is not, however, shared by others. In the opinions of certain feminist writers, the evolution of human rights, both at an internal and an international level, has been presided over by a *male-dominated* view of human rights, a view based on the experiences and the needs of men, which has marginalised the female view of the world. In the words of Carmen Magallón, “male-dominance is a defining characteristic of the tradition of Western thought and of human

<sup>46</sup> The details of all these discussions and negotiations can be consulted in MORSINK, J.: “Women’s Rights in the Universal Declaration”, *Human Rights Quarterly*, Vol. 13, 1991, pp. 233 ff.

<sup>47</sup> This same logic is present in Article 25 of the Declaration, which proclaims the right to an adequate standard of living.

<sup>48</sup> MORSINK, J.: “Women’s Rights...”, *op. cit.*, p. 255.

rights<sup>49</sup>. In addition, the very structure of human rights, as it has been designed historically, is a structure which does not take into account the needs of women as regards human rights. International Human Rights Law itself, which embraces all international legal provisions which attempt to protect human rights, "has developed to reflect the experiences of men and largely to exclude those of women"<sup>50</sup>. One of the reasons for this marginalisation of the expectations of women is that in the environments in which international regulations are created, in States and International Organisations, "the invisibility of women is striking... , very few states have women in significant positions of power"<sup>51</sup>, which contributes to the fact that it is the masculine perspective that ends up in the dominant position<sup>52</sup>. In the process of drafting the Universal Declaration for Human Rights the absence of women on the governmental delegations is enormously significant, despite the role played by Eleanor Roosevelt.

Similarly, in the preamble to the Universal Declaration a call to attention figures, drawing attention to the terrible crimes against human rights committed throughout the Second World War, which are some of the most important factors which led the winners of the war to take on a serious and decided commitment to human rights<sup>53</sup>. This commitment was such that, as we have already seen previously, several statements appear in the Charter of the United Nations Organisation, which reaffirm the faith in fundamental rights which the peoples of the United Nations have. It is the second paragraph of preamble of the Declaration that tells us that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind". It is certainly true that, from now on, the international community is fully conscious of the fact that, if it wants such events not to reoccur in the history of the human race, it should immerse itself in the promotion, encouragement, and effective protection of the human rights of all people<sup>54</sup>. On the other hand, it should be mentioned that, in this second paragraph of the preamble, can be found,

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<sup>49</sup> MAGALLON, C.: "Los derechos humanos desde el género", in CENTRO PIGNATELLI (Ed.): *Los derechos humanos, camino hacia la paz*, Diputación General de Aragón-Seminario de Investigación para la Paz, Zaragoza, 1997, p. 259.

<sup>50</sup> CHARLESWORTH, H.: "Human Rights, Men's Rights", in PETERS, J. and WOLPER, A. (Eds.): *Women's Rights, Human Rights: International Feminist Perspectives*, Routledge, New York, 1995, p. 103.

<sup>51</sup> CHARLESWORTH, H.: "Human Rights as Men's Rights"... , *op. cit.*, p. 104. This female author offers figures which detail female representation in different human rights bodies, figures which are quite revealing as regards the discrimination which takes place. These figures show that the Committee on the Elimination of Racial Discrimination has only one woman among its eighteen members; the Human Rights Committee has three women among eighteen members; there are two women out of a total of eighteen members in the Economic, Social, and Cultural Rights Committee; the Committee against Torture has two women among its ten members.

<sup>52</sup> FREEMAN, M.A. and FRASER, A.S.: "Women's Human Rights: Making the Theory a Reality", in HENKIN, L. and HARGROVE, J.L. (Eds.): *Human Rights: An Agenda for the Next Century*, The American Society of International Law, Washington, D.C., 1994, p. 104.

<sup>53</sup> On how the events of the Second World War influenced the development of a clear conscience regarding the respect of human rights, see BUERGENTHAL, T.: *International Human Rights in a Nutshell*, West Publishing Co., Minnesota, 1988, pp. 17 ff.

<sup>54</sup> Sadly, the events which have taken place in the former Yugoslavia, in Rwanda, in Liberia, an in Kosovo, have again brought to our eyes images which we had considered consigned to the history books.

in one form or another, the four freedoms proclaimed by Franklin D. Roosevelt in his famous speech to the North American Congress in January of 1941. For the President of the New Deal, the fundamental freedoms which all human beings should enjoy are four: freedom of speech and thought; freedom of religion; freedom from want<sup>55</sup>, and freedom from fear. And so, the philosophy behind Roosevelt's thoughts is already expressed in the Universal Declaration of Human Rights<sup>56</sup>, when it states that what it means by the international recognition of human rights is "the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want". As we can see, we find ourselves on the threshold of the Declaration with a faithful representation of the four freedoms proposed by the North American President.

Another of the aspects present in the preamble is the connection between the *rule of law* and the effective protection of human rights. In other words, the Declaration considers it "essential... that human rights should be protected by the rule of law"<sup>57</sup>. At no point in the preamble is what they consider the rule of law defined, but if we carefully read the different articles of the Universal Declaration, we can come to some conclusions as to what the drafters of the Declaration meant by this. Many of the human rights recognised by the Universal Declaration help to configure this "rule of law", among which can be highlighted equality before the law (Article 7), the right to an effective remedy by national tribunals (Article 8), the right to be presumed innocent until proven guilty (Article 11), the right to freedom of thought, conscience and religion (Article 18), the right to freedom of opinion and expression (Article 19), etc. All of these are at the foundation of what is now known as the rule of law, an indispensable requirement for the effective protection of human rights. This is such that, as paragraph three of the preamble recognises, the protection of human rights within a rule of law is necessary "if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression". As we can see, the preamble is, due to the influence of the socialist countries, suggesting the right to rebellion against regimes which do not respect human rights. Nevertheless, in the substantive part of the Declaration we do not find any other reference to this controversial right; as such, this right is, to some extent, minimised, just as the Western countries wanted it to be<sup>58</sup>. This is another of the contrasts between the Universal Declaration and the classic Declarations of rights, in which appeared important pronouncements in favour of the right to resistance<sup>59</sup>. Despite these undeniable recognitions of the

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<sup>55</sup> In saying "freedom from want", Roosevelt was referring to what we know as economic, social, and cultural rights, of which he was a significant instigator, thus contributing to the widening of the traditional concept of human rights in the United States. On this topic, see JOHNSON, M.G.: "The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection for Human Rights", *op. cit.*, pp. 20 ff.

<sup>56</sup> On this subject, see EIDE, A.: "The Universal Declaration in Space and Time", in *Human Rights in a Pluralist World. Individuals and Collectivities*, UNESCO-Roosevelt Study Center, Meckler, Westport, 1990, p. 16.

<sup>57</sup> Paragraph three of the preamble to the Universal Declaration of Human Rights.

<sup>58</sup> On the details and different points of view and discussions regarding this right to rebellion, see CASSESE, A.: *Los derechos humanos...*, *op. cit.*, pp. 44 ff.

<sup>59</sup> One example among many, the *French Declaration of the Rights of Man and the Citizen*, on listing the basic rights, expressly mentions "resistance to oppression". It is the Article 2 the one

right to resistance in the first human rights Declarations, the fact is that this right has lost importance and has become diluted as the theory of human rights has evolved. Proof of this is the debate that came about regarding this right at the time when the Universal Declaration of Human Rights was being discussed in 1948. Many delegations, among which those from Cuba, Chile, and France were the most significant, proposed the inclusion of the right to resist oppression as a separate right in the main body of the Universal Declaration; in other words, they wanted a specific article in favour of this right to be included. This view met with strong support from the Soviet Union, for whom it was essential to recognise a right which was already a part of the Declaration of the Rights of the People of the Soviet Union, and which would be able to prevent regimes totally against human rights, such as the Nazi regime in Germany or Franco's regime in Spain (the USSR delegate, Mr. Demchenko, referred expressly to Franco's regime as one of the examples where the right to resistance could be legitimately invoked). The opposite view as regards this controversial right was defended by countries like Great Britain, the United States, Belgium, and Australia, all of whom were very critical of an eventual inclusion of the right to resistance as an autonomous right in the Universal Declaration of Human Rights. For Great Britain, the existence of this right in the Universal Declaration was a step that would be "inopportune and dangerous" and could entail "the risk of inciting anarchy", when, in its opinion, "non-revolutionary democratic methods should be sufficient to do away with tyranny and oppression". A similar view was held by Eleanor Roosevelt, the North American delegate, for whom "it would not be clever to legalise the right to rebellion, given that it could be invoked by subversive groups who wanted to attack or undermine genuinely democratic governments" (the recognition in the Declaration of human rights of the right to resist acts of tyranny and oppression would be tantamount to encouraging sedition, for such a provision could be interpreted as conferring a legal character on uprisings against a Government which was in no way tyrannical). However, for the American delegation, "an honest rebellion against a tyranny should be permitted by the Universal Declaration". We can see, then, that the United States and Great Britain objected to the inclusion of the right to resistance as an autonomous right, but did come to admit it as a general principle. For Ernest Davies, the British representative at the Commission, who was negotiating the text for the Universal Declaration of Human Rights, resistance when faced with oppression could not be considered to be an authentic right, but it could be seen as a "last resort" when faced with a tyrannical or oppressive government. Eventually, given the evident lack of consensus concerning a problematic issue which had inevitable political ramifications, it was decided that this right would be included in the Preamble of the Declaration, and not in the main body of it, which meant a clear diminishment of the legal and programmatic content of the right to resistance. In addition, a direct recognition of the right to resistance does not appear in paragraph three of the Preamble; rather, this recognition is indirect. The Preamble considers it "essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law". As we can see, the

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which states that "the aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are: liberty, property, security, and resistance to oppression."



right to resistance is not shown as an authentic human right which all human beings enjoy, but rather it expresses it, just as the British delegation wanted, as a type of “last resort” when faced with a tyrannical and oppressive regime. What is made quite clear is that the majority of States present at the discussions regarding the Universal Declaration in 1948 were not particularly in favour of a clear recognition of the right to resistance, and it is for this reason that those who wanted to see this right with diminished power triumphed in the end.

A crucial section of the preamble is its fifth paragraph, which underlines the fact that “... the peoples of the United Nations... have determined to promote social progress and better standards of life in larger freedom”<sup>60</sup>. As we can see, social progress was undeniably linked with human rights. In other words, for people to truly and effectively be able to enjoy human rights, progress and development are absolutely necessary, both as regards economics and society. It is for this reason that the preamble argues for a *larger concept of freedom*, that is to say that freedom is not to be understood in its simplest sense of formal freedom, but that it should include improvement in people’s quality of life. To defend human dignity it will be vital to defend both civil and political rights, as well as those which are economic, social, and cultural; these latter rights were recognised in the international sphere for the first time by the Universal Declaration of Human Rights. It is this fact that motivated Philip Alston to refer to the “revolutionary content”<sup>61</sup> of the Universal Declaration. And the fact is that we cannot forget that “all reflection on the success of a legal system for the promotion and protection of human rights should start with the idea that the reality of these rights is determined by economic, social, and cultural conditions. In a world characterised by misery, illness, exploitation, and injustice, human will not be a reality without the existence of particular economic and social conditions”<sup>62</sup>. So, right from the start of the preamble, the innovative concept of the *indivisibility and interdependence* of the two categories of human rights, civil and political, and economic, social, and cultural, is advancing; this is a concept that will be discussed further below.

Finally, the preamble of the Universal Declaration of Human Rights states in its final section that “a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge” (it is referring to the commitment, taken on in the sixth paragraph of the preamble, to “pledge... to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms”, which clearly reminds us of Articles 55 and 56 of the United Nations Charter). This final paragraph reiterates yet again the call for the universality of human rights, the vital importance of achieving a concept of human rights and freedoms that can be shared by all the different peoples and cultures that inhabit the planet. Regarding this, the General Assembly of the United Nations, on proclaiming the Universal Declaration of Human Rights, defines it as “as a common

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<sup>60</sup> As we have seen, an identical pronouncement appears in the preamble to the United Nations Charter.

<sup>61</sup> ALSTON, P.: “The Fortieth Anniversary of the Universal Declaration of Human Rights: A Time More for Reflection than for Celebration”, in *Human Rights in a Pluralist World. Individuals and Collectivities...*, *op. cit.*, p. 1.

<sup>62</sup> GROS ESPIELL, H.: *Estudios sobre Derechos Humanos II...*, *op. cit.*, p. 254.

standard of achievement for all peoples and all nations”, thus signalling the importance of “teaching and education” for the promotion and stimulation of a true culture of human rights. With this final statement, attention is being drawn to the huge relevance of *Human Rights Education* to the achievement of this “common standard of achievement” which the General Assembly speaks of<sup>63</sup>. It is the responsibility of all, public and private institutions, universities, human rights institutes, the media, individuals, etc. that this culture of human rights should definitively be installed among us.

## 2.2. *Analysis of the main body of the Universal Declaration*

Now that we have analysed the preamble and the first two articles of the Declaration, we will spend some time studying the different rights which have been recognised and consecrated in the Universal Declaration, which will give us a better idea of what exactly the concept of human rights is fighting for. To this end we are going to consider the analysis carried out by one of the main inspirators of the Declaration, the aforementioned René Cassin. For him, four columns of equal importance support the portico of the Universal Declaration of Human Rights: the first column is made up of personal rights and freedoms (Articles 3 to 11 of the Declaration); the second comprises the rights of the individual in relation to the groups of which he or she is part (Articles 12 to 17); the third is made up of political rights (Articles 18 to 21), while the final column consists of economic, social, and cultural rights (Articles 22 to 27). Above these four columns, says Professor Cassin, is placed the frontispiece, Articles 28 to 30 of the Declaration, the final articles which establish the links between the individual and the society of which he or she is a part<sup>64</sup>. Below we will proceed to look more closely at the different divisions made by Professor Cassin.

### 2.2.1. PERSONAL RIGHTS AND FREEDOMS (ARTICLES 3 TO 11)

In this first part of the human rights contained in the Universal Declaration, the rights which refer to the most intimate and personal environment of the human

<sup>63</sup> VERDOOT, A.: “Genèse et Expansion de la Déclaration Universelle des Droits de l’Homme. Role de René Cassin”, in *Recueil des Cours*, Institut International des Droits de l’Homme, Strasbourg, 1998, p. 95. As the General Assembly stated when it proclaimed the *United Nations Decade for Human Rights Education*, this education “should constitute a comprehensive life-long process by which people at all levels in development and in all strata of society learn respect for the dignity of others and the means and methods of ensuring that respect in all societies”, Resolution 49/184, 23rd December 1994.

<sup>64</sup> CASSIN, R.: “La Déclaration Universelle et la mise en oeuvre des droits de l’homme”..., *op. cit.*, pp. 278 ff. This is not the only way the Declaration can be divided. For example, in Spain, the respected expert on human rights, Professor Carrillo Salcedo, former magistrate at the European Court of Human Rights, has distinguished five groups of the human rights recognised by the Universal Declaration 1) inherent personal rights (Articles 3, 4, 5, 6, and 7); 2) rights guaranteeing personal security (Articles 8, 9, 10, 11, 12, and 14); 3) rights relating to the political life of the individual (Articles 18, 19, 20, and 21); 4) economic and social rights (Articles 17, 22, 23, 24, 25, 26, and 27) and 5) rights concerning to the social and juridical life of individuals (Articles 13, 15, and 26), CARRILLO SALCEDO, J.A.: “Human Rights, Universal Declaration”, in *Encyclopedia of Public International Law*, Max Planck Institute, vol. 8, 1985, pp. 305 and 306.

being are found. When discussing this, it is essential to highlight the *right to life* recognised in Article 3 of the Declaration; this is one of the most important rights in the current list of human rights. As this third Article states, "everyone has the right to life, liberty and security of person".

However, the recognition of a right as important as the right to life inevitably brought about significant discussions, concerning the extent to which this right should be "awarded". In the end, a fairly restrictive recognition of the right to life prevailed, with the accent placed on its merely formal aspects. This deals with a right to the integrity of the individual when faced with any kind of interference on the part of the State. There were three more aspects which were discussed in relation with the right to life: the death penalty, abortion, and the inclusion of material elements in the definition of the right to life.

As regards the death penalty, the Soviet Union put forward a proposal for the prohibition of capital punishment in times of peace as a logical extension of the recognition of the right to life<sup>65</sup>. However, this proposal was rejected, and it remained the exclusive responsibility of national legislations to have or not have the death penalty<sup>66</sup>. According to some<sup>67</sup>, this was one of the principal gaps in the Universal Declaration, a gap which there have been attempts to fill with the passing of years<sup>68</sup>, but which today is still one of the principal obstacles as regards the achievement of an authentic culture of human rights.

Regarding the thorny issue of abortion, which mixes ethical, religious, and legal aspects, the Universal Declaration decided in the end to remain completely silent again. Once more, due to the lack of consensus, the delegations in favour of the inclusion of an express prohibition of abortion in the third Article of the Declaration had to back down. The most serious proposals came from the representatives of Chile and Lebanon, defending the view that the right to life should be guaranteed "from the moment of conception"<sup>69</sup>. However, delegations as important as those from Great Britain, the Soviet Union, the United States, China, Australia, and France were opposed to an express mention of the prohibition of abortion, given that this

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<sup>65</sup> This proposal, in the opinion of Lars Adam Rehof, was partly as a result of "tactical reasons" derived from the Cold War, given that the USSR widely used the death penalty during that time, and continued to do so in later years; see REHOF, L.A.: "Article 3", en EIDE, A.; ALFREDSSON, G.; MELANDER, G.; REHOF, L.A. and ROSAS, A. (Eds.): *The Universal Declaration of Human Rights: A Commentary*, op. cit., p. 77.

<sup>66</sup> LLANO, A.E.: *La protección de la persona humana en el Derecho Internacional...*, op. cit., p. 51.  
<sup>67</sup> TOMUSCHAT, C.: "The Universal Declaration of Human Rights of 1948: Does It Need any Updating?", in *The Universal Declaration of Human Rights: Its Significance in 1988*, op. cit., p. 78.

<sup>68</sup> The International Covenant on Civil and Political Rights, approved in 1966, establishes certain limitations to the imposition of the death penalty in its Article 6, which is the one devoted to recognition of the right to life. It states that it can only be imposed "for the most serious of crimes" ...; "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women". An analysis of this Article appears in RAMCHARAN, B.G.: "The Drafting History of Article 6 of the International Covenant on Civil and Political Rights", in RAMCHARAN, B.G. (Ed.): *The Right to Life in International Law*, Martinus Nijhoff Publishers, Dordrecht, 1985, pp. 42-56.

<sup>69</sup> On the different elements of this proposal, see BLÁZQUEZ, N.: "El recurso a la *dignidad humana* en la Declaración Universal...", op. cit., p. 124.

would not be able to be reconciled with some provisions of their internal legislation, which foresaw the possibility of abortion<sup>70</sup>.

Finally, the last issue which was debated during the discussion on the right to life was the extent to which this right should be awarded, or whether the right to life should exclusively deal with formal aspects, or whether it should be complemented by elements of a material character. Following this debate, there was a proposal from Uruguay, Cuba, Lebanon, and Mexico to include a reference to economic, social, and cultural rights within the right to life; in other words, that the right to life should be complemented with all the conditions which make it possible for this life to be dignified. The amendment of these four States said that "everyone has the right to life, honour, liberty, physical integrity, and to the legal, economic, and social security which is necessary to the full development of human personality"<sup>71</sup>. As we can see, there is a clear link between the right to life and those economic and social conditions which are needed for the full development of the personality of individuals.

This proposal to link the right to life with economic and social rights did not enjoy the support of the majority and, as such, was not, in the end, included in Article 3 of the Universal Declaration; this is an aspect which has also been criticised from some doctrinal standpoints. An example of such a criticism comes from Cecilia Medina, for whom Article 3 of the Declaration must necessarily be linked with Articles 25 and 28 of the same document<sup>72</sup>. In other words, the right to life cannot be seen as a merely formal right, but must be complemented with "the right to a standard of living adequate" for himself and his family (Article 25), and with the right "to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized" (Article 28). In the same vein are the views of Rubén Hernández Valle, for whom the right to life should include, in addition to the basic right of all human beings that nobody should attack their lives or their integrity, "the right of all men that social solidarity, whose maximum expression can at present be found in the State, although not exclusively, should provide him with the means necessary for subsistence."<sup>73</sup> And the fact is that, as René Cassin has stated, "there exists an indivisibility, in the right to life, between legal elements, on the one hand, and material and economic elements, on the other"<sup>74</sup>. Advancing with this wide concept of the right to life<sup>75</sup>, we have come

<sup>70</sup> SAMNOY, A.: *Human Rights as International Consensus...*, *op. cit.*, p. 90. The opposition to any reference to abortion which came from Mrs. Begtrup, the President of the Commission on the Status of Women, is also significant; see VERDOOT, A.: *Naissance et Signification de la Déclaration Universelle...*, *op. cit.*, p. 98.

<sup>71</sup> This quotation, as well as a full analysis of the circumstances surrounding this proposal, can be found in MORSINK, J.: "The Philosophy of the Universal Declaration", *op. cit.*, pp. 327 ff.

<sup>72</sup> MEDINA, C.: "A 1988 Universal Declaration of Human Rights", in *The Universal Declaration of Human Rights...*, *op. cit.*, pp. 64 ff.

<sup>73</sup> HERNANDEZ VALLE, R.: "Artículo 3", in ASOCIACION COSTARRICENSE PRO-NACIONES UNIDAS: *La Declaración Universal de Derechos Humanos...*, *op. cit.*, p. 32.

<sup>74</sup> In the same vein, René Cassin asks himself the following question: "Is it not well founded to say that the right to life is made up not only of the right not to be murdered or not to be arbitrarily condemned to death, but also the right to, through work, contribute to production, and receive food, accommodation, clothes, etc. which correlate?" in CASSIN, R.: "La Déclaration Universelle...", *op. cit.*, pp. 285 and 286.

<sup>75</sup> On this topic, see B.G. Ramcharan's interesting comments concerning the different dimensions which should be applied to the right to life, in RAMCHARAN, B.G.: "The Concept and Dimensions of the

to the point where third generation human rights (that is, the right to development, to peace, to the environment, or to humanitarian assistance) are the corollary of the right to life and to security<sup>76</sup>. The right to life would therefore, to use the words of Paolo de Stefani, become a true *synthesis-right*, a right which is situated at the foundation of all human rights, reinforcing their indivisibility and interdependence.

Article 4, for its part, prohibits slavery and the slave trade in all its forms, thus forming the culmination of a process which, as history shows us, had been initiated with the General Act of the Brussels Conference in 1890, the Convention of Saint-Germain-en-Laye of 1919, and the Geneva Convention of 1926, which attempted to suppress slavery and the slave trade. This was an article which did not pose many problems as regards its drafting and inclusion in the Universal Declaration of Human Rights, given that there existed a fairly generalised consensus as regards opinion of slavery *in all its forms* as an attack on basic human rights<sup>77</sup>. Nevertheless, despite the fact that many notable advances have been made in the field, "many parts of the world are still experiencing diverse forms of slavery or servility, and a trade in human beings continues to exist not only in Africa, but also in Asia and some parts of Latin America"<sup>78</sup>. Therefore, slavery and practices analogous to it remain problems which both States and the international community have to face up to. This meant that, in the sphere of the United Nations, the Commission on Human Rights proceeded to create a *Working Group on Contemporary Forms of Slavery* in the mid-1980s. This group has analysed different situations, which are still widespread, and which can be classed as new forms of slavery. Among them, the working group has highlighted the sale of children, child prostitution, the use of minors in pornographic publications, the exploitation of child labour, etc<sup>79</sup>, all situations which demand urgent attention.

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Right to Life", in RAMCHARAN, B.G. (Ed.): *The Right to Life...*, *op. cit.*, pp. 1-32. In the same vein, the Uruguayan Gros Espiell has defended the value of making the distinction between the "right to life" and the "right to live", in GROS ESPIELL, H.: "The Right to Life and the Right to Live", in *Essais sur le concept de "droit de vivre"*. *En mémoire de Yougindra Khushalani*, Bruylant, Bruxelles, 1988, pp. 43-53.

<sup>76</sup> As Gros Espiell has stated regarding respect of the right to development, this right "results from or is a consequence of the recognition... of economic, social, and cultural rights, and in particular the right to life, which necessarily implies the right to live in a full and integrated manner"; see GROS ESPIELL, H.: "El derecho al desarrollo como un derecho de la persona humana", en *Seminario sobre protección y promoción internacional de los derechos humanos. Universalismo y Regionalismo*, Caracas, 31 July to 4 August 1978, p. 11; TIKHONOV, A.A.: "The Inter-Relationship Between the Right to Life and the Right to Peace", in RAMCHARAN, B.G. (Ed.): *The Right to Life...*, *op. cit.*, pp. 97-113; BETTATI, M.: "L'accès aux victimes: droit d'ingérence ou droit d'assistance?", in *Law in Humanitarian Crises. Access to Victims: Right to intervene or Right to receive humanitarian assistance?*, Vol. II, Office for Official Publications of the European Communities, Luxembourg, 1995, p. 14.

<sup>77</sup> Concerning this topic, we cannot forget that the International Court of Justice, in referring in its pronouncement on the *Barcelona Traction* case of 5th February 1970 to the "obligations of States towards the international community as a whole", or obligations *erga omnes*, mentioned as an example of these obligations "the principles and rules concerning the basic rights of the human person, including protection from slavery", CIJ, *Recueil*, 1970, p. 31. As we can see, the practice of slavery would have acquired the status of a *ius cogens* law, according to what is set out in Articles 53 and 54 of the Vienna Convention on the Law of Treaties, which is where the effects of *ius cogens* norms are specified.

<sup>78</sup> MORA ROJAS, F.: "Artículo 4", in ASOCIACION COSTARRICENSE PRO-NACIONES UNIDAS: *La Declaración Universal de Derechos Humanos...*, *op. cit.*, p. 42.

<sup>79</sup> On the work done by this working group, see ASSEN, N.M.: "Article 4", in EIDE, A.; ALFREDSSON, G.; MELANDER, G.; REHOF, L.A. and ROSAS, A. (Eds.): *The Universal Declaration of Human Rights*:

Article 5 is dedicated to establishing that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”, and it is clear from this that these acts are some of the most severe against human dignity. Clear proof of the fact that the international community considers the right not to have to experience any kind of torture or cruel, inhuman, or degrading treatment to be one of the fundamental rights comes from the huge normative development which Article 5 of the Universal Declaration has undergone both on regional and international levels<sup>80</sup>. However, despite normative and institutional development, we should underline the fact that, unfortunately, torture continues to be a widespread practice used in many parts of the world<sup>81</sup>.

The right of all human beings “to recognition everywhere as a person before the law” is consecrated in Article 6 of the Declaration, thus prohibiting the formerly common practice of the *civil death* of a person, or the degradation of a person to a mere object, depriving them of their status as a person before the law<sup>82</sup>.

Article 7, for its part, is the one dedicated to establishing the principle of equality before the law and of non-discrimination<sup>83</sup>. Under this article,

“all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination”.

Article 8 of the Declaration recognises that “everyone has the right to an effective remedy by the competent national tribunals...” for the defence of their funda-

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*A Commentary, op. cit.*, pp. 98 ff. Similarly, an analysis of figures referring to these new forms of slavery regarding minors, focussing in particular on child labour, can be found in UNICEF: *The State of the World's Children 1997*, Oxford University Press, Oxford, 1997.

<sup>80</sup> Within the universal sphere we have the Declaration of the General Assembly of the United Nations of 9th December 1975, concerning the protection of all persons from being subjected to torture and other cruel, inhuman, or degrading treatment or punishment; the International Convention of 10th December 1984 against torture and other cruel, inhuman, or degrading treatment or punishment. Additionally, on a regional level we have the European Convention of 26th November 1987 for the prevention of torture and of inhuman or degrading treatment or punishment, as well as the Inter-American Convention of 9th December 1985 to prevent and punish torture.

<sup>81</sup> Given the seriousness of the situation as regards torture, in 1985 the Commission on Human Rights of the United Nations, in virtue of its resolution 1985/33, appointed a *Special Rapporteur on Torture*. See the final report of the Special Rapporteur, in which he makes clear his concerns “as regards the volume of complaints of torture, particularly related to the extraction of confessions...” following his investigation, which was carried out in many countries *Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1997/38, E/CN.4/1998/38*, of 24th December 1997.

<sup>82</sup> On this issue, see BOGDAN, M.: “Article 6”, in EIDE, A.; ALFREDSSON, G.; MELANDER, G.; REHOF, L.A. and ROSAS, A. (Eds.): *The Universal Declaration...*, *op. cit.*, pp. 112 ff.

<sup>83</sup> This general principle of no discrimination has been extensively developed an made more specific by the normative work undertaken under the auspices of the United Nations. Among the most significant achievements the following can be highlighted: the Convention of 14th December 1960 regarding the fight against discrimination in education; the International Convention of 21st December 1965 concerning the elimination of all forms of racial discrimination; and the Convention of 18th December 1979 concerning the elimination of all forms of discrimination against women.

mental rights, recognised “by the constitution or by law.” Another significant article is Article 9, which states that “no one shall be subjected to arbitrary arrest, detention or exile”<sup>84</sup>. In relation to the two previous articles is Article 10, which states that “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal...”; in other words, this article recognises the famous *right to due process of law*. Obviously, the independence and impartiality of the judiciary is a fundamental element concerning the effective enjoyment of the fundamental rights and freedoms enshrined in the articles under discussion. On this subject, it has been said that these articles “could never have full significance and validity without a truly independent and impartial judiciary”<sup>85</sup>. Finally, and along exactly the same lines as Articles 8, 9, and 10, Article 11 enshrine the *principle of presumption of innocence*<sup>86</sup>, as well as the principle of *non-retroactivity of criminal law*<sup>87</sup>.

As can be seen, all of these articles which deal with rights directly related to the personal and civil sphere of the individual try to achieve the establishment and survival of the “rule of law” which is mentioned in the Preamble to the Universal Declaration. To conclude, democracy and respect for the basic rules of the rule of law are indispensable for the construction of an environment of rights and freedoms<sup>88</sup>.

#### 2.2.2. RIGHTS OF THE INDIVIDUAL IN RELATION TO THE GROUPS OF WHICH HE OR SHE IS PART (ARTICLES 12 TO 17)

This second column of those which form the principal foundations of the Universal Declaration of Human Rights is made up of those rights and freedoms which refer to the relationships of the individual with the different social groups of which he or she is necessarily a member. As such, Article 12 protects people’s private and family life, setting out that “no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation...”. In order to protect this right, Article 12 states that “everyone has the right to the protection of the law against such interference or attacks”.

Article 13 sets out the right to freedom of movement, and that of residence as well as the right to freely leave the country one is in. According to the first section of

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<sup>84</sup> Nevertheless, arbitrary detention continues to be a fairly widespread practice throughout the international community, as can be seen from the fact that through the 1991/42 Resolution of 5th March 1991, the Commission Human Rights proceeded to create a *Working Group on Arbitrary Detention*. According to its mandate, this group can “investigate cases of detention imposed arbitrarily or otherwise inconsistently with relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments...”.

<sup>85</sup> MONTERO CASTRO, J.A.: “Artículos 9, 10 y 11”, in ASOCIACION COSTARRICENSE PRO-NACIONES UNIDAS: *La Declaración Universal...*, op. cit., p. 75.

<sup>86</sup> In its first paragraph, Article 11 states that “everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”

<sup>87</sup> For its part, Article 11.2 states that “no one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed”.

<sup>88</sup> On the interaction between democracy and human rights, see ROLDÁN BARBERO, J.: *Democracia y Derecho Internacional*, Civitas, Madrid, 1994, in particular pp. 119 ff.

this Article, "everyone has the right to freedom of movement and residence within the borders of each State", and the second states that "everyone has the right to leave any country, including his own, and to return to his country". As we can see, this Article sets out the right of all people to move and freely set up residence within a State, regardless of whether or not they are a national of that State. In other words, once a person has legally entered a State, that person has the same rights as a national as regards residence and free movement. Similarly, the same article recognises the right of all people to leave the country in which they find themselves, even if this happens to be their own country. As Alejandro Etienne Llano has said on the topic, "this right to emigration can only be effective as far as facilities for immigration and free movement exist, both within and through other States"<sup>89</sup>. But this last right is not mentioned in Article 13 of the Universal Declaration. Therefore, the right to leave one country exists, but there is not a corresponding obligation to other States to welcome that person.

This provision, as was to be expected, brought about significant discussions between States, given that they found themselves facing a delicate problem which affects one of the main issues of sovereignty, namely how to establish rules which permit a person to freely leave a State, and as regards whether or not a State is under the obligation to accept his or her entry. In this respect, the representative of the Soviet Union, supported by the delegates from the Ukraine, Belarus, and Saudi Arabia<sup>90</sup>, stated that the adoption of Article 13 put Article 2.7 of the United Nations Charter in danger; this is an article which establishes the principle of non-intervention in affairs which fall essentially under the domestic jurisdiction of States. In addition, this Article, again in accordance with the opinions of Mr. Paulov (USSR), deliberately ignored the right of every State to freely regulate the movement of people both within its territory, and at exit points on borders. The huge restrictions which former socialist bloc countries used to place both on free movement within the country and, more significantly, on exiting the country, are well known<sup>91</sup>.

In the same vein, Article 14 is devoted to the recognition of the right to asylum, stating that "everyone has the right to seek and to enjoy in other countries asylum from persecution". As we can see, this Article 14 establishes the right of all people who find themselves facing persecution to seek asylum. What it does not establish, unfortunately for those who are asylum seekers, is the obligation for countries to receive those seeking asylum; this, according to some, deprives this right of any real effectiveness<sup>92</sup>. The provision of asylum, therefore, is defined as an "optional act, not a duty whose fulfilment is obligatory for States"<sup>93</sup>. Additionally, this right to asylum has appropriate limitations, as is established in Article 14.2. According to this Article, "this right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations".

<sup>89</sup> LLANO, A.E.: *La protección de la persona humana en el Derecho Internacional...*, op. cit., p. 73.

<sup>90</sup> These and other opinions can be found in VERDOOT, A.: *Naissance et Signification de la Déclaration...*, op. cit., pp. 147 ff.

<sup>91</sup> GRAHL-MADSEN, A.: "Article 13", en EIDE, A...: op. cit., p. 210.

<sup>92</sup> LLANO, A.E.: *La protección de la persona humana...*, op. cit., p. 75.

<sup>93</sup> TINOCO CASADO, L.D.: "Artículo 14", in ASOCIACION COSTARRICENSE PRO-NACIONES UNIDAS: op. cit., p. 97.



Article 15 recognises the right of all people to have a nationality of which they cannot be arbitrarily deprived, and also the right to change nationality<sup>94</sup>. This is an important right, given that nationality is, in many cases, the condition for the enjoyment of some of the rights recognised in the Universal Declaration of Human Rights. Above all, the objective of this Article 15 is to avoid *statelessness*, or the legal situation in which a person holds no nationality<sup>95</sup>.

The following Article, the sixteenth, is a little more controversial, proclaiming as it does the right to marriage without restriction<sup>96</sup>, and to found a family, classing this as “the natural and fundamental group unit of society”. The Article also states the equality of men and women as regards marriage<sup>97</sup>. This has been said to be a controversial article because some of the delegations from Muslim countries present at the discussions leading to the approval of the Universal Declaration of Human Rights expressed a certain amount of reserve concerning the topic, mainly motivated by cultural and religious factors. This led to the eventual abstention of Saudi Arabia at the final vote on the Universal Declaration, because it was not totally satisfied with the final text of Articles 16 and 18, which will be commented on below. This reserve on the part of the Muslim world was basically due to their particular way of seeing the roles of men and of women in society, and because of the role played by religion in their societies. This was to the extent that, as an Islamic commentator on the Universal Declaration has stated, Article 16 contains many parts “which directly contradict Islamic teaching and which, therefore, are totally unacceptable for Muslims”<sup>98</sup>. The fact is that, as the same author said, Islam forbids marriage between a Muslim and someone of another religion, which contradicts the first paragraph of Article 16, which states that men and women have the right to marry “without any limitation due to race, nationality or religion”. Similarly, natural equality between men and women does not exist in Islam, which believes that nature made them differently, and therefore their roles in society will also be different. Finally, Islam only accepts divorce when it is requested by the man, and not by the woman, and so it cannot accept that, as Article 16.1 states, men and women should have the same rights “at

<sup>94</sup> Article 15: 1. Everyone has the right to a nationality.

2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

<sup>95</sup> A United Nations development of this Article 15 was made during the Convention on the Reduction of Statelessness, 30th August 1961.

<sup>96</sup> It may seem strange that the right to marriage is recognised in the Declaration; nevertheless, this can be understood through analysis of its historical significance: the Second World War had demonstrated the risks of state planning of family life, with discriminatory criteria on the basis of race, nationality, or religion (a ban on marriages between Germans and those who had ancestry which was a quarter or more Jewish...) in PÉREZ VARGAS, V.: “Artículo 16”, in ASOCIACION COSTARRICENSE...: *op. cit.*, p. 108.

<sup>97</sup> Article 16: 1. “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

<sup>98</sup> TABANDEH, S.: *A Muslim Commentary of the Universal Declaration of Human Rights*, F.T. Goulding & Company Limited, London, 1970, p. 35.

[the] dissolution [of the marriage]"<sup>99</sup>. As we can see, Islam questions one of the basic foundations of the Universal Declaration, the principle of non-discrimination.

Following on from this analysis, we should remember that some of the provisions of the Declaration, especially the Article 16 which is discussed above, can pose certain problems as regards their universal acceptance. On this subject, Philip Alston, the Australian internationalist expert on human rights has mentioned "the importance of being culturally sensitive in our interpretation and application of some of the norms [contained in the Declaration]", particularly referring to Article 16 and its statement that the family is "the natural and fundamental group unit of society"<sup>100</sup>. It is possible that this is true in the Western world, but, as we leave behind this world, both culturally and anthropologically, it is very possible that this statement diffuses, and begins bit by bit to lose its clarity. For example, the way of understanding the family in certain parts of Africa is nothing like the Western concept of the family, which is based on the nuclear family<sup>101</sup>. We must conclude that this issue is one which brings up the controversial and thorny issue of the universality of the human rights enshrined in the Declaration.

Another incredibly conflicting issue regarding Article 16 of the Universal Declaration was the question of divorce, given that some delegations from Catholic countries could not accept that an express mention of the possibility of divorce be made<sup>102</sup>. In the end, due to pressure from those countries which included divorce in their legislation, the Catholic countries had to accept an indirect mention of divorce in Article 16; this appears in Article 16.1, which establishes that "men and women... are entitled to equal rights as to marriage, during marriage and *at its dissolution*" (emphasis added).

Finally for this section, Article 17 is devoted to recognition of the right to property. Following bitter arguments and intense discussion between the many delegations from the socialist bloc and from the capitalist nations, a form of consensus was reached regarding the formulation of this right. The right to property was established as follows: the first paragraph of Article 17 states that "everyone has the right to own property alone as well as in association with others", with the second paragraph stating that "no one shall be arbitrarily deprived of his property"; in other words, the right to property is not seen as an absolute right — under certain circum-

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<sup>99</sup> A detailed analysis of Islamic reservations as regards Article 16 of the Universal Declaration can be found in TABANDEH, S.: *A Muslim Commentary...*, *op. cit.*, pp. 36 ff.

<sup>100</sup> ALSTON, P.: "The Fortieth Anniversary of the Universal Declaration of Human Rights: A Time More for Reflection than for Celebration", in *Human Rights in a Pluralist World...*, *op. cit.*, pp. 7 and 8. Similarly, there have been feminist opinions expressed against this strong declaration in favour of the family. Such declarations in favour of the family tend to go against the rights of women, given that through them they are not accorded rights as individuals, but only as mothers or housewives; on this issue, see MORSINK, J.: "Women's Rights in the Universal Declaration", *op. cit.*, pp. 239 ff.

<sup>101</sup> Regarding conceptions of human rights in Africa concerning cultural, ideological, and legal issues, see. MOTALA, Z.: "Human Rights in Africa: A Cultural, Ideological and Legal Examination", *Hastings International and Comparative Review*, Vol. 12, n.º 2, winter 1989, pp. 373-410.

<sup>102</sup> Mr. Vanistendael's opinions on the matter are significant; he stated that "if the Declaration proclaimed the right to dissolve marriage, it would be unacceptable for hundreds of millions of Christians in countries that were members of the United Nations", quoted in MORSINK, J.: "Women's Rights...", *op. cit.*, p. 246.

stances it is possible to legitimately deprive a person of his or her property<sup>103</sup>. As we can see, the consensus was that *individual and collective* property are recognised, which was an attempt to include both Western and Oriental views on the matter. However, true consensus was still far from being reached, as can be seen from the fact that, when the two International Covenants on human rights were approved in 1966, the right to property was not explicitly mentioned in either of them.

### 2.2.3. POLITICAL RIGHTS AND FREEDOMS (ARTICLES 18 TO 21)

The first section, as we have seen, was made up of civil rights and freedoms, indispensable for the “rule of law”; this concept should also, undoubtedly, be able to count on rights and freedoms of a political nature. Along these lines, Article 18 consecrates the recognition of the “right to freedom of thought, conscience and religion”<sup>104</sup>. As before, there were problems for some of the delegations from Islamic countries, this time regarding recognition of freedom of religion and freedom to change religion. This reservation from Islamic countries led to Saudi Arabia’s abstention<sup>105</sup>. As René Cassin has stated regarding the position of the Islamic countries, especially that of Saudi Arabia, “it is difficult to demand that theocratic regimes based on a particular religion proclaim the possibility of the individual’s avoiding it”<sup>106</sup>.

Another basic right needed for the establishment of a democratic regime of law is the “right to freedom of opinion and expression” mentioned in Article 19 of the Declaration<sup>107</sup>. And for its part, Article 20 recognises the right of all people “to freedom of peaceful assembly and association”, continuing in its second paragraph by stating that “no one may be compelled to belong to an organisation”.

The last of the articles in this section is the one aimed at the consecration of the right to participation in politics. Due to its importance for the establishment of democratic society, Article 21 of the Universal Declaration is reproduced in full below:

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right of equal access to public service in his country.

<sup>103</sup> ALFREDSSON, G.: “Article 17”, in EIDE, A.: *op. cit.*, p. 256.

<sup>104</sup> As Article 18 of the Declaration states, “everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance”.

<sup>105</sup> Similarly, Egypt demanded that its reservations figure as a *sine qua non* condition for its affirmative vote concerning the whole of the Universal Declaration, for the same reasons. On the reservations of certain Islamic countries regarding Articles 16 and 18, see VERDOOT, A.: *Naissance et Signification de la Déclaration Universelle des Droits de l’Homme...*, *op. cit.*, p. 77. The theological theories underlying this refusal of the possibility to change religion can be found in TABANDEH, S.: *A Muslim Commentary of the Universal Declaration...*, *op. cit.*, pp. 70 ff.

<sup>106</sup> CASSIN, R.: “La Déclaration Universelle et la mise en oeuvre des droits de l’homme”..., *op. cit.*, p. 287.

<sup>107</sup> This Article states that “everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”.

3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

As we can see, this article clearly expresses the liberal and democratic credo favoured by Western countries, which is based on the principles of popular sovereignty and political participation<sup>108</sup>. However, this democratic credo posed problems regarding the acceptance of all its consequences for delegations from the socialist bloc, and for certain Third World countries. Again, this right must be widely and flexibly interpreted in order for it to be able to contain concepts of democracy present in cultural environments different to that of the West<sup>109</sup>.

#### 2.2.4. ECONOMIC, SOCIAL, AND CULTURAL RIGHTS (ARTICLES 22 TO 27)

We will now deal with the group of rights that was a true innovation as regards the international protection of human rights. Until the time of the drafting of the Declaration, no international text had collected together what we call *second generation* human rights (*first generation* rights are the civil and political rights which came about as a result of the bourgeois revolutions of the eighteenth century). As the Belgian representative at the discussions leading to the approval of the Universal Declaration said, "... it is only after Article 22 that we really made innovations concerning human rights"<sup>110</sup>. The Universal Declaration of Human Rights thus became "the first legal international text to create a fully comprehensive catalogue of human rights"<sup>111</sup>. However, this should be looked at in conjunction with the American Declaration of the Rights and Duties of Man, approved a few months before the Universal Declaration in May 1948; this was a document which took in economic, social, and cultural rights. Also, this recognition of second generation rights was a more vigorous recognition than the one which appears in the Universal Declaration; this has been highlighted as one of the principal differences between the two texts<sup>112</sup>.

However, the inclusion of these economic, social, and cultural rights in the text of the Universal Declaration of Human Rights was far from peaceful. As we have already shown, these rights were mainly supported by Latin American and Socialist

<sup>108</sup> VOLIO JIMÉNEZ, F.: "Artículo 21", in ASOCIACION COSTARRICENSE...: *op. cit.*, p. 149.

<sup>109</sup> An interesting analysis of the concept of political power in African societies can be found in MATALA KABANGU, T.: *El poder por el poder en Africa*, Servicio Central de Publicaciones del Gobierno Vasco, Vitoria-Gasteiz, 1996. See also KUMADO, K.: "Africa and the Universal Declaration of Human Rights", in *The Universal Declaration of Human Rights: Its Significance in 1988*, Report of the Maas-tricht/Utrecht Workshop..., *op. cit.*, pp. 55-60.

<sup>110</sup> See the text reproduced in GONZÁLEZ, N.: "¿Hacia una nueva Declaración de Derechos Humanos?", in *El derecho al desarrollo o el desarrollo de los derechos*, Editorial Complutense, Madrid, 1991, p. 378.

<sup>111</sup> SOMMERMANN, K-P.: "El desarrollo de los derechos humanos desde la Declaración Universal de 1948", in PÉREZ LUÑO, A-E. (Coord.): *Derechos Humanos y Constitucionalismo ante el Tercer Milenio*, Marcial Pons, Madrid, 1996, p. 98.

<sup>112</sup> For Gros Espiell, the American Declaration "enumerates with more precision the economic, social and cultural rights, which the Universal Declaration summarizes" (Arts. 22 to 27)", in Gros ESPIELL, H.: "La Declaración Americana...", *op. cit.*, p. 51.

countries, while Western countries were less enthusiastic about their inclusion. In the end, after some significant hurdles, an equilibrium was reached in the Universal Declaration between civil and political rights, and economic, social, and cultural rights, which could be said to be one of the greatest achievements of the Declaration. René Cassin's input was fundamental to this process; it can be stated without doubt that it was thanks to his intellectual talents and negotiation skills that the huge problems and reservations on the topic were overcome. As Albert Verdoot has said with regards to Professor Cassin's significant input,

"this latter person is taking advantage of his past as an eminent jurist, and of his special abilities to conciliate the liberal tendencies of the French Declaration of 1789 and the socialist tendencies of modern constitutions, especially those of the USSR. He managed to keep both traditional rights and the new economic and social rights in the Universal Declaration."<sup>113</sup>

Even so, and despite all the efforts carried out to strike a balance between the two categories of human rights satisfactory for all, the delegation from South Africa abstained in the final vote on the Universal Declaration of Human Rights, due to the inclusion of economic and social rights. For them, economic, social, and cultural rights, which cannot (in their opinion) be seen as fundamental rights, should never have appeared in the text of the Declaration.

The most important article in the list of economic, social, and cultural rights is, without doubt, Article 22, a type of *chapeau*<sup>114</sup> article, to use René Cassin's term; in other words, it is an article which serves as a basis and a framework which marks out the guidelines for all the articles discussed in this chapter. This Article is the one that recognises the right of all people to social security. As it states,

"everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."

Firstly, it is important to recognise the fact that this Article incorporates the right that every person has to social security. However, it is equally significant that it considers economic, social, and cultural rights to be "indispensable" for the dignity of the human being and for the "free development of his personality". These statements are of crucial importance, and serve to, once and for all, support the "larger freedom" of the preamble that was discussed above<sup>115</sup>. Article 22 clearly and unequivocally sets out the *indivisibility and interdependence* of the two categories

<sup>113</sup> VERDOOT, A.: *Naissance et Signification de la Déclaration Universelle...*, *op. cit.*, p. 49. Along the same lines, Eide and Alfredsson called René Cassin "an eminent draftsman with a deep social commitment..." in EIDE, A. and ALFREDSSON, G.: "Introduction", in EIDE, A.; ALFREDSSON, G.; MELANDER, G.; REHOF, L.A. and ROSAS, A. (Eds.): *The Universal Declaration of Human Rights...*, *op. cit.*, p. 11.

<sup>114</sup> On this topic, see René Cassin's preface to VERDOOT, A.: *op. cit.*, p. IX.

<sup>115</sup> On this topic we have already discussed the enormous contribution of President Roosevelt and his *Speech on the Four Freedoms*, in which he stated the need for economic and social rights for an adequate concept of freedom. See JOHNSON, M.G.: "The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection for Human Rights", *op. cit.*, pp. 20 ff.

of human rights, those which are civil and political, and those which are economic, social, and cultural<sup>116</sup>. Both categories of human rights must be adequately treated if there truly is a desire to guarantee the full dignity of the human being. However, in practice the divergences between the different conceptions of human rights have continued to exist, making a truly fully comprehensive definition of them very difficult. As Professor Cassese has, somewhat sceptically, stated,

“the divergences are significant, and the diplomatic formulae with which, as documentation shows, attempts have been made at overcoming the differences between the opposing sides, have little value. One of these formulae speaks of *indivisibility and interdependence*. This is a comfortable phrase which serves to calm the discussion, leaving things exactly as they were. In reality, the problems continue, and the political and ideological confrontations are only postponed, to reappear more fiercely at the first available opportunity”<sup>117</sup>.

An example of these deep divisions, and of how difficult it is to successfully overcome them in practice, comes from the negotiations in the lead-up to the approval of an International Covenant on Human Rights, where it was suggested that it should complement the regulations of the Universal Declaration of Human Rights. These discussions were begun as soon as the Universal Declaration was adopted in 1948. However, the job could not be completed until 1966, eighteen years later, and the Covenants could not come into force until 1976, ten years later than this. In addition, the approval of one single Covenant which collected together all fundamental human rights was not possible. In the end, due to the vicissitudes of the Cold War and the political and ideological confrontations between Western countries and Socialist countries, discussions led to the approval of two International Covenants, one consecrating civil and political rights, and the other dedicated to the recognition of economic, social, and cultural rights<sup>118</sup>. Now, however, that the Cold War has ended, it is to be hoped that conflicts regarding the concept of human rights will begin to dissipate. Nevertheless, Philip Alston has warned against “the clear endeavor to exclude economic and social rights” from a clearer definition of human rights, a project which is mainly being undertaken by the United States<sup>119</sup>. As Martha H. Good has said on the topic, in reference to

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<sup>116</sup> The indivisibility and interdependence of human rights as a whole has been strongly reaffirmed by many resolutions made by the General Assembly of the United Nations; both the International Conference on Human Rights which was held in Teheran in 1968, and that which took place in Vienna in 1993 have proclaimed this indivisibility and interdependence, with the Vienna Declaration stating that all human rights “are indivisible and interdependent and interrelated”, in the *Vienna Declaration and Programme of Action*, World Conference on Human Rights, Vienna, 14<sup>th</sup> to 25<sup>th</sup> June 1993, A/CONF.157/23, of 12<sup>th</sup> of July 1993, paragraph 5.

<sup>117</sup> CASSESE, A.: *Los derechos humanos en el mundo contemporáneo...*, *op. cit.*, p. 72.

<sup>118</sup> Paradoxically, both International Covenants were approved on the same day and in the same session of the General Assembly of the United Nations, on 16th December 1966.

<sup>119</sup> ALSTON, P.: “The Fortieth Anniversary of the Universal Declaration of Human Rights...”, *op. cit.*, p. 6. Proof of this intent to exclude can be found in the fact that the United States has still not ratified the Universal Covenant on economic, social, and cultural rights, and, even more worryingly, there do not appear to be any reliable sources that indicate that it will do so at any point in the near future.

President Roosevelt's Four Freedoms and his defence of economic and social rights, "more than forty years later, however, there is not freedom from want throughout the world or in the United States"<sup>120</sup>.

Another element of Article 22 that it is important to highlight, and which contributes to the general characterisation of economic, social, and cultural rights, is that these rights are dependent on "national effort" and "international co-operation". In other words, the following is necessary for the fulfilment of second generation rights: effort on the part of States, which is an essential part of the task of each State, and should therefore guarantee economic, social, and cultural rights to all citizens. If, however, State resources are not sufficient, reinforcement through international co-operation should be provided. And it is when we are faced with second generation rights that we realise that they are rights which depend on all the resources which States have, both economic and otherwise. These rights are not absolute, but rather are characterised by *relativity and progressivism*; they depend on available resources at all times. Article 22 itself recognises that these rights depend on "the organization and resources of each State". The conclusion we can reach is that, for enjoyment of economic, social, and cultural rights, there must be complementary national effort and international co-operation, especially if we take into account the difficulties faced by many Third World countries. In many of these, faced with the scarcity of resources, the fulfilment of second generation rights requires the establishment of a closer co-operation with industrialised countries. With this in mind, we are currently witnessing the "divorce" of developed countries from under-developed countries as regards the concept of human rights and the emphasis which should be placed on different rights. In the wise words of Eide and Alfredsson, "there are indications to the effect that previous tensions between East and West are being replaced by increasing differences between North and South"<sup>121</sup>. The debate concerning the so called *third generation rights*, or *solidarity rights*, which first appeared in the 1970s, is proof of this growing tension<sup>122</sup>.

We have seen how this most important Article 22 serves as a portico for economic, social, and cultural rights, contributing to outline their principal characteris-

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<sup>120</sup> As the same author says, "American courts have never recognized any governmental duty to provide welfare or subsistence benefits to citizens", GOOD, M.H.: "Freedom from Want: the Failure of United States Courts to Protect Subsistence Rights", *Human Rights Quarterly*, Vol. 6, 1984, p. 335.

<sup>121</sup> EIDE, A. and ALFREDSSON, G.: "Introduction", in EIDE, A.; ALFREDSSON, G.; MELANDER, G.; REHOF, L.A. and ROSAS, A. (Eds.): *The Universal Declaration of Human Rights...*, *op. cit.*, p. 12.

<sup>122</sup> Third generation rights are a new variety of rights which have come about at the hands of developing countries, and which emphasise their principle demands and needs. As was foreseeable, these new rights have been met with fierce opposition from developed countries. Among these new rights, we can mention the right to development, the right to environment, the right to humanitarian aid, the right to peace, etc. There exists extensive literature on the issue of third generation rights, mainly written by authors from the Third World. Among others, see URIBE VARGAS, D.: *La tercera generación de derechos humanos y la paz*, Plaza&Janes, Bogotá, 1986; ALSTON, P.: "Conjuring up new human rights: a proposal for quality control", *American Journal of International Law*, Vol. 78, 1984, pp. 607-621; MARKS, S.: "Emerging Human Rights: a new generation for the 1980s?", *Rutgers Law Review*, Vol. 33, 1981, pp. 435-452.

tics. In other words, it plays a *propaedeutic role*<sup>123</sup>, as occurred with Article 3 of the Declaration regarding civil and political rights.

The next article in this section devoted to second generation human rights is Article 23, which enshrines the right to work, to equal pay, and to just remuneration, as well as the right to freely join a trade union. This right to work is complemented by Article 24, which deals with the right to rest, leisure, a reasonable limitation of working hours, and periodic holidays with pay. However, it should be taken into account that Articles 23 and 24 of the Universal Declaration “do nothing more than consecrate, at the highest international level, principles which were already being incorporated into the Conventions and Recommendations of the ILO”<sup>124</sup>.

Another important article is Article 25, which is devoted to the recognition of an adequate standard of living for all human beings. As we have seen previously, this article should be examined in the light of Article 3 of the Declaration, or in the light of the right to life. And the fact is that, as Gonzalo J. Facio rightly says, “in poor countries, the right to life is linked above all with the possibility of attaining the necessary minimum for subsistence, such as food, accommodation, health, education, etc...”<sup>125</sup>. As Article 25.1 tells us,

“everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widow-hood, old age or other lack of livelihood in circumstances beyond his control”<sup>126</sup>.

Article 26 is devoted to recognition of the *right to education*, and sets out some of the principals applicable to this right. First, states the Declaration, education should be free “at least in the elementary and fundamental stages”. Secondly, it is stated that this elementary education will be compulsory. Finally, as regards higher education, we are told that access to it “shall be equally accessible to all on the basis of merit”.

The second paragraph of Article 26 is one of huge transcendental importance, given that it is where the objectives of education are established. According to this provision,

“education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace”.

<sup>123</sup> RABOSI, E.: *La Carta Internacional de Derechos Humanos*, op. cit., p. 17.

<sup>124</sup> ARAUZ AGUILAR, A.: “Artículos 23 y 24”, in ASOCIACION COSTARRICENSE...: op. cit., p. 174.

<sup>125</sup> FACIO, G.J.: “Artículo 22”, in ASOCIACION COSTARRICENSE...: op. cit., p. 166.

<sup>126</sup> In addition, and thanks to the influence of the Commission on the Status of Women, presided over by Mrs. Begtrup, a second section was included in Article 25, which is dedicated to special protection for motherhood and childhood, as well as social protection for children whether they are born in or out of wedlock.



As we can see, education, according to the view expressed in the Universal Declaration, must clearly be aimed at respect and the promotion of human rights, tolerance, and peace<sup>127</sup>. It is here that the relevance of *Human Rights Education*<sup>128</sup> comes to the fore, as a fundamental medium for the conversion of education systems into instruments for enjoyment and promotion of human rights, democracy, peace, and development. This is exactly the view expressed in the 1993 Vienna Declaration, which says that

“the World Conference on Human Rights reiterates that States are duty-bound... to ensure that education is aimed at strengthening the respect of human rights and fundamental freedoms. The World Conference on Human Rights emphasizes the importance of incorporating the subject of human rights education programmes and calls upon States to do so. Education should promote understanding, tolerance, peace and friendly relations between the nations and all racial or religious groups... Therefore, education on human rights and the dissemination of proper information... play an important role in the promotion and respect of human rights...”<sup>129</sup>.

With regards to this huge importance afforded to human rights education, it has been argued that, following the process begun with the Universal Declaration of Human Rights, this education has become a true human right in itself, the right to human rights education<sup>130</sup>.

Finally, the last element of the right to education appears in paragraph three of Article 26 of the Universal Declaration, establishing the “prior right” of parents “to choose the kind of education that shall be given to their children”; it proclaims the principle of parental freedom to choose the education system they want their children to be part of<sup>131</sup>.

The next article, Article 27, establishes the right of all people to participate in the cultural life of the community, as well as the right to take advantage of it, while also protecting the copyright. The first paragraph of this Article states that “everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”. As we can see, this section attempts to introduce cultural rights as a separate and quite different category. However, it should be made clear that, as the majority of authors agree, little attention is given to cultural rights in the Universal Declaration, despite the fact that there

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<sup>127</sup> FLINTERMAN, C.: “The Universal Declaration of Human Rights and the need for Human Rights Education”, in *The Universal Declaration of Human Rights: its Significance in 1988*, *op. cit.*, pp. 41-44.

<sup>128</sup> As regards Education in Human Rights, many materials have appeared in recent years, and they aim to promote and extend this education. Among others ANDREPOULOS, G.J. and CLAUDE, R.P. (Eds.): *Human Rights Education for the Twenty-First Century*, University of Pennsylvania Press, Philadelphia, 1997; INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS: *Educación en Derechos Humanos. Texto Autoformativo*, IIDH, San José, 1994; AMNISTIA INTERNACIONAL: *Educación en Derechos Humanos. Propuestas Didácticas*, Los Libros de la Catarata, Madrid, 1995.

<sup>129</sup> *Vienna Declaration and Programme of Action*, World Conference on Human Rights, Vienna, 14 to 25 June 1993, para. 33.

<sup>130</sup> ALFREDSSON, G.: “The Right to Human Rights Education”, en EIDE, A.; KRAUSE, C. and ROSAS, A. (Eds.): *Economic, Social and Cultural Rights*, Martinus Nijhoff Publishers, Dordrecht, 1995, pp. 213-227.

<sup>131</sup> ARAJARVI, P.: “Article 26”, en EIDE, A...: *op. cit.*, p. 411.

were serious attempts for them to play a more significant role<sup>132</sup>. One of the more important reasons for this lack of interest in cultural rights seems to have been the choice to reject the inclusion of minority rights in the Declaration<sup>133</sup>, in significant contrast to the attention paid to minority rights at the time of the League of Nations. The fact is that whether or not to include minority rights in the Universal Declaration was one of the most controversial issues discussed during the drafting of the document<sup>134</sup>. The strongest opposition came from the Western countries and particularly Latin America; this latter opposition was due to the fact that the Latin Americans considered that they did not have any minorities, either indigenous or national. This has been criticised by many<sup>135</sup>, as it attempted to deny the reality of the existence of minorities and indigenous peoples, the true *absent humanity*<sup>136</sup>, in the process of drafting the Universal Declaration of Human Rights; this, in turn, posed problems regarding the supposed universality of the document<sup>137</sup>. The States present assumed "the right to decide not only concerning themselves, but also concerning the totality of peoples in the world... For the time being, they assumed the majority of humanity to be incapable of taking immediate control of their own rights"<sup>138</sup>. In the end, as we know, the absence of minority rights is one of the principal *lacunae* of the Universal Declaration, a gap which there have been attempts to fill as time has passed<sup>139</sup>.

For its part, the second paragraph of Article 27 consecrates recognition of the copyright, stating that "everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author".

<sup>132</sup> Regarding this issue, it is interesting to highlight the contribution of the *American Anthropological Association*, whose executive committee made a presentation in 1947 to the Commission in charge of producing the Universal Declaration, using a text which argued for recognition of the importance of the rights of cultural groups. See the text written by the executive board in "Statement on Human Rights submitted to the Commission on Human Rights", *American Anthropologist*, Vol. 49, n.º 4, October-December 1947. However, it would appear that this input was not particularly successful, given that it was not reflected in the final text of the Declaration.

<sup>133</sup> MELANDER, G.: "Article 27", in EIDE, A...: *op. cit.*, p. 429.

<sup>134</sup> SAMNOY, A.: *Human Rights as International Consensus. The Making of the Universal Declaration...*, *op. cit.*, p. 91.

<sup>135</sup> VAN BOVEN, T.: "40 Years of the Universal Declaration of Human Rights", in *The Universal Declaration of Human Rights: Its Significance...*, *op. cit.*, p. 17.

<sup>136</sup> This expression was coined by Bartolomé Clavero, from Seville University, an expert on the rights of indigenous peoples; see CLAVERO, B.: "De los ecos a las voces, de las leyes indigenistas a los derechos indígenas", in *Derechos de los Pueblos Indígenas*, *op. cit.*, p. 37.

<sup>137</sup> STAVENHAGEN, R.: "The Universal Declaration: Cultural and Structural Constraints", in *The Universal Declaration...*, *op. cit.*, pp. 71 ff.

<sup>138</sup> CLAVERO, B.: "De los ecos...", *op. cit.*, p. 37.

<sup>139</sup> Regarding the rights of minorities, in 1966 the International Covenant on Civil and Political Rights in its Article 27 established that "in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language". As regards the rights of indigenous peoples, the most important work has been done by ILO, with many different Conventions on the subject. The most significant and recent is the Convention concerning Indigenous and Tribal Peoples in Independent Countries, ILO Convention No. 169, 27th June 1989. In the United Nations a Draft Declaration on the Rights of Indigenous Populations (E/CN.4/1995/2) is being discussed.

So, as we have seen, the Universal Declaration of Human Rights very significantly recognises the most important economic, social, and cultural rights, thus contributing, or at least attempting to, to the indivisibility and interdependence of the two generations of human rights, on the one hand the civil and political rights, and on the other hand those which are economic, social, and cultural.

#### 2.2.5. RIGHTS THAT ESTABLISH THE LINKS BETWEEN THE INDIVIDUAL AND SOCIETY (ARTICLES 28 TO 30)

René Cassin has called these articles “the frontispiece of the Universal Declaration”<sup>140</sup>, noting the tremendous importance which they have. This section sets out that “the full and free development of any person’s personality is possible only when he or she forms part of a community and observes his or her duties to it”<sup>141</sup>. However, despite Professor Cassin’s special emphasis on these articles, the truth is that they have been given very little attention during the later development of the provisions of the Declaration; to some extent, these sections have been the victims of “forgetfulness”; the fact that they have been forgotten is, in the opinion of the author, a fully conscious decision, given that people are not willing to accept all the consequences which would come from a full and effective acceptance of these articles<sup>142</sup>.

The first of these provisions is Article 28, a human right which has been described as “exceptional”<sup>143</sup>, and which sets out that

“everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized”.

As we can see, in this Article the importance of social and international order for the satisfaction of human rights is proclaimed. In other words, human rights will, on many occasions, depend on the prevailing social order of a particular State, as well as on the structure of international order. For many, Article 28 is the germ of what, in the 1970s, was called the *Structural Approach to Human Rights*<sup>144</sup>. This Structural Approach puts emphasis on the importance of both internal and international structures for the adequate enjoyment of human rights. It is frequently political, social, economic or cultural structures, both internal and international, which hide behind the most serious violations of human rights. And, as Mary Robinson, former United Nations High Commissioner for Human Rights, has recalled,

<sup>140</sup> CASSIN, R.: “La Déclaration Universelle et la mise en œuvre...”, *op. cit.*, p. 278.

<sup>141</sup> EIDE, A.: “The Universal Declaration in Space and Time”, in *Human Rights in a Pluralist World...*, *op. cit.*, p. 19.

<sup>142</sup> It is very significant that, in the International Covenants of 1966, there is no mention either of the rights or duties of the individual towards the community, nor of Article 28, the Article which relates the enjoyment of human rights to the establishment of a particular social and international order.

<sup>143</sup> ABELLÁN HONRUBIA, V.: “Internacionalización del concepto y de los contenidos de los derechos humanos”, in CENTRO PIGNATELLI (Ed.): *Los Derechos Humanos, camino hacia la Paz*, Seminario de Investigación para la Paz-Diputación General de Aragón, Zaragoza, p. 19.

<sup>144</sup> Concerning the *Structural Approach to Human Rights* and the importance of internal and international order for human rights, see VAN BOVEN, T.: “Human Rights and Development. Rhetorics and Realities”, in *Festschrift für Felix Ermacora*, E. Verlag, Strasbourg, 1988, pp. 575-587.

“what is unacceptable... is the lack of equality in the world, the evident and unacceptable inequalities which deny people a reasonable level of human rights, and which very often become violations of their rights”<sup>145</sup>.

Finally, Article 28 aims, in the opinion of Cassese, to highlight the fact that the human rights recognised in the Universal Declaration “will only be able to come into practice if a social structure that permits the development of countries is set up, and if the international environment as a whole facilitates the economic take-off of the poor countries, and a major redistribution of wealth in developed countries”<sup>146</sup>. This right to a particular social order has been criticised by many writers, who have classed it as an utopian provision lacking in realism<sup>147</sup>. In response to these criticisms, Professor Gros Espiell has stated that

“utopian or not, this way of considering the issue is of profound importance, not only theoretically, but also from a practical point of view, because utopia has been, and is, in certain historical conditions, an irreplaceable catalyst for the political, ideological, economic, social, and legal progress and evolution of humanity”<sup>148</sup>.

The fact is that the serious problems of under-development, misery, illness, environmental destruction, etc. which three quarters of the human race are suffering, constitute some of the most dangerous and flagrant attacks on fundamental human rights. It is for this reason that, based on Article 28 of the Universal Declaration<sup>149</sup>, the General Assembly of the United Nations proclaimed the *right to development* in 1986, declaring that it is “is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized”<sup>150</sup>. On the same topic, Victoria Abellán has said that

<sup>145</sup> Interview with *EL PAIS*, 16th February 1998, p. 3.

<sup>146</sup> CASSESE, A.: *Los derechos humanos en el mundo contemporáneo...*, *op. cit.*, p. 47. Not in vain, this Article 28 of the Universal Declaration of Human Rights is the basis for the rise of third generation human rights, particularly the right to development, given that this right argues for the legitimacy of individuals and peoples demanding a certain amount of economic, social, cultural etc development.

<sup>147</sup> Professor Christian Tomuschat has even reached the point of doubting whether, “from a realistic point of view, Article 28 should be kept... Rights of a purely utopian nature probably contribute to discredit human rights; it is as if they are stories which have nothing to do with reality”. See TOMUSCHAT, C.: “The Universal Declaration of Human Rights: Does it Need any Updating?”, *op. cit.*, p. 79.

<sup>148</sup> GROS ESPIELL, H.: *Estudios sobre Derechos Humanos II...*, *op. cit.*, pp. 349 y 350.

<sup>149</sup> As Clarence J. Dias has said on the topic, “the Universal Declaration of Human Rights provides both the logic and the inspiration for the right to development... The Declaration on the right to development, and subsequent efforts to realise the right to development would be a glorious way of affirming the true universal values of the Universal Declaration”, DIAS, C.J.: “From Self-Perpetuation of the Few to Survival with Dignity of the Many: the crucial importance of an Effective Right to Development”, in *The Universal Declaration of Human Rights: Its Significance in 1988*, Report of the Maastricht/Utrecht Workshop..., *op. cit.*, p. 24.

<sup>150</sup> *Declaration on the Right to Development*, resolution 41/128, of 4th December 1986. We should take into account the fact that in the third paragraph of the Preamble of this Declaration on the Right to Development, there is an express mention of Article 28 of the Universal Declaration. In it, the General Assembly of the United Nations states that it considers that “under the provisions of

“the international promotion of human rights demands the formation of a society of solidarity at international level. And it is within this framework that Article 28 of the Universal Declaration takes on its full meaning”<sup>151</sup>.

The first subsection of Article 29 is also important, fundamentally because it gives us a different way of looking at human rights. This new point of view makes reference to the duties that all people have towards the community of which they are a part. According to this paragraph,

“everyone has duties to the community in which alone the free and full development of his personality is possible”.

This paragraph must be analysed in conjunction with Article 1 of the Declaration which, as has been shown above, sets out that all human beings “should act towards one another in a spirit of brotherhood”. As we can see, this means that the individual is not only faced with rights regarding others, but also with certain obligations to the rest of the community<sup>152</sup>. It has been said that there is a complementary relationship between rights and duties; they would represent the two sides of the same coin<sup>153</sup>. And the fact is that “it is evident that a legal order which recognises and guarantees the rights of the human being can only exist if those rights are integrated within a system that assures the harmonisation of everyone’s rights. Each person’s rights, through their very nature, cannot be unlimited, given that they can only be rights if they co-exist with and respect the rights of others”<sup>154</sup>. In this regard, it is curious to see how, in the West, the emphasis has been placed on people’s individual rights, practically forgetting the existence of correlating duties, while in other cultural environments, such as that of Africa or Latin America, these duties are relatively important. This explains the fact that the Universal Declaration recognises duties fairly discreetly, which is an “almost protocolary”<sup>155</sup> acknowledgment, according to some; thus, they only have a very modest role in the text. In order to see what the opinions of the delegations from Western nations were, it is useful to look at what the North American delegate, Eleanor Roosevelt, said at one of the first sessions of the working group of the drafting committee. In

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the Universal Declaration of Human Rights, everybody is entitled to a social and international order in which the rights and freedoms set forth in that Declaration can be fully realized”. A detailed study regarding the right to development and its link to Article 28 can be found in GÓMEZ ISA, F.: *El derecho al desarrollo como derecho humano en el ámbito jurídico internacional*, Universidad de Deusto, Bilbao, 1999.

<sup>151</sup> ABELLÁN HONRUBIA, V.: “Internacionalización del concepto y de los contenidos...”, *op. cit.*, p. 20.

<sup>152</sup> The most rigorous study on people’s duties towards the community is perhaps the one written by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Erica-Irene A. Daes: *The individual’s duties to the community and the limitations on human rights and freedoms under Article 29 of the Universal Declaration of Human Rights*, E/CN.4/Sub.2/432/Rev.2.

<sup>153</sup> OPShAL, T.: “Articles 29 and 30. The Other Side of the Coin”, in EIDE, A.; ALFREDSSON, G.; MELANDER, G.; REHOF, L.A. and ROSAS, A. (Eds.): *The Universal Declaration of Human Rights: A Commentary*, Scandinavian University Press, Oslo, 1992, pp. 449-470.

<sup>154</sup> GROS ESPIELL, H.: *Estudios sobre Derechos Humanos II...*, *op. cit.*, p. 321.

<sup>155</sup> BLÁZQUEZ, N.: “El recurso a la dignidad humana en la Declaración Universal de Derechos Humanos de las Naciones Unidas”, in *Dignidad de la Persona y Derechos Humanos*, *op. cit.*, p. 111.

her qualified opinion, "the task which has been given to us is that of proclaiming the fundamental rights and freedoms of the human being... not that of listing his duties"<sup>156</sup>.

Explanations for the fact that the duties of the human being figure so modestly in the Universal Declaration of Human Rights are, firstly, the liberal individualism from which it takes its inspiration, an individualism which fundamentally places the emphasis on the rights of the individual, to the detriment of any consideration of duties; and secondly, the context in which the Declaration came about, one which was marked by the horrors of the human rights violations that took place during the Second World War. These meant that, when it came to drafting the Declaration, the main objective was to produce the widest possible catalogue of human rights. Another, final, reason was the motivation that came about as a result of the excesses committed by fascist States, States which had placed particular emphasis on the duties of the individual towards the community. These were some of the many reasons for the fact that the role of duties was hugely minimised in the text of the Declaration; it was as an antidote to future tyranny and excesses of power<sup>157</sup>.

In the end, duties were permitted to be included within the Universal Declaration, although in a much reduced form, as was shown above. This inclusion of the duties people have towards their communities meant a "rejection of eighteenth century individualism, because it asserts an organic connection between the individual and either the State or society" in other words, "it constitutes a refinement of the classical natural rights philosophy"<sup>158</sup>. To summarise, the consecration of duties in the Universal Declaration of Human Rights was one of the elements which contributed to the transformation of the "liberal heart of the Declaration"<sup>159</sup>. As we can see, the Declaration was inaugurating a new conception of human rights in which, unlike the classic doctrine of human rights, the human being is not completely isolated, but instead is seen as a member of society. In other words, "already in these new conceptions man was not an isolated and individualist monad, but rather a member of a collective towards which he has a concrete obligation to maintain and improve it"<sup>160</sup>.

Finally, in the spring of 1948, and due to pressure from the Socialist and Latin American countries, an agreement that duties would be included just as they appear in Article 29.1 was reached. However, it is interesting to note how in the Preamble to the Universal Declaration, in the ideological portico of this instrument,

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<sup>156</sup> These words, due to the fact that there are not official minutes of the first working group meetings, were recorded by René Cassin in CASSIN, R.: "De la place faite aux devoirs de l'individu dans la Déclaration Universelle des Droits de l'Homme", in *Problèmes des Droits de l'Homme et de l'unification européenne. Mélanges offerts à Polys Modinos*, Pedone, Paris, 1968, p. 481.

<sup>157</sup> A thought-provoking consideration of all these explanations for the small role of duties in the Declaration can be found in MADIOT, Y.: *Considérations sur les droits et les devoirs de l'Homme*, Bruylant, Bruxelles, 1998, pp. 111 ff.

<sup>158</sup> MORSINK, J.: "The Philosophy of the Universal Declaration", *op. cit.*, p. 319.

<sup>159</sup> ARGUEDAS, C.M.: "Artículo 30", in ASOCIACION COSTARRICENSE PRO-NACIONES UNIDAS: *La Declaración Universal de Derechos Humanos. Comentarios y Texto*, *op. cit.*, p. 202.

<sup>160</sup> HERNÁNDEZ VALLE, R.: "Artículo 29", in ASOCIACION COSTARRICENSE PRO-NACIONES UNIDAS: *La Declaración Universal...*, *op. cit.*, p. 197.

there is not a single reference to the duties of the human being, either to society or to his peers. In this regard, the contrast with the Preamble of the American Declaration of the Rights and Duties of Man, approved a few months earlier on 2<sup>nd</sup> May 1948, is enormous. The very title of this Declaration is already indicative of the role it wants duties to play, as it is known as the *American Declaration of the Rights and Duties of Man*. From the start, the Preamble of the American Declaration provides a very wide recognition of the duties of the human being, devoting the majority of its paragraphs to it. Due to the huge importance attributed to duties in this Declaration, we shall reproduce here some of the sections of the Preamble which are most explicit in this regard. The first paragraph states that "all men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another" (it should be noted that, apart from the reference to nature, this sub-section is identical to Article 1 of the Universal Declaration of Human Rights). The second paragraph, for its part, states that "the fulfillment of duties by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man...". Further on, the following duties are proclaimed: to "serve the spirit" (paragraph four); "to preserve, practice and foster culture" (paragraph five); and, finally, "always to hold it [moral conduct] in high respect" (paragraph 6). As we can see, duties play a primordial role in the Preamble of the American Declaration of Human Rights, completely unlike what can be seen in the Universal Declaration of Human Rights, which is evidence of the fact that there was not a huge amount of desire to afford them a significant role. This has been highlighted as one of the main differences between the Universal Declaration and the American Declaration, as well as the fact that the Universal Declaration does not include a clear list of human duties, whereas there is one in the American Declaration<sup>161</sup>.

It is significant that this residual role played by duties in the Universal Declaration is not repeated in other international human rights instruments. We have already mentioned the American Declaration of the Rights and Duties of Man, with its Preamble entirely devoted to recognition of the link between rights and duties, and its second chapter containing a list of all the different duties which bind the human being, highlighting among these duties to society, duties between parents and children, the duty to instruct, the duty of suffrage, the duty to serve the community and the nation, the duty to pay taxes, etc<sup>162</sup>. Also in America, the American Convention on Human Rights (1969) in its fifth chapter devotes Article 32.1 to stating that "every person has responsibilities to his family, his community, and mankind". But, without doubt, the text which most significantly recognises the duties of the individual is the African Charter on Human and Peoples' Rights (1981). According to Etienne R-Mbaya, "the emphasis placed on duties is probably explainable by the very conception of the individual in Africa, as well as by the fact that there is now awareness of the state of under-development in which African countries find

<sup>161</sup> GROS ESPIELL, H.: "La Declaración Americana: raíces conceptuales y políticas en la Historia, la Filosofía y el Derecho Americano", *op. cit.*, pp. 42 ff.

<sup>162</sup> The duties explicitly recognised in the American Declaration run from Article 29 to Article 38.

themselves”<sup>163</sup>. Faithful to this concept, the same Preamble considers that “the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone”. Similarly, the whole of the second chapter is devoted to recognition of rights. Article 27, the first of the articles to recognise duties, in its first subsection states that “every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community”. However, the most important article as regards this is Article 29, a provision in which a true catalogue of human duties is produced<sup>164</sup>.

In order to try and fill in some of the gaps regarding the setting out of the duties of the individual in Article 29.1 of the Universal Declaration of Human Rights, many projects on the *Universal Declaration of Human Duties* have been done over the last few years. One of the most complex projects was that done by Karel Vasak which, in its Preamble, states its objective as “to provide a precise list of the duties of man in all their dimensions, to best underline the necessary link between the rights and duties of man...”. Once this objective has been set out, Article 1 of the project states that “every individual has duties towards himself, towards his family and peers, towards his natural environment, and towards the national and international community, as it is only in these that he can freely and fully develop his personality”<sup>165</sup>. Along the same lines is the Declaration of Human Responsibilities and Duties, approved in 1998 by many involved in the Valencia Third Millennium Foundation<sup>166</sup>. The basic idea underlying this Declaration is that, in a world as globalised as the one in which we live, it is vital to talk not only of human rights but also of human responsibilities, which poses questions regarding the rights of future generations<sup>167</sup>. Therefore, hu-

<sup>163</sup> MBAYA, E.R.: “Symétrie entre droits et devoirs dans la Charte Africaine des Droits de l’Homme”, in MEYER-BISCH, P. (Dir.): *Les devoirs de l’Homme. De la réciprocité dans les droits de l’homme*, Editions Universitaires, Fribourg Suisse-Editions du CERF, Paris, 1989, p. 49.

<sup>164</sup> As shown in Article 29, the individual has the duty to:

1. Preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need;
2. Serve his national community by placing his physical and intellectual abilities at its service;
3. Not to compromise the security of the State whose national or resident he is;
4. Preserve and strengthen social and national solidarity, particularly when the latter is threatened;
5. Preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law;
6. Work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;
7. Preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society;
8. Contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

<sup>165</sup> The text of this project on the Universal Declaration of the Duties of Man can be found in VASAK, K.: “Proposition pour une Déclaration Universelle des Devoirs de l’Homme. Introduction et Texte”, in MEYER-BISCH, P. (Dir.): *Les Devoirs de l’Homme...*, *op. cit.*, pp. 14-16.

<sup>166</sup> The text of the Declaration can be found on the Foundation’s website: <http://www.valencia-tercermilenio.org>

<sup>167</sup> On this issue, see the project on the Universal Declaration of the Human Rights of Future Generations, which states that current generations have duties towards future generations, VASAK, K.: “La



man rights and human duties should go hand in hand in the global and interdependent world in which we live at the dawn of the 21<sup>st</sup> century.

In addition to duties, this Article 29 in its second paragraph also deals with the limitations which should be established to fundamental rights and freedoms. In other words, rights should not be considered as absolute, but rather, according to circumstances, they will be susceptible to some sort of limit. When it came to setting some kind of limit to those rights set out in the Universal Declaration, it was decided to choose a *general limiting clause*, given that all rights, as long as they meet the requirements set out, can be the objects of limitations. This option is different to that used by the European Convention on Human Rights in 1950, the International Covenant on Civil and Political Rights in 1966, or the American Convention of Human Rights in 1969. In these treaties, the technique used was *specific limiting clauses*, which means that only articles mentioned as such will be able to be the objects of any limitations.

Once the possibility to limit rights had been set out in the Declaration, the problem moved to the decision as to what circumstances would allow these limitations to come into force. As regards this, the Universal Declaration set out two general principles in Article 29.2:

- 1) The *principle of legality*, which holds that all limitations which there is a desire to place on a right must be set up through law. As Article 29.2 states, "in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law..."
- 2) The *principle of a legitimate end*, which sets out that all limitations to a right recognised in the Declaration must have a legitimate end. As legitimate ends, the Universal Declaration accepts only the following: "securing due recognition and respect for the rights and freedoms of others", and "meeting the just requirements of morality, public order and the general welfare in a democratic society". This setting out of legitimate ends which might allow for limitations to rights is exhaustive, with the result that there is no other reason, however appropriate it may seem, for any kind of limitation of rights.

As regards the possibility of the derogation of human rights in exceptional or emergency situations, the Universal Declaration is completely silent, an aspect which has been criticised by jurists of considerable prestige, such as Cecilia Medina<sup>168</sup>. This silence has received many different doctrinal interpretations. To one extreme we find Albert Verdoot, for whom the silence of the Declaration means that none of the rights contained within it can ever be subject to derogation<sup>169</sup>. On the other hand,

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Declaración Universal de los Derechos Humanos de las Generaciones Futuras", *Revista de Derecho y Genoma Humano*, Vol. 1, 1994, pp. 221-231. Along the same lines are the opinions of Christian Tomuschat, who, after stating that Article 29 makes it clear that rights and duties form an "indivisible partnership", argues that the Universal Declaration should be complemented by the duty to respect the environment, a duty which should be looked at in the light of the rights of future generations; see TOMUSCHAT, C.: "The Universal Declaration of Human Rights of 1948: Does it need any updating?", in *The Universal Declaration of Human Rights: Its Significance in 1988...*, *op. cit.*, p. 80.

<sup>168</sup> MEDINA, C.: "A 1988 Universal Declaration of Human Rights", in *The Universal Declaration of Human Rights: Its Significance in 1988*, Report of the Maastricht/Utrecht Workshop..., *op. cit.*, p. 66.

<sup>169</sup> VERDOOT, A.: *Naissance et Signification de la Déclaration Universelle...*, *op. cit.*, p. 271.

the majority is inclined to think that this means that there exists the possibility that at least some of the rights set out in the Declaration can be restricted in emergency situations<sup>170</sup>. However, as Alejandro Etienne Llano states, “some absolute rights, such as the right to life or freedom of conscience cannot ever be legitimately overcome or restricted<sup>171</sup>”.

Finally, as Article 29.3 sets out, rights and freedoms can never be exercised “contrary to the purposes and principles of the United Nations”; in other words, human rights can never be used as justification for any attempt to diminish the fundamental principles which underpin the work of the United Nations Organisation.

To conclude the commentary that has been being done, the last article of the Universal Declaration of Human Rights, Article 30, sets out a clause whose objective is to protect the rights and freedoms enshrined in the Declaration in the case of foreseeable attacks from a State, an individual, or from groups of people. As this subsection sets out, “nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of the rights and freedoms set forth herein”. In other words, nobody can seek protection in the rights recognised in the Declaration for any attempt against the Universal Declaration itself.

### 3. The universality of the Universal Declaration of Human Rights

In the first stages of the drafting process, the Declaration we are analysing was known as the “International Declaration of Human Rights”. Only later, and as a result of a French proposal<sup>172</sup>, was its title changed, becoming the *Universal Declaration of Human Rights*. René Cassin has explained this change by saying that the Declaration “comes from the legally organised community of all the peoples of the world and expresses the common aspirations of all men”<sup>173</sup>. It is certainly true that the Declaration has a clear vocation for universality; in other words, it aims to award human rights to everybody, without distinction of any kind. On this subject, it is worthwhile to remember Article 1, which begins the Universal Declaration. This Article states that “all human beings are born free and equal in... rights”. As we can see, the Declaration is aimed at the human being, at all human beings, not to any particular type of person. Similarly, the Declaration should be applicable in all territories, regardless of whether they have achieved independence or not. As Article 2.2 states in this respect, as regards the enjoyment of human rights

<sup>170</sup> See ORAÁ, J.: *Human Rights in States of Emergency in International Law*, Clarendon Press, Oxford, 1996 (2nd. Edition).

<sup>171</sup> ETIENNE LLANO, A.: *La protección de la persona humana en el Derecho Internacional. Los Derechos Humanos*, Trillas, México, p. 104.

<sup>172</sup> On this issue it is necessary to return to René Cassin, who was, as we already know, one of the most influential persons concerning the final draft and ideological profile of the Declaration; see CASSIN, R.: “La Déclaration Universelle...”, *op. cit.*, pp. 279 ff.

<sup>173</sup> CASSIN, R.: *op. cit.*, p. 279.

“everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty”.

In other words, the human rights mentioned in the Declaration should be in force in those countries which are still under colonial domination; colonial powers could not treat these nations as they had been doing until the time of the drafting of the Declaration. As of this time there were clear and precise standards which were also applicable in these territories.

We have seen how the Declaration is universal due to its content. And the fact is that, in the wise words of Albert Verdoot, “thanks to [the Declaration], universal society sees its rights and freedoms protected, which until this point were only set out in national constitutions. The Universal Declaration was innovative in that, on a universal plane, it formulated the right which no national declaration or law has been able to formulate except for with reference to a specific country”<sup>174</sup>.

Nevertheless, we should also be conscious of the fact that, although the Declaration undoubtedly does have some aims towards universality, not all of its provisions achieve this to the same extent<sup>175</sup>. As Alston has asserted, “any suggestion that all of the provisions of the Universal Declaration are universally accepted, either in philosophical or anthropological terms, is simply untenable”<sup>176</sup>. Some more sceptical authors have even said that “universality is, for the time being, a myth. That the observance of human rights is very different in different countries is a fact that nobody can deny... They are understood in a different way...”<sup>177</sup>. The fact is that, at the moment, “the universal character of the idea of human rights... is beginning to show symptoms of crisis”<sup>178</sup>. These criticisms come mainly from the Islamic world and from Third World countries, who consider human rights to be a predominantly Western idea that do not correspond to their current demands and needs. Swords are still drawn, as was made clear at the last big international meeting on human rights. This was the World Conference of Human Rights which took place in Vienna in June 1993. At this Conference, one of the principal objects under discussion was that of the universality of human rights<sup>179</sup>. The Final Declaration of the Conference came to

<sup>174</sup> VERDOOT, A.: *Naissance et Signification de la Déclaration Universelle...*, *op. cit.*, p. 318.

<sup>175</sup> Reference has already been made in other parts of this study to the problems which Islamic states had with certain rights such as religious freedom or the consideration that “the family is the natural and fundamental group unit of society” (Article 16.3 of the Declaration).

<sup>176</sup> ALSTON, P.: “The Fortieth Anniversary of the Universal Declaration...”, *op. cit.*, p. 7.

<sup>177</sup> CASSESE, A.: *Los derechos humanos...*, *op. cit.*, p. 61.

<sup>178</sup> On the issue of the universality of human rights and its opposing theory of cultural relativism, see the interesting essay of DUNDES RENTELN, A.: *International Human Rights. Universalism Versus Relativism*, Sage Publications, London, 1990.

<sup>179</sup> Good proof that the positions were far from one another can be found through comparison of the final documents of the Regional Meetings, which were celebrated in preparation for the Vienna World Conference. The first was the African *Regional Meeting*, which took place in

a conclusion which, in my opinion, still leaves this thorny issue unresolved. As the Vienna Declaration states,

“all human rights are universal, indivisible and interdependent, and are inter-related (...). While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic or cultural systems, to promote and protect all human rights and fundamental freedoms”<sup>180</sup>.

It can clearly be seen how this ambiguous paragraph does not openly show support either for the universality of human rights, or for the theory of cultural relativism; it aims, as far as is possible, to please the holders of both opinions. And the fact is that, as we have seen, it was clearly demonstrated in the sessions of the World Conference on Human Rights that views were strongly opposed and that consensus was still very far from being reached<sup>181</sup>.

And so, although we are conscious of the problems that come about when creating a universally applicable concept of human rights, we are also equally aware of the fact that, progressively, a restricted nucleus of almost universally accepted rights is being created. Rights such as the right to life, to security, the prohibition of torture, etc — these are the rights that enjoy very wide acceptance across the majority of the international community. In the coming years, the issue of the universality of human rights will be the biggest battle we will have to face up to. In this battle it will be very necessary to be open to other cultures and to other world-views on human rights, especially if we are to come closer to the suggestions of the Third World and Islamic countries. As Xabier Etxeberria has said on the topic, “there is a dimension of the universality of human rights which is only coming about through intercultural dialogue, in a never-ending process”<sup>182</sup>. This process has begun, and important steps are being taken, while always taking care to be far from any kind of imposition. As regards this, it is interesting to bring up the words of Antonio Cassese:

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Tunisia from 2<sup>nd</sup> to 6<sup>th</sup> November 1992, *Report of the Regional Meeting for Africa of the World Conference on Human Rights*, A/CONF.157/AFRM/14, of 24<sup>th</sup> November 1992. The second was the Latin American and Caribbean Regional Meeting, *Report of the Regional Meeting for Latin America and the Caribbean of the World Conference on Human Rights*, A/CONF.157/LACRM/15, 22<sup>nd</sup> January 1993. The third was the Asian Regional Meeting, *Report of the Regional Meeting for Asia of the World Conference on Human Rights*, A/CONF.157/ASRM/8, 7<sup>th</sup> April 1993. The European Union also held a preparatory meeting for the Conference, *Note verbale dated 23 April 1993 from the Permanent Mission of Denmark to the United Nations Office at Geneva, transmitting a position paper by the European Community and its member States*, A/CONF.157/PC/87, 23<sup>rd</sup> April 1993.

<sup>180</sup> *Vienna Declaration and Programme of Action*, 14<sup>th</sup> to 25<sup>th</sup> June 1993, A/CONF.157/23, 12 July 1993, paragraph 5.

<sup>181</sup> On the issue of the universality of human rights at the Vienna Conference, and in its Final Declaration, see VILLÁN DURÁN, C.: “Significado y alcance de la universalidad de los derechos humanos en la Declaración de Viena”, *Revista Española de Derecho Internacional*, Vol. XLVI, n.º 2, 1994, pp. 505-532.

<sup>182</sup> ETXEBERRIA, X.: “Derechos Humanos: ¿Universales u Occidentales?”, *Gaceta Municipal de Victoria-Gasteiz*, n.º 79, 7<sup>th</sup> December 1996, p. 4.

“fortunately, States and other organisms are making use of the paths towards universality, not to reach at an absurd and undesirable uniformity, but to reach a minimum of common rules as a result of which we will be able to ensure respect of at least the essential foundations of human dignity in any place in the world”<sup>183</sup>.

#### 4. The legal value of the Universal Declaration

The problem of the legal nature of the Universal Declaration is a complex issue, and one which has provoked, and continues to provoke, a certain amount of controversy among the international community<sup>184</sup>. It is clear that the Universal Declaration is not a treaty, and as such is not, *per se*, a legally binding instrument for those States which are parties to it. These States did not want to give it this format, nor take on such international obligations in 1948, although, during the process of the drafting of the Declaration, there were many suggestions that this should be the case.

The Declaration was adopted by the General Assembly of the United Nations as a resolution, and, therefore, in accordance with the UN Charter (Article 13), it is a “recommendation” which does not *prima facie* have any legal force. In any case, as is well known, “Declarations” are not simple General Assembly resolutions, but have a special degree of importance. As has been rightly stated, in the general practice of the organizations of the United Nations system, “in view of the greater solemnity and significance of a “Declaration”, it may be considered to impart, on behalf of the organ adopting it, a strong expectation that Members of the international community will abide by it”<sup>185</sup>. The truth is that, in direct reference to the Universal Declaration, the quoted Memorandum of UN Office of Legal Affairs stated that “a “Declaration” is a formal and solemn instrument, suitable for rare occasions when principles of great and lasting significance are being enunciated, *as is the case for the Human Rights Declaration*. A recommendation is less formal”.

Given this solemn character of a “Declaration”, it can be assumed that the body adopting it is manifesting its strong hope that all members of the international community will respect it. As this hope is gradually justified by the practices of the States, a Declaration can be considered, due to its customary value, to be the herald of obligatory norms for States. The variables which condition the legal value of a Declaration are, fundamentally, these four:

1. the intention to put forward legal principles;
2. the majority by which it was approved;

<sup>183</sup> CASSESE, A.: *Los derechos humanos...*, *op. cit.*, p. 80.

<sup>184</sup> See, for example, the work of Professor Díez de Velasco, who, in his well-known manual on international law, speaks of its “controversial obligatory value as regards legality” (Díez de Velasco, *Instituciones de Derecho Internacional Público*, Madrid, 1994, vol. 1, p. 648).

<sup>185</sup> *Memorandum of the United Nations Office of Legal Affairs, United Nations Secretariat*, Doc. E/CN.4/L.610.

3. its content; and
4. the later practice of States<sup>186</sup>.

The aim of the Declaration was, as stated in the preamble, to establish “a common standard of achievement for all peoples and all nations”, and its content is considered to be “a common understanding of [the] rights and freedoms” to which the Charter refers. It is clear, then, that from the start the huge moral and political value was underlined. As Antonio Cassese has said, in 1948 the Declaration was a “simple and solemn reciprocal promise, only regarding ethical and political commitments, but not constituting legal obligations to States”; this decision of the States (that of “lowering” its level of obligation) was made so as to safeguard state sovereignty to the maximum<sup>187</sup>, an essential fact and basic constitutional principle of the international community. However, the different delegations involved in the production of the Declaration had many different views on the subject when it came to defining legal status; the positions of two of the principal people involved in the writing of the Declaration, Eleanor Roosevelt and René Cassin, are very illustrative of this point.

On the same day as the Declaration was adopted, Eleanor Roosevelt, the President of the Commission on Human Rights, and US representative at the General Assembly, stated that

“In giving our approval to the Declaration today it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a Declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by formal vote of its members, and to serve as a common standard of achievement for all peoples of all nations”<sup>188</sup>.

Faced with this stance which minimised the legal value of the Declaration, one of the “fathers” of the text, René Cassin, upheld the notion that, at the time of its adoption, the Declaration constituted “an authorised interpretation of the United Nations Charter”, although it did not have “coercive legal power”, and was not “a direct source of legal obligations”. This position strengthened the legal character of the Declaration; therefore, Cassin maintained that the Declaration constituted the point of reference for appreciation of the extent to which States fulfilled their obligations to co-operate with the United Nations as regards human rights, set out in Article 56 of the Charter, to which the preamble of the Charter alludes directly. Although this obligation is written in general terms, and needs to be further concreted, for example with the addition of a system of sanctions, this does not to any extent affects its direct legal value. Additionally, the Declaration was called to integrate itself into the “general principles of law”, using the definition appearing in Arti-

<sup>186</sup> Garzón, C., “El Valor Jurídico de las Declaraciones de la Asamblea General”, *Revista Jurídica de Cataluña*, 1973, pp. 581-616.

<sup>187</sup> Cassese, A.: *op. cit.*, p. 51.

<sup>188</sup> Quoted in WHITEMAN, *5<sup>th</sup> Digest of International Law* 243, Washington DC: Dpt. of State Publications, 7873, 1965.

cle 38 of the Statute of the International Court of Justice, and, through this, to form a part of a "universal public order"<sup>189</sup>.

This firm stance of Cassin's in the light of differing opinions is indicative of the fact that the issue of the legal value of the Declaration was not a peaceful one, and that the views of those most active in its writing were very different. This was such that the Belgian delegate, M. Dehousse, put forward the proposal that the opinion of the United Nations Legal Service be sought on the issue; this was, however, a proposal which was unable to gain a sufficient majority at the Third Committee<sup>190</sup>. On the same topic, it is worthy of note that one of the main reasons for South Africa's abstention in the final vote was due to its conviction of the character of the Declaration as being obligatory.

#### 4.1. *The Current Legal Value of the Universal Declaration*

Whatever opinions regarding the character of the Declaration might have been when it was approved, it can safely be said that in the decades following 1948 the document has undergone a significant transformation as regards its legal value. There are now few international lawyers who deny the fact that the Declaration has become a normative instrument which creates legal obligations for Member States of the United Nations. The controversy nowadays, however, concerns two issues: firstly, the interpretation of the process by which the Declaration has become legally binding; and secondly, a discussion as to whether all the rights proclaimed in the Declaration are equally binding for all States.

Although this is the majority opinion, there are still many for whom the current value of the Declaration continues to be as it was when it was adopted; in this regard nothing has changed. Due to the importance of this issue, it is relevant to focus for a while on the position which is held by the United Nations, and which has been declared before the highest legal body of the Inter-American system for the protection of human rights.

In 1989, the Inter-American Court had to produce an Advisory Opinion on the Interpretation of the American Declaration of the Rights and Duties of Man within the framework of Article 64 of the American Convention. The relevant part of the opinion is that it contains the thoughts of the Inter-American Court concerning the legal value of the American Declaration of 1948. This Declaration, which came a few months before the Universal Declaration, has a very similar position within the organisational system of the Organisation of American States to that which the Universal Declaration has in the system of the United Nations. This has the result that the observations of the Court regarding the legal value of the American Declaration

<sup>189</sup> Un Gaor 3d Comm., 3d Sess, 1948, p. 61. CASSIN, R., *La Commission des Droits de l'Homme de l'ONU, Miscelanea W.F. Ganshof Van der Meersch, LGDJ*, Paris 1972, t. 1, p. 405. CASSIN, R.: "La Déclaration Universelle et la mise en oeuvre des droits de l'homme", *RCADI*, 1951-II, pp. 293 ff.

<sup>190</sup> On this topic, it is interesting to note the distinction made by the Belgian delegate before the Third Committee on 20th October 1948 which, apparently, "as a result of its great authority... very much impressed the committee"; this distinction was made between the "legal value" of the Declaration, and its "obligatory character". This is a distinction whose reach and transcendence is still being seen today. TCHIRKOVITCH, S., "La Déclaration Universelle des Droits de l'Homme et sa portée internationale", *Revue Generale de Droit International Public*, vol. 53, 1949, p. 378.

are very relevant to the theme under discussion, and can be “imported” *mutatis mutandi* to the Universal Declaration.

In its section of written observations sent by States which are members of the OAS system, the United States clearly stated its position:

“The American Declaration of the Rights and Duties of Man represents a noble statement of the human rights aspirations of the American States”.

Unlike the American Convention, however, it was not drafted as a legal instrument and lacks the precision necessary to resolve complex legal questions. Its normative value lies as a declaration of basic moral principles and broad political commitments and as a basis to review the general human rights performance of Member States, not as a binding set of obligations.

The United States recognizes the good intentions of those who would transform the American Declaration from a statement of principles into a binding legal instrument. But good intentions do not make law. It would seriously undermine the process of international lawmaking —by which sovereign States voluntarily undertake specified legal obligations— to impose legal obligations on States through a process of “reinterpretation” or “inference” from a non-binding statement of principles.”<sup>191</sup>.

And in order to still further strengthen its point, the United States made a statement to the tune that “the Declaration remains for all Member States of the OAS what it was when it was adopted: an agreed statement of non-binding general human rights principles. The United States must state, with all due respect, that it would seriously undermine the established international law of treaties to say that the Declaration is legally binding.”<sup>192</sup>.

This United States interpretation was not accepted by the Inter-American Court which, in accordance with the International Court of Justice, considers that “an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation”<sup>193</sup>. Continuing along this line of reasoning, the Inter-American Court states that

“to determine the legal status of the American Declaration it is appropriate to look to the inter-American system of today in the light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948”<sup>194</sup>.

There is no doubt as to the fact that the evolution of American law is a regional expression of the situation experienced by universal and international human rights law, and it is because of this that the advisory opinion is so important. In addition, as was stated above, the position of the American Declaration within the OAS system is very similar to that of the Universal Declaration within the United Nations Organisa-

<sup>191</sup> Inter-American Court of Human Rights, Series A, No. 10, Advisory Opinion OC-10/89, 14 July 1989, paragraph 12.

<sup>192</sup> *Op. cit.*, paragraph 17.

<sup>193</sup> *ICJ Reports*, 1971, p. 31.

<sup>194</sup> *Op. cit.*, paragraph 37.



tion. The Charter of the OAS includes some articles which refer to human rights, but does not contain a list of what exactly they are; this is very similar to the situation as regards the San Francisco Charter. This is such that, as the OAS General Assembly has repeatedly stated, the American Declaration is an “authorised interpretation” of the Charter as regards human rights for OAS Member States, and, as such, is a true source of international legal obligations. As the Inter-American Court has said,

“the Member States of the Organization have signaled their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter. Thus the Charter of the Organization cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration”<sup>195</sup>.

The practice repeated at the heart of the OAS has been that for Member States which are not a part of the American Convention (the so-called 1969 San José Charter), the essential legal instrument as regards human rights for the determination of their obligations and the evaluation of their fulfilment is, without doubt, the American Declaration; this is how it has consistently been applied by the Inter-American Commission throughout its significant and long-lasting time in its advisory capacity since 1960, and especially from the moment that the new Statute of the Inter-American court was adopted in 1979. But even for States that were part of the Convention in 1969, although there is no doubt as to the fact that the fundamental basis for their obligations as regards this lies in the same Convention (given the superior precision of its provisions), it is not for this reason that they are freed from the environs of the Declaration through being OAS members and, as such, also bound by the Charter of the Organisation. This position leads the Court to the conclusion that the Declaration undoubtedly has “legal value”<sup>196</sup>.

#### 4.2. *Theories Explaining its Current Legal Value*

The process through which the Universal Declaration has become a normative instrument is due in part to the fact that the writing, approval, and coming into force of the 1966 Covenants took a significant amount of time, and the international community needed a legal document which defined the legal obligations of States as regards human rights. Once the United Nations Commission on Human Rights completed the draft of the UDHR in 1948, it began the huge task of attempting to write an international treaty which would much more specifically set out the international obligations of States on the issue, considering that the UDHR was a Declaration containing only very general principles. Naturally, the achievement of agreement from States regarding the specific obligations coming from each of the rights was a much harder task. Firstly, the Commission had to separate what was united in the UDHR: civil and political rights, and those which are economic, social, and cultural. The main reason for this was that States considered the obligations they took on as

<sup>195</sup> *Op. cit.*, paragraph 43.

<sup>196</sup> *Op. cit.*, paragraph 47.

regards each of these groups of rights to be essentially different. Although the Covenant project was very advanced, and almost completed, in 1955, it was necessary to wait until 16<sup>th</sup> December 1966 for the Covenants to be adopted by the General Assembly and opened up for signing and ratification. It should also be noted that they did not come into force until the first few months of 1976 when State number 35 deposited the instrument of ratification for each of the Covenants.

The prolonged absence (at least from 1948 until 1976, and from this latter year only for those States which had ratified it) of a specific treaty on the subject meant that the Declaration was used with great frequency. When governments, the United Nations, and other international organisations wanted to invoke human rights obligations, or wanted to condemn violations of them by a State, they referred to the Universal Declaration as the basic norm. In this way, the Declaration came to symbolise what the international community understood as “human rights”, reinforcing the conviction that governments had the obligation of assuring fulfilment of the rights of the Declaration for all those individuals under their jurisdiction.

It is undoubted that for the whole United Nations system, especially those bodies relating to human rights (Commission, Sub-Commission, special rapporteurs, working groups, etc), the UDHR has been the fundamental point of reference, and therefore taking on an almost “constitutional” role inside the organisation. The importance of this “obligatory” value of the Declaration for all UN bodies should be highlighted.

There currently exist three fundamental theories, which do not for any reason have to be incompatible or exclusive, which attempt to explain the current legal value of the UDHR. The first of these holds that the UDHR is an “authentic or authorised interpretation” of the obligations contained within the UN Charter as regards human rights (this is the position that would be held by the Inter-American Court, as we have seen regarding the 1948 American Declaration). A second theory states that the UDHR has become “customary international law”; finally, another theory prefers to base its normativity on the category of “general principles of law”. These theories will be looked at in detail below.

#### 4.2.1. THE UDHR AS AN “AUTHENTIC INTERPRETATION” OF THE CHARTER

Some scholars and governments hold that the fact that UN bodies make constant reference to the Declaration when applying clauses in the Charter implies that the Declaration is accepted as an “authorised and authentic interpretation” of these clauses. Many United Nations bodies have made frequent references to the Declaration: the General Assembly in innumerable resolutions; the Commission on Human Rights and its Sub-Commission; the country and thematic special rapporteurs, etc. The references of the International Court of Justice, the highest jurisdictional body of the international community, when it has had to provide an advisory opinion of some kind, or judge some case regarding human rights, are of particular importance. Some examples follow:

In the well-known case of the *Barcelona Traction*, the Court, in referring to obligations “*erga omnes*” (those obligations which States have as regards the international community as a whole), states that one of the sources of these obligations is “the prin-

ciples and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law; others are conferred by international instruments of a universal or quasi-universal character"<sup>197</sup>.

In the case regarding *the presence of South Africa in Namibia*, the ICJ concluded that racial discrimination, which constitutes a denial of fundamental human rights, is a flagrant violation of the purposes and principles of the United Nations Charter<sup>198</sup>. The prohibition of racial discrimination is to be found not only in the Charter, but also in the UDHR (Articles 2, 7, and 16).

As regards the *case concerning United States diplomatic and consular Staff in Tehran*, kidnapped by fundamentalist Islamic students in Tehran, the Court held that the act of abusively denying human beings freedom, and of forcing them into physical suffering in pitiful circumstances, is manifestly incompatible with the United Nations Charter, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights<sup>199</sup>. We can see especially clearly with this case how the ICJ considers the violation of one of the basic human rights protected by the UDHR not only as a violation of this document, but also as a violation of the obligations derived from the United Nations Charter; this is an unequivocal sign that the Court considers the UDHR to be a legal text which specifies the obligations of the Charter as regards human rights.

As a famous scholar has stated on examination of the jurisprudence of the Court, "apparently the unanimous opinion of the Court is that the Universal Declaration is a document with sufficient legal status that its invocation is justifiable as regards the obligations of States in accordance with general international law...the Declaration as a whole sets out fundamental principles recognised by general international law"<sup>200</sup>.

#### 4.2.2. THE UDHR AS "CUSTOMARY INTERNATIONAL LAW"

Other scholars are of the opinion that the fact that governments continually (at international conferences, in presidential declarations, in ministers' statements, etc) cite the Universal Declaration, and that States have even incorporated many of its clauses in their legislation, means that this practice has brought about a norm of customary international law, if not as regards all articles in the Declaration, then certainly as regards a considerable part of them.

The famous theory regarding the relationship between "Declarations" of the UN General Assembly and customary law, formulated by Jiménez de Aréchaga<sup>201</sup>, holds that a "Declaration" can have three effects:

<sup>197</sup> *CJ Recueil*, 1970, p. 32.

<sup>198</sup> *CJ Recueil*, 1971, p. 57.

<sup>199</sup> *CJ Recueil*, 1980, p. 42.

<sup>200</sup> RODLEY, N., "Human Rights and Humanitarian Intervention: The Case-Law of the World Court", 38 ICLQ (1989), pp. 321-326.

<sup>201</sup> As is well-known, this main theory refers to the relationship between treaty and custom, with the application of the Declarations of the General Assembly of the United Nations being a perfect adaptation of the same, JIMÉNEZ DE ARECHAGA, E., *El Derecho Internacional Contemporáneo*, Madrid, 1980, pp. 19-42.

1. a “codifying” effect: the Declaration is no more than a formal and written expression of pre-existing customary norms;
2. a “crystallising” effect: the Declaration is the first written formulation of norms in the process of being set up, and, because of the discussion of the Declaration, consensus among States will lead to its “crystallisation” as a legal rule which is customary in character;
3. a “generative” effect: the Declaration, at the time of its approval, is a new norm, and has the status of *lege ferenda*, but it constitutes the starting point for the later practice of States, a practice which is “repeated and uniform”, so that the Declaration becomes a legal rule because of its customary character.

A first question which should be asked regards which of these three categories the UDHR should be placed in. It is very interesting, and at the same time surprising, that Professor Jiménez de Aréchaga, in his many classifications of “Declarations” regarding these three categories, makes no reference to the UDHR, although this is evidently one of the most important Declarations in the history of the General Assembly. It should not be assumed that this omission from his well-known Course at the Academy of International Law in The Hague is due to any difficulty the great Uruguayan legal expert may have had in making the classification. We, for our part, believe the best position to be that which holds that the UDHR should be placed in the third category, that of being “generative”, although there are also many arguments for putting it into one of the other two categories.

This position leads us to the fact that the UDHR, at the time of its adoption, became the first universal and general international document concerning human rights; its novelty here cannot be disputed. The UN Charter, and the inclusion of clauses on human rights, with the consequent “internationalisation” of a subject which until that time had come under the exclusive internal jurisdiction of States, meant that there was a revolution, and undeniable novelty, in contemporary international law; but the Charter does not contain any list of rights, as it was decided not to draft it at the San Francisco Conference, but to later entrust the task to the Commission on Human Rights created as a result of Article 68. Therefore, when, on 10<sup>th</sup> December, the General Assembly of the United Nations approved the UDHR, it was giving life to a document that was profoundly innovative on the international field (but not in internal law, given that much national legislation already recognised some of these rights), hence the difficulty to prove that the UDHR in 1948 was a “codification of pre-existing customary laws”, or a “crystallisation” of laws which were “*in statu nascendi*”. As a result, it appears that the idea that the rules in the UDHR are customary law can only be based on subsequent practice by States, as long as this practice has proven that it involves two essential requirements: the material or objective element (recurring practice, constant and uniform), and the formal or subjective element of the *opinio iuris*.

Evidence of subsequent practice regarding the UDHR in States and bodies of the international community is abundant, and confirms its character as customary law. As has been said in the *US Restatement*, the following types of practices are relevant to the consolidation of the customary law of human rights:

“quasi-universal adhesion to the UN Charter and to its human rights clauses, quasi-universal and frequently reiterated acceptance of the Universal Declaration, even if only in principle; quasi-universal participation in all stages of the preparation and adoption of international agreements recognising principles of human rights in general, or concrete rights; the adoption of human rights principles by States in regional organisations in Europe, Latin America, Africa, etc; general support from States for UN resolutions declaring, recognising, invoking, and applying international principles of human rights as international law; actions of States aimed at equalling their national law and practices to the standards or principles set out by international bodies, and the incorporation of human rights clauses, either directly or through references to national constitutions and other laws; invocation of human rights principles in national policy, diplomatic practice, international organisations, diplomatic communications and actions expressing the point of view that certain practices violate international human rights law, including condemnation and other adverse reactions from the State to violations by other States”<sup>202</sup>.

It is clear that all this evidence regarding the value of the UDHR cannot be exhaustively analysed, although it is true that there is an enormous amount of material on the subject. Nevertheless, we shall highlight a few points of interest.

Firstly, the UDHR has been correctly classed, as is normal for Declarations, as “a legal milestone in the process of progressive codification of international law”; references to the UDHR in all subsequent international instruments which have specified the international obligations of States are an example of the importance given to the document.

As regards allusions made by governments in final documents of particularly important international conferences, we cannot fail to mention the Proclamation of Tehran at the First World Conference on Human Rights in 1968, held in the year of the 20<sup>th</sup> anniversary of the Declaration; the Helsinki Final Act 1975, and the Final Declaration from Vienna in 1993, made at the end of the Second World Conference on Human Rights.

In the *Tehran Proclamation* (13<sup>th</sup> May 1968), States asserted that the Declaration constitutes an *obligation* for the international community, and that they considered serious violations of human rights to be violations of the Charter<sup>203</sup>.

In the *Helsinki Final Act* (1975), whose huge importance and spread it is not necessary to describe, both Eastern and Western States set out the principles which were to guide their relations, and in doing this specifically devoted chapter VII to the issue of respect for fundamental rights and freedoms; as regards these, they declare that, in the field of human rights, “States will act in conformity with the purposes

<sup>202</sup> *US Restatement: US Rest, 3rd; Restatement of the Foreign Relations Law of the USA*, American Law Institute (Washington, 1987). Vol. II ii & 702, p. 154, n. 2.

<sup>203</sup> “The Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and *constitutes an obligation for the members of the international community*” (emphasis added). The importance of this declaration of obligation for all the international community as regards the UDHR cannot be ignored, bearing in mind the seriousness of the context and the unanimous States’ support achieved.

and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights”.

Finally, in the *Vienna Final Declaration* (1993), the 171 States taking part again reaffirmed “their commitment to the purposes and principles contained in the Charter of the United Nations and the Universal Declaration of Human Rights”<sup>204</sup>.

All these manifestations of States in particularly serious contexts, which give the same importance to the Charter and to the Declaration, are evidence of a particular “*opinio iuris*”; in other words, of a decision of States concerning the legally binding character of the Declaration.

Other important evidence for the normative and customary character which the Declaration has acquired can be found in the very widespread practice across States consistent in its incorporation into constitutions and domestic legal orders. As the International Law Association has correctly stated, “the Universal Declaration has, directly or indirectly, served as a model for many constitutions, laws, rulings and policies which protect human rights. These internal manifestations include direct constitutional references to the Declaration or incorporation of its clauses; fundamental articles of the Declaration which have been reflected in national legislations; and judicial interpretation of national laws with reference to the Declaration”<sup>205</sup>.

No fewer than 90 constitutions written after 1948 contain rules concerning human rights which faithfully reproduce UDHR articles, or are inspired by the document. Many of the constitutions of countries which gained independence after 1950 make direct reference to the Universal Declaration. To mention only one example, the Spanish constitution of 1978 establishes in its Article 10.2 that “provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights...”. The importance of this reference lies in the call for tribunals to interpret the human rights contained within Title I (whose writing was also influenced by the Declaration), in accordance with the UDHR. Legal references to the Declaration are useless if judges and tribunals are not legitimised to apply them.

Regarding the use of the UDHR by domestic courts, it must first be highlighted that these are generally reluctant to decide a case against a national law by directly applying international law, and, in that respect, the UDHR. There are few precedents for such a situation; one of the few is the decision of the High Court of the United Republic of Tanzania which declared a rule of customary Tanzanian law, which permitted discrimination against women, unconstitutional, due to the fact that it was

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<sup>204</sup> Regarding the language used by the Vienna Conference in discussing the value of the UDHR, some authors have detected a certain “step backwards” as regards the Tehran Proclamation, given that at no point is the “obligatory nature” of the Declaration mentioned. The UDHR is rather considered “a common standard of achievement for all peoples and all nations, is the source of inspiration and has been the basis for the United Nations in making advances in standard setting as contained in the existing international human rights instruments”, particularly in the Covenants of 1966 (paragraph eight of the preamble).

<sup>205</sup> International Law Association, “Final Report on the Status of the Universal Declaration of Human Rights in National and International Law”, *ILA Report of the Sixty-Sixth Conference*, Buenos Aires (Argentina), London 1994, pp. 527 ff. In this final report there is a fairly complete study of the incorporation of the UDHR into national laws and constitutions, as well as jurisprudential references to it.

in contravention of Article 7 of the UDHR (equality before the law and prohibition of all discrimination), which, according to the Court “is part of our constitution”<sup>206</sup>. Secondly, it should be noted that the normal situation is for domestic courts to refer to the UDHR when they seek support for any right already recognised by their constitutions or national laws, or help in interpreting them. That is the case, for example, in the practice of Spanish courts; more specifically, the Supreme Court refers to the UDHR to materially reinforce the right under discussion.

#### 4.2.3. THE UDHR AS AN EXPRESSION OF GENERAL PRINCIPLES OF LAW

A third way in which a part of the doctrine has formed a basis for the normativity of the UDHR is that “general principles of law” have been found in it and, as such, because it is one of the sources of international law in accordance with Article 38 of the ICJ Statute, its normativity is without doubt. We have already seen above how one of the fathers of the Declaration, the great jurist from Bayonne, René Cassin, put forward this theory at its adoption. There have later been many authors who have also been of this opinion; among us, and illustrious representative would be J.A. Carrillo Salcedo. For this professor from Seville, “the theory of the general principles contained in the United Nations Charter and developed by the Universal Declaration”, and which are generally accepted, is the most appropriate, and can find its basis in ICJ jurisprudence<sup>207</sup>. This same theory of general principles appears to uphold an Italian Court in its statement that the Universal Declaration reflects “general principles of international law”, which are part of Italian law according to Article 10 of the Italian Constitution<sup>208</sup>.

Many years ago, Theodor Meron was surprised by the little attention that the category of “general principles of law recognized by civilized nations” had received as a method for obtaining a greater legal recognition for the principles of the Universal Declaration and other human rights instruments. He also added that, as regards the extent to which the norms of human rights contained within international instruments are reflected in national laws, Article 38 of the ICJ Statute becomes one of the principal methods for the maturation of such standards in the field of international law<sup>209</sup>. Through this it becomes clear that the barrier between the two sources, international customs and general principles, becomes blurred if not erased.

<sup>206</sup> Ephraim v Pastory & Kaizilige, High Court, 22 Feb 1990, Civil App No. 70 of 1989, reprinted in 87 *International Legal Reports* 106, 110.

<sup>207</sup> Carrillo Salcedo, J.A., “Algunas Reflexiones sobre el Valor Jurídico de la Declaración Universal de los Derechos Humanos”, in *Hacia un Nuevo Orden Internacional y Europeo. Homenaje al Profesor Manuel Díez de Velasco*, Madrid 1993, pp. 22-3. Professor Carrillo specifically refers to the cases of the Corfu Channel (1949), the Genocide Convention (1951), the case concerning United States diplomatic personnel in Tehran (1980), and of Nicaragua v. United States (1986).

<sup>208</sup> Fallimento Ditta Magiv Ministry of Finance, Tribunal de Roma, 27 July 1959, Foro It LXXV (1960), I col. 505.

<sup>209</sup> MERON, T., *Human Rights and Humanitarian Norms as Customary Law*, Oxford 1989, pp. 88-89. The US Restatement also considers another of the major sources of obligations regarding human rights to be “the general principles of law common to main legal systems of the world”, *op. cit.*, p. 152. Similarly, the great American jurist Oscar Schachter also holds that the principles of internal laws are often adequate for international application regarding human rights. Schachter, O., *General Course in Public International Law: International Law in Theory and Practice*, Recueil, 178.5 (1982), p. 79.

Whatever the interpretation might be concerning the foundation of the current legal character of the Declaration, and therefore the extent to which it is obligatory ("authorised interpretation of the Charter", "international customary law", or even "expression of general principles of law which are generally accepted"), what really matters is the general consensus of States concerning the obligatory character, more than the way in which this consensus has been expressed.

As Professor Carrillo has rightly said, "in the development of international law, the essential part is that it crystallises a consensus between States, as the rules of international law are created, modified, and progressively developed through general consensus between States. The formation, development, and modification of this consensus is always a dynamic process: the will of States... is essential in the initial phase...; but... what, above all, is important, is a general acceptance of the fact that these guidelines for behaviour are legally binding."<sup>210</sup> Therefore, continues J.A. Carrillo, what is vital is the consent and willingness of States to determine legal obligations; whatever the way or technical method through which this consent might be manifested and expressed: multi-lateral treaties, customs, United Nations General Assembly resolutions and Declarations.

#### 4.3. *Analysis of the Articles in the Declaration which would have acquired the status of peremptory norms in International Law*

General State consensus concerning affirmations of the legal value of the UDHR, manifested, as discussed above, through multiple "forms" evidenced in the three theories discussed, is indubitable. However, the main problem lies in deciding exactly which Articles in the Declaration are now obligatory for all States in the international community, as a result of their general acceptance<sup>211</sup>. It is clear that the right to life (Article 3) or the prohibition of torture (Article 5) cannot be afforded the same importance as the right to periodic paid holiday (Article 24). Because of this, the investigation concerning which Articles in the Declaration have been generally accepted and which ones have not is a task of undoubted transcendence, necessary so as to concretely define the legal status of the Declaration. The Human Rights Committee of the *International Law Association*, one of the most prestigious international organisations of experts in international law, was devoted to perform this task between 1988

<sup>210</sup> CARRILLO SALCEDO, J.A.: *op. cit.*, para. 4.

<sup>211</sup> Scholars who believe that all articles of the UDHR are equally obligatory for all States in the international community are in the minority; among them, however, is one of the people most involved in the process of drafting of the Declaration, John Humphrey, who says that "the UDHR has been quoted so many times both within and outside the UN that jurists now say that, whatever the intention of the authors might have been, the Declaration is now a part of customary international law and, therefore, is obligatory for all States. The Declaration has become what some nations wanted in 1948: a universally accepted interpretation and definition of human rights, which were left undefined in the Charter.", HUMPHREY, J., "The International Bill of Rights: Scope and Implementation", *17 WM & Mary Law Review* 527, 529 (1976). The following are some other authors who agree: Alston, Bilder, Kartashkin, Lallah, Sohn, Thornberry, Waldock, Robertson y Merrills. There are still fewer who would defend the view that all the Declaration is *ius cogens* (imperative rules of general international law, according to Article 53 of the Vienna Convention on the Law of Treaties); see Haleem, Mc Dougal, Humphrey, Markovit.



and 1994. The results of the Final Report were presented at the Buenos Aires Conference of 1994, and are somewhat unsatisfactory if one is looking for an exhaustive analysis and clear conclusions on international practice concerning each article.

This same committee recognised that “it would be presumptuous to attempt (in the report) to comprehensively analyse every one of the rights contained within the Declaration”<sup>212</sup>. However, in the light of State practice some tentative conclusions can be drawn, which have been reproduced below.

The committee sees the following as legally binding, as rules of customary law, for all States in the international community:

1. Those contained in Articles 1, 2, and 7, which express the fundamental right to freedom, and non-discrimination in the enjoyment of rights. It would be difficult to deny the general acceptance of this right, although in States’ practice there exists a less-than-satisfactory fulfilment of this principle of equality. Thus, women are frequently prevented from exercising their rights in a manner fully equal to men; distinctions based on political and religious beliefs are found in many constitutions; and an effective guarantee of the equal rights of the rich and the poor is often lacking. Discrimination on the grounds of race is accepted by the doctrine as prohibited by general international law, and has even been declared as a *ius cogens* norm.
2. The guarantees of Article 3 (the right to life, freedom, and security) are formulated in such a general manner that they hardly constitute a useful and operative standard; nevertheless, protection of the right to life has always been quoted as one of the rules of customary international law, in such a way that practices such as assassinations, disappearances, and arbitrary deprivation of life have been universally condemned as violations of the right to life.
3. The prohibition of slavery (Article 4), the prohibition of torture (Article 5), the prohibition of prolonged arbitrary detention (Article 9), the right of every human being to recognition of legal personality (Article 6), the right to a fair trial (Articles 10 and 11), and the right to marry (Article 16) would also be classed as customary rules<sup>213</sup>.

However, due to different reasons, the following have not been awarded the status of customary laws: the right to an effective remedy for violations of human rights (Article 8), the prohibition of arbitrary interferences into private lives (Article 12), the right to freedom of movement and residence within a territory, as well the freedom to enter and leave a country (Article 13), the right to a nationality (Article 15), the contro-

<sup>212</sup> *ILA, op. cit.*, p. 545.

<sup>213</sup> The aforementioned *US Restatement (Third) of the Foreign Relations Law*, whose significant authority on the current status of international law is disputed by few, includes a list of rules of international customary law concerning human rights, which includes the prohibition of genocide, slavery and the slave trade, murder and disappearance, torture and cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, and practices which constitute serious violations of internationally recognised human rights (*US Restatement, o.c.*, & 702, vol. II). A discussion of this list can be found in O’RAA, *Human Rights in States of Emergency in International Law*, Oxford 1996 (2nd), pp. 214 ff.

versial right to property (Article 17), the right to freedom of thought, conscience, and religion (Article 18), the right to freedom of expression and opinion (Article 19), the right to freedom of assembly and association (Article 20), and the right to seek asylum (Article 14). Regarding this last right, it should be said that the returning of a person to a country where there are well-founded fears that he or she might be subjected to torture and persecution would be contrary to a practically crystallised customary rule that is the principle of “non-refoulement”.

Although some argue that a “right to democracy” is emerging as a customary norm, it is clear that many States have not accepted the right, recognised in Article 21, of everyone to take part in the government of the country.

Similarly, the Committee states that economic, social, and cultural rights, set out in Articles 22 to 27 (the rights to work, to social security, to rest, to an adequate standard of living, to education, and to take part in the cultural life of the community), are rarely qualified by the doctrine or tribunals as customary norms, despite the fact that, in some cases, they are better supported in the international community than some of the civil and political rights. Among them, perhaps the strongest candidates for soon becoming international customs would be the following: the right to free choice of employment, the right to form and join trade unions, and the right to free and accessible primary education, according to States’ available resources.

The provisional conclusion of the ILA study is that even if a large proportion of the civil and political rights in the UDHR have now become customary rules, this is not the case for economic, social, and cultural rights, and this poses the difficult problem of defining the legal value of these latter rights. It would appear that the position of the ILA is that more value should be afforded to the first group (which are obligatory customary norms), lessening the value of the second group (only very few of these are candidates for soon becoming customary norms).

This position would appear to be in contrast to current doctrine on human rights, which insists that all human rights are “universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis”<sup>214</sup>. This is certainly not the place for an exhaustive study of this problem, so crucial for international human rights law; nevertheless, some reflections on the topic will be helpful.

Firstly, the very fact that both types of rights (those referred to by Karel Vasak as “first and second generation”) were object of two separate international treaties whereas they were united in the Declaration, is a clear indication of the traditional position concerning the differing legal nature of these rights, and, therefore, the differing types of obligations which they generate for States. According to this view, civil and political rights:

1. generate absolute and immediate obligations for States,
2. fundamentally imply an “obligation to refrain from doing something” (prohibition of torture, of arbitrary deprivation of life, of interference in peoples’ private lives, etc), and
3. are justiciable, providing individuals with a remedy against violations.

<sup>214</sup> *Vienna Declaration*, para. 5.

However, economic, social, and cultural rights:

1. generate “relative” obligations (States commit to adopt measures, to the maximum of its available resources, for the progressive realisation of these rights);
2. fundamentally imply “a duty” (positive social benefits), dependent on the resources of each State; and
3. are not justiciable, so individuals are not provided with effective legal remedies in the event of a violation<sup>215</sup>.

This traditional concept of “second generation” rights is the one which poses the real problem regarding the “justifiability”, or the true legal value of these rights; this traditional view is nowadays contested by a significant sector of the doctrine, and by part of the international community<sup>216</sup>.

It is interesting to note that, although the obligations of States as regards these rights can be considered to be “relative” and dependent on the available resources, a “minimum core” of these rights should be obligatorily assured by the State for all individuals under its jurisdiction. This is the position of the Committee on Economic, Social, and Cultural Rights, created by the ECOSOC so as to apply the ICESCR of 1966. In this regard, the Committee holds that, if there is a State where a significant number of individuals are deprived of food, essential primary health care, basic accommodation, or primary education, its government is *prima facie* failing to fulfil its obligations according to the Covenant<sup>217</sup>. One of the important tasks of the Committee consists in establishing standards so as to be able to assess the States’ degree of compliance with the Covenant; along the same lines would be the “Limburg Principles”, written by a significant group of independent experts<sup>218</sup>.

On the same topic, we must not forget the obligations of States, not only to guarantee these rights to those who fall under their jurisdiction, but also to co-operate with other States and with the UN so as to bring about the effective realisation of these rights; this is an obligation found not only in the ICESCR (Article 2.1), but also in the UDHR (Article 22), and the UN Charter (Articles 1, 55, and 56). Moreover, as many States, due to resource constraints, cannot guarantee this minimum of economic and social rights, the latter obligation has become increasingly important.

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<sup>215</sup> This is the concept expressed in the two 1966 Covenants. Compare the wording of Article 2 of each Covenant, which sets out the types of obligations assumed by each State, as well as the different mechanisms for implementation (individual and inter-state complaints in the case of the Covenant on Civil and Political Rights, and system of periodical reports only in the case of the Covenant on Economic, Social, and Cultural Rights). See the interesting “General Comment” No. 3 (5th session 1990) of the Committee on Economic and Social Rights, “The nature of States’ parties obligations”, which specifically reviews Article 2(1) of ICESCR.

<sup>216</sup> On this problem, see SCHEININ, M., “Economic and Social Rights as Legal Rights”, in EIDE et al (ed.), *Economic Social and Cultural Rights*, Martinus Nijhoff 1995, pp. 41-62. This article debates the traditional concept of these rights, as well as their “non-legally binding” nature.

<sup>217</sup> General Comment No. 3, paragraph 10, E/1991/23.

<sup>218</sup> *Limburg Principles on the Implementation of the ICESCR*, UN Doc E/CN.4/1987/17.

The work of the Committee could, in the future, suggest elements of that “minimum core” of economic, social, and cultural rights, which would oblige not only States that are part of the Covenant, but also all States in the international community, to take them on as customary norms; some of these can already be found in the UDHR (Articles 22 to 27). If this were to be the case, rules such as those which prohibit all discrimination on grounds of gender, which would include “the right to equal pay for equal work”, Article 23.2 of the UDHR, given the significant status which the prohibition of discrimination is gaining in international law, could soon emerge as an obligatory rule. In accordance with the position of the ILA, the same could be said of the right to form trade unions (Article 23.4), as a result of the importance of the right to free association in treaties on civil and political rights, and the right to free and accessible primary education (Article 26); and, in conformity with the position of the Committee on Economic, Social, and Cultural Rights, would also include a “minimum core” of these rights, made up of, at least, food, clothing, accommodation, and primary health care (Article 25.1). Although the provisional conclusions of the International Law Association holds a certain amount of interest, and it is undoubted that the majority of the rights considered to be customary norms are just that, it would be necessary to conduct a much more detailed and exhaustive analysis of State practice as regards every one of the other rights protected in the Declaration, before coming to definitive conclusions regarding the character of customary norms, and therefore binding for all States in the international community.

## 5. Conclusions

Following this detailed study of the birth and the main elements of the content and legal value of the Universal Declaration of Human Rights, one of the main conclusions which we have reached is that we are faced with a document which is a child of its time; in other words, it is indissolubly linked to the vicissitudes which occurred during the Second World War, a fact which is reflected in many of its passages both in the preamble and in the main text. The Universal Declaration was only the first step and starting point in a long process of internationalisation of human rights, a process in which the United Nations have played a fundamental role with its approval of a huge variety of instruments aimed at developing the sometimes vague and generic provisions contained in the Declaration. With this in mind, the different provisions of the Declaration must be interpreted in a dynamic manner, in the light of the international treaties and other instruments which the international community has provided itself with.

On the other hand, the Declaration was the fruit of consensus; it could not have been otherwise. The final content of its text reflects compromise and a delicate balance between the different ideologies and world-views existing in the United Nations at its time of writing. In this regard, it must be noted that the Universal Declaration became a revolutionary instrument, as it was the first international text which achieved the inclusion both of civil and political rights as well as economic, social, and cultural rights, through this advancing the concept of the indivisibility and interdependence of the whole gamut of human rights.

Finally, we would like to state how, more than fifty years on, the Declaration continues to be a document that is alive and full of inspirational strength for the fight against new threats to human dignity and the very survival of humankind. The seeds of all the human rights developments which have taken place after the writing of the Declaration are found in the document. It is necessary that we should continue to reflect on this document which is still vital for every reference to human rights and fundamental freedoms. To use the words of Federico Mayor Zaragoza, the former Director General of UNESCO, the Universal Declaration of Human Rights has become a true "ethic heritage of mankind"<sup>219</sup>.

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<sup>219</sup> MAYOR ZARAGOZA, F.: "Consolidación de una Cultura de Paz", *XVI Curso Interdisciplinario en Derechos Humanos*, Instituto Interamericano de Derechos Humanos, 15th to 26th June 1998, San José, Costa Rica.



# CONVENTIONAL PROTECTION OF HUMAN RIGHTS





# The International Covenant on Civil and Political Rights\*

Manfred Nowak

**Summary:** 1. Introduction. 2. Substantive provisions: an overview. 3. Obligations of State Parties. 4. Derogation and limitation clauses. 5. Human Rights Committee. 6. Reporting procedure. 7. Inter-State complaints procedure. 8. Individual complaints procedure. 9. Conclusions.

## 1. Introduction

In 1986 the Human Rights Committee decided that the “breadwinner” requirement in the Dutch Unemployment Benefits Act (married women received support only when they could prove that they were “breadwinners”, whereas this proof was not required of married men) constituted *gender-specific discrimination* in violation of Article 26 of the International Covenant on Civil and Political Rights (CCPR).<sup>1</sup> As a consequence, the *Netherlands* and other States Parties to the Covenant had to amend a substantial number of social security laws in order to achieve equality for women.

During the time of the former military regime in *Uruguay* the Committee examined a large number of individual complaints it had received on behalf of political prisoners from their relatives living abroad. In most of these cases it established serious violations of the rights to *life, liberty and security of the person, of the prohibition of torture* and inhuman prison conditions, of *freedom of expression* and other *political rights and freedoms*. Taken together this case law revealed a consistent pattern of gross and reliably attested violations of human rights and as such contributed more than any other international procedure to the overthrow of the military government in 1985. Moreover, in a decision of July 1994, the Committee held that victims of gross human rights violations such as torture are entitled under Article 2(3)(a) of the Covenant to an *effective remedy* which entails the obligation of the present democratic government to carry out official investigations, to identify the individual perpetrators and to grant compensation to the victims. As a consequence, the Amnesty

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<sup>1</sup> Communication No. 172/1984, *S. W. M. Broeks v. the Netherlands*, and Communication No. 182/1984, *F. H. Zwaan-de Vries v. the Netherlands*. Report of the Human Rights Committee, UN General Assembly, Official Records, Forty-second Session, Supplement No. 40 (A/42/40), pp. 139-150 and 160-169.

Law of December 1986 was found to be incompatible with the legal obligations of Uruguay since it "has contributed to an atmosphere of impunity which may undermine the democratic order and give rise to further grave human rights violations".<sup>2</sup> This decision has had a major impact on the policy of reconciliation and *impunity* not only in Uruguay but also in many other, notably Latin American, African and Eastern European States in transition to democracy.

*Compensation for human rights violations by a former regime* was also at issue in a case against the *Czech Republic* decided in July 1995. The case was based on a complaint by a number of persons who had left the former CSSR for political reasons between 1968 and 1987 and whose property had, therefore, been confiscated by the then Communist government. The Restitution Act of 1991 is not applicable to the applicants, who presently live in Canada and Switzerland, on the ground that the right to restitution and compensation is only granted to Czech citizens who permanently reside in the country. Although the right to *property* is not protected by the Covenant (as opposed, e.g. to the European Convention for the Protection of Human Rights and Fundamental Freedoms; henceforth European Convention on Human Rights or ECHR), the Committee found that the cumulative conditions of citizenship and permanent residence were unreasonable and, therefore, violated the *equal protection of the law* under Article 26 of the CCPR.<sup>3</sup>

With respect to a growing number of complaints submitted by prisoners on death row in *Jamaica* and *Trinidad and Tobago*, the Committee established a consistent line of legal reasoning that, in *capital punishment* cases, States Parties must observe rigorously all the guarantees for a fair trial and that the imposition of a death sentence upon conclusion of an unfair trial constitutes a violation of the *right to life* pursuant to Article 6 of the CCPR.<sup>4</sup> As a consequence, quite a few death sentences were commuted to prison sentences, and some prisoners were released. Moreover, in November 1993 the Committee arrived at the conclusion that execution by gas asphyxiation, as practised, for example, in California, constitutes cruel and inhuman treatment. Consequently, by exposing somebody to the real risk of being executed in such a manner by means of *extradition* to the United States, *Canada*, a State Party which had abolished the death penalty, violated Article 7 of the Covenant.<sup>5</sup> Since the *United States* has not ratified the First Optional Protocol to the Covenant, no individual complaints can be

<sup>2</sup> Communication No. 322/1988, *Hugo Rodríguez v. Uruguay*. Report of the Human Rights Committee, Vol. II, UN General Assembly, Official Records, Forty-ninth Session, Supplement No. 40 (A/49/40), pp. 5-11. See also NOWAK, M.: "The Activities of the UN Human Rights Committee: Developments from 1 August 1992 to 31 July 1995", *Human Rights Law Journal*, Vol. 16, n.º 10-12, 1995, pp. 395-396.

<sup>3</sup> Communication No. 516/1992, *Alina Simunek et al. v. the Czech Republic*. See Human Rights Committee, Final Decisions, UN Doc. CCPR/C/57/1, pp. 99-108.

<sup>4</sup> See, e.g. NOWAK, M.: "The Activities of the UN Committee: Developments from 1 August 1989 to 31 July 1992", *Human Rights Law Journal*, Vol. 14, 1993, pp. 13-14 y NOWAK, M.: *op. cit.*, 1995, pp. 384-385 y 389. See also Communications Nos. 575 and 576/1994, *Lincoln Guerra and Brian Wallen v. Trinidad and Tobago*, Human Rights Committee, Final Decisions, UN Doc. CCPR/C/57/1, pp. 195-202; and *Human Rights Law Journal*, Vol. 16, No. 10-12 (1995), pp. 400-403.

<sup>5</sup> Communication No. 469/1991, *Charles Chitat Ng v. Canada*. Report of the Human Rights Committee, UN General Assembly, Official Records, Forty-ninth Session, Supplement No. 40 (A/49/40), pp. 189-220. See also NOWAK, M.: *op. cit.*, 1995, pp. 385-387.

lodged directly against the US Government. With respect to the US practice of imposing death sentences even on minors, the Committee, however, considered the US *reservation* to Article 6(5) of the CCPR to be incompatible with the object and purpose of the Covenant and explicitly requested the US Government to withdraw this reservation as well as the reservation concerning the prohibition of torture.<sup>6</sup>

A number of leading members of the former opposition party *Union pour la Démocratie et le Progrès Social* (U.D.P.S.) including the later Prime Minister Etienne Tshisekedi had submitted complaints against the former regime of President Mobutu in *Zaire*. In most cases the Committee found serious violations of the rights to *personal liberty, physical integrity, privacy and movement* and, in its finding, thus contributed to the international pressure on the Mobutu regime to improve its human rights situation. Similar human rights violations of opposition members have been established with respect to various other African and Latin American countries such as Zambia, Equatorial Guinea, Cameroon, Madagascar, Libya, Surinam, the Dominican Republic, Nicaragua, Ecuador and Colombia.

In a growing number of *disappearance cases in Latin America*, the Committee in principle follows the jurisprudence of the Inter-American Commission and Court of Human Rights by establishing violations of the rights to personal liberty, security and physical integrity as well as of the right to life. In addition, it urged the respective States parties to open proper investigations of disappearance cases, to provide for appropriate compensation, and to bring to justice those responsible.<sup>7</sup>

In March 1994 the general prohibition of male homosexuality in the Australian State of *Tasmania* was found to be in violation of the right to *privacy* in Article 17 of the Covenant.<sup>8</sup> With the active support of the Federal Government of *Australia*, which in fact disapproved of the Tasmanian practice, the laws in question have now been repealed.<sup>9</sup>

In the controversial case of *Faurisson v. France* the Committee ruled that criminal sanctions imposed by French courts on a well-known French professor of literature for his denial of the existence of Nazi gas chambers for the extermination of Jews did not violate his freedom of expression under Article 19 of the Covenant. The Committee raised, however, certain doubts as to the compatibility of the French "Gayssot Act" of 1990 which makes it a criminal offence to contest the existence of the category of crimes against humanity as defined in the Charter of the International Military Tribunal at Nuremberg, on the basis of which Nazi leaders were convicted after the Second World War.<sup>10</sup>

<sup>6</sup> UN Doc. CCPR/C/79/Add.50.

<sup>7</sup> See, e.g. Communications No. 540 and 563/1993, *Ana Rosario Celis Laureano v. Peru* and *Nydia Erika Bautista de Arellana v. Colombia*. Report of the Human Rights Committee, Vol. II, UN General Assembly, Official Records, Fifty-first Session, Supplement No. 40 (A/51/40), pp. 108-115, 132-143.

<sup>8</sup> Communication No. 488/1992, *Nicholas Toonen v. Australia*. Report of the Human Rights Committee, UN General Assembly, Official Records, Forty-ninth Session, Supplement No. 40 (A/49/40), pp. 226-237. See also NOWAK, M.: *op. cit.*, 1995, pp. 390-391.

<sup>9</sup> Report of the Human Rights Committee, Vol. I, UN General Assembly, Official Records, Fifty-second Session, Supplement No. 40 (A/52/40), pp. 88-89.

<sup>10</sup> Communication No. 550/1993, *Robert Faurisson v. France*. Report of the Human Rights Committee, Vol. II, UN General Assembly, Official Records, Fifty-second Session, Supplement No. 40 (A/52/40).

In the famous case of the *Lubicon Lake Band v. Canada*, although the Committee dismissed the allegations of a violation of the *right to self-determination* on procedural grounds, it ruled that historical inequities as well as large-scale expropriation of the lands of this Cree Indian band for commercial interests (oil and gas exploration) threatened the way of life and culture of this *indigenous minority* and thereby constituted a violation of Article 27 of the Covenant.<sup>11</sup> The Canadian Government offered to set aside 95 square miles of land for a reserve and to pay Can \$ 45 million as compensation for historical inequities. This was considered by the Committee to be an appropriate remedy within the meaning of Article 2 of the CCPR.

These few cases were selected to illustrate the *variety of issues arising under the Covenant* and the impact of the case law of the Human Rights Committee on domestic human rights problems. On the other hand, this impact must, of course, not be exaggerated. Many States in which gross and systematic human rights violations occur are not (yet) parties to the Covenant or the First Optional Protocol, and only a minority of States Parties actually make convincing efforts to comply with their obligations under the Covenant and with the legally non-binding decisions of the Committee. In order to assess the actual significance of the Covenant and the achievements of the Committee in a fair, balanced and realistic manner, one has to see it in the overall context of the progress and the difficulties of the international protection of human rights during the 50 years since the adoption of the Universal Declaration of Human Rights.

Together with the Universal Declaration of Human Rights of 10 December 1948 and the International Covenant on Economic, Social and Cultural Rights (CESCR), the International Covenant on Civil and Political Rights and its two Optional Protocols constitute the core of United Nations human rights law commonly referred to as the *International Bill of Human Rights*. This core is supplemented and defined in more detail by a considerable number of special human rights conventions, declarations, bodies of principles, minimum rules, etc. Some provisions of the International Bill of Human Rights, such as the prohibition of slavery and torture, acquired in the meantime the status of customary international law, others are legally binding only on States Parties to the respective treaties.

Originally, the United Nations envisaged only one general human rights treaty to give binding force to the provisions of the Universal Declaration.<sup>12</sup> During the early

<sup>11</sup> Communication No. 167/1984, *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*. Report of the Human Rights Committee, Vol. II, General Assembly, Official Records, Forty-fifth Session, Supplement No. 40 (A/45/40), pp. 1-30.

<sup>12</sup> General Assembly Resolution 421 (V) of 4 December 1950. For the historical background, see UN Doc. A/2929; BOSSUYT, M.J.: *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights*, Martinus Nijhoff Publishers, Dordrecht, 1987; MCGOLDRICK, D.: *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, Clarendon Press, Oxford, 1991; NOWAK, M.: "The Effectiveness of the International Covenant on Civil and Political Rights: Stocktaking after the First Eleven Sessions of the UN Human Rights Committee", *Human Rights Law Journal*, Vol. 1, 1980, pp. 136-170; PECHOTA, V.: "The Development of the Covenant on Civil and Political Rights", en HENKIN, L. (Ed.): *The International Bill of Rights: The Covenant on Civil and Political Rights*, Columbia University Press, New York, 1981, pp. 32-71.

years of the Cold War, the Western States succeeded, however, in their demand for *two separate Covenants* with different State obligations and different monitoring bodies and procedures.<sup>13</sup> In their view only the civil and political rights of the so-called “first generation” were genuine human rights that could be guaranteed immediately and implemented by judicial procedures, whereas the economic, social and cultural rights of the so-called “second generation” were only considered as “programme rights”. The Socialist States, on the other hand, stressed the interdependence and indivisibility of all human rights and objected strongly to any judicial or quasi-judicial monitoring system. These were only some of the ideological conflicts which delayed the adoption of the Covenants for almost 20 years. After the Commission on Human Rights submitted its drafts in 1954,<sup>14</sup> the Third Committee of the General Assembly still needed 12 years to finalize these drafts. On 16 December 1966, both Covenants were adopted unanimously by 106 States and the First Optional Protocol to the CCPR, which provides for the possibility of individual complaints, by 66 to 2 votes, with 38 abstentions.<sup>15</sup> On 15 December 1989, a second Optional Protocol aimed at the abolition of the death penalty was adopted by 59 to 26 votes, with 48 abstentions.<sup>16</sup> Both Covenants and the First Optional Protocol entered into force in 1976, the inter-State complaints procedure under Article 41 of the CCPR in 1979, and the Second Optional Protocol in 1991. As at April 2006, the CCPR had been ratified by 156 States and the CESCR by 153 States from all regions of the world. Forty-seven States accepted the inter-State complaints system under Article 41 of the CCPR, 105 States the individual complaints system of the First Optional Protocol, and 57 States were bound by the Second Optional Protocol not to re-introduce the death penalty.<sup>17</sup>

In October 1997, the Human Rights Committee adopted a general comment on issues relating to the continuity of obligations of States Parties to the Covenant. Referring to the fact that the Covenant does not include a provision on *denunciation* or withdrawal and to the nature of the Covenant constituting, together with the CESCR and the Universal Declaration of Human Rights, the International Bill of Human Rights, the Committee concluded that international law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce or withdraw from it.<sup>18</sup> In fact, the Government of the Netherlands, which in a first reaction to the Committee’s jurisprudence on the Dutch social security cases mentioned at the beginning of this chapter had considered to denounce the Covenant, soon realized that this was impossible. By way of comparison, it is to be noted that Article 12 of the First Optional Protocol to the Covenant explicitly allows for denunciation but includes special arrangements for a transition period. As an expression of dissatisfaction with the Committee’s case law on capital punishment cases, *Jamaica and Trinidad and Tobago recently denounced the First Optional Protocol*.

<sup>13</sup> General Assembly Resolution 543 (VI) of 5 February 1952.

<sup>14</sup> UN Doc. E/2573, p. 62.

<sup>15</sup> General Assembly Resolution 2200/A (XXI).

<sup>16</sup> General Assembly Resolution 44/128.

<sup>17</sup> Information received from the UN Treaty Collection database (<http://www.un.org/Depts/Treaty>).

<sup>18</sup> General Comment 26(61) of 29 October 1997, UN Doc. CCPR/C/21/Rev.1/Add.8.

Trinidad and Tobago acceded again with a reservation excluding the competence of the Committee to consider communications relating to the imposition of the death penalty but this reservation appears to be clearly incompatible with the object and purpose of the Covenant.

## 2. Substantive provisions: an overview

The Covenant is divided into a Preamble and six parts. Parts I to III (Articles 1 to 27) contain all substantive rights as well as some general provisions such as the prohibition of discrimination and misuse, gender equality, derogations and a savings clause. Parts IV to VI (Articles 28 to 53) contain the international monitoring provisions, some principles of interpretation and final clauses. The First Optional Protocol contains 14 articles relating to the individual complaints procedure, whereas the 11 articles of the Second Optional Protocol in fact constitute an amendment to the right to life in Article 6 of the CCPR.<sup>19</sup>

With the exception of the collective right of peoples to self-determination (Article 1), which is listed in a separate Part I and which according to the case law of the Human Rights Committee is not subject to monitoring by means of individual complaints,<sup>20</sup> the Covenant only guarantees individual rights enumerated in Part III: the right to life (Article 6), the prohibition of torture and inhuman prison conditions (Articles 7 and 10), the prohibition of slavery (Article 8), the right to personal liberty and security, including prohibition of detention for debt (Articles 9 and 11), freedom of movement and protection of aliens against arbitrary expulsion (Articles 12 and 13), procedural guarantees in civil and criminal trials including prohibition of retroactive criminal laws (Articles 14 and 15), recognition of legal personality (Article 16), privacy (Article 17), freedom of thought, conscience, religion and belief (Article 18), freedom of opinion, expression and information, including the prohibition of propaganda for war and advocacy of hatred (Articles 19 and 20), freedom of assembly, association and trade unions (Articles 21 and 22), rights of marriage, the family and the child (Articles 23 and 24), political rights (Article 25), equality (Article 26) and rights of persons belonging to minorities (Article 27).

Part III constitutes a fairly comprehensive catalogue of civil and political rights comparable to those in regional treaties such as the European and American Conventions on Human Rights or the African Charter on Human and Peoples' Rights. Compared to the civil and political rights enlisted in the Universal Declaration, the Covenant does not contain the rights to property, nationality and asylum. The European Convention on Human Rights also protects the right to education (which forms, however, part of the CESCR) and prohibits the collective expulsion of aliens. The American Convention on Human Rights also contains a right of reply and correction and a general right to a name.

<sup>19</sup> For an article by article commentary of all substantive and procedural provisions of the Covenant and its Optional Protocols, see NOWAK, M.: *UN Covenant on Civil and Political Rights. CCPR Commentary*, NP Engel, Kehl, 2005. See also HENKIN, L. (Ed.): *op. cit.* y MCGOLDRICK, D.: *op. cit.*

<sup>20</sup> *Lubicon Lake Band v. Canada*, *supra*, note 11.

With the exception of the detailed minimum rights of the accused in a criminal trial in Article 14, the rights of persons deprived of liberty in Articles 9 and 10, as well as the restrictions on the death penalty in Article 6, most rights are formulated in rather general terms. More detailed provisions can, however, be found in special human rights treaties and declarations such as, for example, the UN Conventions against Genocide, Torture, Racial Discrimination, Discrimination against Women, the Convention on the Rights of the Child and the Declarations on Religious Intolerance, on Enforced Disappearances or on the Rights of Disabled Persons. In addition, the Human Rights Committee, in applying the Covenant provisions in the complaints and reporting procedures, as well as by adopting general comments in accordance with Article 40(4) of the CCPR, sheds further light on the content and meaning of these rights.

In accordance with the nature of the Covenant as a general and universal human rights treaty most of its rights apply to every human being, and Article 2(1) explicitly prohibits any discrimination in the enjoyment of these rights. Nevertheless, some rights apply only to certain categories of human beings. The rights listed in Article 27, for example, only apply to persons belonging to ethnic, religious or linguistic minorities, the political rights in Article 25 only to citizens, freedom of movement in Article 12 only to persons lawfully within the territory of a State Party, the guarantee of Article 13 only to aliens, the rights to a name and nationality only to children (Article 24), the rights to marry and found a family in Article 23 only to adults ("men and women of marriageable age"), the minimum guarantees of Article 14(2) and (3) only to persons charged with a criminal offence, the minimum guarantees of Articles 9(2) to (5) and 10 only to persons deprived of their liberty, certain restrictions on the death penalty in Article 6(5) only to pregnant women and to persons below 18 years of age, and the right of self-determination in Article 1 only to peoples.

### 3. Obligations of States Parties

According to Article 2(1) of the CCPR each State Party undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, without discrimination of any kind. This obligation to respect immediately, *i.e.* from the date of entry into force of the Covenant for the State Party, and ensure all Covenant rights, differs significantly from the corresponding provision of the CESC. Each State Party to this Covenant, pursuant to Article 2(1), only undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the economic, social and cultural rights recognized in the Covenant, including particularly the adoption of legislative measures. This difference reflects the widely-held belief, at least in the time of the Cold War when both Covenants were drafted, that there exists a fundamental difference between human rights of the first and second generation, and that economic, social and cultural rights only imply an obligation to take steps toward their progressive realization. Modern human rights theory and the practice of the Committee on Economic, Social and Cultural Rights prove, however,

that this difference is only of a relative nature, and that the CESCR contains various obligations of both conduct and result which clearly may be violated by States Parties.<sup>21</sup> In accordance with this change of attitude the 1993 Vienna World Conference on Human Rights recommended the adoption of an Optional Protocol to the CESCR providing for an individual complaints system.<sup>22</sup>

The *obligation to respect* in Article 2(1) of the CCPR indicates the negative character of civil and political rights.<sup>23</sup> It means that States Parties must refrain from restricting the exercise of these rights where such is not expressly allowed. The concrete substance of this duty of forbearance depends on the formulation of the given right. Some rights, such as the prohibition of torture in Article 7, are absolute, *i.e.* States must refrain from practising torture under all circumstances, even in the event of a national emergency. Other provisions, such as the right to life in Article 6(1) or the protection of privacy in Article 17, only prohibit arbitrary interference. Still other provisions, in particular, the political freedoms in Articles 18, 19, 21 and 22, expressly empower the States Parties to impose certain restrictions.<sup>24</sup>

The *obligation to ensure* in Article 2(1) of the CCPR indicates the positive character of civil and political rights. It means, as in the case of economic, social and cultural rights, that States Parties must take positive steps to give effect to the Covenant rights and to enable individuals to enjoy their rights.<sup>25</sup> This duty of performance implies the obligation to adopt the necessary legislative and other measures under Article 2(2), to provide an effective remedy to victims of human rights violations pursuant to Article 2(3), and to safeguard certain rights institutionally by way of *procedural guarantees* or the establishment of relevant *legal institutions*. For instance, the right to a fair trial in criminal cases or suits at law ensured by Article 14 requires States Parties to establish a sufficient number of courts and tribunals and to regulate their procedure in a manner that at least fulfils the minimum guarantees set forth therein. Similar procedural and institutional obligations might be derived, for example, from Articles 1, 9, 10, 13, 15, 16, 20, 23, 24, 25, 26 and 27. The wording of Article 2(1) indicates, however, that the obligation to ensure the rights by means of positive State action applies to all rights listed in the Covenant. Even a so-called classic negative right as the prohibition of torture contains the positive obligation to take effective steps for the prevention of torture (by means of education, procedural guarantees, etc.) and for the investigation of alleged acts of torture. As has been shown in a case against Uruguay in the introduction, this positive obligation may still apply even to a new government more than ten years after the actual act of torture.

<sup>21</sup> See DRZEWICKI, K.; KRAUSE, C. and ROSAS, A. (Eds.): *Social Rights as Human Rights: A European Challenge*, Abo Akademi University, Turku, 1994; EIDE, A.; KRAUSE, C. and ROSAS, A. (Eds.): *Economic, Social and Cultural Rights. A Textbook*, Martinus Nijhoff Publishers, Dordrecht, 1995; CRAVEN, M.: "The International Covenant on Economic, Social and Cultural Rights", en HANSKI, R. and SUKSI, M. (Eds.): *An Introduction to the International Protection of Human Rights. A Textbook*, Abo Akademi University, Turku, 1999, pp. 101-124. See also the contribution by José Mila in this publication.

<sup>22</sup> For the progress in drafting such an Optional Protocol, see COOMANS, F. And VAN HOOF, F.: "The Right to Complain about Economic, Social and Cultural Rights", *SIM Special N.º 18*, Utrecht, 1995.

<sup>23</sup> For the following, see NOWAK, M.: *UN Covenant...*, *op. cit.*

<sup>24</sup> See below, section 4 of this article.

<sup>25</sup> See General Comment 3(13), para. 1. UN Doc. CCPR/C/21/Rev.1, p. 3; UN Doc. HRI/GEN/1/Rev.3, pp. 4-5.



The obligation to ensure also implies a basic *obligation to protect* individuals against certain interferences with their civil and political rights by other private individuals, groups or entities. As in the case of other State obligations, these “horizontal effects” depend, of course, on the precise wording of the given right. Some provisions, such as the prohibition of slavery in Article 8 or the prohibition of advocacy of racial hatred in Article 20, apply primarily on the horizontal level. In other provisions, the formulation “right to the protection of the law” (e.g. Articles 6, 17, 23, 24 and 26) indicates a special requirement to take positive measures for the protection of children, the family or the rights to life, privacy and equality. For instance, Uruguay, Colombia and the Dominican Republic have been held responsible for cases of *disappearances* with respect to the right to life without any proof of the involvement of governmental agents.<sup>26</sup> In *Delgado Paéz v. Colombia*, a case concerning a teacher who fled the country because of death threats, the Human Rights Committee found a violation of Article 9(1) on the ground that the Colombian Government had not taken appropriate measures to protect him and thereby ensure his right to *personal security*.<sup>27</sup>

#### 4. Derogation and limitation clauses

As noted above, only very few human rights, such as the prohibition of torture, slavery and retroactive criminal laws, can be considered as absolute. But even in this case, the definition of which acts actually constitute torture or slavery is controversial and might, therefore, leave a certain discretion to States Parties. For example, the European Court of Human Rights considered even comparably mild forms of corporal punishment on the Isle of Man as degrading punishment in violation of Article 3 of the ECHR,<sup>28</sup> but it is arguable whether other regional or universal treaty monitor-

<sup>26</sup> Communication No. R.7/30 (1978), *Irene Bleier Lewenhoff and Rosa Valiño de Bleier v. Uruguay*, Report of the Human Rights Committee, UN General Assembly, Official Records, Thirty-seventh Session, Supplement No. 40 (A/37/40), pp. 130-136; Communication No. 107/1981, *Elena Quinteros and M. C. Almeida de Quinteros v. Uruguay*, Report of the Human Rights Committee, UN General Assembly, Official Records, Thirty-eighth Session, Supplement No. 40 (A/38/40), pp. 216-224; Communication No. 161/1983, *Herrera Rubio v. Colombia*, Report of the Human Rights Committee, UN General Assembly, Official Records, Forty-third Session, Supplement No. 40 (A/43/40), pp. 190-198; Communication No. 181/1984, *A. and H. Sanjuan Arévalo v. Colombia*, Report of the Human Rights Committee, UN General Assembly, Official Records, Forty-fifth Session, Supplement No. 40 (A/45/40), pp. 31-37; and Communication No. 449/1991, *Barbarin Mojica v. the Dominican Republic*, Report of the Human Rights Committee, Vol. II, UN General Assembly, Official Records, Forty-ninth Session, Supplement No. 40 (A/49/40), pp. 142-145. See also *supra*, note 7.

<sup>27</sup> Communication No. 195/1985, *W. Delgado Paez v. Colombia*, Report of the Human Rights Committee, Vol. II, UN General Assembly, Official Records, Forty-fifth Session, Supplement No. 40 (A/45/40), pp. 43-49. See also, Communication No. 314/1988, *Peter Chiiko Bwalya v. Zambia*, Report of the Human Rights Committee, UN General Assembly, Official Records, Forty-eighth Session, Supplement No. 40 (A/48/40), pp. 52-56; and Communications No. 449/1991, *Barbarin Mojica v. the Dominican Republic*, and No. 468/1991, *Angel N. Oló Bahamonde v. Equatorial Guinea*, Report of the Human Rights Committee, Vol. II, UN General Assembly, Official Records, Forty-ninth Session, Supplement No. 40 (A/49/40), pp. 142-145 and 183-188.

<sup>28</sup> *Tyrer* case, judgment of 25 April 1978, Publications of the European Court of Human Rights, Series A, No. 26.

ing bodies would apply an equally strict standard in a similar case in, for example, an Islamic or African State.<sup>29</sup>

Most of the Covenant rights may be subject to reservations, derogations, restrictions and limitations in conformity with the relevant provisions.<sup>30</sup> These measures were designed to leave States Parties a fairly broad "margin of appreciation" in order to adapt universal human rights standards to their respective political, economic, social and cultural circumstances. In other words, these limitation clauses provide a fair balance between the allegedly contradictory aims of universalism and cultural relativism.

In accordance with Article 19(c) of the Vienna Convention on the Law of Treaties, *reservations* made by States at the time of ratification or accession are permissible to the extent that they are compatible with the object and purpose of the Covenant. In practice, roughly half of the States Parties submitted a total of more than 150 reservations and declarations of interpretation on many substantive and procedural provisions in the Covenant and the First Optional Protocol.<sup>31</sup> No reservation has so far been submitted to the Second Optional Protocol.<sup>32</sup>

In November 1994, the Human Rights Committee adopted a highly controversial *general comment* on issues relating to reservations.<sup>33</sup> According to this opinion, provisions that represent customary international law and various other provisions of the Covenant may not be the subject of reservations. Furthermore, the Committee expressed its belief that the respective provisions of the Vienna Convention on the Law of Treaties are inappropriate to address the problem of reservations to human rights treaties on the ground that the principle of inter-State reciprocity has no place. Consequently, the Committee considers itself as the only body entrusted by the Covenant to determine whether a specific reservation is compatible with the object and purpose of the Covenant. If a reservation is considered incompatible, the Committee applies the respective provision to the State Party without the benefit of the reservation. It is not surprising that some States strongly objected to this legal opinion of the Committee.<sup>34</sup>

In time of *public emergency* which threatens the life of the nation (e.g. international armed conflict, civil war, other serious cases of violent internal unrest, natural or human-made disasters), Article 4 of the CCPR authorizes States Parties to take measures derogating from their obligations under the Covenant.<sup>35</sup> In order to prevent the misuse of this *derogation clause*, Article 4 imposes a number of conditions and restrictions: The state of emergency must be officially proclaimed, the government shall immediately inform the Secretary-General of the United Nations of the

<sup>29</sup> See also the "lawful sanctions" clause in Article 1 of the UN Convention against Torture.

<sup>30</sup> KISS, A.C.: "Permissible Limitations on Rights", en HENKIN, L. (Ed.): *op. cit.*, pp. 290-310.

<sup>31</sup> UN Doc. CCPR/C/2/Rev.4.

<sup>32</sup> See the explicit restriction in Article 2(1) of the Second Optional Protocol.

<sup>33</sup> General Comment 24(52) of 2 November 1994, UN Doc. CCPR/C/21/Rev.1/Add.6; UN Doc. HRI/GEN/1/Rev.3, pp. 42-49. See also NOWAK, M.: *op. cit.*, 1995, pp. 379-382.

<sup>34</sup> See the observations of the United Kingdom and the United States in Report of the Human Rights Committee, Vol. I, UN General Assembly, Official Records, Fiftieth Session, Supplement No. 40 (A/50/40), pp. 126-134.

<sup>35</sup> NOWAK, M.: *UN Covenant...*, *op. cit.*

provisions derogated and its reasons for doing so; derogation measures are only permitted to the extent strictly required by the exigencies of the situation, and shall be consistent with other obligations under international law and must not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin. Finally, Article 4(2) prohibits any derogations from the rights to life, prohibition of torture, slavery, servitude, detention for debt and retroactive criminal laws, as well as the rights to recognition of legal personality and freedom of thought, conscience, religion and belief.

In practice, more than 20 States Parties have notified of various derogation measures and justified them with internal difficulties, such as ethnic conflicts, terrorism, guerrilla war or social unrest.<sup>36</sup> In cases of obvious misuse of the derogation clause, such as in Colombia and by the military dictatorships in Chile and Uruguay, the Committee considered the respective derogation measures as violations of the Covenant.<sup>37</sup>

In addition to the possibility of reservations and derogation measures, most Covenant provisions explicitly authorize *restrictions* and *limitations* by States Parties. One technique is the use of the word "*arbitrary*" as, for example, in Articles 6(1), 9(1) and 17(1) of the CCPR. Other provisions, such as Articles 12(3), 13, 18(3), 19(3), 21 and 22(3), contain so-called *limitation clauses* which authorize restrictions on the condition that they are provided by law, consistent with other Covenant rights, that they serve one of the purposes of interference listed in the respective provision and are necessary for achieving this purpose. The decisive criterion for the permissibility of limitations is, therefore, the principle of *proportionality*. As in the case of discrimination, *i.e.* a distinction which is not based on reasonable and objective grounds, the finding of a violation by the Committee thus necessarily implies certain value judgments and often depends on the ability or readiness of the government concerned to submit convincing legal arguments.

## 5. Human Rights Committee

Much has been said about the Human Rights Committee without explaining what it is. Similar to the Racial Discrimination Committee and the Committee on the Rights of the Child, it is not a UN organ in the strict sense but a *treaty monitoring body*, *i.e.* it is established by a treaty (Article 28 of the CCPR) with the task of monitoring the compliance of States Parties with their obligations under this treaty.<sup>38</sup> It consists of 18 *independent experts* who are elected for a period of four years at biannual meetings of States Parties. Although they are nominated and elected by governments for a relatively short period, most members in fact enjoy a surprisingly high independence from "their" governments as compared, for example, to the Sub-Commission on Protection and Promotion of Human Rights. They are usually professors of law or judges in their home countries and represent all geopolitical

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<sup>36</sup> See UN Doc. CCPR/C/2/Rev.4, pp. 58-112.

<sup>37</sup> NOWAK, M.: *UN Covenant...*, *op. cit.*

<sup>38</sup> MCGOLDRICK, D.: *op. cit.*;

regions and the major legal systems.<sup>39</sup> In 1997, the Committee adopted a set of “Guidelines” on the independence of its members.<sup>40</sup>

The first elections were held shortly after the entry into force of the Covenant in 1976, and the Committee started its activities in 1977. It usually holds three sessions of three weeks per year, the spring session in New York, the summer and fall sessions at Geneva. Together with preparatory work and meetings of working groups, every Committee member spends roughly one-quarter of his or her time for the Committee, *i.e.* less than members of the European Court of Human Rights but considerably more than members of other UN treaty monitoring bodies.

The Committee adopts its own *rules of procedure* in accordance with Article 39(2) of the CCPR. Although this provision envisages decisions by majority vote, the Committee in practice usually reaches decisions by *consensus*. Only individual cases are sometimes decided by majority with dissenting and concurring opinions appended. With the exception of the consideration of complaints, the meetings of the Committee are usually open to the public and the media. After initial problems caused by members from Socialist States, the Committee has developed a very fruitful cooperation with non-governmental organizations (NGOs). In contrast to the practice of the Committee on Economic, Social and Cultural Rights (which was established by ECOSOC) and the Committee on the Rights of the Child, NGOs are, however, not permitted to officially participate in the Committee’s procedures.

The two main tasks of the Committee are the examination of State reports and individual complaints since until now no inter-State complaint has been submitted.

## 6. Reporting procedure

The submission and examination of State reports in accordance with Article 40 is the only *mandatory* monitoring procedure established by the Covenant. All 156 States Parties are under an obligation to submit an initial report within one year of the entry into force of the Covenant and “thereafter whenever the Committee so requests”. In practice, the Committee established a five years periodic reporting cycle and, in exceptional circumstances, requests supplementary or emergency reports. Recently, the Committee abandoned the mechanical five-year reporting interval in favour of a new arrangement under which it decides, as part of its concluding observations on each State report, the deadline for the submission of the next report.

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<sup>39</sup> As of April 2006, the Committee consists of the following members: Ms. Christine Chanet (Chairperson, France), Mr. Nisuke Ando (Japan), Mr. Prafullachandra Natwarlal (India), Mr. Alfredo Castillero Hoyos (Panama), Mr. Abdelfattah Amor (Tunisia), Mr. Maurice Ahanhanzo Glèlè-Ahanhanzo (Benin), Mr. Edwin Johnson López (Ecuador), Mr. Walter Kälin (Switzerland), Mr. Rajsoomer Lallah (Mauritius), Mr. Michael O’Flaherty (Ireland), Mr. Rafael Rivas Posada (Colombia), Sir Nigel Rodley (United Kingdom), Mr. Ivan Shearer (Australia), Mr. Hipólito Solari Yrigoién (Argentina), Mr. Ahmed Tawfik Khalil (Egypt), Ms. Ruth Wedgwood (United States of America), Mr. Roman Wieruszewski (Poland), and Ms. Elisabeth Palm (Sweden).

<sup>40</sup> UN Doc. CCPR/C/61/GUI.

The reporting procedure is the major UN treaty monitoring procedure which, in spite of being criticized as inefficient, serves a number of *useful purposes*. First of all, it forces governments to reflect thoroughly on whether and how the Covenant's rights and obligations are actually implemented in their domestic legal systems. After all, the implementation of international human rights treaties is and remains a task of national governments, whereas international monitoring procedures can only fulfil limited functions of assistance and control. The way in which governments in fact carry out their reporting duties varies, of course, considerably. There are still governments who deem it sufficient to submit reports of a few pages which do not go beyond the citation of their respective constitutional provisions. A growing number of governments, however, take their reporting obligations more seriously and submit comprehensive reports covering both the legal and *de facto* situation including also certain problems and difficulties of implementation, as requested by Article 40(2) of the CCPR. Some governments even involve NGOs and independent research institutes in the drafting of their reports in order to enhance their accuracy and objectivity. To make the reporting duty easier for States, and to ensure a certain uniform standard, the Committee adopted guidelines regarding the form and contents of initial and periodic reports.<sup>41</sup> In addition, the United Nations, under its programme of advisory services and technical cooperation, as well as independent human rights institutes, such as the Raoul Wallenberg Institute in Sweden, organize seminars to train government officials in the preparation of reports.

All reports are examined by the Committee in public session, usually in the presence of State representatives. The procedure, although still based on the principle of *constructive dialogue* with governments, has over the years gradually developed into one of critical examination and assessment. Originally, members from Socialist States did not only object to any involvement of NGOs, but also to any evaluation by the Committee or its individual members of the respective State's performance. Legally speaking, this conflict centred on the interpretation of the words "its reports" in Article 40(4) of the CCPR.<sup>42</sup> Today, international and local NGOs openly provide the Committee members with their critical comments on State reports and assessments of the human rights situation in the respective countries; working groups and individual rapporteurs of the Committee thoroughly prepare every examination of State reports, and State representatives often face serious difficulties in answering critical questions referring to failures and shortcomings in the domestic implementation of civil and political rights. Since the mid-eighties it has become common practice for Committee members to submit quasi-concluding personal statements on the human rights situation in the State concerned. As from April 1992, the Committee as a whole adopts by consensus concluding comments on every State report pointing at positive aspects, as well as factors and difficulties impeding the application of the Covenant. Since then these *country-specific comments* were formulated in an increasingly comprehensive and critical manner including principal subjects of concern, as well as detailed suggestions and recommendations. In April 1994, the

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<sup>41</sup> See NOWAK, M.: *UN Covenant on Civil and Political Rights: CCPR Commentary*, Engel Publishers, Kehl, 1993, pp. 558 and 876.

<sup>42</sup> *Ibid.*, p. 568.

Committee finally decided to discontinue its practice of including in its annual reports summaries of its consideration of State reports and now only includes in chapters on each individual country a short introduction and its concluding comments.<sup>43</sup>

In addition to these country-specific comments, the Committee from the very beginning issued *general comments* in accordance with Article 40(4) of the CCPR. They are directed at States Parties in their entirety and reflect the views of the Committee on various substantive and procedural provisions of the Covenant. Since these general comments are adopted by consensus, often after extensive discussions within the Committee, they constitute an important and authoritative source of interpretation. Between July 1981 and January 1999, the Committee published a total of 26 general comments on the reporting procedure itself and on most of the rights contained in the Covenant.<sup>44</sup> Most controversial were General Comment 14(23) of November 1984, in which the Committee expressed its opinion that “the production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity”, and the General Comment 24(52) on issues relating to reservations discussed above.<sup>45</sup>

## 7. Inter-State complaints procedure

The inter-State complaints procedure in Articles 41 and 42 of the CCPR is modelled on similar procedures of the International Labour Organisation (ILO) and under Article 33 of the European Convention on Human Rights, as amended by Protocol No. 11. It was adopted by the General Assembly only after long and highly controversial discussions and was finally watered down to the extent that the procedure hardly deserves to be called a complaints procedure.<sup>46</sup> In contrast to other, more effective, inter-State complaints procedures the one before the Human Rights Committee is *optional*, the role of the Committee is reduced to seeking a friendly solution, and if its good offices fail, an *ad hoc Conciliation Commission* may be appointed only with the prior consent of the States Parties concerned, and this Commission again is only empowered to express its views on the possibilities of an amicable solution which may even be legally rejected by the States Parties. In other words, the whole procedure is nothing more than a *pure mediation or conciliation procedure* without any possibility of a final decision on the relevant human rights issues in the event that the efforts to reach conciliation fail. It is, therefore, not surprising that only 47 of the 156 States Parties have made the optional declaration required by Article 41 and that none of these States has actually resorted to this procedure.

<sup>43</sup> NOWAK, M.: *op. cit.*, 1995, pp. 378-379.

<sup>44</sup> For the texts of the General Comments, see UN Doc. HRI/GEN/1/Rev.3, pp. 2-54; and CCPR/C/21/Rev.1/Add.8/Rev.1.

<sup>45</sup> See *supra*, section 4.

<sup>46</sup> In fact, the Covenant uses the term “communication” rather than “complaint”. For a detailed description of the procedure in comparison to other inter-State complaints procedures in the light of the *travaux préparatoires*, see NOWAK, M.: *UN Covenant...*, 1993, p. 538.

## 8. Individual complaints procedure

Although the individual complaints procedure was even more controversial during the drafting of the Covenant than the inter-State complaints procedure and resulted in the compromise to refer it to a separate Optional Protocol, this procedure, thanks to the quasi-judicial practice of the Human Rights Committee, emerged as the *most effective human rights complaints system at the universal level*.<sup>47</sup> As of April 2006, 105 of the 156 States Parties to the Covenant, including most of the former Communist States of Europe as well as an increasing number of Latin American and African States, were Parties to the First Optional Protocol and thereby submit themselves to the jurisdiction of the Human Rights Committee in cases of alleged individual human rights violations.

The procedure is modelled on the one applied under the European Convention on Human Rights. It is also divided into an admissibility stage and a stage in which an examination on the merits of the case occurs. Since the Committee is the only body involved the duration of the average procedure is, however, considerably shorter than that before the European Commission and Court of Human Rights prior to the merger of these two organs.

In contrast to Article 34 of the European Convention on Human Rights as amended by Protocol No. 11, only individuals, *i.e.* not groups, NGOs or other legal entities, may submit a communication to the Committee under Articles 1 and 2 of the Optional Protocol. As a consequence, the collective right of peoples to self-determination cannot be subject to this procedure.<sup>48</sup> The *admissibility requirements* in Articles 2, 3 and 5 of the Optional Protocol are less strict than those under the European Convention on Human Rights which means in practice that the chances of applicants to pass the admissibility stage are significantly higher before the Committee. Communications must not be anonymous, abusive or incompatible with the provisions of the Covenant *ratione temporis, personae, loci* or *materiae*. There is no time limit but the applicant must first exhaust all available domestic remedies. The simultaneous submission to different complaints procedures is excluded by Article 5(2) of the Optional Protocol, but in contrast to Article 35(2)(b) of the ECHR, an applicant may first go to Strasbourg and afterwards to Geneva (not vice versa). However, many Member States of the Council of Europe followed a recommendation of the Committee of Ministers by submitting a reservation which excludes the possibility of two consecutive international complaints procedures.<sup>49</sup> Although the First Optional Protocol does not contain an explicit authorization similar to Article 35(3) of the ECHR to declare “manifestly illfounded” communications inadmissible, the Committee developed the requirement that allegations must be sufficiently substantiated to be admissible.<sup>50</sup>

<sup>47</sup> Although the First Optional Protocol uses the term “communication” it is justified to speak of a quasi-judicial complaints system. See MCGOLDRICK, D.: *op. cit.*, p. 120; and the different contributions by Nowak mentioned in this article.

<sup>48</sup> Communication No. 167/1984, *Lubicon Lake Band v. Canada*, *supra*, note 11.

<sup>49</sup> See NOWAK, M.: *UN Covenant...*, 1993, p. 700.

<sup>50</sup> *Ibid.*, p. 666.

Under Article 4 of the Optional Protocol communications which have been declared admissible are brought to the attention of the government concerned for its observations on the merits. The entire procedure is *confidential* and based only on *written information* made available by both parties. This explicit restriction in Article 5(1) of the Optional Protocol excludes, for example, oral hearings, the examination of witnesses, or fact-finding on the spot, and often leads to serious problems in establishing the facts. In the absence of adequate replies by the respective government, the Committee often found a violation by basing its decision exclusively on the well-founded allegations of the applicant.<sup>51</sup>

Although not legally binding the Committee's decisions on the merits of the case ("*final views*" in accordance with Article 5(4) of the Optional Protocol) are structured like court judgments, usually well-reasoned and published in full in the Committee's annual reports. Individual members may add their dissenting or concurring opinions to the final views. If the Committee finds one or more violations of the Covenant, it requests the government concerned to provide the victim with an appropriate remedy such as release from detention, adequate compensation and/or the necessary measures to prevent similar violations in the future. In view of the fact that many governments did not comply with these requests and recommendations, the Committee, in July 1990, appointed a *Special Rapporteur for the Follow-Up of Views* with the task of monitoring States' compliance with its views. Nevertheless, the lack of legally binding effects and of any sanctions against non-cooperative governments remain the most serious shortcomings of the individual complaints procedure.

## 9. Conclusions

In 2006 we celebrate the fortieth birthday of the Covenant on Civil and Political Rights and the thirtieth anniversary of its coming into force. Although it constitutes a compromise between the then prevailing Western and Socialist concepts of human rights, it is still a surprisingly *modern document*. Apart from the rights to property and asylum, no important contemporary civil and political right is missing. Most provisions including the derogation and limitation clauses are formulated in a way that strikes a fair balance between the aims of universal application on the one hand, and cultural relativism on the other. More than two-thirds of the present 191 Member States of the United Nations are already Parties to the Covenant which proves that, notwithstanding major differences among contemporary legal, political, economic and cultural systems, the Covenant provides *an excellent framework for a truly universal acceptance* of the human rights of the so-called first generation.

*Less satisfactory is the monitoring system* established by the Covenant and its First Optional Protocol. Thanks to its independent, active and innovative membership, the Human Rights Committee developed the reporting and individual complaints procedures far beyond the narrow limits of their legal framework. Nevertheless, the shortcomings of these procedures are obvious. Apart from its moral and political authority, the Committee lacks any power to force or only induce governments to

<sup>51</sup> *Ibid.*, p. 691.



submit their reports on time, to cooperate in a proper manner and to comply with its recommendations resulting from the examination of State reports or with its final views relating to individual communications. These decisions are neither legally binding nor politically enforceable. The inter-State complaints procedure, which is primarily designed to respond to gross and systematic human rights violations, provides even fewer possibilities for effective action.

Under the European Convention on Human Rights the *judicial functions* of establishing the facts and handing down legally binding decisions and judgments are strictly *separated* from the *political supervision of their execution* which is entrusted the major political body, the Committee of Ministers.<sup>52</sup> Although not perfect, this division of labour has in principle functioned fairly well and was, therefore, upheld and strengthened with the establishment, on 1 November 1998, of a single European Court of Human Rights in accordance with Protocol No. 11. Article 45 of the CCPR and Article 6 of the Optional Protocol which oblige the Human Rights Committee to submit annual reports on its activities through the Economic and Social Council to the General Assembly of the United Nations, are based on a similar philosophy. In practice, both political bodies failed, however, to give force to the country-specific recommendations and views of the Committee.

Much has been said, in the context of the new international order following the Cold War, about the decisive move from the mere protection to an effective enforcement of human rights and a comprehensive policy to prevent violations of human rights. Like country-specific and thematic rapporteurs and working groups of the Commission on Human Rights, the Committee as the most important treaty monitoring body made a significant contribution to the development of universal human rights standards and their supervision by international experts. Now it is up to the competent political bodies to ensure that governments in fact comply with the decisions and recommendations of the relevant expert bodies and adopt appropriate measures for the domestic implementation of their obligations under the Covenant and other international human rights treaties.

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<sup>52</sup> Article 46 of the ECHR, as amended by Protocol No. 11.



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

José Milá Moreno

**Summary:** 1. **Origins:** 1.1. Antecedents 1.2. The ICESCR  
2. **Content** 3. **Mechanisms of protection:** 3.1. Periodical reports 3.2. The Optional Protocol Project: individual communications.

## 1. Origins

### 1.1. Antecedents

The emergence and evolution of human rights is based on the idea of human dignity and the values which make it up. Freedom, equality, solidarity, and the common good are all values which determine the integral dignity of the human being, communities, and humankind in general, which have all been achieved through a process of great struggles throughout history, which have still not ended. The evolution of human rights is influenced, therefore, by events which determine the subjects of reflection of humanity concerning its highest aspirations about the values which constitute the concept of human dignity<sup>1</sup>.

With this in mind, this article will focus on an analysis of the International Covenant on Economic, Social, and Cultural Rights (ICESCR), even though the historical origins of the rights set out in the Covenant are detached from previous events. For this reason, it will be necessary to briefly refer to these antecedents to the universal recognition of the economic, social, and cultural rights which was made by the Covenant under discussion.

In effect, the first expressions of these rights appeared in the Constitution of the First French Republic of 24<sup>th</sup> June 1793<sup>2</sup>. In its Article 17 express mention was made of the right to choice of employment, and in its Article 21 the first formulation of what constitutes a dignified life was consecrated; according to this, public charity is a sacred debt of society for the guarantee of subsistence for its less well off citizens, be this by offering work or any other means of subsistence for those

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<sup>1</sup> ANNAN, Koffi, *Universal Declaration of Human Rights Illuminates Global Pluralism and Diversity: Fiftieth Anniversary Year of the Universal Declaration of Human Rights*, Tehran, 10th December 1997. This document can be found at <http://www.unhchr.ch/Hurricane/Hurricane>.

<sup>2</sup> DE CASTRO CID, Benito, *Derechos Económicos, Sociales y Culturales*, Universidad de León, León, 1993, p. 50; AMUCHASTEGUI, J.G., *Louis Blanc y los orígenes del Socialismo Democrático*, Centro de Investigaciones Sociológicas, Madrid, 1989. For further analysis of these first expressions of economic, social, and cultural rights, see: DENIS, Henri, *Historia del Pensamiento Económico*, Ariel, Barcelona, 1970, pp. 287-315; CAMACHO, Ildefonso, *La Doctrina Social de la Iglesia*, Paulinas, Madrid, 1991, pp. 50-55.

most incapacitated. For its part, the Article 22 of this Constitution set out the right to education, stating that instruction is necessary for all people, and therefore society should make education available to all. Later, the Constitution of the Second French Republic of 4<sup>th</sup> November was to further and more deeply develop these rights.

This acceptance of the basic principles of second generation rights was to be reinforced by the appearance of a workers' movement which promoted the consecration of socio-labour rights, such as rights to appropriate working conditions, to strike, and to assembly and trade union membership<sup>3</sup>. Similarly, the social doctrine of the Catholic Church, expressed in the Papal Letter *Rerum Novarum* of Pope Leon XIII of 10<sup>th</sup> January 1890, provided significant support to aspects such as protection of the work of women and children, the social aspects of salary, and basic social security<sup>4</sup>.

It was to be in the Constitutions of Mexico in 1917 and in that of the Weimar Republic in Germany that these ideals became true positive rules<sup>5</sup>, and gave rise to a constitutional current that was to quickly be extended across the whole world<sup>6</sup>. Unfortunately, this consecration of economic, social, and cultural rights was generic, and, as such, conditioned to a previous legislative development, as well as separately to civil and political rights.

From the time of the Constitution of the International Labour Organisation (ILO)<sup>7</sup>, a slow process of projecting these rights from the national scale onto the international scale began; to it was added the statement of F.D Roosevelt, the then

<sup>3</sup> For more analysis, see DOLLEANS, Édouard, *Historia del Movimiento Obrero*, Zero, Madrid, 1969, book II.

<sup>4</sup> Among the most significant documents which make up the Social Doctrine of the Church are: *Rerum Novarum* (Leon XIII, 10/1/1890), *Inmortale Rei* (Leon XIII, 1/11/1885), *Quadragesimo Anno* (Pius XI, 15/5/1931), *Mater et Magistra* (John XXIII, 15/5/1961), *Pacem in Terris* (John XXIII, 11/4/1963), *Constitución Pastoral Gaudium et Spes* (John XXIII, 7/12/1965), *Populorum Progressio* (Paul VI, 26/3/1967), *Octogesima Adveniens* (Paul VI, 14/5/1971), *Laborem Exercens* (John Paul II, 14/9/1981) y *Sollicitudo Rei Socialis* (John Paul II, 30/12/1987).

<sup>5</sup> The following rights, among others, were established in the 1917 Mexican Constitution: the right to education (article 3), the right to a fair salary (article 5), restrictions to property (article 27), the right to form trade unions (article 16), the right to strike (article 17). For its part, the Weimar Constitution consecrated rights to education (article 120), protection of youth and the family (article 119 and 122), health (article 161), form trade unions (article 159), minimum social rights (article 162).

<sup>6</sup> NÚÑEZ RIVERO, Cayetano; MARTÍNEZ, Rosa María, *Historia Constitucional de España*, Universitas, Madrid, 1997, p. 220, show how the Weimar and Mexican Constitutions were taken into consideration by Jiménez de Asúa from the moment he formed the Commission charged with the task of writing the Spanish Constitution Project of 1931. Also VILLARROYA, Joaquín Tomas, *Breve Historia de Constitucionalismo Español*, Centro de Estudios Constitucionales, Madrid, 1994, pp. 122-123, highlights the influence of this constitutional current throughout the whole process of the writing of the Spanish Constitution in 1931. Other constitutions which did the same are those of Chile in 1921, Ireland in 1937, Peru in 1933, Romania in 1933, and the Kingdom of Serb-Croatia in 1921. For more detail, see PECES-BARBA, Gregorio, "Los Derechos Económicos, Sociales y Culturales: Su Génesis y Su Concepto", *Revista de Derechos y Libertades*, n.º 6, year III, February 1998, p. 22.

<sup>7</sup> For a more detailed analysis of the contribution of this organisation to the configuration of the rights mentioned in the ICESCR, see LEARY, Virginia, "Lessons from the Experience of the International Labour Organization", in ALSTON, P., *United Nations and Human Rights*, Clarendon Press, Oxford, 1993.

President of the United States, who proclaimed “freedom from want” as one of the four fundamental freedoms which should be guaranteed to all people so as to achieve the full development of their human dignity<sup>8</sup>.

Because of all these factors, the preamble of the United Nations Charter makes reference to a “larger freedom” which covers both the traditional civil political rights, as well as the newer economic, social, and cultural rights<sup>9</sup>. In this way, the United Nations Organisation decided to begin by writing a general Declaration on internationally recognised human rights, so as to later be able to produce a binding instrument which would link them, together with international supervision mechanisms. And so second generation rights were recognised in an international framework in the Universal Declaration of Human Rights of 10<sup>th</sup> December 1948<sup>10</sup>. The writing of the Covenants, which detailed the content of the rights expressed in the Declaration and established the international supervision mechanisms, was a task that took sixteen years, due to the confrontations of the Cold War, which will be discussed in more detail later.

## 1.2. *The International Covenant on Economic, Social, and Cultural Rights*

The writing of a truly international treaty which was to establish obligations for States as regards human rights, as well as mechanisms for their supervision, was conditioned by the tension of the Cold War. From 1955, relationships between delegations in the General Assembly of the United Nations reversed from what they were at its time of foundation<sup>11</sup>, as the process of decolonisation meant that a new group of countries became members of the Organisation. This new group had as its primary objective the reaching of social and economic development which would help them to escape from their situations of dependence, poverty, and under-development<sup>12</sup>.

<sup>8</sup> ROOSEVELT, F. “State of the Union Message” in JOHNSON, M. Glen, “The Contribution of Eleanor and Franklin Roosevelt to the Development of International Protection of Human Rights”, *Human Rights Quarterly*, vol. 9, 1987, p. 19.

<sup>9</sup> Compare the articles by Felipe Gómez and Jaime Oraá in this volume. See also SALOMON, A., *Le Préambule de La Charte, base idéologique de l’O.N.U.*, Geneva, 1946, p. 198.

<sup>10</sup> However, the specific guidelines in the Declaration which define economic, social, and cultural rights can be found both in its preamble and in its main part, from article 22 to article 28. Article 22 is vitally important due to the fact that its content radiates through all the other economic, social, and cultural rights, as it establishes that “everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity...”. This section reinforces the expansion of the concept of life and human rights on defining the human being as a social subject; in other words, contextualised within an economic, social, and cultural reality “as a member of society”. In this way, the formal and abstract concept of the human being as an individual and formal entity grows on a worldwide level.

<sup>11</sup> For a detailed analysis of the evolution of political and ideological forces at work in the heart of the General Assembly of the United Nations, see CASSESE, Antonio, “The General Assembly: Historical Perspective 1945-1989”, in ALSTON&STEINER, *International Human Rights*, Clarendon Press, Oxford, 1996, pp. 25-54.

<sup>12</sup> The threat of seeing their sovereignty at risk through an international system of supervision of human rights was not only a worry for Western countries, but also for Soviet bloc countries,

This was the state of affairs when work began in the heart of the Human Rights Commission on the inclusion of economic, social, and cultural rights in the project for an international convention which would set out minimum obligatory international norms for States on the subject; the distance between the two differing views was widened. The capitalist countries proposed the writing of two separate conventions, one for each type of rights, and that economic, social, and cultural rights should be consecrated in the form of programmatic principles. The socialist countries, on the other hand, were in favour of the writing of a single convention for both categories, which would unite the international protection mechanisms in a precise and operative manner.

The discrepancy was such that the Commission decided to ask the opinion of the General Assembly, to find out whether it favoured the adoption of a single convention which encompassed both types of rights, or whether two separate treaties should be adopted. The General Assembly, where the Socialist bloc and the Third World made up the majority, did not hesitate in ordering the writing of a single instrument that would regulate both categories, following the criterion of indivisibility of all human rights which was established in the Universal Declaration of Human Rights. However, at the Commission, on hearing the opinion of the General Assembly, the capitalist countries showed their determination not to accept the writing of a single convention, even threatening to withdraw from the system of international protection which would arise from it. The result of this was that the General Assembly was again consulted on the issue. This time, in the face of huge pressure, a pronouncement was made in favour of writing two separate conventions, in accordance with resolution 543 (VI) of 1953. The writing process ended in 1954, and the final drafts then passed to the General Assembly for discussion and approval. The internal debate at the Human Rights Commission was long and intense, to the point that neither convention was approved until 1966; when they were approved, it was through resolution 2200 (XXI) of 16<sup>th</sup> December 1966 of the General Assembly.

Despite this political and ideological pressure for separating human rights into two categories through regulating them with two different instruments, the preambles of the ICCPR and the ICESCR picked up on the natural interdependence that exists between all human rights. In this way, the preamble common to both Covenants states that "in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights". This forecast has been eloquently interpreted by Philip Alston, who has said that "the interdependence principle, apart from its use as a political compromise between advocates of one or two covenants, reflects the fact that the two sets

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which had developed a body of doctrine that was opposed to any type of international control; see Bokor, Hanna, "Human Rights and International Law", in *The Socialist Concept of Human Rights*, Akadémiai, Kiadó, Budapest, 1966, p. 297. Bokor, representative of the School of Budapest, indicated that "protection should be such that it respects the sovereignty of each State", and, concerning individual and collective complaint mechanisms, stated that "elevating the status of the individual to International Law is reprehensible,... it is an excellent medium for interfering in internal affairs".

of rights can neither logically nor practically be separated in watertight compartments"<sup>13</sup>.

Against all this background, the ICESCR signified a transcendental step in the history of economic, social, and cultural rights, being a code of universal and binding legal rules for those States ratifying it, who had accepted being part of an international supervision system which is still working towards being perfect, but has definitively broken with the barrier of state sovereignty.

Now, economic, social, and cultural rights have achieved formal recognition as fundamental rights which are formally positivised on a universal level and, as such, are subject to international control above and beyond the sovereignty and domestic affairs of States. However, new eras bring with them new political, economic, and legal challenges for the effective realization of these rights.

## 2. Content

Below, we will focus on an analysis of the content of the ICESCR, the rights and obligations it sets out. Firstly, we must highlight the fact that the Covenant deals with rights such as those to work (Articles 6 and 7), to form trade unions (Article 8), social security (Article 9) protection of the family, women, and children (Article 10), the achievement of an adequate standard of living (Article 11), health (Article 12), education (Articles 13 and 14), culture (Article 15)... In this way, an international legal code has been set up, which deals with minimum and concrete duties and obligations as regards economic, social, and cultural rights, which the State and the international community have the duty to respect.

However, the part which causes most interest and difficulty as regards the content of this international instrument is found in the nature of the obligations which States assume regarding the realisation of the aforementioned rights. These obligations are dealt with in article 2.1 of the Covenant in the following way:

"Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".

At the heart of this norm lies the debate concerning the substantial elements of the obligations derived from the Covenant, namely the following: justifiability, progressive nature, and the conditioning of these obligations according to whether or not sufficient economic resources are available. These aspects will be dealt with below.

Firstly, and generally, the justifiability of a right consists in its capacity to be invoked before judicial or quasi-judicial bodies so as to obtain their protection when

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<sup>13</sup> STEINER&ALSTON, *International Human Rights in Context*, Clarendon Press, Oxford, 2000 (2<sup>nd</sup> edition), p. 247.

faced with a concrete case of violation. Despite those who have an alternative opinion concerning the legally binding nature of the rights in the ICESCR<sup>14</sup>, the Committee on Economic, Social, and Cultural Rights (CoESCR) has dealt with this issue in its General Comment number 3, in which it analyses the nature of the obligations established under the aforementioned article 2.1 of the Covenant. In this interesting Comment, the CoESCR has stated that at least some of the elements of economic, social, and cultural rights set out in the Covenant can be justifiable and immediately put into force by States. It is for this reason that "any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain"<sup>15</sup>. Similarly, the Committee has indicated which of the rights are those which States which are members of the Covenant are obliged to execute immediately due to their legally binding nature, both internationally and nationally; they are: equality in the enjoyment of the rights in the ICESCR between men and women (Article 3); the right to just and favourable working conditions which ensure, as minimum standards, equal remuneration for work of equal value, without any kind of discrimination (Article 7 a) i), the right to form and join trade unions of his choice, and the right of trade unions to establish national federations or confederations, the right to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society, and, finally, the right to strike (Article 8)<sup>16</sup>.

Applying this interpretation under analysis to concrete cases, the CoESCR has stated in its Final Observations<sup>17</sup> the uniform and repeated criterion that member States must open up their mechanisms of internal judgement so as to be able to permit "the rights enshrined in the Covenant to be invoked before the tribunals"<sup>18</sup>. This interpretation has the support of a significant proportion of international lawyers<sup>19</sup>.

In conclusion, it appears that new concrete aspects of economic, social, and cultural rights are being revealed, which make them susceptible to both internal and international justifiability, and, as such, it does not appear to be justifiable to deprive these rights of the mechanisms of supervision and justifiability that are enjoyed by civil and political rights.

<sup>14</sup> See CRANSTON, M., *What are Human Rights?*, BodyHead, London, 1973; VIERDAG, E.W., "The Legal Nature of the Rights Granted by the International Convention on Economic, Social and Cultural Rights", *Netherlands Yearbook of International Law*, vol. 9, n.º. IX, 1978, pp. 69-105; BOSSUYT, M., "La distinction juridique entre les droits civil et politiques et les droits économiques, sociaux et culturels", *Revue des Droits de L'Homme*, vol. 8, 1975, pp. 783-820.

<sup>15</sup> See General Comment n.º 3, *The nature of states parties obligations (Art. 2, para 1 ICESCR)* (1990), E/1991/23, Annex III, para. 5.

<sup>16</sup> For more examples, see General Comment n.º 3..., *op. cit.*

<sup>17</sup> O'FLAHERTY, Michael, *Human Rights and the UN*, Sweet & Maxwell, London, 1996, p. 67.

<sup>18</sup> CoESCR, *Observación Final: Azerbaiyán*, E/C. 12/1/Add.20, Geneva, 22nd December 1997, par. 13. Along the same lines is *Observación Final: Perú*, E/C. 12/1/Add.14, Geneva, 20th May 1997, par. 25.

<sup>19</sup> On the subject, see "The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights", *Human Rights Quarterly*, vol 9, 1987, p. 124; OPSAHL, Torke, "Instruments of Implementation of Human Rights", *Human Rights Law Journal*, vol. 10, 1989, p.39; GROS ESPIELL, Héctor, *Estudios sobre Derechos Humanos*, Editorial Jurídica Venezolana, Caracas, 1985, pp. 178-179; SCHACHTER, Oscar, "United Nations Law", *American Journal of International Law*, vol. 88, 1994, pp. 13-14; CASSIN, René, "Veinte Años después de la Declaración Universal", *Revista de la Comisión Internacional de Juristas*, vol. VIII, no. 2, 1967, p. 13.



The second element which characterises the obligations of economic, social, and cultural rights refers to their manner of realisation. There are still some who hold that economic, social, and cultural rights, due to their nature, have an exclusively positive nature, and, as such, their realisation must be progressive over time, unlike civil and political rights, which are negative, and are therefore realised immediately, with the abstention of the State. As such, these people conclude that the rights in the ICESCR rights cannot be fully justifiable in the short term<sup>20</sup>.

It is our opinion that this traditional point of view does not have a full understanding of many specific aspects of the obligations concerning economic, social, and cultural rights, such as the true extent of the meaning of the *progressive* realisation mentioned in Article 2.1 of the ICESCR. On the one hand, we have seen above how the CoESCR has identified a series of rights in the ICESCR which must be realised immediately, and which can even be justifiable. On the other hand, however, it cannot be denied the fact that there are rights whose development requires the progressive execution of a series of steps, but even in such cases a long term obligation is not completely lacking. This is the case for rights such as an adequate standard of living, or social security.

It is true that the CoESCR in its third General Comment analyses the progressive character of second generation rights, and indicates that “progressive realisation” should be understood as the recognition that these rights cannot be fulfilled in an immediate time frame, but instead within a determined length of time, but including both *obligations of conduct* as well as *obligations of result*. This requires States to adopt measures which are “... deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant”. These measures are not only legislative, but also administrative, educational, and judicial<sup>21</sup>.

Because of this, and again as stated in the General Comment under analysis, progressive realisation “... should not be misinterpreted as depriving the obligation of all meaningful content”, but instead reaffirms its justifiable character. The *raison d'être* of the Covenant is to establish clear obligations for States parties in respect of the full realization of the rights in question. “It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal”. In this way, “any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources”<sup>22</sup>.

In relation to the legally binding nature of the progressive implementation of the ICESCR, States are under the obligation to maintain minimum standards regarding the enjoyment of the rights set out in the Covenant for those groups which are in a situation of vulnerability. So, for example, in the case of children, the elderly, indigenous groups, and women, there is a particular interest in upholding at all times the realisation of the rights recognised in the ICESCR, due to the fact that, in practice, there are many reasons for these groups not enjoying their rights, especially in times

<sup>20</sup> BOSSUYT, M., “International Human ...” *op cit.*, p. 52.

<sup>21</sup> See General Comment n.º 3..., *op. cit.*, paras. 2 and 3.

<sup>22</sup> *Ibidem.*, para. 9.

of economic crisis. This is again highlighted by the CoESCR in its official interpretation of article 2.1 of the ICESCR, according to which "even in times of severe resources constraints whether caused by a process of adjustment, or economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes"<sup>23</sup>.

As we can see from the Committee's explanation, it is in times of scarcity of resources that most insistence should be made that States make the effort not to prioritise other interests over the economic, social, and cultural rights of the most vulnerable groups. And the fact is that, without doubt, the political will of the authorities charged with the fulfilment of the ICESCR affects its realisation; this is proven at those times when resources are scarce and priorities need to be established for their distribution.

Therefore, it can be understood that, in the diverse studies and analysis on the progress of the ICESCR which have been performed at the Human Rights Commission<sup>24</sup>, the main worry for this progressive realisation of human rights is a lack of political will, more than the legal nature of economic, social, and cultural rights.

However, after all that has been said above, we come to the final element in the obligations regarding economic, social, and cultural rights set out in Article 2.1 of the ICESCR: the use of the phrase "to the maximum of its available resources". This is not a factor which should minimise the universal and legally binding nature of the economic, social, and cultural rights set out in the ICESCR as, given their character as human rights in the legal sense, they are *per se* unconditional and can not be derogated. Because of this, the third General Comment just mentioned indicates that "a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*"<sup>25</sup>.

In addition, as has been shown above, the necessity of having significant economic and technical resources available is now recognised as necessary for the realisation of many of the civil and political rights set out in the ICCPR, and they do not lose their legally binding nature because of this<sup>26</sup>. Certainly, we can ask ourselves if the right not to be tortured or not to suffer inhuman treatment does not also require an economic investment from the State as regards the training of security forces, or if the right to a fair trial would be viable without support from the State of an efficient legal system, where judges, public prosecutors, and lawyers can count on having the material and technical resources they need so as to be able to appropriately make justice.

The above does not mean that there are no real problems which affect the availability of resources for the implementation of economic, social, and cultural rights.

<sup>23</sup> *Ibidem.*, para. 12.

<sup>24</sup> Guissé, Hadji, *Final report on the question of the impunity of perpetrators of human rights violations (economic, social and cultural rights)*, prepared by Mr. El Hadji Guissé, *Special Rapporteur, pursuant to Sub-Commission resolution 1996/24*, E/CN.4/Sub.2/1997/8, 23rd June 1997, para. 116.

<sup>25</sup> See General Comment n.º 3..., *op cit.*, para. 10.

<sup>26</sup> CoESCR, *Concluding Observations: Canada*, E/C.12/1/Add.31, 10th December 1998, para. 4.

It is more than clear that problems can arise at any given moment, but this requires to be taken into consideration very cautiously, as economic impediments to using all resources available at the time are frequently in response more to political priorities than true reasons which are not linked with the will of the States. This prudence is in addition to the opinion held by the CoESCR, which holds that there exist factors which frequently divert funds to other interests, but which do not justify any State's relegation of its duty to fulfil its obligations set out in Article 2.1 of the ICESCR.

It is at this point that it is particularly relevant to highlight how many States, and the international community in general, place political and economic interests above the fulfilment of the ICESCR at times. In the light of International Law, this constitutes an unacceptable excuse for steps backwards or non-fulfilment of the obligations set out in article 2.1 of the ICESCR for its member States.

This means that the economic incapability of a State to execute its commitments for reasons beyond its will is not a justifiable excuse in itself. According to the CoESCR in its third General Comment, "even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. Moreover, the obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints"<sup>27</sup>.

As a result of this interpretation, it would appear difficult for States to avoid or put off their obligations as regards the economic, social, and cultural rights in the ICESCR by explaining them with a lack of economic resources, as the legally binding nature of these rights can not be abolished for economic motives, and still less because other interests or priorities (of any kind) are classed as more important. Among these difficulties are external debt, armed conflict, economic sanctions<sup>28</sup>, fluctuations in international commercial markets<sup>29</sup>, and corruption<sup>30</sup>.

There is currently a trend within some international financial institutions, such as the World Bank, to slowly become more sensitive to the protection of the ICESCR basic rights of the most vulnerable groups in developing countries. Because of this, the World Bank is starting to recognise that the completion of Structural Adjustment Programs should not bring with it a denial of such rights to those citizens involved in them. The World Bank Group has learnt from experience that "the stakes have changed over the years. The Bank group has learned from experience, and been led to shift its de-

<sup>27</sup> General Comment N.º 3, ... *op. cit.*, para. 11.

<sup>28</sup> In CoESCR, *Concluding Observations: Irak*, E/C.12/1/Add.17, 12th December 1997, para. 9, the Committee clearly stated that "while noting that the effect of sanctions and blockades hampers the full implementation of certain rights under the Covenant, underlines that the State party remains responsible to implement its obligations under the Covenant "to the maximum of its available resources" in accordance with article 2, paragraph 1, of the Covenant".

<sup>29</sup> As regards this, the Committee has recognised that the availability of resources in many States in the Third World is directly economically dependent on the fluctuations of international markets of the products on which their economies are based, such as oil. See CoESCR, *Concluding Observations: Libia*, E/C.12/1/Add. 15, 20th May 1997, para. 9.

<sup>30</sup> The Committee mentions the internal corruption present in many States as a serious obstacle for the realisation of the Covenant. See CoESCR, *Concluding Observations: Nigeria ... op. cit.*, para. 3.

velopment approach. Whereas we initially thought that growth would eventually filter down to the poor by osmosis, we have now realized that curbing poverty also requires taking measures to aid the most disadvantaged and most vulnerable groups<sup>31</sup>.

Therefore, the serious problems which affect the availability of the necessary economic resources for the effective implementation of economic, social, and cultural rights do not come about as a result of their nature, as they can not legally be derogated, but as a result of the political and economic conditions being experienced both nationally and internationally. In other words, we are facing the significant problem of the financial and political priorities of the current national and international economic order, which does not favour the practical realisation of the economic, social, and cultural rights upon which a large proportion of humanity depends for a dignified existence<sup>32</sup>.

However, this poses the question of the availability of resources for the realisation of economic, social, and cultural rights. None of these categories should be interpreted only on a national level, but should instead be looked at on a much wider, international, level. This means that we can infer that, if a State effectively shows that it lacks sufficient internal resources for dealing with the economic, social, and cultural rights set out in the ICESCR, its first priority should be to seek international cooperation so as to obtain the necessary resources for the realisation of its right to development, as proclaimed by the Committee in the aforementioned third General Comment<sup>33</sup>.

### 3. Mechanisms of supervision

Due to the political confrontations of the time, the ICESCR has at its disposal a system of supervision and control consisting of the presentation of periodical reports from each State party<sup>34</sup>, differing from the system planned in the ICCPR which, in addition to this mechanism, is reinforced with a contentious mechanism for the resolution of concrete cases through the presentation of both inter-State and individual communications. This discriminatory treatment of economic, social, and cultural rights, compared with the treatment of civil and political rights, to the detriment of their protection mechanisms, represents a clear break in the principle of indivisibility and interdepend-

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<sup>31</sup> WORLD BANK, *Les Lecons du passé, les enjeux de l'avenir*, in DESPUY, Leandro, *Final Report on extreme poverty and human rights*, E/CN.4/Sub.2/1996/13, 28th June 1996, para. 90. In addition, it must be stated that the ILO, with its new focus on lessening the effect of these programs on the enjoyment of human rights, is bringing about the creation of social protection networks, as well as promoting closer dialogue between countries in debt and financial institutions, so as to be able to safeguard social human rights. See also GUISSÉ, H., *op cit.*, para. 31.

<sup>32</sup> Compare DE FEYTER, K.: *Human Rights. Social Justice in the Age of the Market*, Zed Books, London-New York, 2005.

<sup>33</sup> The relationship between the ICESCR and the right to development (recognised in the Declaration adopted by the General Assembly of the United Nations in its resolution 41/128 of 4th December 1986) deserves special mention. In effect, international cooperation in favour of the rights set out in the Covenant requires in practice the fulfilment of what is set out in the same Declaration. As regards this, the Committee notes "the importance of the Declaration on the Right to Development... and the need for States parties to take full account of all of the principles recognized therein". See General Comment n.º 3 ... *op. cit.*, para. 14.

<sup>34</sup> FISCHER, Hugo, "The Human Right Covenants and Canadian Law", *The Canadian Yearbook of International Law*, vol. XV, 1977, p. 64.

ence between the two types of rights, a principle which is set out both in the Universal Declaration of Human Rights and in the common preamble to both Covenants.

Regarding this situation, there is currently a Draft Optional Protocol to the ICESCR which aims to set up a communication mechanism, similar to that in the ICCPR, with the hope of restoring the principle of indivisibility between the two. It should be added that, originally, the supervisory body of the ICESCR was the Economic and Social Council of the United Nations (ECOSOC), which is an institution more political than technical. Nevertheless, it created the CoESCR by virtue of resolution 1985/17, to carry out the supervision of the reports submitted by States parties<sup>35</sup>. The Committee is a technical body, and is made up of independent experts, which means that it is getting more similar to the Human Rights Committee created by the ICCPR, although this latter organisation has a more solid legal base, due to the fact that it is founded on its Covenant; in other words, on an international treaty. We will continue with a brief summary of the system of supervision estipulated by the ICESCR.

### 3.1. *Periodic Reports*

In Articles 16 to 25 of the ICESCR, the procedure for the presentation of reports from States is set out, a procedure which takes place before the CoESCR. This procedure obliges States to present periodic reports to the Committee, indicating the concrete measures they are adopting for the fulfilment of their obligations, as well as any obstacles they face.

The procedure consists in States parties to the ICESCR presenting their reports to the Secretary General of the United Nations who, in turn, passes them on to ECOSOC and the Committee, so that they can be monitored. States are obliged to include in these reports an explanation of concrete measures and developments which they have adopted so as to ensure the fulfilment of their obligation to realise the rights in the Covenant, as well as any obstacles and problems they are facing.

The Committee produces a technical analysis of the fulfilment of the obligations of each State, based on the information provided. For this reason, the obligation to present reports brings with it the duty for the State to provide information that is concrete, reliable, and relevant.

In addition, UN specialised agencies in the areas of these rights are invited to participate in the analysis of the report; for example, the ILO regarding labour rights, or UNESCO regarding the situations of education, science, and culture in the country in question. They will receive a copy of the report and be invited to make any comments they deem helpful. The Committee believes that, within the framework of this procedure, the possibility exists for the formulation of questions for the State whose report is being analysed, so as to arrive at a more comprehensive understanding of the situation.

The end result of this process is that the Committee produces its concluding observations, in which it explains its conclusions regarding whether or not the State in ques-

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<sup>35</sup> For a detailed analysis of the origins of the Committee, see COMISIÓN INTERNACIONAL DE JURISTAS, "Supervisión del Pacto de Derechos Económicos, Sociales y Culturales. Grupo de Trabajo del ECOSOC", *La Revista de la Comisión Internacional de Juristas*, No. 27, 1981, p. 39.

tion fulfils its obligations in accordance with the Covenant. Through this, the Committee has opted for the presentation of the reports being an opportunity for maintaining a *constructive dialogue* with States on these issues, and therefore in its final observations avoids the use of terms of condemnation when a State does not fulfil its obligations, as the report is not a quasi-judicial procedure against the State. However, the Committee does make its observations public, so that the media, NGOs... become aware of them; in this way, the State is submitting itself to criticism from international public opinion in the event of its non-fulfilment of its obligations, which is frequently the instigator of strong pressure on the State to change those of its practices which contravene human rights.

### 3.2. *The Draft Optional Protocol: individual communications*

Faced with the weaknesses of periodic reports as mechanisms for the true control of States' activities in the field of economic, social and cultural rights, and as a measure to reinforce the system of supervision established in the ICESCR, the Committee has developed a draft optional protocol, based on consensus reached between its members in conjunction with United Nations specialized organisations such as the ILO or UNESCO, and also certain NGOs. In addition, the Committee has taken into account the discussions and proposals made at a meeting of a group of experts organised in January 1995 by the Netherlands Institute of Human Rights (SIM, Utrecht)<sup>36</sup>. As a result, at its fifteenth session in 1996, the Committee approved a final report in which it included the text of a draft optional protocol that introduces a new communications mechanism. This project was presented to the Human Rights Commission for consideration and approval<sup>37</sup>. Through this quasi-judicial mechanism, similar to that of the Optional Protocol to the ICCPR, and attempt has been made to offer victims of concrete cases of rights violations the possibility of addressing the Committee so as to ask it to investigate the actions that make up their complaint. If it is determined that the violation effectively did take place, the Committee will mention this to the State in its final decision. This decision is a recommendation addressed to the State, but the State is faced to the possibility of having to undergo the condemnation of world public opinion, which can lead to the adoption of national measures for the avoidance of future transgressions.

The beginning of this process led the Commission to initiate the debate of the project. For this, it needed the Secretary General of the United Nations to ask the governments of States who were members of the ICESCR, as well as a variety of NGOs, for their opinions on the contents of the project, for their consideration and later approval<sup>38</sup>.

However, if the Commission were to eventually adopt the project, it would also be necessary for the Economic and Social Council and the General Assembly to ap-

<sup>36</sup> ICESCR Draft Optional Protocol, 25<sup>th</sup> January 1995. The full text of this project can be seen in ARAMBULO, Kitty, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights*, Hart Intersentia, Utrecht, 1999, pp. 391-408.

<sup>37</sup> CoESCR, *Report on the sixteenth and seventeenth sessions*, E/1997/22, and E/C.12/1996/6, annex IV.

<sup>38</sup> See OHCHR, Report on a Draft Optional Protocol to the ICESCR, E/CN.4/2000/49, January 2000.

prove it. Only then could the phase of ratification by States of the Optional Protocol begin. Once the minimum number of ratifications for establishment had been obtained, the project would go on to become a reality. For this, it would be necessary for the draft protocol to represent an international consensus between two key principles for the existence and efficiency of all mechanisms for the protection on human rights: universality (ratified by the greatest possible number of States) and efficiency (a procedure offering minimum guarantees of protection to individuals as regards their rights)<sup>39</sup>.

Therefore, the Draft Optional Protocol Project presented by the CoESCR to the Human Rights Commission must be a text that is balanced between the two principles. In effect, this project has, up until now, been able to count on the approval and support of the majority of States and organisations which have made pronouncements concerning its usefulness and importance, and there has been a rich flow of ideas for its improvement in all its aspects.

As regards what was said before, until the current times the mechanism of ICESCR communications proposed in the aforementioned project has been able to count on consensus and therefore been able to maintain a quasi-judicial profile in relation with other international instruments. It even incorporates advances made in the environment of human rights in the passing years. Because of this, the Draft Optional Protocol to the ICESCR is an example of the materialisation of progressive and dynamic development in international human rights supervision systems. Below, we will discuss some of the most relevant aspects of this new mechanism for the supervision of economic, social, and cultural rights.

Firstly, it must be highlighted that the Committee has wanted to follow the practices of the Human Rights Committee as regards the legitimate subjects for presentation of communications in accordance with the already existing First Optional Protocol to the ICCPR. We can verify that the procedure proposed by the Committee on Economic, Social, and Cultural Rights refers to individual and collective communications, respectively legitimising "individuals" and "groups" for the presentation of communications as victims. This was established because there was a consensus between members of the Committee when the question was posed as to whether violations of the ICESCR can affect individuals personally, or whether they affect them as part of a collective of individuals<sup>40</sup>.

The recognition of the legitimisation of the individual for the submission of communications as a victim of a violation has not presented major controversy regarding its inclusion in the draft protocol. Instead, much more reflection within the Committee was needed for the legitimisation of a group for making a collective presenta-

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<sup>39</sup> INTERNATIONAL LAW ASSOCIATION, *Report of the Sixty-Seventh Conference (Helsinki Conference)*, ILA, London, 1996, pp. 136-137. In other words, at a certain point in time, the level of efficiency of the supervisory mechanism of the each treaty of human rights will probably be not very demanding, with the aim of diminishing State reluctance and therefore encouraging the greatest possible number of ratifications. Once the necessary ratifications from the international community have been obtained and, as States adapt to being supervised by an international body, the control system will be able to be progressively modified, through the use of different techniques for elevating and reinforcing the level of supervision, therefore offering a higher level of protection to individuals.

<sup>40</sup> CoESCR, E/C.12/1996/SR.45, 5th December 1996, paras. 36-43.

tion. In the end, it was concluded that only in those groups of individuals where all or some of the members allege being victims will a member be able to present the communication on behalf of the disadvantaged group, therefore following the position of the Human Rights Commission in accordance with its resolution 1994/20. On the other hand, in this final case the draft optional protocol also follows the well-developed (by the Human Rights Committee) practice on communications under the Optional Protocol to the ICCPR, which ensures that NGOs are not included within this concept of a group<sup>41</sup> which can be a victim of an alleged violation.

However, apart from the above subjects, the draft protocol is open to third parties also being able to submit communications, and it is on this point that the special participation of NGOs is foreseen. In effect, the Committee recognised that it is both desirable and necessary for third parties to be able to present communications on behalf of victims, as long as there exists a link between the victim and the third party representing and defending, be they an individual or a group<sup>42</sup>. The essence of this link consists in "third parties that could demonstrate in some way that they were acting on behalf — and in the interests — of the alleged victim"<sup>43</sup>, which is fulfilled when there is "enough evidence that the third party was, in fact, acting with the *knowledge* and *consent* of the alleged victim"<sup>44</sup>(emphasis added).

On the other hand, it should be highlighted that the projected communications procedure proposes a wide and objective area for applications, which should extend to all the rights in the Covenant. Therefore, after lengthy debate, the Committee decided by majority to adopt an integral focus, under which article two of the draft optional protocol would be applicable to "any of the rights enshrined in the Covenant". Nevertheless, the Committee informed the Human Rights Commission that this agreement was reached despite the existence of a "significant minority" among its members who, for many reasons, maintained their opinion in favour of a restricted focus, through which each State could choose the rights of the Covenant which will be able to be object of individual communications<sup>45</sup>.

As regards what was mentioned above, the draft optional protocol assumes an adequate material focus in qualifying acts treated as "violations" of rights, and not as mere "failure by the State party to give effect to its obligations under the Covenant". Therefore, it expressly states in its second Article that communications should be presented by a "... victim of a violation by the State party concerned of *any of the economic, social and cultural rights recognized in the Covenant*" (emphasis added).

However, the decisive question is whether States parties to the ICESCR are in the position to accept this focus in the communications system which is proposed in the project. Until now, the majority of States and international organisations which have made presentations before the Human Rights Commission on the content of the draft optional protocol have not expressed any opposition to it. Only

<sup>41</sup> See decision of the Human Rights Committee on Communication 163/1984, 1984.

<sup>42</sup> CoESCR, E/C.12/1996/SR.46, 8th January 1997, para. 15.

<sup>43</sup> CoESCR, E/C.12/1996/SR.49, 3rd December 1996, para. 92.

<sup>44</sup> *Ibidem.*, para. 93.

<sup>45</sup> CoESCR, *Report on the sixteenth and seventeenth sessions, op. cit.*, para. 28.



three States have made any comment on the use of the term “violation” in the project. Of these, Lithuania<sup>46</sup> and Croatia have been most positive, considering that “it seems clear that the right of an individual complaint coming under the protocol may affect just the violation of the individual right granted by the Covenant”<sup>47</sup>. Notably, the Czech Republic has been the only State to be opposed, in considering it more appropriate to refer to “failure to ensure the satisfactory application of a provision of the Covenant” instead of “violation”, as the obligations set out in the ICESCR are, according to Article 2.1 of this instrument, different in nature (progressive and conditioned by economic resources) to those obligations set out on the ICCPR<sup>48</sup>.

In our opinion, the focus on “violations” made by the Committee in its draft optional protocol seems to be good, as it reaffirms the principle of the indivisibility of all human rights, and raises the level of respect afforded to these rights, making it more equal to that afforded to civil and political rights. In addition, it follows the current tendency concerning the supervision mechanism of communications at international level, and has the necessary political support from the international community, according to the States and organisations which have expressed themselves to be in favour of it. This terminology is also necessary for the reaffirmation of the idea that we are faced with justifiable rights according to the obligations set out in Article 2.1 of the ICESCR.

Another notable aspect of the protocol is that it sets out a procedure which integrates the most recently developed rules of admissibility of communications in other analogous procedures. Accordingly, the requirements of admissibility of the draft optional protocol was not an issue which gave way to deep debates between members of the CoESCR. In effect, at this point there was a generalised agreement that the draft protocol should follow the same rules set out in the First Optional Protocol to the ICCPR.

However, these requirements are both for the initial reception of the communication, and for the decision of whether or not it is admitted by the Committee. Firstly, the elements necessary *prima facie* are established, so that the Committee can receive any communication submitted to it by individuals or groups, so as to later be able to proceed to determination as to whether it should be admitted and studied further<sup>49</sup>.

Nevertheless, due to the fact that the criteria for the initial reception of the communication and the criteria for admissibility are very similar, the tendency is not to separate them, and the technique employed is generally that of grouping them in one single article<sup>50</sup>, which was considered by the Committee to be convenient for the draft optional protocol to the ICESCR<sup>51</sup>. In this way, the CoESCR sets out in Article 3 of its proposal that:

<sup>46</sup> Lithuania's opinion. See E/CN. 4/2000/49, *op cit.*, para. 29.

<sup>47</sup> Croatia's opinion. See E/CN. 4/1999/112, *op cit.*, para. 2.

<sup>48</sup> Czech Republic's opinion. See E/CN. 4/2000/49, *op cit.*, para. 7.

<sup>49</sup> ARAMBULO, Kitty, *op cit.*, p. 243.

<sup>50</sup> ARAMBULO, Kitty, *op cit.*, p. 243.

<sup>51</sup> CoESCR, *Report on the sixteenth and seventeenth sessions, op. cit.*, para. 32.

- "1. No communication shall be received by the Committee if it is anonymous or is directed at a State which is not a Party to this Protocol.
2. The Committee shall declare a communication inadmissible if it:
- (a) does not contain allegations which, if substantiated, would constitute a violation of rights recognized in the Covenant;
  - (b) constitutes an abuse of the right to submit a communication; or
  - (c) relates to acts and omissions which occurred before the entry into force of this Protocol for the State Party concerned, unless those acts or omissions:
    - (i) continue to constitute a violation of the Covenant after the entry into force of the Protocol for that State Party; or
    - (ii) have effects which continue beyond the entry into force of this Protocol and those effects themselves appear to constitute a violation of a right recognized in the Covenant.
3. The Committee shall not declare a communication admissible unless it has ascertained:
- (a) that all available domestic remedies have been exhausted; and
  - (b) that a communication submitted by or on behalf of the alleged victim which raises essentially the same issues of fact and law is not being examined under another procedure of international investigation or settlement. The Committee may, however, examine such a communication where the procedure of international investigation or settlement is unreasonably prolonged."<sup>52</sup>

Another vital aspect for any quasi-judicial procedure is the recognition by the supervisory body of some kind of option for demanding that the State in question adopt provisional measures during proceedings, with the aim of avoiding possible irreparable damage to the alleged victims as a result of an action or omission by the State authorities.

However, we must signal that the determination as to which provisional measures can be applied is based on a discretionary decision of the Committee in each concrete case. It is the Committee who has to consider that, in the case under examination, real and existing fear is justified, believing that serious damage to the supposed victims would be caused if the suggested measures are not adopted. Evidently, it will remain the task of the victims to make the request, and prove to Committee members that the facts are a good basis for the adoption of provisional special measures during the period of communication proceedings.

Therefore, the Committee officially communicated to the Human Rights Commission that, although these measures are not explicitly mentioned in the First Optional Protocol of the ICCPR, this has been subsequently highlighted by a uniform practice by the Human Rights Committee in the application of the Covenant<sup>53</sup>. In this sense, the CoESCR is of the opinion that it is not "necessary or desirable to adopt a blanket provision which would apply in all cases, ... it should be given the discretion, to be used in potentially serious cases involving the possibility of ir-

<sup>52</sup> *Ibidem*, para. 33.

<sup>53</sup> *Ibidem*, para. 36.

reparable harm, to request that interim measures be taken"<sup>54</sup>. As a consequence, the provision proposed by the Committee as Article 5 of the draft optional protocol reads as follows:

"If at any time after the receipt of a communication, and before a determination on the merits has been reached, a preliminary study gives rise to a reasonable apprehension that the allegations, if substantiated, could lead to irreparable harm, the Committee may request the State Party concerned to take such interim measures as may be necessary to avoid such irreparable harm".

The truth is that these measures are included in the rules of procedure adopted by other UN Committees. So, for example, we have the rules 108.9 and 110.3 of the Committee Against Torture, and rule 94.3 of the Committee on the Elimination of all Forms of Racial Discrimination. As regards the Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), which has recently come into force, the interim measures are found in Article 5 of the same Protocol<sup>55</sup>, differing from previous cases where we find rules for procedure which are adopted by the relevant supervisory body. For all this, it is clear that the draft optional protocol to the ICESCR is, on this point, consistent with the progressive development of International Law.

Once the communication has been admitted, the examination phase begins, with a study of the key elements of the events, and the right which they deal with. Among them, perhaps the most notable is the fact that the project incorporates *in loco* visitors into the communications procedure of the protocol. In any case, we can highlight the fact that the inclusion of *in loco* visits in future proceedings of individual communications constitutes an advance in the development of International Human Rights Law. Certainly, these *in loco* visits have normally been included in the framework of investigations into grave or systematic violations of certain human rights, such as the Optional Protocol to the CEDAW. As such, their inclusion in an individual communications procedure such as it is established in the draft optional protocol to the ICESCR, is an innovation in this field.

In this way, then, the Committee's draft optional protocol unites all these aspects in its seventh Article, in the following manner:

"1. The Committee shall examine communications received under this Protocol in the light of all information made available to it by or on behalf of the author in accordance with paragraph 2, and by the State Party concerned. The Committee may also take into account information obtained from other sources, provided that this information is transmitted to the parties concerned for comment.

2. The Committee may adopt such procedures as will enable it to ascertain the facts and to assess the extent to which the State Party concerned has fulfilled its obligations under the Covenant.

3. As part of its examination of a communication, the Committee may, with the agreement of the State Party concerned, visit the territory of that State Party.

<sup>54</sup> *Ibidem*, para. 36.

<sup>55</sup> Compare the contribution on CEDAW and its Optional Protocol by Felipe Gómez in this book.

4. The Committee shall hold closed meetings when examining communications under this Protocol.

5. After examining a communication, the Committee shall adopt its views on the claims made in the communication and shall transmit these to the State Party and to the author, together with any recommendations it considers appropriate. The views shall be made public at the same time”.

Finally, after examination of the whole communication in accordance with the aforementioned rules, the projected communications mechanism should conclude with a final decision regarding whether or not the violations alleged in the communication are legitimate or not, following the consolidated practices of the other UN Committees. In other words, according to this, in the case of the Committee's final decision determining that the alleged violation of the ICESCR *did* take place, States are not obliged to apply the measures recommended by the Committee so as to restore the situation infringed. This has been justified by the Committee because “while there is much to be said in policy terms for such measures, it is correct, as pointed out during the debates, that making such measures legally mandatory would transform the nature of the procedure from a quasi-judicial to a judicial one. In the latter case, more complex procedures in general would be necessary, including a greater variety of procedural safeguards for the parties concerned”<sup>56</sup>, to which we add that it would significantly complicate an arrival at a final consensus.

In this way, the draft optional protocol proposed by the Committee formulates the final decision after the examination of a communication in its eighth Article in the following terms:

1. “Where the Committee is of the view that a State Party has violated its obligations under the Covenant, the Committee may recommend that the State Party take specific measures to remedy the violation and to prevent its recurrence.

2. The State Party concerned shall, within six months of receiving notice of the decision of the Committee under paragraph 1, or such longer period as may be specified by the Committee, provide the Committee with details of the measures which it has taken in accordance with paragraph 1”.

As we can see, in the first paragraph of this provision, express mention is made of the fact that the Committee “may recommend...” measures to the State to repair the damage and to prevent its recurrence in the future, while in the second paragraph referral is made to the follow-up of its decision, showing that the State in question “shall” provide the Committee, within a period of six months, the measures adopted for applying the Committee's decision. This last point has led some doctrine to consider that the application of the Committee's decision is not as optional on the part of States as it could be, as the reference in the second paragraph to the fact that the State “shall” provide a report is made in terms similar to those of an obligation, and in a categorical tone. In the opinion of Kitty Arambulo, the tone of the text is imposing, using very demanding terms, confirming that the Committee desires its decisions have an obligatory nature<sup>57</sup>.

<sup>56</sup> CoEscr, *Report on the sixteenth and seventeenth sessions...*, *op. cit.*, para. 47.

<sup>57</sup> ARAMBULO, Kitty, *op cit.*, p. 315.

One of the questions regarding the draft optional protocol that the Committee leaves unanswered is that of reservations, and, as such, a decision regarding such a controversial issue lies in the hands of the Human Rights Commission. In any case, what was reported on was that in the case of a protocol being adopted whose proposed sphere of application was not wide, but narrow or selective, it would be illogical to later allow reservations against it. As such, only in the case of the adoption of a more integral vision on the issue should the convenience of admitting reservations against substantial aspects of the Covenant be suggested. If it was allowed to States to suggest doubts regarding the procedure that it is attempting to be set up, we would run the serious risk of having a multiplicity of different procedures for each country. And the fact is that the issue of reservations is perhaps the most polemic, and that on which a large part of future debate on the subject within the Human Rights Commission will focus. We have to remain alert, as this directly affects the indivisibility and interdependence of human rights as regards the protection mechanisms to be created.

Finally, we can conclude that the ICESCR currently signifies the most important agreement of universal vocation as regards economic, social, and cultural rights. It is a code of legally binding rules for all States which have ratified it, and have therefore submitted themselves to a system of international supervision. Despite the defects that can be found in it, we should not forget that, like all legal human rights instruments, it is a living reality, in a constant process of evolution and improvement so as to adapt itself to the evolution of reality both at national and at international level.



# The International Convention on the Elimination of All Forms of Racial Discrimination

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**Summary:** 1. Introduction. 2. Evolution of the definition of racial discrimination under the UN Convention on the Elimination of All Forms of Racial Discrimination. 3. Functions, mechanisms and procedures of the CERD Committee. 4. Minorities, indigenous peoples, and women: new challenges in anti-discrimination standards.

## 1. Introduction

The Convention on the Elimination of All Forms of Racial Discrimination was the first human rights treaty elaborated under the UN system known as treaty-body. This Convention was adopted and opened for signature and ratification by United Nations General Assembly resolution 2106 (XX) on the twenty first of December 1965, and entered into force on fourth of January 1969. Its rapid process of elaboration in comparison to the International Covenant of Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights both adopted by the General Assembly in 1966 but not entered into force until 1976, was due to the interest and the political pressure that the African countries drove to the process itself.

Some of these States had already been accepted as members of the UN and their main area of concern was the decolonization process and the issue of racial discrimination in the region. For most of these territories, the decolonization process ended at the eighties, and in the nineties other issues concerning discrimination were appearing as priorities at the UN political agenda.

As a consequence, since 1969 up to 2006 the concept of racial discrimination evolved to include new patterns of discrimination that did not refer exclusively to the question of race. This evolution enriched the definition and the methods for fighting against racism including the cultural and identitarian elements generally linked to any construction of racism.

In this article, I will explain then the evolution in the application and implementation of measures to prevent and fight against discrimination under the UN Convention on the Elimination of All Forms of Racial Discrimination (from now on the Convention). I will also examine the implications that all these measures have had in a new approach to the question on how to live in our societies free from discrimination and on equal standards without considering membership to some cultural or gendered group as a disadvantage.

## 2. Evolution of the definition of racial discrimination under the UN Convention on the Elimination of All Forms of Racial Discrimination

The Convention refers to racial discrimination in Article 1 as:

“any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”.

However, there are two important limitations to this general prohibition: a) distinctions, exclusions, restrictions or preferences made by a State Party between citizens and non-citizens (Article 1.2) and b) special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection (Article 1.4).

Concerning the distinction between citizens and non-citizens, the Committee produced a recommendation in which it is specified that:

“Article 1, paragraph 2, must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights”<sup>1</sup>.

This aspect has been very problematic for States Parties and the Committee itself. The Convention establishes that distinctions between citizens and non-citizens can be made by the States Parties, but at the same time provisions envisaged at Article 5 of the Convention should also be respected. Article 5 guarantees fundamental rights to any person under the jurisdiction of one of the State Parties. This article recognises that States Parties will prohibit and eliminate racial discrimination in all its forms and will guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law and to the enjoyment of fundamental human rights. These rights listed in the article are, among others, the right of everyone to enjoy equal treatment before tribunals; the right to marriage, the right to freedom of movement and residence; the right to freedom of thought, conscience and religion; the right to work; the right to housing or the right to public health, medical care and social security.

Provisions of Article 5 refer both to civil and political rights and economic, social and cultural rights, and establish the obligation to provide the rights guaranteed in this article to every person under the jurisdiction of the State Party. However, different treatment based on citizenship is allowed in Article 1 and, as a consequence, the relation between these two articles is often tense, difficult and complex. The assumption of the Committee is that there is a legal possibility to regulate different rights

<sup>1</sup> UN Committee on the Elimination of Racial Discrimination, General Recommendation No. 30 on Discrimination Against Non-Citizens, 1<sup>st</sup> October 2004, para. 2.



for migrants without violating fundamental rights recognised in Article 5. However, this question has become increasingly problematic and a close examination to the proceedings of the reporting procedure reveals that the Committee is very much concerned about Alien Laws and migrant legal regulations at the State Parties.

For this reason in 2004, the Committee produced a recommendation on discrimination against non-citizens to try to clarify some of these aspects. However, the criteria set up by the Committee on this issue are still very vague and they are based on a case by case approach.

“Differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim”<sup>2</sup>.

The concern about the relationship between discrimination and citizenship or immigration status has not been exclusively addressed by the Committee. In the case of immigrants and asylum-seekers in waiting areas at airports, ports and borders, the Special Rapporteur, Mr. Doudou Diène, on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance has recommended to the General Assembly:

“To give particular attention to the discriminatory treatment of groups in waiting and holding areas at airports, ports and borders, and to recommend that Member States consider taking the necessary measures to prevent such areas from becoming so-called no rights zones. In this context, the Special Rapporteur:

- Recommends that training courses for border police include training on national and international standards relating to the prohibition of racial discrimination and xenophobia.
- Encourages Governments to refrain from adopting measures motivated by ‘security threats’ which could result in discrimination, in particular discrimination based on race, colour, language, religion, nationality, or national or ethnic origin.
- Also encourages Governments to take urgent measures to ensure that any person who is in a waiting area and could be expelled is given basic guarantees. Such guarantees must include respect for fundamental human rights, including the right to obtain legal assistance.
- Reminds Governments of their obligation to ensure that no person is sent back to a country where they could be subject to fundamental human rights violations”<sup>3</sup>.

These recommendations show the approach that both the Committee and Special Rapporteur have adopted in relation to the issue of the rights of non-citizens. In this regard, a State can take any necessary measure to control and reduce access

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<sup>2</sup> UN Committee on Elimination on Racial Discrimination, General Recommendation No. 30 on Discrimination Against Non-citizens, 1<sup>st</sup> October 2004, para. 4.

<sup>3</sup> The Fight against Racism, Racial Discrimination, Xenophobia and Related Intolerance and the Comprehensive implementation of and Follow-up to the Durban Declaration and Programme of Action, A/60/283, 19<sup>th</sup> August 2005, p. 18, para. 56.

of immigrants to the country. The procedure and the measures applied to these persons will not be in contradiction to International Law of Human Rights as far as basic international human rights standards are respected. The question is then how a State can comply with international human rights standards while applying national provisions on waiting areas in airports, ports and borders. This problem reminds as a delicate issue in which the balance between national and International Law has to be struck nationally in relation to human rights standards.

On the other hand, the Convention establishes that measures adopted to secure the advancement of certain racial groups or ethnic groups might not constitute racial discrimination. These kinds of actions are considered necessary in order to permit the group to have access on equal bases to resources and goods available to other persons or groups in the State. Affirmative actions and national laws exceptions in favour of cultural or religious groups have been included as measures to fight against discrimination. The type of actions that the Committee can recommend under this heading varies from case to case. As I will mention, the Committee's approach to indigenous peoples reflects pretty well the evolution on this area and how recommendations to adopt specific measures for the exclusive benefit of one group are considered as measures to prevent racial discrimination.

This perception is not exclusive from the Committee. In July 2004, the Special Rapporteur on Contemporary Forms of Racism, Mr Doudou Diène, visited Guatemala, Honduras and Nicaragua. In the concerning on his mission to Nicaragua, the Special Rapporteur encouraged the government to demarcate and restore property rights of indigenous peoples and to implement the Bilingual Intercultural Education Programme<sup>4</sup>. These measures can be easily understood as positive actions that the government should take in order to place indigenous peoples on the same standing as the rest of the population.

However, we must take into account that on the issue of indigenous peoples, the Committee has also said that different treatment can mean discrimination when there is an application of different criteria in order to determine the existence and recognition of some ethnic groups or indigenous peoples and not others<sup>5</sup>.

In recent years, the Committee has developed new applications and concerns on Article 1, such us the situation of Afro-descendants. In 2002, the Commission of Human Rights, in its resolution 2002/68 of 25<sup>th</sup> April 2002, created a working group of experts on people of African descent<sup>6</sup> and the Committee produced its recommendation on this issue on first November 2002. The Committee defined Afro-descendants as those persons who suffer discrimination based on caste or analogous inherited systems. Some of the characteristics of persons belonging to this group are:

<sup>4</sup> E/CN.4/2005/18/Add.6, 4<sup>th</sup> March 2005, p. 12.

<sup>5</sup> General Recommendation No. 24 on reporting of persons belonging to different race, national/ethnic group or indigenous peoples (Article 1), 27<sup>th</sup> August 1999, para. 3.

<sup>6</sup> In 2002, a regional seminar on Afro-descendants in the Americas was held in Honduras. This seminar was organised by UN working Group on Minorities in cooperation with Organización de Desarrollo Étnico Comunitario. Final recommendations of this seminar can be found at E/CN.4/Sub.2/2002/40, 10 June 2002.

“Inability or restricted ability to alter inherited status; socially enforced restrictions on marriage outside the community; private and public segregation, including in housing and education, access to public spaces, places of worship and public sources of food and water; limitation of freedom to renounce inherited occupations or degrading or hazardous work; subjection to debt bondage; subjection to dehumanizing discourses referring to pollution or untouchability; and generalized lack of respect for their human dignity and equality”<sup>7</sup>.

This recommendation on Afro-descendants collects a series of specific measures that should be applied to this group in order to avoid new patterns of discrimination. The result of the evolution of the definition of racial discrimination has been the inclusion of new aspects and concerns into this category. The definition of Article 1 has shown sufficient flexibility in order to adapt to new forms of discrimination. In this regard, the definition is not close and it is open to new contributions.

### 3. Functions, mechanisms and procedures of the CERD Committee

The Committee is one of the organs that made up the UN treaty-bodies system. Eighteen independent experts constitute this Committee that monitors the implementation of the provisions of the Convention.

In order to fulfil this mission, all States parties are obliged to submit regular reports to the Committee on how the Convention is applied in their countries. States must report initially one year after acceding to the Convention and then every two years. Over the years, the Committee has had to face constant delays on behalf of some States that do not submit their reports on time. Answering to this situation, the Committee decided in 1991 that they would examine reports overdue by five years or more on the basis of information included in last reports submitted by the State Party concerned. At the sixteenth meeting of chairpersons of the human rights treaty bodies held in Geneva in June 2004, the chairperson of the CERD Committee declared that regarding non-reporting, one third had been overdue for more than five years and 6 reports were more than 20 years overdue. He also stated that the review procedure had motivated several States Parties to produce reports<sup>8</sup>.

In 1996, the Committee also decided that States Parties whose initial reports were overdue by five years or more, would also be subjected to this procedure based on information submitted by the State Party to other organs of the United Nations or, even, in severe cases, using other sources, including non-governmental ones.

Finally, in 2004, the Committee decided that concluding observations adopted under, what it is called, the review procedure, would be considered as provisional and would be communicated confidentially to the State Party concerned. These con-

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<sup>7</sup> General Recommendation n.º 29 on Article 1, paragraph 1 of the Convention (Descent) 1 January 2002, para. 1.

<sup>8</sup> Effective implementation of international instruments on human rights, including reporting obligations under international instruments of human rights, note by the Secretary-General, A/59/254, 11<sup>th</sup> August 2004, p.6, para. 9.

cluding observations would be adopted as definitive in the case of non-compliance of the State Party with the submission of the overdue report. This was the case, among others, of Saint Lucia that was subjected to this procedure in 2004<sup>9</sup>.

The examination of the State Party report by the Committee is conducted under a constructive dialogue. The State Party delegation normally opens the session with an oral presentation of the report after which members of the Committee submit questions and comments based on the presentation and the information provided by the State. Non governmental organisations do not have an official role in this procedure, but it is commonly accepted that they can submit an alternative report on the situation of racial discrimination in the country subjected to examination.

The quality, extension and number of NGOs participants in the elaboration of the alternative reports vary from country to country<sup>10</sup> and there are no guidelines that NGOs have to follow in order to prepare an alternative report. In the last years, and due to the extension of this procedure, some NGOs have produced different documents with very useful information about how to prepare and submit an alternative report<sup>11</sup>.

Once the alternative report is prepared, it is usually sent to the Secretariat of the Committee and to the NGO ARIS (Anti Racism Information Service) who distribute it among members of the Committee.

In other treaty bodies organs, pre-sessional working groups are set up to prepare documentation and discussions on some of the aspects of the Committee work in that session. This pre-sessional working groups are held in private sessions and NGOs might be invited after a request. In the case of the CERD Committee, pre-sessional working groups do not exist and previous briefings with members of the Committee are the only possibility for NGOs to make oral presentation on the State Party concerned before the Committee members. These briefings normally take place previous to the examination of the State Party report. Translation is not provided and different NGOs can be gathered in the same room in order to make very short and precise presentation of their alternative reports. In this kind of briefings it is important to co-ordinate the presentation among the NGOs in order to give a coherent picture of situation of discrimination in the country.

When the Committee examines the report of the State Party they produce a recommendation called concluding observations in which the Committee mentions positive aspects, areas of concern and recommendations. These recommendations are published as official documents of the UN but the Committee also suggests the

<sup>9</sup> Report of the Committee on Elimination of Racial Discrimination, General Assembly, Supplement No. 18, (A/59/18) pp. 82 and ff.

<sup>10</sup> There is a long list of NGOs that have submitted alternative reports to the Committee. As example of this productive activity we can mention some of them. In 2003, nineteen NGOs from Sweden participated in the alternative report on the situation of racial discrimination in Sweden. Information on this alternative report can be founded in <http://www.sfn.se/svefn/files/CERD2004.pdf>, Accessed 31/10/2005. The Asian Legal Resource Centre also submitted a report concerning Nepal in 2003, <http://www.ahrchk.net/ma/mainfile.php/0205/76/>. Accessed 31/10/2005. Transnational Racial Justice Initiative elaborated a report in 2001 titled "The persistency of white privilege and institutional racism in US policy" <http://www.arc.org/trji/> Accessed 31/10/2005.

<sup>11</sup> See, TANAKA, ATSUKO; NAGAMINE, YOSHINOBU, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Guide for NGOs*, Minority Rights Group and IMADR, London, 2001.

State Parties to publish them in their own countries in the official language(s) of the State. However, not many States comply with this recommendation.

As a consequence of the evolution of the reporting procedure, the Committee established also a follow-up procedure in order to monitor how States complied with Committee's recommendations. In 2005, the Committee in a plenary session on 15 August 2005 reformed their Rules of Procedure in the area of follow-up. This modification establishes that:

"The Committee may designate one or several Special Rapporteurs for Follow-Up on Opinions adopted by the Committee under Article 14, paragraph 7, of the Convention, for the purpose of ascertaining the measures taken by States parties in the light of the Committee's suggestions and recommendations. The Special Rapporteur(s) may establish such contacts and take such action as is appropriate for the proper discharge of the follow-up mandate. The Rapporteur(s) will make such recommendations for further action by the Committee as maybe necessary; he or she will report to the Committee on follow-up activities as required, and the Committee shall include information on follow-up activities in its annual report"<sup>12</sup>.

In addition to the reporting procedure, the Committee is in charge of four more mechanisms: the early-warning procedure, the urgent procedure, the examination of individual complaints and the inter-state complaints procedure.

The Committee launched the early warning procedure and urgent procedure in the nineties. The early warning procedure aims to preventing potential violent situation to transform into conflicts. The Committee uses different criteria in order to decide whether the early warning procedure should be applied to one State Party. These criteria include:

- a) The lack of an adequate legislative basis for defining and criminalizing all forms of racial discrimination, as provided for in the Convention;
- b) Inadequate implementation or enforcement mechanisms, including the lack of recourse procedures;
- c) The presence of a pattern of escalating racial hatred and violence, or racist propaganda or appeals to racial intolerance by persons, groups or organizations, notably by elected or other officials;
- d) A significant pattern of racial discrimination evidenced in social and economic indicators;
- e) Significant flows of refugees or displaced persons resulting from a pattern of racial discrimination or encroachment on the lands of minority communities<sup>13</sup>.

The urgent procedure was created to respond to situations that needed a rapid intervention due to the evolution of discrimination into a serious, massive or persistent pattern of racial discrimination. Both procedures are based on a request made by the Committee to the State Party for "further information" about a subject mat-

<sup>12</sup> The text on the adoption of this new rule can be consulted at <http://www.ohchr.org/english/bodies/cerd/docs/newruleprocedure-august05.pdf>, Accessed 2 November 2005.

<sup>13</sup> Report of the Committee on Racial Discrimination, General Assembly A/48/18, 15 September 1993, p. 128.

ter of concern. After the Committee considers the State reply and other relevant information, it makes a decision on the issue. This decision can imply bringing the matter to the attention of the UN High Commissioner for Human Rights, to the UN Secretary General or to the General Assembly. In some cases, these procedures can lead to a technical co-operation mission at the State concerned.

As these mechanisms do not have a specific procedure, there is very limited information available on them. Some NGOs have noted that there is very little information on how the Committee decided to include one State Party into this procedure and the measures that are going to be applied in every case. Besides, as the Committee normally decides to apply this procedure at the beginning of the session, NGOs can make very few contributions in terms of information<sup>14</sup>.

The results of the application of an early warning procedure depends very much on the support that the issue concerned may have nationally and internationally and the ability of the people affected by the State's discriminatory policies to claim and negotiate their situation with the State.

In 1999, Yomba Shoshone Tribe from United States submitted an initial request for an early warning and urgent action procedure before the Committee. This urgent action was based on the denying of traditional lands of Yomba Shoshone and the extinction of their native title in a discriminatory manner<sup>15</sup>. Western Shoshone lands cover approximately 60 million acres stretching across what is now referred to as the states of Nevada, Idaho, Utah and California. The United States claims around 90% of the land base as "public" or federally-controlled lands. The Western Shoshone challenge the United States assertion of ownership stating that there has never been a legally valid transfer, sale or cession of land by the Western Shoshone to the United States<sup>16</sup>.

On 15 August 2005, the Committee celebrated a private meeting between members of the Committee and the delegation of the United States. On 19 August, a formal letter was sent to the State Party in which the Committee request the State to respond various questions related to the approval of expanded mining activities in the Mount Tenabo area in Crescent Valley and the approval to store nuclear waste at Yucca Mountain. Both areas are of spiritual and cultural importance to the Western Shoshone and are sites where local creation stories originate for the Western Shoshone peoples. The Committee invited the State Party to submit a report by 31 December 2005 and to examine it in Geneva on February, 20, 2005.

<sup>14</sup> On the opinion of some NGOs in relation to this procedure, see the common statement prepared by Minority Rights Group and the International Movement Against all Forms of Discrimination and Racism for the Thematic Discussion on Prevention of Genocide to be held in Geneva 28 February-1 March at the Committee, <http://www.imadr.org/geneva/2005/CERD.genocide.html>, accessed 3 November 2005.

<sup>15</sup> Information on the initial request submitted to the Committee on 1 July 2001 can be found at [http://www.law.arizona.edu/depts/plp/advocacy\\_clinical/western\\_shoshone/documents/WSCERDA\\_mendedRequest.pdf](http://www.law.arizona.edu/depts/plp/advocacy_clinical/western_shoshone/documents/WSCERDA_mendedRequest.pdf), accessed 2 November 2005. Second request on 29 July is at [http://www.wsdp.org/final\\_cert\\_request\\_v2.pdf](http://www.wsdp.org/final_cert_request_v2.pdf), accessed 2 November 2005.

<sup>16</sup> The situation of the Western Shoshone has also been reflected in a report from Amnesty International United States. This report can be consulted at [http://www.amnestyusa.org/justearth/indigenous\\_people/western\\_shoshone.html](http://www.amnestyusa.org/justearth/indigenous_people/western_shoshone.html). Accessed 1 November 2005.

This early warning procedure has allowed the Western Shoshone peoples to claim their rights internationally and to situate the debate about how federal authorities applied indigenous laws in the field of discrimination. This category is also important because it means that there is not just a concrete and punctual violation of human rights, but a sustained, historical and extended situation in which Western Shoshone peoples have not been treated by federal authorities on equal bases as the rest of the population.

The outcome of this procedure is still open and the possibility to negotiate and reach an agreement between Western Shoshone and federal authorities is on the table.

The early warning and urgent procedure are both an extension of the Committee capacity to request information based on the reporting procedure established in Article 9 of the Convention. The Convention, in Article 14, designed the individual complaint system as an optional mechanism subjected to the declaration of its acceptance by the State Parties. This procedure came into operation in 1982. The communications are subjected to some requirements established in Article 91 of the Committee Rules of Procedure. These requirements set up that: a) The communication cannot be anonymous; b) The communication has to be submitted by the claimant, relatives, representatives or in exceptional cases by others on behalf of the alleged victim; c) The communication has to be compatible with the provision of the Convention; d) The claimant must have exhausted all available domestic remedies; e) The communication has to be submitted within six months after all the domestic remedies have been exhausted<sup>17</sup>.

Finally, Articles 11 to 13 of the Convention regulate the inter-State complaint procedure. This procedure is applicable to all States Parties of the Convention and does not require any other declaration. It aims at solving disputes arising from State's compliance with their obligations under the Convention. Until today, it has never been applied.

#### **4. Minorities, indigenous peoples, and women: new challenges in anti-discrimination standards**

Since the nineties, the Committee has become increasingly interested in areas more traditionally related to multiculturalism. McGoldrick refers to three basic factual premises for multiculturalism and human rights. First, the ethnically and culturally diverse world in which we are living implies population flows from one country to another. Secondly, the globalisation and the multiple interconnections developed through this process have placed people and countries much closer. Finally, the recognition of indigenous and minorities rights have contributed to protect cultural diversity<sup>18</sup>. All these factors have contributed to (re)formulate the concept of discrimination and to include new patterns and elements that were previously left aside.

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<sup>17</sup> Committee on Elimination of Racial Discrimination, Rules of Procedure, HRI/GEN/3/Rev.2, 28, May, 2005, pp. 57-93.

<sup>18</sup> McGOLDRICK, Dominic, "Multiculturalism and its Discontents", *Human Rights Law Review* 5:1 (2005), pp. 30-31.

In 1996, the Committee produced a recommendation on self-determination and another one on refugees and displaced person, in 1997 the Committee dealt with the issue of indigenous peoples and finally in 2000 the Committee elaborated a recommendation on gender and a second one on discrimination against Roma. This approach confronted a liberal idea of discrimination based only on individual standards. Thus, discrimination could also operate for groups in a manner quite different from the one that affected individuals. The Committee based these recommendations on the idea that discrimination affecting women, Roma or indigenous peoples was rooted on structural causes and violations of some group rights.

This step has meant that groups such as indigenous peoples have been able to challenge national laws affecting their right to land or to sacred places on the basis of discrimination. This new perspective has implied changes in the field of how the Committee should deal with discrimination against indigenous peoples or Roma. The question then is not longer a matter solely concerning individual rights, but also about how discrimination operates as institutional and structural patterns that make peoples' choices irrelevant and insignificant in Member States.

The early warning, urgent procedures and concluding observations have been a good opportunity to test some of aspects of this complex relation between collective rights and protection against discrimination. In the case of Brazil, the Committee recommended the State Party to

“complete the demarcation of indigenous lands by 2007 and considers it an important step towards securing the rights of indigenous peoples, it remains concerned at the fact that effective possession and use of indigenous lands and resources continues to be threatened and restricted by recurrent acts of aggression against indigenous peoples. In the light of general recommendation XXIII on the rights of indigenous peoples, the Committee recommends that the State party complete the demarcation of indigenous lands by 2007. Furthermore, the Committee recommends that the State party adopt urgent measures to recognize and protect, in practice, the right of indigenous peoples to own, develop, control and use their lands, territories and resources. In this connection, the Committee invites the State party to submit information on the outcome of cases of conflicting interests over indigenous lands and resources, particularly those where indigenous groups have been removed from their lands<sup>19</sup>”.

Land rights have been one the main areas of concern for the Committee in relation to indigenous peoples and discrimination. This approach was based on general recommendation XXIII in which the Committee refers to four fields: a) culture, history, language and identity, b) sustainable economic and social development compatible with cultural characteristics, c) Effective participation in public life and protection of territories, land and resources<sup>20</sup>.

<sup>19</sup> Report on the Committee on the Elimination on Racial Discrimination 2004, General Assembly, Supplement No. 18, A/59/18, p. 24, para. 60.

<sup>20</sup> Compilation of general comments and general recommendations adopted by the human rights treaty bodies, HRI/GEN/1/Rev.7, 12<sup>th</sup> May 2004, pp. 215-216.



However, recently, indigenous peoples fight against discrimination has also implied reforms in the democratic system. In the case of Australia, the Committee suggested in its last concluding observations for this State Party that effective representation of indigenous peoples in the public affairs is also a matter of discrimination.

“The Committee is concerned about the abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC), the main policy-making body in Aboriginal affairs consisting of elected indigenous representatives. It is concerned that the establishment of a board of appointed experts to advise the Government on indigenous peoples’ issues, as well as the transfer of most programmes previously provided by the ATSIC and the Aboriginal and Torres Strait Islander Service to government departments, will reduce the participation of indigenous peoples in decision-making and thus alter the State party’s capacity to address the full range of issues relating to indigenous peoples (arts. 2 and 5). The Committee recommends that the State party take decisions directly relating to the rights and interests of indigenous peoples with their informed consent, as stated in its general recommendation XXIII. The Committee recommends that the State party reconsider the withdrawal of existing guarantees for the effective representative participation of indigenous peoples in the conduct of public affairs as well as in decision- and policy-making relating to their rights and interests”<sup>21</sup>.

The Committee’s approach to minorities is based also in the assumption that the State has to adopt positive measures in order to secure the application of equal standards to members of the minority and the rest of the population. These affirmative actions are very varied and imply different measures. In the general recommendation on Roma, the Committee makes an extensive list of which measures the States Parties should adopt to eliminate discrimination against Roma including references to education, racial violence, living conditions, media and public life.

In 2000, the Committee produced a recommendation on gender-related dimension of racial discrimination. In this recommendation the Committee recognised that there are some specific forms of discrimination that affect primarily women. In many cases, their access to remedies is also more limited. According to the Committee, the appropriate methodology to work with gender and discrimination would be the one that include in the analysis the form and the manifestation of discrimination, the circumstances in which it occurred, the consequences and the accessibility and availability to legal remedies<sup>22</sup>.

The Special Rapporteur on violence against women, on her contribution in 2001 to the General Assembly debate on race, gender and violence, said that in the field of gender and race the key concept was intersectional subordination.

“The idea of ‘intersectionality’ seeks to capture both the structural and dynamic consequences of the interaction between two or more forms of discrimination or systems of subordination. It specifically addresses the manner

<sup>21</sup> Concluding Observations Australia, CERD/C/AUS/CO/14, 14 April 2005, pp.12-13, para. 11.

<sup>22</sup> Compilation of General Comments and General Recommendations adopted by HR Treaty-Bodies, General Recommendation XXV on gender-related dimensions of racial discrimination, HRI/GEN/1/Rev7, 12<sup>th</sup> May 2004, pp. 217-218.

in which racism, patriarchy, economic disadvantages and other discriminatory systems contribute to create layers of inequality that structures the relative positions of women and men, races and other groups. Moreover, it addresses the way that specific acts and policies create burdens that flow along these intersecting axes contributing actively to create a dynamic of disempowerment”<sup>23</sup>.

Following the contribution of the Special Rapporteur, there are three types of intersectional subordination: a) Targeted discrimination that results from abuses that are specifically targeted at racialized women as occurred in the context of armed conflict in areas such as Bosnia and Herzegovina or Colombia; b) Compound discrimination when women are sometimes subject to discrimination because of their gender roles and because they are members of racial or ethnic groups; c) Structural discrimination applies when policies intersect with underlying structures of inequality to create a compounded burden for particularly vulnerable women. As a consequence women experience of discrimination is different from that experienced by men in their communities<sup>24</sup>.

This approach reveals that discrimination, gender and race can act at different levels and as a consequence, the measures to fight against all these practices should take into account the nature and the origin of this type of discrimination.

In the case of women, the Committee on Elimination of Discrimination against Women (CEDAW Committee) has recommended that States should adopt temporary special measures to accelerate the achievement of a concrete goal of women's *de facto* or substantive equality. These measures are also included in the Committee's approach to women and race showing the necessary complementary role that the CEDAW Committee and the CERD Committee should play in this field.

All these challenges imply new ideas and new aspects of discrimination that may generate new standards. Discrimination is not a static concept, as it varies and evolves to include different elements and situations. Human rights responses must take into account the fact that people's life can be affected by discrimination in a different manner depending on which ethnic group the person belong to or other issues such as gender. The evolution of the Committee's works shows that other groups and concerns can be taken into account in order to improve mechanisms for fighting against discrimination. In this regard, the contribution of NGOs and civil society is essential in order to reveal practices and structures that sustain racism in our societies.

<sup>23</sup> A/CONF.189/PC.3/5, 27<sup>th</sup> July 2001, p. 8, para. 23.

<sup>24</sup> *Ibid.* pp. 9 y ss.

# The Convention Against Torture and its Optional Protocol

Fernando M. Mariño Menéndez

**Summary:** 1. The Relevance of the Convention to the International Community. 2. Obligations which the Convention imposes on Member States. 3. Norms of general International Law regarding torture and ill-treatment, and their relationship with those set out in the Convention. 4. The control system set up by the Convention: the Committee Against Torture and its procedures. 4.1. The examination of the reports of States parties. 4.2. The procedure of confidential inquiry. 4.3. The examination of communications submitted by States parties. 4.4. The examination of individual complaints. 5. Publication of the proceedings and results of the various procedures before the Committee. General comments. 6. The Optional Protocol to the Convention Against Torture. 7. Final observations.

## 1. The Relevance of the Convention to the International Community

*The International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* constitutes an essential milestone in the fight of the international community and International Law against such criminal acts. As the number of States Parties increases, so too does its legal relevance. Efforts have finally culminated in providing it with an Optional Protocol, which reinforces action in favour of the prevention of torture and, besides, in recent years there have been reforms of the different Rules of Procedure of its Committee, so as to make its working more efficient. It is useful in this short essay, then, to note those normative innovations which are, basically, procedural in nature.

The Convention (referred to from now on as the CAT) was adopted on 10th December 1984, through resolution 39/46<sup>1</sup> of the General Assembly of the United

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<sup>1</sup> The specific antecedents of the Convention can be found in Article five of the Universal Declaration of Human Rights (Res.A.G. 217 A (III) of 10-12-1948), article seven of the International Covenant on Civil and Political Rights (Res. A.G. 2200 A (XXI), 16 December 1966), and the Declaration on the Protection of all people from Torture and other cruel or inhuman treatment or punishment (Res. A.G. 3452 (XXX), 9 December 1975). See *United Nations Treaty Collection* (as of 5 February 2001). *Multilateral treaties deposited with the Secretary-General*. Treaty I-IV-12. As general monographs of the UN Convention against Torture (the object of significant study since its coming into force), the following can be highlighted: GONZÁLEZ GONZÁLEZ, R. *El control internacional de la prohibición de la tortura y otros tratos o penas inhumanos y degradantes*. Granada, 1998. BOULESBAA, A. *The United Nations Convention on Torture and the prospects for enforcement*. La Haya, M. Nijhoff, 1999. The selection of materials from practice is useful, especially that concerning the application of the European Convention regarding the prevention of torture, to be found

Nations, opened for signature from 4<sup>th</sup> February 1985, and entered into force, in accordance with its Article 27, on 26<sup>th</sup> June 1987. The Convention can be denounced by any State (although it never effectively has been), and expressly only admits reservations in accordance with two of its provisions, Article 28, which permits reserving the procedure allowing a “confidential inquiry” established under Article 20, and Article 30, which allows the reservation of the obligation to submit to arbitration and successively to the International Court of Justice, any dispute concerning the interpretation or application of the Convention, arising among States Parties, which can not be settled by negotiation. However, it does not prohibit other reservations, which some other States Parties have made known, the most significant of these being those which attempt to make their domestic law in general, or some of its particular interpretations, prevailing over the provisions of the Convention, particularly the reservations of certain Islamic countries and of the United States<sup>2</sup>.

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in: *Prevention of Torture. (a Digest of cases)*. Ineke Boerefijn (ed.) OLPI, SIM. Dordrecht 2001. More specifically, see RODLEY, N.S. *The treatment of prisoners under International Law*. 2<sup>nd</sup> ed. Oxford 1999. For a more complete bibliography regarding the Convention and its control mechanisms, see: VILLÁN, C. *Curso de Derecho Internacional de los Derechos Humanos*. Madrid 2002, p. 429 s. *The definition of torture. Proceedings of an expert Seminar*. APT. Geneva 2001. RODLEY, N.S. “The definition(s) of torture in International Law”, in *Current legal problems*. M. D. A. Freeman (ed.) Oxford 2002, vol.55, p. 467 ff. M. D. EVANS. “Getting to grips with torture”. *ICLQ*, vol.51, April 2002, p. 365 ff. D. FERNÁNDEZ PUYANA. *La noción de tortura y otros tratos o penas crueles, inhumanos o degradantes en el marco del Comité de derechos humanos y del Comité contra la tortura de Naciones Unidas*. Barcelona 2003, FERNÁNDEZ DE CASADEVANTE, C. “ Régimen jurídico internacional de la lucha contra la tortura (I)”, in *Derecho Internacional de los derechos humanos*, C. Fernández de Casadevante (coord.), 2.ª ed. Madrid, 2003, p. 265 ff. HOPE, D. “Torture”. *ICLQ* vol.53, October 2004, p. 807 ff. VAN BOVEN, Th. “Urgent appeals on behalf of torture victims”, in *Mélanges en hommage au Doyen G. Cohen-Jonathan*. Paris 2004, p. 1637 ff. MARINO MENÉNDEZ, F.M. “En torno a la prohibición internacional de la tortura”, in *Pacis Artes. Libro Homenaje al Prof. J. González Campos*. Vol. I, pp. 402-482. Madrid, 2005.

<sup>2</sup> See CAT/C/2/Rev.6. (14-10-02). The following have declared that they do not accept the obligatory jurisdiction of the International Court of Justice: Afghanistan, Saudi Arabia, Bahrain, Chile, China, Cuba, United States, France, Ghana, Equatorial Guinea, Indonesia, Israel, Kuwait, Monaco, Panama, Poland, and Turkey. The desire to make internal law prevail has, in many respects, caused the reservations of Bangladesh, Botswana, United States, and Qatar, who have all been strongly objected to. The insistence of the United States to redefine the Convention’s conception of torture through reservations is notable, as is their attempt to make it fit in with the norms of its domestic law and in particular its Constitution. Objections to the reservations of the United States have come from Finland, the Netherlands, and Sweden. For its part, Chile (which in 1990 withdrew and reinterpreted some of its earlier reservations) has maintained its objections, according to which “in its relations with American States that are Parties to the Inter-American Convention to Prevent and Punish Torture, it will apply that Convention in cases where its provisions are incompatible with those of the present Convention”. In any case, the validity of a “regional international law” against torture is not admissible, if it were contradictory to universal law. The 1984 Convention admits (Article 1.2) the prevalence of “provisions of wider application” from any international instrument or national legislation. On the other hand, the amendments adopted on 9<sup>th</sup> September 1992 by States Parties (accepted by 27 among them) have not come into force; they are aimed at superseding the seventh paragraph of Article seventeen and the fifth of Article eighteen, and inserting a new fourth paragraph into Article eighteen, according to which members of the Committee against Torture will receive remuneration from the funds of the United Nations, in accordance with the terms and conditions decided upon by the General Assembly. The General Assembly showed its support for these amendments in its resolution 47/111 of 16<sup>th</sup> December 1992.

On 15<sup>th</sup> September 2005, a total of 140 States (including the Holy See) had either ratified it, had acceded, or had succeeded another State as a member<sup>3</sup>. These figures make it the second least accepted of the seven United Nations Conventions most significant due to their general nature and universality, regarding the protection of human rights<sup>4</sup>.

Of the most populous States of the international community, only India (a signatory State) is not part of the CAT, but non-acceptance of the Convention is also notable from, as well as various Oceanic States, five of the Islamic Middle Eastern States (United Arab Emirates, Oman, Pakistan, Iraq, and Independent Republic of Iran), six States from Indo-China and South-East Asia (Brunei Darussalam, Malaysia, Myanmar, People's Democratic Republic of Laos, Thailand, and Vietnam), and a number of Caribbean States, especially those with links to Britain (Bahamas, Barbados, Dominica, Granada, Dominican Republic, Haiti, Jamaica, Saint Kitts and Nevis, Santa Lucia, and Trinidad and Tobago).

## 2. Obligations which the Convention imposes on Member States

In its Preamble, the CAT states that its objective is "to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world". In its first Article, it defines the term "torture" in its very own terms, as:

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

<sup>3</sup> See the following web page: [ohchr.org/english/countries/ratification/9.htm](http://ohchr.org/english/countries/ratification/9.htm). Between 1991 and 2001 four States from the former Socialist Federative Republic of Yugoslavia became members: Croatia (1991), Bosnia-Herzegovina (1992), the former Yugoslav Republic of Macedonia (1994), and Yugoslavia (2001); Slovenia joined on 16th July 1993. Similarly, the Czech Republic (1993) and Slovakia (1993) have also joined.

<sup>4</sup> Without being members, ten States have signed it: Andorra, Comores, Gambia, Guinea-Bissau, India, Nauru, Dominican Republic, San Marino, São Tomé e Príncipe, and Sudan. Fifty-five States are not members, of which two are European (Andorra and San Marino); eleven are American (Bahamas, Barbados, Dominica, Granada, Haiti, Jamaica, Dominican Republic, St Kitts and Nevis, Santa Lucia, Surinam, and Trinidad and Tobago); fourteen are in Oceania (Cook Islands, Fiji, Kiribati, Marshall Islands, Federated States of Micronesia, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu); fifteen are Asian (Bhutan, Brunei Darussalam, United Arab Emirates, Iraq, India, Malaysia, Myanmar, Oman, Pakistan, People's Democratic Republic of Korea, Independent Republic of Iran, People's Democratic Republic of Laos, Singapore, Thailand, and Vietnam); and thirteen are African (Angola, Comores, Eritrea, Gambia, Guinea-Bissau, Liberia, Madagascar, Central African Republic, United Republic of Tanzania, São Tomé e Príncipe, Sudan, and Zimbabwe). The least accepted universal Convention is, incidentally, the "International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families"; on 26 January 2006 it had been ratified by 34 States.

an official capacity. It does not include pain or suffering arising only from inherent in or incidental to lawful sanctions”.

The three central elements of this definition are, then: i) any act or conduct which intentionally inflicts on a person severe pain or suffering be this physical or mental. ii) the aim with which the pain or suffering is caused being not solely private. iii) the person causing the suffering, be this by action or omission, being a public agent, or acting at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

According to this definition of torture, the main norms of the Convention impose obligations on member States not to torture, and to adopt measures to effectively prevent torture, to repress torture, and to guarantee domestic remedies for appeal and reparation for the victims (Articles 2 to 4 and 9 to 15). In each case, the corresponding obligation is imposed to every State Party in its relations with any other one and, simultaneously, should be interpreted in the sense that individuals finding themselves in any territory under the jurisdiction of a State Party are holders, in accordance with the Convention, of subjective international rights *vis-a-vis* States Parties, rights which must be enforceable within the corresponding internal legal order.

Specifically, in the language used in the Convention, its norms impose the following obligations to member States:

- A) *To take effective measures to prevent* acts of torture in any territory that falls under their jurisdiction: legislative, administrative, judicial or any other type of measures (Article 2.1).
- B) To prevent torture, in particular by:
  - a) *Not expelling, returning, or extraditing* a person to another State where there are “substantial grounds” for believing that he or she would be in danger of being subjected to torture; in other words, preventing torture that could be reasonably believed to be committed by (a) third State(s) against the person who were passed on to it by the State Party (Article 3.1).
  - b) *Ensuring* that no statement obtained under torture can be used as evidence in any proceedings (Article 15).
  - c) *Ensuring* that full education and information regarding the prohibition of torture are part of the training of law enforcement personnel, civil or military, medical personnel, public officials, and any other people who may be involved in the custody, interrogation or care of any person subject to any form of arrest, detention, or imprisonment (Article 10.1).
  - d) Keeping under systematic review interrogation rules, instructions, methods and practices as well as arrangements regarding the custody and treatment of any individual subjected to any form of arrest, detention, or imprisonment in any territory under their jurisdiction (Article 11).
- C) To repress all acts of torture by, in particular:
  - a) *Ensuring that*:
    - i) All acts of torture, or attempts to commit them, or acts of complicity or participation in torture, *are offences under its criminal law and these*

*offences are made punishable by appropriate penalties that "take into account their grave nature"* (Article 4).

- ii) The competent authorities perform a prompt and impartial *investigation* as long as there are reasonable grounds to believe that an act of torture has been committed in any territory under their jurisdiction (Article 12).
- b) *Establishing and exercising criminal jurisdiction* regarding crimes of torture, in accordance with the norms and procedures established in the Convention, and affording (between member States) *all possible help* regarding any criminal proceedings concerning crimes of torture (Article 9). In particular, to ensure that at least one State Party always exercises its jurisdiction *in all cases* of alleged torture, the Convention (without excluding any criminal jurisdiction exercised in accordance with national laws) obliges every one of its States Parties:
- i) *To establish their own jurisdiction* regarding crimes of torture:
    - Whenever they are committed in any territory under their jurisdiction, or on an aeroplane or ship registered in the State.
    - When the accused is a national of the State<sup>5</sup>, and
    - When the accused is present in any territory under its jurisdiction, and extradition is not granted either by obligation or free choice to any State Party competent to proceed according to the Convention (Article 5.1 and 5.2).
  - ii) *To exercise their jurisdiction* over those presumed responsible for the torture who are present in their territory, and, in this way (Articles 6 and 7).
    - Immediately proceeding to a preliminary inquiry into the facts.
    - If the circumstances justify it, detaining the person in question, or adopting other means to ensure his or her presence.
    - And, finally, submitting the case to the competent authorities for the purpose of prosecution, or *extraditing* the person presumed responsible to a State Party which has set up its jurisdiction by obligation according to the Convention, or from a free choice (Articles 6 and 7). The Convention against Torture therefore imposes on member States the general obligation of extradition in cases of their own jurisdiction not being exercised, and may be considered as a legal base for extradition, on the repressive principle of *aut dedere aut judicare* (Article 8).
- D) To guarantee domestic remedies for appeal and reparation to the victims, in particular:
- a) Ensuring that anyone alleging having been a victim of torture "in any territory under its jurisdiction" has the right to complain and to have his

<sup>5</sup> On the other hand, this jurisdiction will only be put into practice *if it is deemed* appropriate, when the victim is a national of the State in question (Article 5.1 c).

case promptly and impartially examined by the competent authorities (Article 13).

- b) Ensuring that in its legal system the victim of an act of torture obtain *redress and has an enforceable right to fair and adequate compensation*, including “the means for as full rehabilitation as possible” (Article 14.1).

Regarding those acts which constitute *cruel, inhuman or degrading treatment or punishment* “which do not amount to torture”, as this is defined by the Convention, States Parties undertake, in accordance with Article 16, to *prohibit and prevent them* in any territory under their jurisdiction, when such acts are committed by a public official or another person acting in an official capacity, or by instigation or by the consent or acquiescence of this public official or person.

Similarly, through references to the corresponding articles in the Convention, member States are obliged to:

- i) *Prevent* the types of treatment indicated and, more concretely, to *ensure* full education and information regarding their prohibition in the training of people who will be involved in the custody, interrogation, or care of any person subject to any form of arrest, detention, or imprisonment; similarly, to *keep under systematic review interrogation* norms and regulations, methods and practices, and regulations regarding the custody and care of persons subject to any type of arrest, detention, or imprisonment in any territory under their jurisdiction.
- ii) *Repress such treatments*, in particular, *ensuring* that the competent authorities conduct prompt and impartial *investigations*, as long as there are reasonable motives for believing that one of the specified acts or crimes was committed in any territory within their jurisdiction, and
- iii) Ensure that any person alleging having been subjected to one of the indicated treatments, in any territory under their jurisdiction, has the *right to complain and to have* their case be promptly and impartially examined by the competent authorities.

However, the references which Article 16 makes to other provisions of the Convention regarding the specified acts or crimes does not include Articles 5 to 9 or 14 and 15 of the mentioned instrument.

### 3. Norms of general International Law regarding torture, ill-treatment, and their relationship with those set out in the Convention

The regulations of the CAT and their practices of application form an essential part of the constituent elements of international practice regarding norms of general International Law against torture and other cruel, inhuman, or degrading treatment and punishment<sup>6</sup>. In particular, its own definition of “torture” has an au-

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<sup>6</sup> On a universal level, see Article 7 of the International Covenant on Civil and Political Rights; Article 5 b) of the International Convention of 1966 on the Elimination of all Forms of Racial Discrimination; Article 1 (and those corresponding to it) of the 1979 Convention on the Elimination



thority which comes from being included within the conventional text which is most universal on this topic. Even though the obligation to “incorporate” this definition to their respective domestic legal systems does not derive explicitly from the text of the Convention, any other definition or norm which they adopt and which is related to it should at least have the same scope and the same protective nature as those in the CAT.

Three norms of *general* International Law on torture place inter-related obligations *on States* (and, eventually, on any other subject of International Law), together forming a group of provisions which are indivisible and complementary.

These general rules are: i) that which obliges States not to practice torture, or, in other words, to respect the prohibition of torture; ii) that which obliges to prevent

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of all Forms of Discrimination against Women; Article 37 a of the 1989 Convention on the Rights of the Child (of which only the United States is not a member). On a regional level, the following have been adopted specifically against torture: i) in Europe, the “European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment”, which came into force on 1st February 1989, and created the “European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment”, and also has two additional protocols, both from 4th November 1989, of principally procedural interest, even though the first of them extends the potential subjective reach of the application of the Convention to States which are not members of the Council of Europe. ii) In the Americas, the “Inter-American Convention to Prevent and Punish Torture” of 9th December 1985, in force since 28th February 1987, whose definition of torture (Article 2, especially its second paragraph) makes it into one “of wider application” than that of the United Nations Convention of 1984. Similarly, the “Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women” (“Belem do Pará Convention”), of 9th June 1994, linked to the jurisdictional system of the San José Convention of 1969; and the “Inter-American Convention on the Forced Disappearance of Persons” of 9th June 1994 (Articles I and II).

It is hardly necessary to remind those regional instruments for the general protection of human rights that protect the right of the human being not to be subject to torture or to cruel, inhuman, or degrading treatments or punishments: Convention of Rome of 4-11-1950 (Article three, which does not expressly refer to *cruel* punishments or treatments), the American Convention of 22-11-1969, of José de Costa Rica (Article 5.20), the African Charter on Human and Peoples’ Rights of 26<sup>th</sup> June 1981 (Article 5), with its protocol relating to the rights of women in Africa (July 2003), and the African Charter on the Rights and Welfare of the Child of 11<sup>th</sup> July 1990 (Article sixteen). Similarly, section VII of the “World Declaration on Human Rights in Islam” of 19<sup>th</sup> September 1981, adopted in Paris by the Islamic Council, which regulates the “right to be free from torture”; and Article 13 of the “Arab Charter on Human Rights”, adopted by the Council of the League of Arab States on 15<sup>th</sup> September 1994. Regarding humanitarian law conventions, see *infra*. For a complete view of legal international heritage on the topic, see also the different non-conventional instruments, especially the Declarations of the General Assembly, adopted by the United Nations for recommending general rules, of significant authority and which are vital points of reference, and describe their relevance to different areas of protection against torture and other illegal treatment (see [unhcr.ch/html/intlist.htm](http://unhcr.ch/html/intlist.htm)). Particularly noteworthy is paragraph 5 of section B of part II of the Declaration and the Vienna Plan of Action adopted in June 1993 by the World Human Rights Conference (A/CONF.157/239); and the “Istanbul Principles”, annexes to the resolution G.A. 55/89 of 4<sup>th</sup> December 2000, regarding the efficient investigation and documentation of torture and other cruel, inhuman, or degrading treatments or punishments. Finally, the “Recommendations from the Special Rapporteur on the Prevention and Eradication of Torture”, submitted to the General Assembly in accordance with resolution 55/89 of 3rd July 2001 (Doc. A/56/156) and the report of the then Special Rapporteur Theo Van Boven (E/CN.4/2004/56, of 23<sup>rd</sup> December 2003), replaced in 2004 by the new Rapporteur Manfred Nowak.

and to monitor the practice of torture within those areas under the jurisdiction of the State in question; and iii) that which obliges States to prosecute and punish the authors of torture under their jurisdiction, at the same time guaranteeing *fair reparation* for victims.

The three norms and the obligations established by them have an imperative nature (*ius cogens*): its validity can never be suspended and no person can renounce to their protection. To prove these Statements there is a widespread international practice including the adoption, interpretation, and application of universal and regional international legal instruments, their accompanying norms of internal law, and the decisions of internal and international jurisdictional bodies<sup>7</sup>, especially if it is considered from the perspective of the fundamental right not to be subjected to torture or other inhuman treatments.

One must remark the indisputable nature of the imperative character of the general norm which *abstractly* obliges States (and other subjects) to take necessary measures for *foreseeing and preventing* torture. As has been shown above, according to Article 1 of the CAT States can be "responsible" for torture also "... with the consent or acquiescence of a public official or other person acting in an official capacity"<sup>8</sup>.

In practice, a concrete norm which makes precise this abstract norm obliging prevention has acquired relevance: the norm or principle of non-devolution (*non refoulement*) which obliges not returning, extraditing, expelling, or handing over in any way, a foreigner to a State where he or she will run the risk of being subject to torture (or of being arbitrarily deprived of life or subjected to slavery or servitude); or (once handled over) runs the risk of being handed over to a third State and there subject to these dangers. This norm is contained, as was stated above, in the CAT

<sup>7</sup> See resolution G.A. 3452 (XXX) of 1975 (Article 4); the International Covenant of Civil and Political Rights of 1966 (Article 4); the Convention against torture (...) of 1984 (Article 2.2); the Convention of Rome of 1950 (Article 15); the San José Convention of 1969 (Article 27). Regarding absolute prohibition in the area of humanitarian law, as regards international armed conflicts: Convention III of Geneva of 1949 (Articles 13, 14, 17, and 130); Convention IV of Geneva of 1949 (Article 147); Protocol I of 8<sup>th</sup> June 1977, in addition to the Conventions of Geneva (Article 75). Regarding non-international armed conflicts: Protocol II of 8<sup>th</sup> June 1977, in addition to the Geneva Conventions (Article 4); Article 3, common to the four Geneva Conventions of 1949. As stated in the G.A. resolution 56/143 of 1st February 2002, "... freedom from torture is a right that must be protected under all circumstances, including in times of internal or international disturbance or armed conflict". See also the authoritative "General observation number 29" on Article 4 of the International Covenant on Civil and Political Rights, made by the Human Rights Committee in 2001 (HR/GEN/1/Rev. 7, p. 215 ff). On the imperative nature of the international law prohibiting torture, see the decisions of the International Tribunal on former Yugoslavia in the *Furundzija* cases (10-12-1998), case number IT-95-17/1, and *Kunarac et al.* (22-2-2001), case number IT 96-23-T/1. See also the TEDH decision of 21-11-2001 regarding the case of *Al-Adsani vs. United Kingdom* (34 EHRR, 11 (2002)), paragraph 62. Regarding doctrine see, among others, Rodley, N. S. *The treatment of prisoners under International Law*, 2<sup>nd</sup> ed. 1999, and Cassese, A., *International Law*, Oxford, 2001, p. 254.

<sup>8</sup> The Committee's decision in the *Hajrizi Dzemajl et al. vs Yugoslavia* (n.º 161/2000), (Doc.A/58/44, p. 94) includes this pronouncement: "... the Committee considers that the complainants have sufficiently demonstrated that the police (public officials), although they had been informed of the immediate risk that the complainants were facing and had been present at the scene of the events, did not take any appropriate steps in order to protect the complainants, thus implying acquiescence in the sense of Article 16 of the Convention ...".

(Article 3)<sup>9</sup>; in fact, more than 80% of individual *complaints* submitted until now to the Committee Against Torture refer to the (possible) violation of the rights which this norm protects. So important is this norm in practice that the only “General comment” adopted by the Committee Against Torture refers to it under the rubric of “Implementation of Article 3 of the Convention in the context of Article 22”<sup>10</sup>. The jurisprudence of the Committee on this topic is long and extended<sup>11</sup>. As a rule of general International Law, this norm must be considered self-executing, and directly enforceable by individuals before internal authorities.

For its part, the general international norm which obliges States to prosecute and, if necessary, punish those responsible for torture, does not definitively place upon them the obligation to exercise a criminal jurisdiction that is *universal and absolute*, without the crime being shown to have any links with the forum, save precisely the extreme gravity of the crime itself. More specifically, it has been set out by internal and international jurisprudence, that if any State whose criminal jurisdiction is based on generally accepted criteria (the alleged author and/or victim of the crime hold their nationality, and/or the crime took place in their territory, and/or under their territorial jurisdiction the alleged authors of the crime are at the time of

<sup>9</sup> See also the “Declaration on Territorial Asylum” (G.A. Res. 2132 (XXII) of 14th December 1976), and Article 33 of the Geneva Convention Relating to the Status of Refugees, which sets out the *principle of non-refoulement*, which nevertheless admits some exceptions regarding its application. On this issue in Spanish doctrine see GORTÁZAR ROTAECHÉ, C. *Derecho de asilo y no rechazo del refugiado*. Madrid, 1997. On the application of the principle of non-devolution in the context of the application of Article three of the Convention of Rome, see GIL BAZO, T. “La protección de los refugiados en la Unión Europea tras la entrada en vigor del Tratado de Amsterdam a la luz del Derecho Internacional de los derechos humanos” in: F. MARIÑO MENÉNDEZ y C. FERNÁNDEZ LIESA (Dir.) *La protección de las personas y grupos vulnerables en el Derecho Europeo*. Madrid. Instituto Francisco de Vitoria y Ministerio de Trabajo y Asuntos Sociales, 2001, pp. 147-187. Recently: LAUTERPACHT, Sir E. and BETHLEHEM, D. “The scope and content of the principle of non-refoulement: Opinion”. in: E. FELLER, V. TÜRK, and F. NICHOLSON (ed) *Refugee protection in International Law. UNHCR’s Global Consultations on International protection*. Cambridge University Press and UNHCR, 2003, p. 8 ff.

<sup>10</sup> General Commentary number one. Adopted on 21st November 1997 (A/53/44, annexe IX). See HRI/GEN/1/Rev. 7, *cit.*, p. 329. According to its sixth paragraph, “... the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable”.

<sup>11</sup> Thus the *Report by the Committee Against Torture* corresponding to the periods of the 25<sup>th</sup> and 26<sup>th</sup> sessions (November of 2000 and April and May of 2001) (Supplementary document number 44 (A/56/44). G.A. Official Document number 56, session period 2001 New York), sets out the eleven rulings adopted by the Committee which are based on Article 22 of the Convention (pp. 96-190). Of these, ten (numbers 49/1996 122/1998, 123/1998, 128/1999, 134/1999, 142/1999, 144/1999, 147/1999, 149/1999 and 150/1999) make rulings on “non-refoulement”. And the *Report by the Committee Against Torture* corresponding to the periods of sessions 27 and 28 (November 2001 and April and May 2002) (Supplementary document number 44 (A/57/44). G.A. Official Document number 57, session period New York 2002), sets out fourteen decisions made regarding the basis of the question adopted by the Committee based on Article 22 of the Convention (pp. 94 -191). Of these, thirteen make statements regarding issues of “non-devolution”, numbers 138/1999, 146/1999, 154/2000, 156/2000, 162/2000, 164/2000, 166/2000, 175/2000, 177/2000, 178/2000, 179/2000, 180/2000 and 185/2000; etc. I am interested to expressly discuss the relevance, in this context, of the recent decision of the CAT referring to Communication number 233/2003, adopted in the *Agiza vs. Sweden* case on 24<sup>th</sup> May 2005 (CAT/C/34/D/233/2003), due to its specific importance for “devolutions” regarding presumed terrorists.

the prosecution), does not efficiently exercises its criminal jurisdiction (for example, preventing its exercise through the laws of "self amnesty", or other obstacles of internal law), every third State is internationally made able by general international law to exercise its own jurisdiction against the person allegedly responsible for the torture<sup>12</sup>.

But, having said this, it should also be stated more generally that admitted the qualification in general international law of torture as a "crime against international law" of individuals, it implies that the exercising of *universal jurisdiction* against the alleged authors of the crime is internationally lawful in all cases.

In addition, the commission of an act or acts of torture qualifiable as "crime against humanity" or "war crime"<sup>13</sup> can imply the international criminal responsibility of *individuals* before international criminal tribunals. If this is the assumption, then, the notion of torture is included in a penal type distinct to that of the 1984 Convention. So, the internal courts of member States of the Rome Statute of the International Criminal Court (ICC) are obliged to apply its norms and consider all laws defined within it to be "like internal laws" and, as such, also the acts of torture which make it up according to international typification.

Also, the fact that the CAT does not extend the full range of all its regulations and guarantees relating to the crime of torture to the completion of its own regulations regarding cruel, inhuman, or degrading *treatments or punishments*, which also impose obligations of prohibition, prevention, prosecution, punishment, and reparation, does not mean that, at least for some of them, they cannot be established as norms of general International Law. This is certainly the case for the duty that States have to establish domestic remedies and fair compensation for victims of (other) cruel, inhuman, or degrading treatment or punishments. On the other hand, a progressive extension of the obligatory nature of the "principle of non-devolution" in cases of such "treatments and punishments" is evident. However, the principle of *habilitation of absolute universal jurisdiction* does not appear to have a specific application in the context of ensuring international norms regarding these treatments and punishments.

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<sup>12</sup> It is not necessary to make reference here to the series of internal jurisdictional decisions which support this practice of universal jurisdiction in cases of the prosecution of great criminals who are also responsible for torture (the Eichmann, Demjanjuk, Pinochet, etc. cases). Regarding this, see the decision of 10<sup>th</sup> December 1998, made by the International Tribunal for the former Yugoslavia regarding the *Prosecutor vs. Furundzija* case (paras. 155-157), text in 38 *I.L.M.* 317 (1999). Especially significant regarding this is the *Carmelo Soria* case (a victim of torture an murder by DINA agents in Chile under General Pinochet's regime) (OEA/Ser/LV/II.105.Doc. 12, of 19-11-1999, report number 133/99, case 11.723, Chile, p. 40), even though it is partially based on the application of the Convention of New York of 1973 regarding the prevention and punishment of crimes against people who are internationally protected, including diplomatic agents. Regarding interference between the norm being examined here and the norms of international law concerning the individual immunity of the highest State dignitaries, see TORRES BERNÁRDEZ, S. "Acerca de las inmunidades del Jefe de Estado o de Gobierno en Derecho Internacional y de sus límites" in: *El Derecho Internacional en los albores del siglo XXI. Estudios de Derecho Internacional en Homenaje al Profesor Juan Manuel Castro Rial*. F. M. Mariño (Ed.), Madrid, 2002, pp. 593-639.

<sup>13</sup> The most authoritative typification of the international crimes of individuals is to be found in the Rome Statute of the International Criminal Court (adopted on 17th July 1998, it came into force on 1st July 2002).

#### 4. The control system set up by the Convention: the Committee Against Torture and its procedures

The Convention created the *Committee Against Torture* (CoAT) as a body competent to control the implementation by the States Parties of the obligations which are placed on them by it. This Committee, then, belongs to the group of “conventional” control committees which makes up the universal system for the promotion and protection of human rights, and perform their functions within the framework of different universal Conventions, set up and adopted by the United Nations with that end in mind<sup>14</sup>.

The Committee acts following the basic rules of the Convention and its Rules of Procedure it has provided itself with. According to the Convention, six of its members constitute a quorum, and the decisions of the Committee will be taken by majority vote of the members present (Article 18.2)<sup>15</sup>.

The new third paragraph of rule 61 of the Rules of Procedure specifically sets out that the Committee “may also appoint one or more of its members as Rapporteurs to perform such duties as mandated by the Committee”. Designation as rapporteur constitutes a manifestation of the more general power of the Committee to establish the subsidiary bodies it believes necessary (Article 61.1). As we will see below, recourse to rapporteurs has been expressly foreseen in many different articles of the rules of procedure.

The Committee performs its tasks through four different control procedures<sup>16</sup>, in accordance with the corresponding regulations of the Convention: *considera-*

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<sup>14</sup> From the Spanish-language bibliography regarding this “universal system”, the following should be highlighted: C. VILLÁN DURÁN, *Curso de Derecho Internacional de los derechos humanos*. Madrid 2002. The most significant criticism, although not official, regarding the whole of the conventional system is that of BAYEFSKI, A.F. *The U.N. Human Rights Treaty System: Universality at the Crossroads*. Nueva York, 2001. See the same author (ed.): *On the Future of the UN Human Rights Treaty System (Dordrecht, 2001)*. P. Alston wrote the official critical report for the Human Rights Commission, and it is highly relevant: *Final Report of the independent expert on enhancing the long-term effectiveness of the UN human rights treaty system*, UN Doc. E/CN.4/1997/74.

<sup>15</sup> The final, and important, amendments to the Rules of Procedure were adopted at the 28<sup>th</sup> session of the Committee, which took place in May 2002. See the current text in the following document: CAT/C/3/Rev.4., of 9th August 2002, and the Report of the Committee Against Torture of the 27<sup>th</sup> period of sessions (G.A. Official Document Supplement number 44 (A/57/44) pp. 217 ff. The previous version of the Rules of Procedure was from 13<sup>th</sup> July 1998 (CAT/C/Rev.3). The Committee is made up of ten experts “of high moral standing and recognized competence in the field of human rights” (CAT, Art. 17.1). Its members are chosen by States Parties at biennial meetings, and by secret ballot from a list of persons nominated by them; they are chosen for four years and can be re-elected if they are willing to become candidates again. They perform their jobs “in their personal capacity”. The Committee meets, in principle, at two ordinary annual sessions, which it has done since 1993. It chooses its bureau for a period of two years, and bureau members can be re-elected. According to the new second paragraph of rule 12, “the Chairperson, members of the Bureau and rapporteurs may continue performing the duties assigned to them until one day before the first meeting of the Committee, composed of its new members, at which it elects its officers”.

<sup>16</sup> For a critical analysis of these new procedures, see BANK, R. “Country-oriented procedures under the Convention against Torture: Towards a New Dynamism”. In: *The future of U.N. Human rights Treaty monitoring*. P. Alston and J. Crawford (eds.). pp. 145-175. Cambridge University Press. Cambridge, 2000. SØRENSEN, B. “CAT and Articles 20 and 22”. In: *International human rights. Monitoring mechanisms. Essays in honour of Jakob Th. Möller*. G. Alfredsson, J. Grimheden, B.G. Ramcharam and

*tion of the reports* of member States; *confidential inquiries* regarding the situation in particular countries; *admission and examination of communications presented by a State party*, which allege that another State is not fulfilling their obligations under the Convention; and the *admission and consideration of complaints made by individuals* (or made on their behalf), subjected to the jurisdiction of a State Party, who allege that they have been victims of a violation by another State Party of the dispositions of the Convention.

#### 4.1. *The examination of the reports of States parties*

In the first place, the *consideration of reports* of States Parties takes place regarding the reports that each of them must present (Article 19 of the CAT and Articles 64 to 68 of the Rules of Procedure). The *initial report* shall be presented within the year immediately following the coming into force of the Convention for the State Party concerned, and others supplementary shall be presented successively and periodically every four years (without affecting the authority of the Committee to request other reports, should these be necessary), with a view to recording the measures which have been adopted to give effect to their undertakings under the Convention. The reports shall be presented in accordance with the guidelines set out by the Committee<sup>17</sup>.

The Committee considers each report in a public session. According to recently established practice, which is in harmony with that already followed by other conventional committees, except in the case of the initial reports, the Committee sends a specific questionnaire (proposed by the rapporteurs and approved by the Committee as a whole) to each State whose report is to be examined, several weeks before the corresponding examination session, made up of particular questions which it is deemed will make concrete those points which have been established as being of most interest. The State shall, therefore, respond to these questions in particular, which it will do orally at the initial public session, without affecting the fact that it has submitted written responses to the Committee either a few days before the debate or on the day of the debate itself.

At this point it is significant to highlight the fact that some committees have begun to follow the practice of holding "formal" working meetings for the direct

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A. de Zayas (eds.), pp. 167-185. The Hague, Boston, and London 2001. More generally on the Committee Against Torture, see INGELSE, Ch. *The UN Committee against torture - An assessment*. (Kluwer) 2001.

<sup>17</sup> The guidelines can be seen in CAT/C/14/ Rev. 1 of 2<sup>nd</sup> June 1998. Similarly G / SO 221 (1) of 26<sup>th</sup> April 1991. There are special guidelines for the initial report: CAT/C/Rev.2 of 18<sup>th</sup> June 1991 and, finally, CAT/C/4/Rev.3 of 18<sup>th</sup> July 2005. In general, see HRI/GEN/2/Rev./Add.1 of 6<sup>th</sup> May 2005: "Compilación de directrices relativas a la forma y al contenido de los informes que deben presentar los Estados Partes en los tratados internacionales sobre derechos humanos". See also HRI/MC 2005/3 of 1<sup>st</sup> June 2005, which contains the "Directrices armonizadas sobre la preparación de informes con arreglo a tratados internacionales sobre derechos humanos, incluidas las orientaciones relativas a la preparación de un Documento Básico ampliado y de informes orientados a tratados específicos". A *normal* report contains information regarding new regulations and innovations regarding the application of the Convention, any additional information that has been requested by the Committee, and information regarding the application of the previous conclusions and recommendations by the Committee.

reception of the information and impressions regarding the situation in each country with the most relevant NGOs, before the holding of the public debate in the same period of sessions which will take place regarding them. In the case of the CoAT, the decision to hold these meetings was taken in the session of May 2004, and entered into force in the session of November 2004.

In addition, at the examination session, following the relevant oral presentation, the rapporteur and co-rapporteur present and formulate to the State delegation their observations and questions regarding the contents of the aforementioned questionnaire, to which can also be added the questions of other members of the Committee. A few days later, as fixed by the Committee, the State will publicly respond to the new questions posed at a second meeting, this act being an occasion for the exchange of questions and answers between members of the State delegation and members of the Committee. Finally, the Committee (following relevant internal debate, which is confidential), adopts its "conclusions and recommendations"<sup>18</sup>, in which it can make clear, if relevant, that the member State has not implemented some of its obligations as regards the CAT, and can recommend behaviour and plans of action for the better fulfilment of those obligations. These conclusions and recommendations will be communicated directly to the interested State before being made public. If necessary, the Committee can indicate the time-frame within which observations in reply from member States should be received (rule 68.2), highlighting those recommendations whose putting into practice requires a speedy reply.

The Committee is faced with the same problems as the other conventional control mechanisms of the United Nations: the fact that States do not present the required reports; or that they do it late, sometimes significantly; or the non-appearance of a State at the examination session of its report which has previously been submitted<sup>19</sup>.

In order to face up to these problems, the 2002 version of the Rules of Procedure has introduced a few new rules, in line with those already adopted by other committees that work with the universal system of conventions, especially the Human Rights Committee of the International Covenant on Civil and Political Rights of 1966. These are:

- A) In those cases where it is deemed relevant, the Committee will be able to consider that the information contained within the last report submitted covers the information which should have been included in overdue reports (rule 64.2)<sup>20</sup>.

<sup>18</sup> The new rubric of rule 68 of the regulations requests precisely the "Conclusions and recommendations by the Committee", terminology which replaces the previous "General comments". The text of rule 68.1 sets out that the Committee can formulate "general comments, conclusions or recommendations".

<sup>19</sup> See HRV/GEN/4/Rev.5 of 3<sup>rd</sup> June 2005: *Recent reporting history under the principal international human rights instruments*. On the current reform efforts for the system for the presentation of reports to conventional bodies see my work: "Cuestiones actuales de regulación del procedimiento de examen de informes estatales por el Comité de Naciones contra la tortura", in *Libro Homenaje al Prof. J. A. Pastor Ridruejo* Madrid, 2005, pp. 171-183, *infra*, note 22.

<sup>20</sup> In its recent "Conclusions and Recommendations" regarding the second report submitted by the Bolivarian Republic of Venezuela (CAT/C/XIX/Misc.6, of 21<sup>st</sup> November 2002), the Committee welcomed "with satisfaction the second periodic report of Venezuela, which should have been

- B) If it is considered necessary, the Committee may notify the defaulting State through the Secretary-General, that it has the intention to examine, on a date specified in the notification, the measures adopted by the member State to protect or give effect to the rights recognised in the Convention, and to make general comments as it deems to be appropriate under those circumstances (rule 65.3).
- C) If the State in question has submitted its report for examination but does not appear before the Committee, this body has the discretion to take one of the following decisions (rule 66.2):
- a) notify the member State through the Secretary-General that it has the intention to examine the report at a specified session, in accordance with the general rules of procedure, and, eventually, come to conclusions and make recommendations; or
  - b) proceed at the originally specified session to examine the report and make and submit to the State party its provisional concluding observations. The Committee will determine the date on which the report will be examined, in accordance with the general rules, or the date on which the new periodic report should be submitted as an “additional report”.

Until the session of November 2002, the Committee had examined reports from 73 member States, even receiving fourth reports from many of them. However, delays in the presentation of reports from many States is notable, to the point where some, having been under the obligation to do so for many years, have still not even submitted their initial reports<sup>21</sup>.

In each successive report, member States should provide information regarding the compliance of the recommendations which the Committee has made for them as regards their examination of previously submitted reports. In addition, the Committee may appoint one or more rapporteurs to follow up with the compliance by the State of its conclusions and recommendations (rule 68.1). These should act in accordance with the procedural mandates received, which can involve specific acts such as the Committee asking for supplementary information before the next periodic report in its conclusions and recommendations, or the Committee considering that circumstances between periodic reports demand certain particular questions to

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submitted in August 1996 but was received in September 2000 and updated in September 2002. This report contains the information which the State party was to have included in its third periodic report, which should have been submitted in August 2000. The Committee therefore decided to consider document CAT/C/33/Add.5 as the second and third periodic reports of Venezuela” (para. 2), and invited “the State party to submit its fourth periodic report at latest by 20 August 2004” (para. 13).

<sup>21</sup> Follow up Reports have already been submitted by Lithuania (6<sup>th</sup> April 2004), Azerbaijan (14<sup>th</sup> July 2004) and New Zealand (2<sup>nd</sup> August 2005). In accordance with document CAT/C/34/CRP.1/Add.2 of 12<sup>th</sup> May 2005, 36 member States had not yet submitted their *initial* reports, with eight of these more than ten years late: Guyana, Guinea, Somalia, The Seychelles, Cape Verde, Antigua, Barbuda, and Ethiopia. However, Guyana has now submitted a report, which will be examined in the next session.



be answered. Their actions can even cover the situation of a member State which is delaying regarding either its initial report or its periodic report<sup>22</sup>.

#### 4.2 *The procedure of confidential inquiry*

In accordance with Article 20 of the CAT, the development of a *confidential inquiry*<sup>23</sup> procedure on the situation existing in particular countries can be decided on by the Committee, in certain cases, as long as the member State which is to be the object of the investigation has not declared that it does not recognise this specific competence<sup>24</sup>.

It is the Secretary-General who brings to the attention of the Committee the information which has been, "or appears to be", submitted for examination by the Committee in accordance with Article 20.1 of the Convention (rule 69.1 of the Rules of Procedure), and will maintain a permanent register of this information. In this way, in a "preliminary exam", the Committee will determine if it considers that the information it has received contains "well-founded indications" that torture *is being systematically practiced* within the territory of the State party in question. If the Committee considers the information received to be "reliable" and to contain indicators that, effectively, torture is systematically practiced in a member State, it will invite that State to cooperate in the examination of the information and present its observations regarding the information in question. In the light of these observations and any other relevant information available<sup>25</sup>, the Committee may, if it decides that the information is warranted, designate one or more of its members to make a confidential inquiry and urgently report the Committee. The cooperation of the member State in question will be essential, as the investigation might include a visit to the territory (rules 78 to 80). In the conduct of such a "visiting mission", those taking part in it will even be able to organise *hearings* in connection with the inquiry as they deem it appropriate (rule 81.1).

The conclusions of the member or members of the visiting mission will be examined by the Committee, and then transmitted to the member State, together with any comments or suggestions deemed appropriate in the light of the situation.

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<sup>22</sup> Regarding questions posed by the rationalisation of the procedure for the submission and examination of member State reports to committees created by human rights treaties, see Doc. HRI/CM/2002/2, of 25th April 2004: "Métodos de trabajo relacionados con el proceso de presentación de informes de los Estados". Above all, see Doc. HRI/CM/2002/3, of 24th September 2002, "Informe de la primera reunión entre los Comités que son órganos creados en virtud de tratados de derechos humanos", where we should highlight paragraphs 23 to 28, regarding "estrategias para favorecer la presentación de informes, incluida la asistencia técnica". The CoAT has already begun to encourage the presentation of the most delayed State reports, through previous contacts offering said assistance.

<sup>23</sup> The corresponding rules of the Rules of Procedure (from 69 to 84) have not suffered any modification in the reforms which took place in 2002.

<sup>24</sup> The "reservation" of not recognising this authority, allowed by Article 28 of the Convention and which can be retired at any moment, was entered in January of 2006 by eleven member States: Afghanistan, Saudi Arabia, China, Cuba, Equatorial Guinea, Indonesia, Israel, Kuwait, Morocco, Poland and Syria.

<sup>25</sup> The Committee has full discretion to make use of all sources of information it deems appropriate for dealing with the information it receives, and for acquiring more (rules 76.4 and 5).

The State "shall be invited" to inform the Committee within a reasonable delay of the action it is taking with regard to the Committee's findings and in response to its comments and suggestions (rule 83).

In the light of the confidential nature of all these proceedings, once they have ended, the Committee can decide, following consultation with the State concerned (which will be invited to transmit its thoughts after a reasonable period of time), to include a *summary account* of the results of the proceedings in its annual report (rule 84).

In its first *summary account* regarding its investigation concerning the situation in Turkey (1993), the Committee<sup>26</sup> produced its doctrine, later disseminated in other reports, regarding when "systematic torture" can be said to have taken place:

"The Committee considers that torture is practised systematically when it is apparent that the torture cases reported have not occurred fortuitously in a particular place or at a particular time, but are seen to be habitual, widespread and deliberate in at least a considerable part of the territory of the country in question. Torture may in fact be of a systematic character without resulting from the direct intention of a Government. It may be the consequence of factors which the Government has difficulty in controlling, and its existence may indicate a discrepancy between policy as determined by the central Government and its implementation by the local administration. Inadequate legislation which in practice allows room for the use of torture may also add to the systematic nature of this practice".

*Summary accounts* have been published regarding five confidential investigations which have taken part in Turkey (1993), Egypt (1996), Peru (2001), Sri Lanka (2002), and Mexico (2003)<sup>27</sup>. In the case of Turkey (para. 58), the Committee confirmed "the existence and systematic character of the practice of torture". In the case of Egypt, a country which did not allow the entrance of the inquiry mission, the Committee (para. 220) "... is forced to conclude that torture is systematically practised by the security forces in Egypt, in particular by State Security Intelligence, since in spite of the denials of the Government, the allegations of torture submitted by reliable non-governmental organizations consistently indicate that reported cases of torture are seen to be habitual, widespread and deliberate in at least a considerable part of the country". In the case of Peru (para. 20) "the large number of complaints of torture, which have not been refuted by the information provided by the authorities, and the similarity of the cases, in particular the circumstances under which persons are subjected to torture and its objectives and methods, indicate that torture is not an occasional occurrence but has been systematically used as a method of investigation". In the case of Sri Lanka (para. 177), it was indicated that "even though the number of instances of torture is rather high, the majority of suspects are not tortured; some may be treated roughly". In the case of Mexico (para. 218), it was stated that "... the police commonly use torture and resort to it systematically as another method of criminal investigation, readily available whenever required in order to advance the process".

<sup>26</sup> See paragraph 39 of document A/48/44/Add.1 de 15th November 1993.

<sup>27</sup> Respectively, Docs. A/48/44/Add.1; A/51/44, paras.18-222; A/56/44, paras.144-193; A/57/44 paras. 123-195; CAT/C/75.

There is no doubt regarding the usefulness of this process, although, until now, its use has been limited and very slow in occurring; in practice, this can take years. One of the issues raised by its effectiveness is that of the follow up of the recommendations made by the Committee according to the results of the “inquiry”. The Committee Against Torture has recently shown its willingness to carry out this follow up<sup>28</sup>.

#### 4.3 *The examination of communications submitted by States parties*

In accordance with Article 21 of the Convention, the *admission and consideration of communications submitted by a member State* alleging that another member State is not fulfilling the obligations under the Convention takes place through an optional procedure, since it depends on a declaration by both States Parties stating that they recognise the competence of the Committee to receive and consider this kind of communications<sup>29</sup>.

The Committee can intervene only if the concerned member States have previously attempted to resolve the affair through direct contact between the two and, nevertheless, this has not been adjusted to the satisfaction of both States parties within six months after the receipt by the receiving State of the initial communication. In this case, “either State shall have the right to refer the matter to the Committee” (Article 21.1.b). There is also a requirement that domestic remedies must have been exhausted (Article 21.1.c) of the Convention and rule 91 c) of the Rules of Procedure).

Once the communication has been accepted, the Committee makes available its good offices to the parties with a view to a friendly solution, including, if necessary, the creation of an *ad hoc* conciliation commission. After having examined the case during a period of sessions where the “concerned” States are present and have made written and oral presentations, the Committee shall submit a report (within a maximum period of one year after the date of the receipt of notice) in which it will either confirm the agreement that has been reached, or will make only a brief statement of the facts, and will add the written submissions and record of the oral submissions made by the member States concerned. In every matter, the report by the CoAT shall be sent to those States involved.

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<sup>28</sup> So, in para. 7 of the “Recommendations” adopted by the Committee following its examination of the fourth periodic report from Egypt (CAT/C/CR/29/4, 23 December 2002) it is stated that “the Committee reiterates to the State party the recommendations addressed to it in May 1996 on the basis of the conclusions the Committee reached under the procedure provided for in Article 20 of the Convention, and requests the State party to inform it of the steps it has taken to implement them”.

<sup>29</sup> On 26<sup>th</sup> January 2006, fifty five States had made known their declaration of acceptance of this authority in the Committee: Algeria, Argentina, Germany, Australia, Austria, Belgium, Bosnia-Herzegovina, Bulgaria, Cameroon, Canada, Chile, Cyprus, Croatia, Costa Rica, Denmark, Ecuador, Slovakia, Slovenia, Spain, United States, Russian Federation, Finland, France, Ghana, Greece, Hungary, Ireland, Iceland, Italy, Japan, Liechtenstein, Luxembourg, Malta, Monaco, New Zealand, Norway, Netherlands, Paraguay, Peru, Poland, Portugal, Czech Republic, United Kingdom, Senegal, Serbia and Montenegro, South Africa, Sweden, Switzerland, Togo, Tunisia, Turkey, Ukraine, Uganda, Uruguay, and Venezuela.

Given that this procedure has never been used, nor does it look as if it will ever be (similar to what happens with other analogous “inter-state” procedures set out by the other conventions existing for the protection of human rights within the universal system of the United Nations), there is no need to consider it further, especially as its rules have not suffered any of the changes of the Rules of Procedure reforms of 2002 (rules 85 to 95).

#### 4.4 *The examination of individual complaints*

Similarly facultative is the acceptance by States Parties<sup>30</sup> of the procedure relating to *the admission and consideration of “individual complaints”*<sup>31</sup> which are submitted by individuals (or on behalf of them) subject to the jurisdiction of any State Party, alleging that they have been victims of a violation by a State Party of the norms of the Convention, meaning violation of the rights enshrined in the Convention. It deals, then, with the allegation that an individual right, derived from the CAT, has been violated by the State in question. This procedure has been the object of various reforms, some of which are relevant, through the new Rules of Procedure adopted in 2002.

There follows a summary of the articles regarding general regulations, the organisation, and the phases of the procedure in the light of the latest modifications.

A) The Secretary-General shall bring to the attention of the Committee complaints of individuals “which are or appear to be” submitted for consideration in accordance with Article 22.1 of the CAT (doubts as to the wish of the complainant will be dealt with at this stage) (rule 97). A list of the complaints brought to the attention of the Committee shall be prepared by the Secretary-General, who shall circulate it at regular intervals to the members of the Committee, maintaining a “permanent register” of all such complaints (rule 98).

Complaints may be “registered” by the Secretary-General or by a decision of the Committee or by the Rapporteur on new complaints and interim measures (rule 98.1). But the *Secretary-General* shall not register any complaint against a member State which has not accepted the Committee’s competence to accept and consider them. Neither will anonymous complaints be registered, or those which have not been submitted in writing by the person alleging that he or she is the victim, or by close relatives writing in his or her name, or by a representative with the appropriate written authorisation (rule 98.2). In this last case, the decision to not register may be revised by a favourable decision concerning the admissibility of a complaint, always taken under the ultimate control of the Committee (see *infra*).

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<sup>30</sup> The list of States which have accepted this procedure is almost the same as that in the previous footnote, except that Japan, the United Kingdom, the United States, and Uganda have not accepted it, and are replaced by Azerbaijan, Burundi, Guatemala, Mexico, and the Seychelles.

<sup>31</sup> In the new 2002 version, the Rules of Procedure notably substitute the term “communication” for that of “complaint”, which accents both the formal complaint nature of the violation regarding the active legitimisation of victims, and the contradictory and almost contentious nature of the procedure. Thus the rubric of chapter XIX of the new text sets out “Procedure for the consideration of communications received under Article 22 of the Convention”.

B) The procedure for determining the admissibility of the complaints of individuals has been made more precise and undergone significant developments.

- a) The general norm (rule 105.1) is that the Committee decides, *by simple majority and as soon as possible*, whether or not a complaint is admissible under Article 22 of the Convention.
- b) A *Working Group* created by the Committee may also (always under the ultimate control of the Committee) declare the admissibility of the complaint by majority vote, or inadmissibility by unanimity, and also may make recommendations to the Committee regarding the merits of the complaints, and to assist the Committee in any other way it deems necessary (rules 61, 105.2, and 106.1).

The working group will be made up of no fewer than three and no more than five members of the Committee, and chosen by it for every two periods of sessions (rule 106.2), and will be able to choose Special Rapporteurs from among its members, who will be charged with dealing with specific complaints (rule 106.3) (authority which in the previous version of the Rules of Procedure was attributed to the Committee as such). At the moment, the usefulness of this working group is being called into question, and it is probable that in the end the Committee will always work as a whole.

- c) One provision now sets out that *the Committee, the working group, or the special rapporteur(s)* (unless they have expressly decided otherwise), will examine complaints in the order that they were "received" by the Secretariat. The Committee will be able to make a decision regarding whether to conduct the joint examination of two or more complaints, or to divide the complaints into those proposed by different authors, in such a way that the complaints, thus divided, will receive separate registry numbers (rules 105.3-5).
- d) In accordance with rule 107, the following conditions for the admissibility of complaints will be verified by *the Committee, the working group, the rapporteur on new complaints and interim measures, or a rapporteur* charged with dealing with specific complaints (the last two had not the authority to exercise powers in this proceeding, according to the previous version of the Rules of Procedure).
  - i) The individual submitting the complaint should do it so as a victim of a violation at the hands of the member State concerned, in accordance with the provisions of the Convention<sup>32</sup>.
  - ii) The complaint does not constitute an "abuse of the Committee's process or manifestly unfounded".
  - iii) The complaint is not incompatible with the provisions of the Convention.

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<sup>32</sup> According to rule 107 a), "the complaint should be submitted by the individual himself/herself or by his/her relatives or designated representatives, or by others on behalf of an alleged victim when it appears that the victim is unable personally to submit the complaint, and, when appropriate authorization is submitted to the Committee". This motive for inadmissibility is a reason for the rejection of the registration of a complaint, according to what is mentioned above.

- iv) The same issue has not been and is not being examined under another procedure of international investigation or settlement.
  - v) The person has exhausted all available domestic remedies, a condition which cannot be demanded if the application of said remedies is unreasonably prolonged, or is unlikely to bring effective relief to the person who is the victim of the violation of the Convention.
  - vi) The time elapsed since the exhaustion of domestic remedies is not so unreasonably prolonged as to render consideration of the claims unduly difficult by the Committee or the State party.
- e) *The Committee or the working group* can decide that a complaint is inadmissible (or that consideration of it should be suspended or discontinued). The decision regarding inadmissibility can be reviewed *by the Committee* upon a request from one of its members, or by a written request by or on behalf of the individual concerned (rule 110), in which documentary evidence should be provided to the effect that the reasons for inadmissibility established in Article 22.5 of the Convention are no longer applicable.
- f) As soon as possible “after the complaint has been registered”, it should be transmitted to the member State with a request for a written reply within six months (rule 109.1). A complaint may not be declared admissible unless the member State concerned has received its text, and has had the opportunity to provide information or observations (rule 109.8).  
The response of the State concerned shall include an explanation or statement relating both to admissibility and the merits of the complaint, as well as to the corrective measures which have been taken regarding the incident, unless the *Committee, the working group, or the rapporteur on new complaints and interim measures* have, due to the exceptional nature of the case, decided to request a written response referring only to the issue of admissibility (rule 109.2). The State that receives such a request may, for its part, make allegations, within a period of two months, in favour of inadmissibility, but the Committee or the rapporteur on new complaints and interim measures (the text does not include the working group here) will take a decision regarding whether or not the issue of admissibility should be considered separately from the merits (rule 109.3).
- g) Once the contradictory process regarding the merits of the complaint has begun, the Committee may revoke its decision regarding the admissibility of a complaint in the light of explanations or statements made by the member State during this phase; however, before doing this, “the explanations or statements concerned must be transmitted to the complainant so that he or she may submit additional information or observations within a time limit set by the Committee” (rule 111.5).

C) The new rule regarding “interim measures” is especially worthy of comment. According to the new rule 108, at any time after having *received* the complaint, the Committee, a working group, or the rapporteur(s) for new complaints and interim measures may transmit to the State party concerned a request that it take such interim measures “as the Committee considers necessary to avoid irreparable damage

to the victim or victims of alleged violations". Where a request for interim measures has been made, the working group or rapporteur(s) should inform the Committee members "of the nature of the request... at the next regular session of the Committee" (rule 108.3), and the Secretary-General shall maintain a list of such requests (rule 108.4). For its part, the member State may inform the Committee that the reasons for the adoption of the interim measures have disappeared, or may set out the reasons why the request for such measures should be withdrawn (rule 108.6).

The rapporteur for new complaints and interim measures will also be charged with monitoring compliance with the Committee's request for interim measures. *The Committee, the working group, or the rapporteur* may withdraw the request for interim measures (rules 108.5 and 7)<sup>33</sup>.

In the new version of the Rules of Procedure, all reference to the possible adoption of interim measures during the Committee's examination of communications regarding the merits of the complaint has been dropped<sup>34</sup>. Until now, to use the terminology of the previous version of the Rules of Procedure, the degree of fulfilment of the "view" of the Committee regarding the utility of the adoption of interim measures has been very wide by the required States. In any case, the new rule of the Rules of Procedure shows the willingness to emphasize the *compulsory nature* of the petition for provisional measures.

This is plausible given the fact that this is the same practice followed by other "conventional Committees", taking into account that in some cases there has been danger to the life or physical integrity of foreigners "returned" to third countries by member States, through leaving unfulfilled the *request* of the Committee in those cases in favour of the application of the provisional measure of "non-refoulement" while a decision could not have been reached yet on the merits of the individual complaint in question. It is, undoubtedly, possible legitimately to doubt the good faith that is demanded of a member State regarding their obligations in accordance with the Convention, if the State generally *does not fulfil* the "requests" for interim measures which were directed towards it by control bodies. Reinforcement of international control which deals with the fulfilment of such requests guarantees this consideration.

D) Article 111 of the Rules sets out the procedure relating to the examination of the merits of individual complaints once they have been declared admissible. The Committee sets out the time-frame for the State party concerned (which will be informed what information it is required to produce) to submit its written explanations or statements, as well as the written information and observations provided by

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<sup>33</sup> In my opinion, given the fact the Committee and the working group do not meet frequently (in two annual sessions), the power of the rapporteur(s) to withdraw their petition for interim measures can be exercised in conditions which do not allow the person making a complaint to defend himself or herself, and they consequently lack effective remedies before the Committee (which is not meeting) against a decision which could potentially seriously affect them. In any case, the Committee has prepared some guidelines for its own actions and those of subsidiary bodies as regards provisional measures. See the Committee's decision on the "Mandate of the Rapporteur on new complaints and interim measures", in Doc. A/57/44, *op. cit.* p. 215.

<sup>34</sup> See Article 110.3 of the previous version of the Rules of Procedure, which refers to the "view" of the Committee regarding the adoption of interim measures.

the author of the complaint. In addition, the Committee may invite the complainant or his or her representative, and the representative of the member State, "to be present at specified close meetings of the Committee in order to provide further clarifications or to answer questions on the merits...". Once one *party* has been invited, the other *party* (the Rules of Procedure now use the terminology appropriate to a contradictory procedure of a contentious nature) shall also be informed and invited to attend the session and make any observations it deems necessary. However, if one party does not appear, this will not prejudice the consideration of the case (rule 111.4).

Once the procedure has been completed, the Committee will formulate its "decisions"<sup>35</sup> on the merits, although before doing this it may refer the communication to the working group or to a case rapporteur designated under rule 106.3, so that either of the two can make recommendations to the Committee (rule 112.1). As a general rule, the member State concerned shall be invited to inform the Committee within a specific time-frame of the measures it has adopted in accordance with the decisions of the Committee (rule 112.5).

As stated above, the "conclusions and recommendations" are not strictly obligatory for the State at which they are directed, but the adoption of all necessary measures for putting them into practice should be taken in good faith. Certainly, the CoAT is not jurisdictional in nature, and its activities, especially during the period of the examination of reports, are not aimed at "condemning" a member State for violation of its obligations, or establishing and demanding international responsibility for such a violation. Far from a "jurisdictional" approach, this deals with "dialogue" with the State being controlled, and the progressive obtaining of good faith assurances that they are acting in accordance with the provisions and legal standards set out in the Convention and, more generally, by the international legal order.

An important innovation was the creation, through rule 114, of a *follow-up procedure* for the decision taken within the framework of the examination procedure of individual complaints, which consists in the designation by the Committee of one or more special rapporteur(s) "for the purpose of ascertaining the measures taken by States parties to give effect to the Committee's findings". These rapporteurs will be able to take measures and establish the appropriate contacts for the due completion of the mandate for the appropriate following-up and will report to the Committee. In addition, they will recommend further action to the Committee as may be necessary, and shall regularly inform the Committee of activities taking place for the follow-up of its decisions. On the other hand, its mandate is also to bring about, with the approval of the Committee, the necessary visits to the member State concerned (rule 114.4)<sup>36</sup>. In the text of its annual reports the Committee has begun to include information on follow-up activities by the rapporteurs.

<sup>35</sup> In the previous version of the Rules of Procedure the term used was "view of the Committee".

<sup>36</sup> See the text of the Committee's decision taken on 16th May 2002 on "Mandate of Rapporteur on follow-up of decisions on communications submitted according to Article 22", in Doc. A/57/44, *op. cit. supra*, p. 216.



## 5. Publication of the proceedings and results of the various procedures before the Committee. General comments

In referring to the publication of the proceedings and results of the procedures which take place before the Committee, it must be said that the “sanction by public opinion” (internal or international) is an instrument which in many cases aids international progress regarding human dignity, although we should not ignore the danger and cases of programmed “manipulation”.

In line with this, the Rules of Procedure foresees that, in particular cases, the Committee may decide to issue “communiqués” on its activities, through the Secretary-General, for the use of the information media and the general public<sup>37</sup>.

In a more general and institutional manner, it is set out that the Committee shall submit an annual report of its activities according to the Convention to the States parties and to the General Assembly of the United Nations (Article 24 of the CAT and rule 63 of the Rules of Procedure), in which it must include a list of those States which have not submitted their obligatory periodic reports (rule 2). The CoAT may, at its discretion, decide whether to include the conclusions and recommendations made at the end of the procedure of examination of State reports, as well as the observations of the member States concerned, and a copy of the report of the State party concerned if so requested by the State itself (rule 68.3).

Similarly, the Committee, having consulted the member State in question, may include a summary of the results of the procedure of the *confidential inquiry* of Article 20<sup>38</sup>. Before this, the Committee will, through the Secretary-General, invite the State concerned to inform the Committee of its observations on the issue of possible publication, indicating a date by which this should be done. Logically, if it decides to include the summary in question, the Committee shall forward, through the Secretary-General, the text of the summary account to the member State concerned (rule 84).

Finally, the Committee may decide whether to include in its annual report a summary of the complaints examined and, where it considers appropriate, a summary of the explanations and statements of the States parties concerned and of the Committee’s evaluation (rule 115.1). In the annual report the text of the final decisions will also be included, including decisions relative to the merits of the complaints received, as well as the text of any decision declaring the inadmissibility of a complaint. Similarly, information on activities regarding the follow-up of this will also be included (rule 115<sup>39</sup>).

<sup>37</sup> Rule 74 of the Rules of Procedure, referring to communiqués on activities in accordance with Article 20 of the Convention; rule 90, on activities in accordance with Article 21 (in this case, “after consultation with the States parties concerned”); and rule 102, regarding activities which take place in accordance with Article 22.

<sup>38</sup> The almost completely reserved nature of the procedure of the “confidential inquiry” of Article 20 of the Convention, and the demand for “reservation” of many transactions of other control proceedings, have double foundations in the nature of international crimes which they attempt to prevent and repress (in particular the protection of their victims, be these real or potential), and in the fear of States (or political regimes) of seeing themselves publicly disgraced if they are made responsible for acts which disgust the majority of people.

<sup>39</sup> For reference to the mandate of the Human Rights Commission’s Special Rapporteur on torture, see the report submitted by Mr. Theo van Boven, E/CN.4/2002/137, 26<sup>th</sup> February 2002. The

The Committee has at its disposition an instrument that is particularly useful for the interpretation, precision, and clarification of the norms which place obligations upon States: the "General Comments" made on the different provisions of the Convention. But, unfortunately, as was shown above, they have only been used on one occasion, in 1996, for "commenting" on the "implementation of Article 3 in the context of Article 22"<sup>40</sup>.

## 6. The Optional Protocol to the Convention Against Torture

The adoption of a project on the *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*<sup>41</sup> obeys a request from the World Conference on Human Rights of 1993, and has the aim of establishing of a *system of regular visits* undertaken by independent international and national bodies to those places where people are deprived of their freedom,

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Rapporteur, in line with his predecessor, has the aim of "cooperating with human rights mechanisms particularly relevant to his mandate, such as the Committee Against Torture, the Human Rights Committee,... In this respect, he is mindful of the complementary nature of the mandates and activities of the various bodies that combat practices of torture and that provide redress and rehabilitation to torture victims" (para. 5). In practice, the Rapporteur has made the compromise of not acting through the means of field visits, so as not to interfere in the "confidential inquiries" which the Committee Against Torture could be carrying out. For a summary of the relevant activity of the previous Special Rapporteur on Torture, Sir Nigel Rodley, see his report submitted in fulfilment of resolution 2001/62 of the Human Rights Commission: E/CN.4/2002/76, 27<sup>th</sup> December 2001.

<sup>40</sup> HRI/GEN/1/Rev.7/Add.1, 4<sup>th</sup> May 2005, *A compilation of general observations adopted by bodies created by virtue of human rights treaties*, p. 329. This lack of action is not present in the frequent "interpretative" activities of other conventional committees, which even "orient" in no uncertain terms the development of international practice relevant to the formation of international legal norms. In this regard, the relevance of the Human Rights Committee, the Committee against Racial Discrimination, and the Committee on Economic, Social and Cultural Rights must be underlined. The "recommendations", "observations", "conclusions", and "decisions" of the CAT have given rise to a rich and coherent casuistry which could be rationalised, even more so when other conventional human rights committees have adopted interpretations and commentaries on the meaning of the prohibition of torture and mistreatment in their respective environments. On the application by internal legal bodies of standards established by different decisions and the general comment of the Committee Against Torture, see Iwasawa, Y. Byrnes, A.C. and Kamminga, M.T. (Rapp. and co-rapp.) Committee on International Human Rights Law and Practice. I.L.A. New Delhi Conference (2002). Report of the 70<sup>th</sup> Conference, London 2002, pp. 507 ff.

<sup>41</sup> E/CN.4/2002/WG.11/CRP.1, 17<sup>th</sup> January 2002. This project was approved by the Human Rights Commission in its 58<sup>th</sup> session (18<sup>th</sup> March to 26<sup>th</sup> April of 2002; Doc. E/CN.4/2002/L.5, 2<sup>nd</sup> April 2002) which was presented by the open-ended working group. See the final report of the working group in E/CN.4/2002/78, 20<sup>th</sup> February 2002, and the annexed documentation on the preparatory work. This report contains a clear summary of the opposing positions of groups of States in favour of and against an instrument which, in my opinion, complements the actions and competences of the Committee Against Torture. Following approval from ECOSOC, the third commission of the General Assembly approved the protocol on 7<sup>th</sup> November with 104 votes in favour and eight against (among them the U.S., China, Cuba, Israel, Syria, Nigeria, and Vietnam), and 37 abstentions. See A/RES/57/199 of 9<sup>th</sup> January 2003. On 8<sup>th</sup> December 2005, Uruguay became the sixteenth State to ratify the Protocol, which will come into force once it has been accepted by twenty member States of the Convention Against Torture. The Protocol has been signed at 26<sup>th</sup> January 2006 by 49 States, including Spain which signed at 13 April 2005.

in order to prevent torture and other cruel, inhuman, or degrading treatment or punishment (Article 1 of the Protocol). Definitively, what it deals with, as shown in the Preamble of this new instrument, is the aim of achieving the eradication of such criminal practices, and strengthening, through different types of measures, the protection of individuals against torture and other cruel, inhuman or degrading treatment or punishment, which is seen as “a common responsibility shared by all”.

The optional protocol is a conventional instrument linked to the 1984 Convention, such that only States which are members of the Convention can be members of the optional protocol. In order for it to come into force, it needs twenty ratifications or members (Article 28). Reservations to the text of the Protocol are prohibited (Article 30), and it incorporates the possibility of its denounce or amendment (Articles 33 and 34).

Given that a “system of regular visits” to places of detention also exists under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 26<sup>th</sup> November 1987<sup>42</sup>, Article 31 of the Protocol includes a clause of compatibility between the two systems, and encourages the Subcommittee on Prevention (see *infra.*) and the bodies established under regional conventions to consult one another and cooperate so as to avoid duplication and promote effectively the objectives of the Protocol. In addition, Article 32 of the Protocol includes another compatibility clause regarding the four Geneva Conventions on International Humanitarian Law of 1949, and their Additional Protocols of 1977, foreseeing in particular that its provisions shall in no way affect the opportunity that any member State has to authorise the International Committee of the Red Cross to visit places of detention in situations not covered by International Humanitarian Law.

The Protocol’s prevention system is based on the inter-related and complementary actions of bodies belonging to two *pillars*: the international and the national of each State. On a universal level, only this system of *double* legitimacy has allowed the reaching of a difficult consensus, needed for the adoption of the instrument; this consensus lies on a balance between the defence of values and universal interests through international mechanisms provided with “supra-national” competences, and the protection of “sovereignty” or national interests against undesirable or inconvenient “foreign interventions”.

The international body created by the Protocol is the *Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee Against Torture* (hereinafter referred to as the Subcommittee), which is guided by the principles of confidentiality, impartiality, non-selectivity, universality, and objectivity, as well as the purposes and principles set out in the Charter of the United Nations and in the norms of the United Nations concerning the treatment of persons deprived of their liberty (Article 2)<sup>43</sup>.

<sup>42</sup> See note 6.

<sup>43</sup> Its condition as an international body is reinforced by Article 25 of the Optional Protocol, according to which the expenditure incurred by the Subcommittee are borne by the United Nations; the Secretary-General shall provide the necessary staff and facilities for the effective performance of its tasks; finally, a Special Fund shall be set up for contributing to the financing of the implementation of its recommendations after a visit, as well as education programmes of the national preventive mechanisms (Article 26). Compare these provisions with Articles 17.7 and 18.5 of the 1984 Convention, whose amendments, as has been indicated (see note 2), have not been able to come

The Subcommittee consists of ten members (this number can increase to 25 if the number of States Parties reaches fifty), who shall exercise their functions in their individual capacity, and shall be available to serve the Subcommittee efficiently. They shall be chosen for a term of four years, and may be re-elected<sup>44</sup>.

Their mandate has a threefold nature (Article 11):

- a) Visiting any “place of detention”<sup>45</sup>, and making recommendations to member States regarding the protection of “people deprived of their liberty”<sup>46</sup> from torture or other cruel, inhuman, or degrading treatment or punishment.

The visits will take place in accordance with “a programme of regular visits to the States parties”, established at first by lot; such a programme shall be notified to the States parties “in order that they may, without delay, make the necessary practical arrangements for the visits to be conducted” (Article 13). At least two members of the Subcommittee will take part in the visit, but they can be accompanied by experts of demonstrated professional experience and knowledge selected from a roster of experts. The State party concerned may show its opposition to the inclusion of a specific expert in the visit. If that is the case, the Subcommittee “shall propose another expert” (Article 13.3). In addition, if the Subcommittee considers it appropriate, it may propose a short *follow-up visit* after a regular visit (Article 13.4).

On the other hand, the Subcommittee shall communicate its recommendations and observations confidentially to the State party and, “if relevant, to the national preventive mechanism” (Article 16.1). More concretely, the Subcommittee shall publish its report, together with any observations of the member State concerned, if the State requests it to do so; but if the State itself makes part of the report public, the Subcommittee may publish its report in whole or in part, avoiding the inclusion of personal data without the express consent of the person involved (Article 16.2).

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into force due to lack of acceptance by member States who, in the majority, do not want to finance the functions of the Committee and its members with the United Nations budget.

<sup>44</sup> Specifically, it is foreseen that the composition of the Subcommittee will have to take into account an equitable geographic distribution of members, the representation of different “forms of civilization and legal systems of the States parties”, and (the biggest innovation), the need “for a balanced gender representation on the basis of principles of equality and non-discrimination” (Articles 5.3 and 4). Members of the Subcommittee shall be accorded privileges and immunities, in accordance with sections 22 and 23 of the Convention on the Privileges and Immunities of the United Nations of 1946.

<sup>45</sup> In other words, in accordance with what is set out in Article 4.1, “... any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence...”. No express reference to “control” is found in the Articles of the 1984 Convention.

<sup>46</sup> “Deprivation of liberty” is defined in Article 4.2, for the purposes of the Protocol, in the following terms: “any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority”. The express reference to “private” detention institutions must be highlighted, as it serves to deal with the practice followed in some States (which I believe to be dangerous and inadequate for the human rights of prisoners) of “entrust” these private institutions the exercise of *penitentiary public power*.

- b) Acting in relation to the national prevention mechanisms, advising and assisting States in their creation; maintaining direct, and if necessary confidential, contact with the national preventive mechanisms, and offering them training and technical assistance; advising them to evaluate their needs and the means necessary to strengthen the protection of people deprived of their liberty; and making observations and recommendations to member States so as to strengthen the capacity and mandate of the national preventive mechanisms.
- c) Cooperating for the prevention of torture in general with the relevant United Nations bodies and mechanisms, as well as with international, regional and national institutions and organisations whose objective is to strengthen the protection of people against torture.

In general terms, States Parties are obliged to do whatever necessary for the Subcommittee to adequately complete its mandate. More concretely, they commit (Articles 12 and 14) to receive it in their territory and grant it access<sup>47</sup> to all places of detention and their installations and facilities, and to all information regarding the number of people deprived of their freedom in places of detention, the number of places and their location, and the treatment and conditions of the detention; to allow them the possibility to have private interviews with the persons deprived of their liberty without witnesses, as well as with any other person who the Subcommittee believes may supply relevant information; to allow them the freedom to choose the places of the visits and the people to be interviewed (anyone providing such information will enjoy special protection in accordance with Article 15); to provide all information requested for the evaluation of the needs and measures which should be taken; to encourage and facilitate contacts between the Subcommittee and the national preventive mechanisms; and, finally, to examine the recommendations of the Subcommittee and engage in dialogue with it regarding possible measures for implementation.

The Subcommittee is not a subsidiary body of the Committee Against Torture, as it has its own treaty of creation. However, many doubts came about during the process of the negotiation of the optional protocol, from the perspective that its approval would come about in detriment of the relevance and functions of the Committee. Some of the provisions of the Protocol deal with the relationship between the Subcommittee and the Committee, without undermining the basic independence of the former in the carrying out of its tasks. So, it is established that the Subcommittee and the Committee will hold their periods of sessions simultaneously at least once a year (Article 10.3); that the Subcommittee will present an annual report on its activities to the Committee (Article 16.3); that if a member State refuses to cooperate with the Subcommittee, or to take steps to improve the situation in the light of the recommendations of the Subcommittee, the Committee may, at the request of the Subcommittee, "decide by a majority of its members, after the State

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<sup>47</sup> In accordance with Article 14.2, "objection to a visit to a particular place of detention may be made only on urgent and compelling grounds of national defence, public safety, natural disaster or serious disorder in the place to be visited that temporarily prevent the carrying out of such a visit. The existence of a declared state of emergency as such shall not be invoked by a State party as a reason to object to a visit".

Party has had an opportunity to make its views known, to make a public statement on the matter or to publish the report of the Subcommittee..." (Article 16.4).

The national *pillar* is designated as "national preventive mechanism", and is made up of one or several visiting bodies set up by each member State, designated and maintained at a national level, at the latest one year after the entry into force of the Protocol or its ratification or accession (Articles 3 and 17). The national mechanism will be "independent", and the "mechanisms established by decentralized units may be designated as national preventive mechanisms for the purposes of the present Protocol if they are in conformity with its provisions" (Article 17)<sup>48</sup>. National preventive mechanisms will have *at a minimum* certain "faculties" in accordance with the Protocol (Article 19). These are: the periodical examination of the treatment of people deprived of their freedom in places of detention with the aim of strengthening their protection; to make recommendations to the relevant authorities for the improvement of the treatment and conditions of people deprived of their liberty, and for the prevention of torture and mistreatment, "taking into consideration the relevant norms of the United Nations"; and to submit proposals and observations regarding current legislation or "draft legislation".

Member States (Article 18) should take the necessary measures to guarantee the functional independence of national mechanisms as well as the independence of their personnel (even affording them privileges and immunities), and to ensure that experts have the required capabilities and professional knowledge, particularly taking into account the need of a "gender balance and the adequate representation of ethnic and minority groups in the country". Finally, States parties assume the commitment of adequately funding the national preventive mechanisms for their appropriate functioning.

In addition, in parallel with the obligations *vis-a-vis* the Subcommittee, member States undertake (Article 20) to grant national preventive mechanisms access to all places of detention and their installations and facilities, and to all information regarding the number of people deprived of their liberty in places of detention, the number of places and their location, and to all information concerning the treatment of those persons and the conditions of their detention; to allow them the possibility of interviewing people deprived of their liberty (without witnesses, personally or with a translator if necessary), or with any other person considered relevant by the national mechanism, as well as allowing them the freedom to select the places they want to visit and the people they want to interview (anyone providing the national mechanism with information will enjoy special protection, as established in Article 21).

States also commit to allowing national preventive mechanisms the right to maintain contact with the Subcommittee, sending them information, and meeting with them, and they are under the obligation to examine the recommendations of the national mechanism, and to take part in a dialogue with it regarding possible implementation measures (Article 22), and to publish and disseminate the annual reports of the national preventive mechanisms (Article 23).

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<sup>48</sup> The problems arising from its "federal" structure were mentioned by different States against the appropriateness of the Protocol. Article 17 finds a channel for the solution of thus formulated conflicts of interest, together with Article 29, according to which the provisions of the Protocol "shall extend to all parts of federal States without any limitations or exceptions".

## 7. Final observations

The prevention and eradication of torture and cruel, inhuman, or degrading treatment or punishment is an objective of the international community, and a principle of International Human Rights Law. As an essential “piece” of the universal system for the promotion and protection of human rights, the 1984 Convention and its recent Optional Protocol are instruments of great value, whose potential is not fully realised due to the negative attitudes of many States regarding global policies which would reinforce the actions of the international community and its institutions as regards respect of the dignity of all people.

It is true that the United Nations system for the promotion and protection of human rights, especially its conventional dimension, demands a reform to rationalise it or make it more effective. It is also true that the functioning of the Committee Against Torture may be improved, even with the current means in place: that is what it is trying to do right now. But the battle against torture and cruel, inhuman, or degrading treatment or punishment deserves much more attention from States whose public and international actions cannot efficiently be replaced neither by international organisations nor by international civil society. This does not, however, discount the vital tasks which are being carried out (in an increasingly institutionalised manner every day) by human rights NGOs.





# The Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol

Felipe Gómez Isa

**Summary:** 1. Introduction. 2. Historical overview. 2.1. Exclusion of Women's Rights from the Traditional Discourse on Human Rights. 2.2. The United Nations and the Principle of Non-discrimination. 3. **The Convention on the Elimination of All Forms of Discrimination Against Women.** 3.1. Substantive Provisions of CEDAW. 3.2. Addressing the Problem of States' Reservations to the Convention. 3.3. The Protection Mechanisms Under CEDAW Needed to be Strengthened. 4. **The Optional Protocol to CEDAW.** 4.1. Precedents to Ratification of the Protocol: the Negotiation Process. 4.2. Examining the Content of the Optional Protocol. 5. **Conclusions.**

## 1. Introduction

The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women has significantly enriched the protection mechanisms of women's rights at the international level. This article presents a very brief historical overview of the different stages through which women's rights have crossed at the international level. Thus, I fundamentally analyze the efforts, from 1945 to the present, of the United Nations towards the recognition of the principle of non-discrimination based on gender. I pay special attention to the Convention on the Elimination of all Forms of Discrimination Against Women, adopted in 1979 by the General Assembly of the United Nations.<sup>1</sup> Nevertheless, the main focus is the elaboration of an Optional Protocol to this Convention,<sup>2</sup> which aims to reinforce the weak mechanisms that exist to protect the rights of women at the international level. The process of elaboration, which started at the beginning of the 1990s, has faced many obstacles and difficulties. However, in spite of these problems, the Optional Protocol was finally adopted by the General Assembly through Resolution 54/4 on October 6, 1999 and entered into force on December 22, 2000.

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<sup>1</sup> Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, available at <http://www.un.org/womenwatch/daw/cedaw/states.htm> [hereinafter CEDAW].

<sup>2</sup> *Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women*, G.A. Res. 4, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/RES/54/4 (1999), available at <http://www.un.org/womenwatch/daw/cedaw/protocol/op.pdf> [hereinafter *Optional Protocol to CEDAW*].

## 2. Historical overview

### 2.1. Exclusion of Women's Rights from the Traditional Discourse on Human Rights

The concept of human rights arose relatively recently, dating from the liberal revolutions that took place throughout Europe and North America at the end of the 18th century.<sup>3</sup> The French Revolution undoubtedly lent a sense of legitimacy to the idea of human rights through the ratification of the *Déclaration des droits de l'homme et du citoyen* in 1789.<sup>4</sup> However, this important Declaration and the period of the Illustration are not especially favorable to the reinforcement of women's rights, especially with respect to their involvement in the political sphere.<sup>5</sup> Encarnación Fernández has pointed out that not acknowledging their right to participate in politics was an obvious contradiction of the revolutionary principles, above all, the principle of equal rights.<sup>6</sup> Nevertheless, the revolutionary impulse in France inspired the emergence of voices reclaiming the presence of women's rights. Two clear examples include Condorcet's *Essai sur l'admission des femmes au droit de cité* (1790) and Olympe de Gouges' *Déclaration des droits de la femme et de la citoyenne* (1791). Contemporaneously with the publication of the essays of Condorcet and Olympe de Gouges, Mary Wollstonecraft, one of the precursors of the British feminist movement, wrote *A Vindication of the Rights of Women* (1792). These contributions were arguably the first attempts at establishing legal rights for women. The situation of women in the legal sphere has been —and in many countries remains— characterized by a deep sense of inequality.<sup>7</sup> From the French Revolution until today, society has seen a widespread development in the recognition of human rights, both nationally and internationally. Throughout this evolution, including the emergence of the three generations of human rights,<sup>8</sup> there has been a gradual affirmation of

<sup>3</sup> This does not mean that there were no attempts to acknowledge certain human rights before the 18th century. An example is the important contribution of the Salamanca School of International Law towards the recognition of the rights of indigenous peoples in the context of the colonization of the Americas. See Mauricio BEUCHOT PUENTE, *Los fundamentos de los derechos humanos en Bartolomé de las Casas*, 1994. An interesting contribution regarding the history of human rights can be found in Gerhard OESTRICH, & Karl-Peter SOMMERMANN, *Pasado y presente de los derechos humanos*, 1990.

<sup>4</sup> The title itself of this Declaration, with its exclusive reference to the rights of *man* and (male) *citizens*, indicates clearly the prevailing concept of human rights.

<sup>5</sup> On feminism during the Enlightenment, see Cristina MOLINA PETIT, *Ilustración y Feminismo: lo privado y lo público en el pensamiento liberal* (1987) (unpublished Ph.D. dissertation, Universidad Complutense).

<sup>6</sup> "[E]l reconocimiento de su derecho a la participación política implicaba una contradicción evidente con los principios revolucionarios y, en especial, con el principio de igualdad de derechos." Encarnación FERNÁNDEZ, *Los derechos de las mujeres*, in Jesús BALLESTEROS (Ed.): *Derechos Humanos*, 1992, p. 148.

<sup>7</sup> A study of the historical stages of women's rights is included in Ney BENSADON, *Les droits des femmes des origines à nos jours*, 1980. On the legal situation of women during specific periods in history, see Jane F. GARDNER, *Women in Roman Law and Society*, 1990; Roger JUST, *Women in Athenian Law and Life*, 1994; Maria Teresa GUERRA MEDICI, *I Diritti delle donne nella Società Altomedievale*, 1986; Raphael SEALEY, *Women and Law in Classical Greece*, 1990.

<sup>8</sup> The first generation of human rights would be the civil and political rights born out of the 18th century liberal Revolutions. Second generation rights would include economic, social, and

principles of non-discrimination and the rights of women. However, according to many women writers, an *androcentric* concept of human rights has prevailed. This concept of rights centered on the experiences and needs of men, which excludes women's vision of the world. Carmen Magallón, for example, believes that androcentrism is a defining characteristic in the tradition of Western thought and human rights principals.<sup>9</sup> Furthermore, the very structure of human rights, such as it has been historically designed, does not consider the needs of women. Even international human rights law and the set of international legal norms it encompasses has developed in such a way that it reflects the experiences of men, excluding those of women.<sup>10</sup> One reason for this marginalization is that women are underrepresented in the environments where these international norms are created, such as States' governments and International Organizations. Women are appallingly invisible and occupy very few of the important positions, which contributes to the predominance of a male perspective.<sup>11</sup>

Another important reason why human rights have not met women's expectations is that the concept of human rights is based on the dichotomy between the public and the private spheres. Human rights generally concern only the public realm. International human rights law was originally intended to protect individuals against abuses by the State. Violations of rights that legal norms try to prevent are those that take place in the public sphere, since it is controlled by the State. However, women are generally relegated to the private sphere due to their subordinate status in society. Therefore, the principal violations of women's rights take place in the private sphere, fundamentally within the family. Traditionally, States have been reluctant to intervene in matters of the home and family life. Furthermore, according to the traditional theory of human rights, the State has no access to the private sphere. Feminist legal scholar Charlotte Bunch has stated that the dichotomy between the public and the private has been widely used to justify the subordination of women and to exclude human rights abuses committed in the private sphere from public view.<sup>12</sup>

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cultural rights resulting from the Communist and Socialist movements, which appeared during the second half of the 19th century. Lastly, the third generation of rights are those that arose during the 1960s as an attempt to bring solidarity to the international scene. For a brief review of these three generations of human rights, see Felipe Gómez Isa in this volume.

<sup>9</sup> Carmen MAGALLÓN, "Los Derechos Humanos Desde el Género", in *Los derechos humanos, camino hacia la paz*, Centro Pignatelli ed., 1997, p. 259. ("[E]l androcentrismo es un rasgo definitorio de la tradición del pensamiento occidental y los derechos humanos").

<sup>10</sup> Hilary CHARLESWORTH, "Human Rights as Men's Rights", in Julie Peters & Andrea Wolper (Eds.): *Women's Rights, Human Rights: International Feminist Perspectives*, 1995, p. 103.

<sup>11</sup> *Id.* at 104. The author includes data concerning the presence of women in various human rights organizations that clearly demonstrates discrimination occurring. For instance, the Committee for the Elimination of Racial Discrimination has only one woman among its eighteen members; the Committee for Human Rights has three women among its eighteen members; the Committee for Economic, Social, and Cultural Rights includes two women among its eighteen members; and the Committee Against Torture, two women among its ten members.

<sup>12</sup> "[L]a distinción entre público y privado es una dicotomía ampliamente utilizada para justificar la subordinación femenina y excluir los abusos a los derechos humanos en la esfera privada del escrutinio público." Charlotte BUNCH, "Transforming Human Rights from a Feminist Perspective", in *Women's Rights, Human Rights*, supra note 10, at 14.

The traditional discourse on human rights has developed without considering its impact upon women. Transforming this discourse to a perspective that will consider the needs and vindications of women is absolutely essential.<sup>13</sup> The United Nations must play a central role in this transformative process.

## 2.2. *The United Nations and the Principle of Non-discrimination*

### 2.2.1. UNITED NATIONS CHARTER

The United Nations was created following World War II. Its purpose and the basic principles it affirms, including the principle of non-discrimination, are set forth in the UN Charter.<sup>14</sup> In the Preamble, the peoples of the United Nations declare themselves to be “determined to reaffirm faith in the equal rights of men and women.”<sup>15</sup> Article 1 of the Charter establishes as a goal of the UN “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”<sup>16</sup> As an attempt to apply the principle of non-discrimination to the workings of the Organization itself, Article 8 of the Charter states “the United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs.”<sup>17</sup> As we can see, from the very beginning the United Nations aimed for the recognition of the principle of non-discrimination.<sup>18</sup>

### 2.2.2. THE COMMISSION ON THE STATUS OF WOMEN

The Commission on the Status of Women was created in 1946, just one year after the United Nations Charter entered into force.<sup>19</sup> This Commission, which deals with all matters concerning women, demonstrates the United Nations’ commitment to the principle of non-discrimination in relation to women.<sup>20</sup> The Commission has played a very important role in the process of elaborating the human rights mechanisms adopted within the framework of the United Nations.<sup>21</sup>

<sup>13</sup> Marsha A. FREEMAN & Arvonne S. FRASER, “Women’s Human Rights: Making the Theory a Reality”, in Louis HENKIN & John HARGROVE (Eds.): *Human Rights: An Agenda for the Next Century*, 1994, p. 104.

<sup>14</sup> U.N. CHARTER.

<sup>15</sup> *Id.* Preamble.

<sup>16</sup> *Id.* Art. 1, para. 3.

<sup>17</sup> *Id.* Art. 8.

<sup>18</sup> For a comprehensive study on the work of the United Nations regarding women, see Anne WINSLOW (ed.): *Women, Politics and the United Nations*, 1995; cf. Nuria CAMPS MIRABET, “La acción de la Organización de las Naciones Unidas para el desarrollo y protección de los derechos de la mujer”, in *Tendencias actuales en Derecho Internacional*, 1994.

<sup>19</sup> The UN Charter entered into force on October 24, 1945. U.N. Charter.

<sup>20</sup> For an overview of the work done by this Commission, see Margaret E. GALEY, “Promoting Non-Discrimination Against Women: The Commission on the Status of Women”, 23 *International studies quarterly*, 1979, p. 273.

<sup>21</sup> This Commission, as discussed *infra* Part IV.A., later created the Working Group for the elaboration of an Optional Protocol to CEDAW.

### 2.2.3. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

The human rights provisions in the United Nations Charter were extremely vague and general; it soon became apparent that they would need to be specified. Therefore, interested States Parties drafted the Universal Declaration of Human Rights, which was adopted on December 10, 1948.<sup>22</sup> It is important to point out the significant role of the Commission on the Status of Women in the creation of the Universal Declaration. Throughout the drafting process, the Commission constantly defended the inclusion of the female perspective into the text. Mrs. Bergtrup, who was President of the Commission, played an important role in this matter.

The Preamble to the Universal Declaration of Human Rights reaffirms the "equal rights of men and women", mentioned in the Preamble to the United Nations Charter.<sup>23</sup> Article 1 of the Declaration is particularly important from the point of view of women's rights. It states, "*all human beings* are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."<sup>24</sup> The expression "all human beings" sparked a great deal of controversy during the negotiations leading to the ratification of the Universal Declaration.<sup>25</sup> One of the initial proposals for Article 1 used the expression "all men."<sup>26</sup> This would have been a poor beginning for the Universal Declaration, which would have adversely affected women. The Commission on the Status of Women and some delegations from countries more open to the vindications of women, pressured drafters of the Declaration to use inclusory language.<sup>27</sup> As a result, the expression that now appears in Article 1 of the Declaration was included, which demonstrates more respect for the rights of a group that constitutes half of the human race.

Article 2 of the Universal Declaration establishes the principle of non-discrimination. In its first paragraph, Article 2 states "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." This provision expands the prohibition against discrimination originally stated in Article 1.3 of the United Nations Charter. Another achievement of the women's movement was the inclusion of expressions such as "everyone", "all", and "no one", in all articles of the Universal Declaration. The purpose of such language was to clarify that the principle of

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<sup>22</sup> *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR, 3d Sess., art. 1, U.N. Doc. A/217 (1948). For a brief commentary on the Universal Declaration on its 50th anniversary, see James ORAA & Felipe GÓMEZ ISA, *La Declaración Universal de los Derechos Humanos* (2d ed. 2002).

<sup>23</sup> "We the Peoples of United Nations Determined... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women." UN Charter pmbi.

<sup>24</sup> *Universal Declaration of Human Rights*, *supra* note 22 (emphasis added).

<sup>25</sup> For a discussion of the events surrounding these discussions and negotiations, see Johannes MORSINK, "Women's Rights in the Universal Declaration", 13 *Hum. Rts. Q.* 229, 233 (1991).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 234-35.

non-discrimination applies to all of the human rights recognized by the Universal Declaration.

There are, nevertheless, some references in the Universal Declaration that are rather negative from the perspective of women's rights. For example, Article 23.3, concerning the recognition of the right to work, states "everyone who works has the right to just and favourable remuneration ensuring *for himself and his family* an existence worthy of human dignity."<sup>28</sup> This provision assumes that the man is the only wage earner and provider for the family.<sup>29</sup>

Notwithstanding the negative references towards women included in the Declaration, Johannes Morsink argues that the Universal Declaration is a very progressive document in respect to women's rights.<sup>30</sup> According to Morsink, this is evidenced by the inside history of the writing process, and the struggle to reach the final product.<sup>31</sup> Such an optimistic view of the Declaration is not, however, shared by other writers.<sup>32</sup>

#### 2.2.4. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

The United Nations adopted two International Covenants on human rights in 1966: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights.<sup>33</sup> In addition to promoting human rights, these Covenants also contain specific references to the principle of non-discrimination. Article 2 of each document makes a general statement concerning non-discrimination on the basis of sex.<sup>34</sup> Article 3 of the ICCPR establishes that "the States Parties to the present Covenant undertake to ensure the equal right of men and women" to the enjoyment of the rights set forth in the Covenant.<sup>35</sup> The

<sup>28</sup> *Universal Declaration of Human Rights*, *supra* note 22, art. 23.3 (emphasis added).

<sup>29</sup> This same logic is followed by Article 25 of the Declaration, which proclaims the right to an adequate standard of living. *Id.* Art. 25.

<sup>30</sup> Morsink, *supra* note 25, at 255.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 233 (quoting Adamantia POLLIS & Peter SCHWAB, *Toward a Human Rights Framework*, 1982, p. 7).

<sup>33</sup> International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (entered into force Jan. 3, 1976) [hereinafter ICESCR]; International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 135, 6 I.L.M. 360 [hereinafter ICCPR].

<sup>34</sup> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

ICCPR, *supra* note 33, Art. 2.1.

The State Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

ICESCR, *supra* note 33, Art. 2.2.

<sup>35</sup> ICESCR, *supra* note 33, Art. 2.

language of the ICESCR is practically identical and was intended to have the same meaning.<sup>36</sup>

#### 2.2.5. THE DEVELOPMENT OF HUMAN RIGHTS INSTRUMENTS SPECIFIC TO WOMEN

A brief historical overview indicates that the United Nations has also done a commendable job recognizing certain aspects of women's rights.<sup>37</sup> The International Labour Organization (ILO), a specialized agency of the United Nations, was the first to create an instrument elaborating women's rights. With the intent to define women's rights in the labor field, the ILO approved a Convention dealing with women in the industrial sector who work night shifts on July 9, 1948.<sup>38</sup> Three years later, in 1951, the Convention on Equal Pay for Equal Work of Men and Women was adopted.<sup>39</sup> In 1952, the United Nations approved the Convention on the Political Rights of Women.<sup>40</sup> The Declaration of the General Assembly of the United Nations on the Elimination of Discrimination Against Women was issued in 1967. Most recently, the United Nations adopted the Convention on the Elimination of All Forms of Discrimination Against Women. All of these international treaties, and many others, clearly demonstrate the United Nations' commitment to women's rights.

Without a doubt, the most important texts concerning the fight to eliminate discrimination against women are the Declaration of the General Assembly of the United Nations on the Elimination of Discrimination Against Women<sup>41</sup> and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>42</sup> CEDAW completed and gave legal force to what was established by the Declaration of the General Assembly. The Declaration on the Elimination of Discrimination Against Women expressed the concern that extensive discrimination against women continued to exist despite instruments such as the Charter of the United States, the Universal Declaration of Human Rights, and the International Covenants on Human Rights.<sup>43</sup>

<sup>36</sup> The ICESCR states "[t]he States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant." *Id.* Art. 3. As we can see, the differences are in the wording alone; the meaning is identical in both.

<sup>37</sup> For a complete analysis of the main instruments in this field ratified by the United Nations, see Elsa Stamatopoulou, "Women's Rights and the United Nations", in *Women's Rights, Human Rights*, *supra* note 10, at 37.

<sup>38</sup> This Convention was ratified by Spain, where it entered into force in 1959. Night Work (Women) Convention (Revised), July 9, 1948, 81 U.N.T.S. 147, available at <http://www.ilo.org/iollex/cgi-lex/convde.pl?c089>.

<sup>39</sup> This Convention entered into force in Spain in 1968. Equal Remuneration Convention, June 6, 1951, 165 U.N.T.S. 303, available at <http://www.ilo.org/iollex/english/convdsp1.htm>.

<sup>40</sup> This Convention has been applied in Spain since 1974. Convention on the Political Rights of Women, Dec. 20, 1952, 193 U.N.T.S. 135.

<sup>41</sup> *Declaration on the Elimination of Discrimination Against Women*, G.A. Res. 2263, U.N. GAOR, 22d Sess., Supp. No. 16, at 35, U.N. Doc. A/6880 (1967).

<sup>42</sup> CEDAW, *supra* note 1.

<sup>43</sup> *Id.* pmbl.

Certainly, great progress has been made in the context of legal equality in all countries compared to the much slower advances made in the field of *de facto* equality.<sup>44</sup> The most important article of the Declaration is Article 1, which defines the principle of non-discrimination in a general sense. The rest of the Declaration attempts to specify this general principle in concrete areas such as political participation, nationality, legal capacity, education, and marriage. According to Article 1 of CEDAW, "discrimination against women, denying or limiting as it does their equality of rights with men, is fundamentally unjust and constitutes an offence against human dignity."<sup>45</sup>

#### 2.2.6. UN CONFERENCES AND OTHER SPECIAL EFFORTS RELATED TO THE RIGHTS OF WOMEN

The United Nations has sponsored activities aimed at promoting equality between men and women. Within this framework, the General Assembly of the United Nations proclaimed 1975 to be International Women's Year. That same year, the United Nations held the First International Conference on Women, which took place in Mexico. Once International Women's Year was over, the General Assembly declared the United Nations Decade for Women in order to follow up on the advancement of women. The Mexico Conference was followed by further conferences held in Copenhagen, Nairobi, and, most recently, in Beijing in 1995.<sup>46</sup> All of these Conferences have been great steps forward along the tortuous path leading to the recognition and achievement of women's rights.

In June 1993, the World Conference on Human Rights was held in Vienna. The Vienna Declaration and Program of Action that resulted is the most explicit proclamation supporting the acknowledgement and expansion of women's rights.<sup>47</sup> This Declaration establishes:

The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community. The human rights of women should form an integral part of the United Nations human rights activities, including the promotion of all human rights instruments relating to women.<sup>48</sup>

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<sup>44</sup> Fernández, *supra* note 6, at 155 ("[E]l plano de la igualdad jurídica es en el que más se ha progresado en todos los países en comparación con los avances, mucho más lentos, en el terreno de la igualdad *de facto*.").

<sup>45</sup> *Declaration on the Elimination of Discrimination Against Women*, *supra* note 41, art. 1.

<sup>46</sup> Arantxa ELIZONDO LOPETEGI, "Veinte años de cooperación internacional para las mujeres: De México a Pekín (1975-1995)", in *2 Jornadas Municipales sobre la Cooperación Norte-Sur: La dimensión global de la solidaridad*, 1995, pp. 185-211.

<sup>47</sup> At the World Conference on Human Rights, held in Vienna from June 14-25, 1993, the Vienna Declaration and Program of Action was adopted. It was adopted by the United Nations in 1994. G.A. Res. 121, U.N. GAOR, 48th Sess., Supp. No. 49, U.N. Doc. A/121 (1994) [hereinafter *Vienna Declaration*].

<sup>48</sup> *Id.* para. 18.



The UN has promoted human rights instruments relating specifically to the rights of women. CEDAW represents the most serious systematic attempt by the United Nations to fight decidedly for the rights of women.

### 3. The Convention on the Elimination of all Forms of Discrimination Against Women

#### 3.1. Substantive Provisions of CEDAW

After lengthy and complicated negotiations, CEDAW<sup>49</sup> was approved by the General Assembly of the United Nations on December 17, 1979.<sup>50</sup> The ratification process as indicated by Article 27.1 resulted in this Convention entering into force<sup>51</sup> on September 3, 1981, following the “deposit with the Secretary General of the United Nations of the twentieth instrument of ratification or accession.”<sup>52</sup> CEDAW is composed of a Preamble and thirty articles that establish different measures to be adopted by the States and by specific private parties. The purpose of these measures is the recognition and expansion of the principle of non-discrimination. In the Preamble itself, States Parties affirm the main goal of the Convention by declaring they are “determined to implement the principles set forth in the Declaration on the Elimination of Discrimination Against Women and, for that purpose, to adopt the measures required for the elimination of such discrimination in all its forms and manifestations.”<sup>53</sup>

One of the most important aspects of CEDAW is that it not only addresses the States, but also the private sphere. This field is where the most serious violations of women’s rights take place. Donna Sullivan, an expert in these matters, has stated that the Convention plans for the restructuring of gender relations within the family, requiring the State to adopt positive measures to protect women against discrimination inflicted by private actors.<sup>54</sup> One of the more radical provisions in CEDAW, Article 5, urges the States “to modify the social and cultural patterns of conduct of men and women.”<sup>55</sup> Furthermore, this provision promotes establishing the “common responsibility of men and women in the upbringing and development of their children.”<sup>56</sup> Similarly, Article 16 promotes equality in all matters related to marriage and family relations.

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<sup>49</sup> For an interesting analysis of the negotiations over CEDAW, see Arvonne Fraser, “The Convention on the Elimination of All Forms of Discrimination Against Women (The Women’s Convention)”, in *Women, Politics and the United Nations*, *supra* note 18, at 84.

<sup>50</sup> The results of the vote in the Assembly are symbolic of the problems surrounding its negotiation and the obstacles that the Convention would face: 130 States voted in favor, none voted against, and eleven abstained. The countries that abstained are mostly those with strong family and religious traditions: Bangladesh, Brazil, Comores, Djibouti, Haiti, Mali, Mauritania, Mexico, Morocco, Saudi Arabia, and Senegal.

<sup>51</sup> As of 9 March 2006, there were 180 States Parties to the Convention.

<sup>52</sup> CEDAW, *supra* note 1, Art. 27. 1.

<sup>53</sup> *Id.* preamble.

<sup>54</sup> Donna J. SULLIVAN, “The Public/Private Distinction in International Human Rights Law”, in *Women’s Rights, Human Rights*, *supra* note 10, at 129.

<sup>55</sup> CEDAW, *supra* note 1, Art. 5(a).

<sup>56</sup> *Id.* Art. 5(b).

The progressive nature of some of the provisions of CEDAW warrants further discussion.<sup>57</sup> Discrimination against women, as defined by Article 1 of the Convention, comprises:

[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>58</sup>

In Article 2 of CEDAW, the States Parties “condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.”<sup>59</sup> In order to achieve this, States Parties agree to a series of measures to be specified in the various sections of the Convention. Thus, in Article 3 the States agree to “ensure the full development and advancement of women.”<sup>60</sup> Article 4 refers to special measures to attain “*de facto* equality between men and women.”<sup>61</sup> Article 6 discusses the suppression of “all forms of traffic in women and exploitation of prostitution of women.”<sup>62</sup> Article 7 refers to the elimination of any “discrimination against women in the political and public life of the country.”<sup>63</sup> The advancement of rural women is encouraged in Article 14.<sup>64</sup> The Convention, in Article 8, also refers to the need to ensure the participation of women at the international level.<sup>65</sup> It also addresses non-discrimination on the basis of nationality.<sup>66</sup> Additionally, CEDAW promotes equal rights in the fields of education,<sup>67</sup> employment,<sup>68</sup> and health care.<sup>69</sup>

### 3.2. Addressing the Problem of States’ Reservations to the Convention

A serious problem that has had a profound impact on the effectiveness of CEDAW is that States Parties expressed a great number of reservations concerning certain provisions.<sup>70</sup> This has turned CEDAW into the international human rights treaty with the greatest number of reservations. Furthermore, according to certain

<sup>57</sup> For studies of the main points of CEDAW, see FREEMAN & FRASER, *supra* note 13, at 112; Shelley WRIGHT, “Human Rights and Women’s Rights: An Analysis of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women”, in Kathleen E. MAHONEY & Paul MAHONEY (Eds.) *Human Rights in the Twenty-First Century: A Global Challenge*, 1993, pp. 75-88.

<sup>58</sup> CEDAW, *supra* note 1, art. 1.

<sup>59</sup> *Id.* Art. 2.

<sup>60</sup> *Id.* Art. 3.

<sup>61</sup> *Id.* Art. 4.

<sup>62</sup> *Id.* Art. 6.

<sup>63</sup> *Id.* Art. 7.

<sup>64</sup> *Id.* Art. 14.

<sup>65</sup> *Id.* Art. 8.

<sup>66</sup> *Id.* Art. 9.

<sup>67</sup> *Id.* Art. 10.

<sup>68</sup> *Id.* Art. 11.

<sup>69</sup> *Id.* Art. 12.

<sup>70</sup> Rebecca J. Cook, “Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women”, 30 *Vanderbilt Journal of International Law*, 1990, p. 643.

experts some of these reservations go against the object and purpose of the Convention,<sup>71</sup> which is expressly prohibited both by the Vienna Convention on the Law of Treaties<sup>72</sup> and by CEDAW Article 28.2.<sup>73</sup> The Committee for the Elimination of Discrimination Against Women has repeatedly expressed its concern regarding the large number of reservations that seem to be incompatible with the object and purpose of the Convention. The Committee issued a General Recommendation suggesting that all States Parties should reconsider their reservations with the aim of retracting them.<sup>74</sup> In this regard, considering the number of reservations and the significance of their content, the World Conference on Human Rights held in Vienna in June 1993 decided that “ways and means of addressing the particularly large number of reservations to the Convention should be encouraged.”<sup>75</sup> The Conference also urged the States to “withdraw reservations that are contrary to the object and purpose of the Convention or which are otherwise incompatible with international treaty law.”<sup>76</sup>

### 3.3. *The Protection Mechanisms Under CEDAW Needed to be Strengthened*

The protection mechanisms for women's rights established by CEDAW are much weaker than those included in other international human rights treaties.<sup>77</sup> With respect to this, Theodor Meron has pointed out that CEDAW had become a second-class instrument within the family of United Nations human right treaties.<sup>78</sup> Various types of mechanisms exist for protecting human rights at the international level, such as periodical reports, individual complaints, inter-state complaints, and inquiry procedures. However, CEDAW only provides for the periodical reports mechanism. Article 17 of the Convention establishes a Committee for the Elimination of Discrimination Against Women, which aims to analyze the progress made by the States

<sup>71</sup> *Stamatopoulou, supra note 37*, at 38.

<sup>72</sup> Vienna Convention on the Law of Treaties, *opened for signature*, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980). Article 19 of the Convention proclaims that a State can express reservations, but not if “the reservation is incompatible with the object and purpose of the treaty.” *Id.* Art. 19.

<sup>73</sup> Article 28.2 states that “a reservation incompatible with the object and purpose of the present Convention shall not be permitted.” CEDAW, *supra note 1*, Art. 28. 2.

<sup>74</sup> General Recommendation No. 4, The Committee on the Elimination of Discrimination Against Women (sixth session, 1987), *available at* <http://www.un.org/womenwatch/daw/cedaw/recomm.htm> [hereinafter CEDAW, General Recommendation 4].

<sup>75</sup> *Vienna Declaration, supra note 47*, para. 39.

<sup>76</sup> *Id.*

<sup>77</sup> *Cf.* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 113 (entered into force June 26, 1987); CEDAW, *supra note 1*, Art. 17; First Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. For a very interesting study conducted by the Secretary General of the United Nations comparing the protection mechanisms for women's rights with those established by other human rights treaties see *Elaboration of a Draft Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, U.N. Commission on the Status of Women, 41st Sess., E/CN.6/1997/4, 1997.

<sup>78</sup> Theodor MERON, “Enhancing the Effectiveness of the Prohibition of Discrimination Against Women”, *84 American Journal of International Law*, 1990, p. 213.

Parties in enforcing the Convention. In order to monitor the success of the States in fulfilling CEDAW, Article 18 of the Convention declares:

States Parties undertake to submit to the Secretary General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect.<sup>79</sup>

These reports, according to Article 18.1 (a) and (b), shall be presented "within one year after the entry into force for the State concerned; thereafter at least every four years and further whenever the Committee so requests."

Once the Committee for the Elimination of Discrimination Against Women<sup>80</sup> has analyzed the reports submitted by the States Parties to the Convention, the Committee "may make suggestions and general recommendations based on the examination of reports and information received from the States Parties."<sup>81</sup> This is a rather weak mechanism, since all responsibility falls primarily on the State to submit information, and because the Committee's powers are quite limited. An added difficulty is that, according to Article 20.1 of CEDAW, "the Committee shall normally meet for a period of not more than two weeks annually in order to consider the reports submitted."<sup>82</sup> This period of two weeks has clearly proven to be insufficient for a calm, detailed analysis of the reports submitted by the States. This has been the reason for the Committee's considerable delay in the examination of the periodical reports.<sup>83</sup> For these reasons, the Committee for the Elimination of Discrimination Against Women recommended that the States Parties to the Convention adopt an amendment to Article 20.1 that would allow the Committee to hold as many meetings as needed to fulfill its duties properly.<sup>84</sup> Echoing this suggestion by the Committee, the eighth meeting of the States Parties to the Convention, on May 22, 1995, resulted in a resolution recommending the adoption of said amendment. This amendment will enter into force once it has been ratified by at least two thirds of the States Parties to CEDAW. The General Assembly of the United Nations is fully conscious of the difficulties faced by the Committee due to the brief period allowed

<sup>79</sup> CEDAW, *supra* note 1, Art. 18.

<sup>80</sup> CEDAW mandates that the Committee will include:

[T]wenty-three experts of high moral standing and competence in the field covered by the Convention. The experts shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilisation as well as the principal legal systems.

CEDAW, *supra* note 1, Art. 17. 1.

<sup>81</sup> *Id.* Art. 21. See also Zagorka Ilic & Ivanka Corti, "The Convention on the Elimination of All Forms of Discrimination Against Women", in *Manual on Human Right Reporting Under Six Major International Human Rights Instruments*, 1997, pp. 305-365 (for a detailed analysis of the system of periodic reports set out by CEDAW).

<sup>82</sup> CEDAW, *supra* note 1, Art. 20.1.

<sup>83</sup> For a study of the experiences of the Committee on the Elimination of Discrimination Against Women, see FRASER, *supra* note 49.

<sup>84</sup> General Recommendation No. 22, *The Committee on the Elimination of Discrimination Against Women* (fourteenth session, 1995), available at <http://www.un.org/womenwatch/daw/cedaw/recomm.htm>.

for its meetings. Therefore, in recent years, the United Nations has authorized the Committee to meet during two three-week sessions a year.

Since the beginning of the 1990s, the significant weaknesses in the protection mechanisms for women's rights established by CEDAW has motivated an increasingly insistent demand for the expansion of these mechanisms. The Commission on the Status of Women created a Working Group for the purpose of finding solutions to strengthen these mechanisms. As a result, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women was developed and opened for ratification in October 1999.

#### **4. The Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women**

##### *4.1. Precedents to Ratification of the Protocol: The Negotiation Process*

During the negotiation process of CEDAW, some States discussed the appropriateness of including individual complaints within the framework of the Convention.<sup>85</sup> Such a mechanism would allow a person to file a complaint of an alleged violation of a provision of the Convention before the Committee on the Elimination of Discrimination Against Women. However, ultimately this possibility was discarded.<sup>86</sup> Once CEDAW entered into force and the Committee started to carry out its functions, it was clear that it suffered from an excessive weakness in its protection mechanisms. For this reason, there has been a strong insistence on the need to strengthen these procedures since the beginning of the 1990s. Two possibilities for reform were put forth. Some argued for major reforms of CEDAW itself, while others advocated for the adoption of an Optional Protocol to the Convention, following the example of the International Covenant on Civil and Political Rights. It soon became clear that a reform of CEDAW would create many inconveniences, especially due to the large number of reservations to this instrument. In the face of these difficulties, an Optional Protocol was determined to be the more practical solution.

Both legal scholars<sup>87</sup> and the organs of the United Nations in charge of women's rights began to ask that a negotiation process be opened for an Optional Protocol. In 1991, at a meeting of experts organized by the Division for the Advancement of Women, it was first recommended that the United Nations Organization examine the possibility of adopting an Optional Protocol to CEDAW. The Committee on the Elimination of Discrimination Against Women took the lead. In Recommendation

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<sup>85</sup> The Netherlands was the biggest proponent of a mechanism for individual complaints under CEDAW.

<sup>86</sup> See Andrew BYRNES & Jane CONNORS, "Enforcing the Human Rights of Women: A Complaints Procedure for the Women's Convention", 21 *Brooklyn Journal of International Law*, 1996, p. 679 (discussing BYRNES & CONNORS, *The Adoption of a Petition Procedure under the Convention on the Elimination of All Forms of Discrimination Against Women*, Background Paper prepared for the Expert Group Meeting on the Adoption of an Optional Protocol to CEDAW organized by the Women in Law Project International Human Rights Group and the Maastricht Centre for Human Rights, 3, 1994).

<sup>87</sup> Meron, *supra* note 78, at 216-217.

Number 4, the Committee addressed the World Conference on Human Rights to be held in Vienna, recommending that the right to petition be included in CEDAW.<sup>88</sup> The Committee stated that the Optional Protocol was necessary in order to make CEDAW equal to other human rights treaties ratified by the United Nations. Subsequently, the World Conference on Human Rights decided that new procedures to reinforce the international community's commitment to women's equality and human rights should be adopted. For this purpose, the Vienna Declaration and Plan of Action recommended the creation of an Optional Protocol to CEDAW:

The Commission on the Status of Women and the Committee on the Elimination of Discrimination against Women should quickly examine the possibility of introducing the right of petition through the preparation of an optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women.<sup>89</sup>

In 1994, the Committee on the Elimination of Discrimination Against Women adopted Suggestion 5 recommending that the Commission on the Status of Women establish a group of independent experts to prepare a draft for the Optional Protocol. The Commission, however, ignored this recommendation by the Committee. That same year, the Human Rights Center in Maastricht and the International Human Rights Group called a meeting of women's rights experts. This meeting, financed by the governments of the Netherlands and Australia, resulted in the most serious and elaborate draft for an Optional Protocol. This draft became the basis for later discussions and negotiations.<sup>90</sup> In January 1995, the Committee on the Elimination of Discrimination Against Women issued Suggestion Number 7, which declared the different elements that should be included in an Optional Protocol to CEDAW.<sup>91</sup>

Finally, in July 1995 the stage was set for Resolution 1995/29, in which the Economic and Social Council of the United Nations (ECOSOC) asked the Commission on the Status of Women to establish an Open-Ended Working Group for the elaboration of an Optional Protocol to CEDAW. In September 1995, the Fourth International Conference on Women held in Beijing encouraged the Commission on the Status of Women to draft an optional protocol to CEDAW. The Conference also asked that the optional protocol enter into force in the near future, and include the right to petition.<sup>92</sup> In March 1996, in fulfillment of resolution 1995/29 of ECOSOC, the Commission on the Status of Women created an Open-Ended Working Group for the elaboration of

<sup>88</sup> CEDAW Recommendation 4, *supra* note 74.

<sup>89</sup> *Vienna Declaration*, *supra* note 47, para. 40.

<sup>90</sup> A draft Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women was adopted by The Expert Group Meeting on the Adoption of an Optional Protocol to CEDAW organized by the Women in the Law Project International Human Rights Group and the Maastricht Centre for Human Rights, which met September 29-October 1, 1994. For relevant portions of the draft, see *Draft Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, U.N. Commission on the Status of Women, U.N. Doc. E/CN.6/5 (1997).

<sup>91</sup> Suggestion 7, Committee on the Elimination of Discrimination Against Women, U.N. GAOR, 50th Sess., Supp. No 38, at 8, U.N. Doc. A/38 (1995).

<sup>92</sup> *Report of the Fourth World Conference on Women*, Beijing Declaration, Annex I, at 116, U.N. Doc. A/Conf.177/20, 1995.

a Draft Optional Protocol to CEDAW. This Working Group met in New York on March 11-22, and mainly examined Suggestion 7 made by the Committee on the Elimination of Discrimination Against Women. The Committee also considered the opinions sent by several States to the Secretary-General of the United Nations, which expressed support or opposition to an Optional Protocol to CEDAW. Some of the positions listed important characteristics that such a Protocol should have.<sup>93</sup> The Spanish expert who participated in this Working Group pointed out that, even though no government openly opposed the elaboration of an Optional Protocol, there were significant reservations concerning the project.<sup>94</sup>

The second meeting of the Open-Ended Working Group for the elaboration of an Optional Protocol to CEDAW was held on March 10-21, 1997. During this second meeting, the President of the Working Group, Aloisia Wörgetter from Austria, presented a document that became a basis for the discussions.<sup>95</sup> This text was based on discussions held during the 1996 session, Suggestion 7 made by CEDAW Committee, and the opinions sent by the States to the Secretary-General of the United Nations.<sup>96</sup> During this session, there was an initial reading of the document prepared by the President, which resulted in the elaboration of an official Draft Optional Protocol to CEDAW.<sup>97</sup> This Draft would become the basic document for the discussions and negotiations of the Working Group.

The Working Group held its third meeting on March 2-13, 1998. During this period, there was a second reading of the Draft Optional Protocol to CEDAW. Following the second reading, experts expressed the main reservations of some countries about this Optional Protocol. There was much hope at this time that the Working Group could reach a consensus before the fiftieth anniversary of the Universal Declaration of Human Rights. In her speech before the Commission on the Status of Women, Mary Robinson, United Nations High Commissioner for Human Rights, emphasized the great importance of adopting the Optional Protocol to CEDAW. She stated that such action would signify a great step towards better protecting the rights of women.<sup>98</sup> However, not all of these expectations were met. Since there were still differences of opinion, the adoption of the Optional Protocol had to be postponed.<sup>99</sup>

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<sup>93</sup> These opinions appear in the *Report of the Secretary General: "Elaboration of a Draft Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women"*, U.N. ESCOR, 40th Sess., Supp. No. 6, U.N. Doc E/CN.6/10, 1996.

<sup>94</sup> *Id.*

<sup>95</sup> *Working Group on the Elaboration of a Draft Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women*, U.N. ESCOR, 41st Sess., U.N. Doc. E/CN.6/WG/L.1, 1997 [hereinafter *Working Group*].

<sup>96</sup> For new opinions on the Draft Optional Protocol, particularly those of the Spanish government, see *Additional Views of Governments, Intergovernmental Organizations and Non-Governmental Organizations on an Optional Protocol to the Convention*, U.N. ESCOR, 41st Sess., U.N. Doc. E/CN.6/5, 1997 [hereinafter *Additional Views*].

<sup>97</sup> *Working Group*, *supra* note 95.

<sup>98</sup> *Statement made to the 42d Session of the Commission on the Status of Women*, Mar. 3, 1998, at 3 (statement of Mary Robinson, U.N. High Commissioner for Human Rights); see also *Statement made to the 42d Session of the Commission on the Status of Women*, Mar. 2, 1998 (statement of the Representative of the United Kingdom of Great Britain and Northern Ireland).

<sup>99</sup> See U.N. ESCOR, 43d Sess., U.N. Doc. E/CN.6/27, 1998. For an account of this session, see Felipe GÓMEZ ISA, "El Proyecto de Protocolo Facultativo a la Convención sobre la Eliminación de To-

The fourth meeting of the Working Group was held on March 1-12, 1999. Again, there were many hopes placed on this fourth meeting, and this time these hopes were not in vain: the Optional Protocol to CEDAW was finally born. At the opening session of the Working Group, several delegations expressed their desire for a definite adoption of the Optional Protocol to CEDAW. The European Union, a main contributor in the effort to ratify the Protocol, was fully confident that this could finally happen on the twentieth anniversary of the adoption of CEDAW. Furthermore, the European Union was convinced that the Protocol would be a very useful tool for supporting the enforcement of women's human rights.<sup>100</sup> Other delegations, such as the ones from Norway,<sup>101</sup> Lesotho,<sup>102</sup> and Namibia,<sup>103</sup> made similar initial declarations. Notwithstanding their support, adoption of the Protocol turned out to be extremely complicated since the different delegations had clashing opinions on its most controversial aspects. The process involved two weeks of intense and complicated negotiations and seemingly impossible obstacles. Finally, the Optional Protocol to CEDAW was approved by consensus within the Open-Ended Working Group and the Commission on the Status of Women.

#### 4.2. Examining the Content of the Optional Protocol<sup>104</sup>

Many problematic issues existed in the Draft Optional Protocol, which resulted in the postponement of its adoption. In fact, the text of the adopted Protocol does not satisfy all of the demands and assertions of all the delegations. The Optional Protocol to CEDAW is the result of a delicate negotiation; it reflects the balance, compromise, and consensus among the different opinions expressed by the members of the Working Group.

The inclusion of protection mechanisms in the Optional Protocol was one of the most intensely debated topics in the negotiations. Some consensus existed among the different delegations of the Working Group as to the importance of including

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das las Formas de Discriminación contra la Mujer: hacia una mayor efectividad de los derechos de las mujeres en la esfera internacional", *II Congreso Internacional sobre Género y Políticas de Acción Positiva*, 1999.

<sup>100</sup> *Statement made to the Open-Ended Working Group on the Elaboration of a Draft Optional Protocol to CEDAW*, Mar. 1, 1999 (statement by Dr. Christine Bergmann, Federal Minister for Family Affairs, Senior Citizens, Women and Youth).

<sup>101</sup> *Statement made to the Open-Ended Working Group on the Elaboration of a Draft Optional Protocol to CEDAW*, Mar. 1, 1999 (statement by the Permanent Mission of Norway).

<sup>102</sup> *Statement made to the Open-Ended Working Group on the Elaboration of a Draft Optional Protocol to CEDAW*, Mar. 1, 1999 (statement by Phakiso Mochochoko, representative of the Permanent Mission of the Kingdom of Lesotho).

<sup>103</sup> *Statement made to the Open-Ended Working Group on the Elaboration of a Draft Optional Protocol to CEDAW*, Mar. 1, 1999 (statement by Netumbo Nandi-Ndaitwah, Mp Director-General, Dept. of Women's Affairs).

<sup>104</sup> For one of the most thorough studies of the Draft Optional Protocol project, see BYRNES & CONNORS, *supra* note 86; see also Donna J. SULLIVAN, *Center for Women's Global Leadership, The Adoption of an Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, 1997. The Inter-American Institute of Human Rights has likewise provided an article-by-article commentary of the Draft Optional Protocol, along with very interesting proposals. *Instituto interamericano de Derechos Humanos, Protocolo Facultativo. Documento de Trabajo. Convención sobre la Eliminación de Todas las Formas de Discriminación contra la MUJER*, 1998 [hereinafter PROTOCOLO FACULTATIVO].



the procedure of individual communications. However, no consensus was found on the issue of including an *ex officio* inquiry procedure by the CEDAW Committee. The procedure of inter-State communications was introduced in early drafts of the Protocol as an alternative to an *ex officio* procedure. Although some experts have emphasized its positive aspects, this alternative was soon discarded since this procedure has hardly been used in the international sphere.<sup>105</sup> As a result, the Optional Protocol to CEDAW includes a procedure for individual communications as well as an inquiry procedure.

#### 4.2.1. NEGOTIATIONS OVER THE INDIVIDUAL COMMUNICATION PROCEDURE

Early in the Protocol discussions, most parties agreed that the procedure of individual communications should be at the heart of the Protocol. Most government delegations accepted a mechanism that would allow women who had suffered violations of their rights to denounce their State before the CEDAW Committee. However, significant differences of opinion remained concerning the details of this procedure. The most controversial points surrounding the individual communication mechanism were those of *active legitimation* and the question of *justiciability* in CEDAW provisions.

##### 4.2.1.1. The Debate over Active Legitimation

The question of *active legitimation* (who can present an individual communication to the CEDAW Committee) is the most problematic element of the entire Optional Protocol. This thorny issue prevented the consensus and final development of a Protocol during the March 1998 sessions. The main focus of the controversy was whether someone other than the victim could present an individual communication before the Committee on behalf of the victim. Countries such as Mexico, Colombia, Cuba, China, Egypt, Tunisia, Morocco, Algeria, and India were concerned that international non-governmental organizations, which constitute real international networks, could use the individual petition procedure "on behalf of the victims." On the other hand, another important group of countries<sup>106</sup> supported allowing non-governmental organizations to petition the Committee. This group argued that such action was necessary in order for the mechanism to defend the human rights of *all* women, and not just of those who have the economic and intellectual resources to take action in the international sphere. Amnesty International is one of the NGOs that made the greatest efforts during the negotiation process and pointed out that this possibility is:

[C]rucial if the Optional Protocol is to provide a real remedy for women victims of violations of the Convention. In Amnesty International's many years of working on behalf of victims of human rights violations, we have found that those most in need of redress, those whose rights have been most vio-

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<sup>105</sup> For Theodor Meron, there is an enormous "symbolic significance" in this procedure, since it allows one State to accuse another State for violations of the rights of women. See MERON, *supra* note 78, at 217. This opinion is shared by BYRNES & CONNORS, *supra* note 86.

<sup>106</sup> To view the opinions of countries such as Costa Rica, South Africa, Italy, Spain, Panama, and Chile, see *Additional Views*, *supra* note 96, at 17.

lated, are often those least able to come forward and speak of their suffering and obtain redress. Thus, the role of human rights defenders, including non-governmental organizations (NGOs), in facilitating victims claiming their rights is a crucial one. Women may be reluctant to complain because of fear of reprisal, such as in cases involving violence against women in the family. For example, permitting an organization which provides shelter and legal services to women subjected to violence in the family to raise such claims would minimize the risk of harm to individual women. The concept of sufficient interest will also take into account the often systemic nature of gender discrimination and the particular obstacles women may face in seeking remedies, including danger of reprisals, low levels of literacy and legal literacy and resource constraints. National or international NGOs and groups with a "sufficient interest" in the matter may be less [reluctant to complain].<sup>107</sup>

A similar opinion has been expressed by Andrew Byrnes and Jane Connors, who argued that Articles 1 and 2 of the Optional Protocol must be at least as extensive as those of other Human Rights Conventions.<sup>108</sup> For these authors, requiring a person to be a victim of a violation would excessively restrict the range of communications that can be received. Byrnes and Connors also point out that many forms of structural discrimination against women affect many, or perhaps all, women in a society.<sup>109</sup> An NGO would be better positioned than individual victims to bring such complaints.

Although not all parties were satisfied, consensus on this matter was finally reached. This result can be considered a good basis for employing the individual communication procedure by women victims of human rights violations. Articles 1 and 2 of the Optional Protocol describe how this mechanism will function. Article 1 simply supposes that every State that ratifies the Optional Protocol will accept the Committee's competence to receive communications. Article 1 states: "[a] State Party to this Protocol ("State Party") recognizes the competence of the Committee on the Elimination of Discrimination against Women ("the Committee") to receive and consider communications submitted in accordance with article 2."

Article 2, on the other hand, is much more controversial and led to many more discussions within the Working Group. This article establishes who will be able to submit a communication. The disagreements were based on whether communications could be submitted on behalf of a person; and, in this case, whether that specific person's consent should be required. Finally, Article 2 stated:

Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights set forth in the Convention by that State Party. Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent.<sup>110</sup>

<sup>107</sup> Amnesty International, *The Optional Protocol to the Women's Convention*, AI: IOR 51/04/97, Dec. 1997, at 10 [hereinafter Amnesty International].

<sup>108</sup> BYRNES & CONNORS, *supra* note 86.

<sup>109</sup> *Id.*

<sup>110</sup> *Optional Protocol to CEDAW*, *supra* note 2, Art. 2.

This was one of the most debated articles and nearly caused the negotiations to fall through once again. In the end, this second article constitutes a fine balance between the different opinions held by the members of the Working Group. However, because many states were dissatisfied, this article has raised the most interpretative statements.

#### 4.2.1.2. The Need for Consent when Presenting Communications on Behalf of the Victim

Communications may be presented by individuals or groups of people, on their own or on behalf of someone. This means that a woman, or a group of women, whose rights have been violated by a State Party to the Optional Protocol can submit a communication to the Committee, either by themselves or through another person or organization acting on their behalf. The person, group, or organization that presents the communication, either for herself or on behalf of another, must be under the jurisdiction of the accused State. Article 2 states this provision in a somewhat confusing manner. If the communication is presented on behalf of a victim, "this shall be with their consent unless the author can justify acting on their behalf without such consent."<sup>111</sup> Therefore, consent will be essential in submitting a communication to the Committee on someone's behalf. This requirement is not as progressive as other international human rights instruments,<sup>112</sup> which make no specific mention of the need for consent. However, many of the delegations were not prepared to compromise on the issue of consent. For the sake of consensus, accepting the inclusion of the need for consent into the Protocol's text instead of into the Committee's rules of procedure was necessary.

As previously stated, Article 2 is one of the articles that has elicited the greatest number of interpretative statements. For the Canadian government, "the CEDAW Committee has the authority to determine the question of consent according to the particular circumstances of each case and that the Committee should interpret Article 2 in a way no less favorable than the existing practice and procedures of other human rights treaty bodies."<sup>113</sup> This view was shared by the European Union and by a group of African countries, including Ghana, Botswana, Kenya, Lesotho, Malawi, South Africa, and Uganda.<sup>114</sup> Denmark<sup>115</sup> also opposed the exclusion of NGOs from the text of Article 2 but interprets the expression "groups of individuals" to mean "NGOs alleging to be victims of a violation can bring a communication to the attention of the Committee."<sup>116</sup> On the other hand, China wanted Article 2 to be as restrictive as possible, arguing that this article should prevent certain persons "from taking advantage of the special situation of the victims for their own purposes by

<sup>111</sup> *Id.*

<sup>112</sup> See, e.g., *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *supra* note 77.

<sup>113</sup> U.N. ESCOR, 43d Sess., Annex 2, Supp. No. 7, at 60, E/CN.6/10/Annex 2, 1999 [hereinafter *Interpretative Statements*].

<sup>114</sup> *Id.* at 64.

<sup>115</sup> Denmark also spoke on behalf of Finland, Iceland, and Norway.

<sup>116</sup> *Interpretative Statements*, *supra* note 113, at 62.

acting in the name of the victims. The will of the victims should be fully respected, and their representatives, if any, should be from the same country as the victims."<sup>117</sup> Clearly, China's opinion tries to greatly restrict any organization, especially international organizations, from representing a potential victim. The Indian representative issued a similar declaration that interpreted the word "consent" as "not acting contrary to the wishes of the victim and without violating her right to privacy should she so desire."<sup>118</sup>

#### 4.2.1.3. Justiciability: Are Individual Communications to the CEDAW Committee Limited to Certain Rights in the Convention?

The other problematic issue in the context of the procedure for individual communications is that of *justiciability*. The question here was: which of the rights included in the Convention are eligible for individual communications, since many establish obligations of a programmatic nature for the States Parties? While there were conflicting opinions, these views were not as extreme as in the case of active legitimation. Most governments agreed that all of the Convention's substantive provisions should be justiciable since all human rights are considered, to a greater or lesser extent, justiciable.<sup>119</sup> Most NGOs and legal scholars that have analyzed this matter share this view.<sup>120</sup> However, reaching a consensus based on the opinions mentioned was impossible; therefore, parties decided to adopt a far different solution than the one initially proposed. Therefore, communications may be presented when there is an alleged violation of "any of the *rights* set forth in the Convention."<sup>121</sup> In other words, only provisions of the Convention that include rights, as established by Article 2 of the Protocol, may be defended before the Committee. Once again, this controversial matter has resulted in the formulation of interpretative statements by several delegations. The Danish delegation, also on behalf of Finland, Iceland, and Norway, opposed this compromise. As a result of their interpretative statements, the Committee will be able to accept communications from victims of those states concerning "each and every substantive provision set forth in the Convention."<sup>122</sup>

#### 4.2.2. THE INDIVIDUAL COMMUNICATION PROCEDURE IN ACTION

An individual communication submitted to the CEDAW Committee must go through four stages: (1) the admission of the communication; (2) an in-depth examination of the matter; (3) the Committee's decision; and (4) the follow-up to this decision.

<sup>117</sup> *Id.* at 61-62.

<sup>118</sup> *Id.* at 64-65.

<sup>119</sup> *Additional Views*, *supra* note 96.

<sup>120</sup> *Protocolo Facultativo*, *supra* note 104, at 16-17; BYRNES & CONNORS, *supra* note 86; Amnesty International, *supra* note 107, at 20.

<sup>121</sup> *Optional Protocol to CEDAW*, *supra* note 2, Art. 2 (emphasis added).

<sup>122</sup> *Interpretative Statements*, *supra* note 113, at 64.

#### 4.2.2.1. Admission of Communications

Articles 3 and 4 of the Optional Protocol establish the procedure for admission of individual communications. Article 3 states that communications must be submitted “in writing” and “shall not be anonymous.”<sup>123</sup> Also, in order for the Committee to study any communication, the communication must refer to a State that has ratified both CEDAW and its Optional Protocol. Article 4 requires “that available domestic remedies have been exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief.”<sup>124</sup> Likewise, the Committee will not accept communications where the same matter has already been examined by the Committee or has been, or is being, examined under another procedure of international investigation or settlement.<sup>125</sup> The Committee will not accept communications incompatible with the provisions of the Convention.<sup>126</sup> A communication is not admissible if it is manifestly ill-founded or not sufficiently substantiated, nor if it is an abuse of the right to submit a communication.<sup>127</sup> Finally, if the alleged violation occurred prior to the entry into force of this Protocol for the State Party concerned, the communication is not admissible, unless the violation continued after that date.<sup>128</sup> The Protocol includes many of the same admission requirements normally included in international human rights treaties that allow individual communications.

The Committee’s first step after admission of the communication is to take measures to protect the victim who made the communication. According to Article 5, once the Committee has received the communication, it may ask the State Party involved to “take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation.”<sup>129</sup> Furthermore, Article 5.2 of the Optional Protocol states that the Committee’s adoption of certain provisional measures “does not imply a determination on admissibility or on the merits of the communication.”<sup>130</sup>

#### 4.2.2.2. In-depth Examination of the Matter

The second stage is the in-depth examination of the communication, established in Articles 6 and 7 of the Protocol. Once the Committee has decided that the communication fulfills all of the requisites for admission, it sends the communication, confidentially, to the State involved. Within six months, the State must present to the Committee “written explanations or statements clarifying the matter and the remedy, if any, that may have been provided by that State Party.”<sup>131</sup> The Committee holds private sessions to study the communications. In the interest

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<sup>123</sup> *Optional Protocol to CEDAW*, *supra* note 2, Art. 3.

<sup>124</sup> *Id.* Art. 4.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* Art. 5.

<sup>130</sup> *Id.* Art. 5, para. 2.

<sup>131</sup> *Id.* Art. 6, para. 2.

of procedural fairness, communications are considered in light of the information received from all parties.

#### 4.2.2.3. The Committee Reaches a Decision and Communicates with the State

After full consideration of all sides, the Committee reaches a decision. According to Article 7.3, once the Committee has decided on the merit of the communication, "the Committee shall transmit its views on the communication, together with its recommendations, if any, to the parties concerned."<sup>132</sup> Therefore, the CEDAW Committee can make certain recommendations to a State Party to the Optional Protocol when it determines the State has violated the Convention. Furthermore, the State Party must give "due consideration to the views of the Committee, together with its recommendations, if any."<sup>133</sup>

#### 4.2.2.4. Follow-up to the Committee's Decision

After the State receives the Committee's decision regarding the merits of the communication, it must respond with a report on actions taken to implement the recommendations. The State must submit to the Committee "within six months, a written response, including information on any action taken in the light of the views and recommendations of the Committee."<sup>134</sup> The Protocol also allows for a follow-up by the Committee. Article 7.5 states that the Committee may invite the State Party "to submit further information about any measures the State Party has taken in response to its views or recommendations, if any, including as deemed appropriate by the Committee, in the State Party's subsequent reports under Article 18 of the Convention."<sup>135</sup> Therefore, the Committee will continue to track the fulfillment of its views and recommendations.

Several individual communications have been submitted before the Committee so far but, unfortunately, only in one recent case the Committee has taken a final decision on the merits. In the first case before the Committee, *Ms. B-J v. Germany*<sup>136</sup>, the author alleged that she was subject to gender-based discrimination under the statutory regulations regarding the law on the legal consequences of divorce (equalization of accrued gains, equalization of pensions, and maintenance after termination of marriage). According to her view, the regulations systematically discriminate against older women with children who are divorced after long marriages in which women usually assume the role of homemaker. She defended that the law does not take into account the improved or devalued "human capital" of marriage partners. She maintained that this constitutes discrimination, as it results in providing a husband with his wife's unremunerated labour. Unfortunately, the Committee decided to declare the communica-

<sup>132</sup> *Id.* Art. 7, para. 3.

<sup>133</sup> *Id.* Art. 7, para. 4.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* Art. 7, para. 5.

<sup>136</sup> Communication n.º 1/2003, Decision adopted on 14 July 2004, thirty-first session, A/59/38.

tion inadmissible under Article 4.1, for the author's failure to exhaust domestic remedies, and Article 4.1.e), because the disputed facts occurred prior to the entry into force of the Optional Protocol for the State Party and did not continue after that date<sup>137</sup>.

Another interesting case that also was declared inadmissible is *Rahime Kayhan v. Turkey*<sup>138</sup>. In this case, the author, a teacher of religion and ethics, complained that she was a victim of a violation of Article 11 of CEDAW by Turkey by dismissing her and terminating her status as a civil servant for wearing a headscarf. Allegedly she is one of more than 1.500 women civil servants who have been dismissed for wearing a headscarf. It was a very interesting case from different angles, since it involved questions regarding freedom of religion, right to work, gender discrimination on religious grounds... It is a pity that once again the communication was declared inadmissible by the Committee under Article 4.1 of the Optional Protocol for failure to exhaust domestic remedies<sup>139</sup>.

The only case in which the Committee has adopted its views after considering the merits of the communication is *Ms. A.T. v. Hungary*<sup>140</sup>, a case related to gender violence. The author of the communication alleged that for more than four years she had been subjected to severe domestic violence by her husband. Although the life of the author had been threatened on several occasions, she did not go to a shelter, reportedly because no shelter in the whole country is equipped to take in a fully disabled child together with his mother and sister. On the other hand, the author also stated that there were no protection orders or restraining orders available under Hungarian law. On the contrary, her husband had not been detained at any time and no action had been taken by the Hungarian authorities to protect the author from him. In sum, the author alleges the violation of Articles 2.a), b) and e), Article 5.a) and Article 16 of CEDAW by Hungary, for its failure to provide effective protection from her husband. She claims that the State

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<sup>137</sup> *Id.* para 8.8. Two members of the Committee, Krisztina Morvai and Belmihoub-Zerdani, issued a dissenting individual opinion, considering the communication as "partly admissible". In their view, "the separate claim regarding the ongoing proceedings concerning the issues of accrued gains and spousal maintenance in fact do meet all admissibility criteria". In the present case, proceedings as regards spousal maintenance and accrued gains had been ongoing for about five years. The author of the communication, as so many women in the world, devoted her whole adult life to unpaid work in the family, while her husband had advanced his career and his income. Her financial situation was very uncertain at the time of submitting the communication, since she is considered an "older woman" and, therefore, has very little chance to enter the labour market. Under all these circumstances, the domestic courts should have determined and granted her a decent maintenance a long time ago. Then, the two members conclude by defending that "for an older woman who raised three children and worked for the benefit of her spouse..., living in such uncertainty five years after the divorce is rightly considered to be unacceptable and a serious violation of her human rights". Taking all this into consideration, the opinion of the two dissenting members of the Committee is that "the application of domestic remedies is *unreasonably prolonged*". Therefore, the general rule in Article 4.1 concerning the exhaustion of all domestic remedies does not apply here, instead the "unreasonable prolongation" exception to the rule applies, and the communication should have been declared as partially admissible.

<sup>138</sup> Communication n.º 8/2005, Decision adopted on 27 January 2006, thirty-fourth session.

<sup>139</sup> *Id.*, para. 7.9.

<sup>140</sup> Communication n.º 2/2003, Views adopted on 26 January 2005, thirty-second session.

passively neglected its “positive” obligations under CEDAW and supported the continuation of a situation of domestic violence against her. At the same time, on 10 October 2003 the author of the communication also urgently requested effective interim measures, in accordance with Article 5.1 of the Optional Protocol, in order to avoid possible irreparable damage to her, namely to save her life from the violent conduct from her husband. On 20 October 2003, ten days after the request, the Committee sent a note verbale to the State Party for its urgent consideration, requesting the Government to provide immediate, appropriate and concrete preventive interim measures of protection of the author, as may be necessary, to avoid irreparable damage to her. The Committee invited Hungary to provide information no later than 20 December 2003 of the type of measures it had taken to give effect to the Committee’s request of interim measures. On July 2004 the Working Group on Communications came to the conclusion that “the State Party had furnished little information on the interim measures taken to avoid irreparable damage to the author”. Accordingly, the Working Group requested that the author “be immediately offered a safe place for her and her children to live and that the State Party ensure that the author receive adequate financial assistance, if needed”<sup>141</sup>. As a response to the communication by the author, the State Party assumes that “the system of remedies against domestic violence is incomplete in Hungarian law and that the effectiveness of the existing procedures is not sufficient”. For that reason, Hungary instituted a comprehensive action programme against domestic violence in 2003, and on 16 April 2003 the Hungarian Parliament adopted a resolution on the national strategy for the prevention and effective treatment of violence within the family, to be followed by a number of legislative and other actions<sup>142</sup>. More than one year later after the adoption of the national strategy just mentioned, the State Party had to admit that “the legal and institutional system in Hungary is not ready yet to ensure the internationally expected, coordinated, comprehensive and effective protection and support for the victims of domestic violence”<sup>143</sup>. Once the Committee had ascertained that it had no reason to declare the communication inadmissible, it started with the consideration of the merits. First of all, it recalled its General Recommendation n.º 19 on violence against women, in which the Committee addressed the question of whether States can be held accountable for the conduct of non-State actors. As stated in this very relevant general recommendation, “... discrimination under the Convention is not restricted to action by or on behalf of Governments.... Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation”. The Committee noted that the State Party “has admitted that the remedies pursued by the author were not capable of providing immediate protection to her against ill-treatment by her former partner...”<sup>144</sup>. On the other hand,

<sup>141</sup> *Id.*, para. 4.7.

<sup>142</sup> *Id.*, para. 5.7. See the different initiatives taken by Hungary from para. 5.7 to para. 5.10.

<sup>143</sup> *Id.*, para. 7.4.

<sup>144</sup> *Id.*, para. 9.3.



the Committee also noted that for four years and continuing to the time when it was considering the communication, the author felt threatened by her former partner, she was battered by him, and she was unsuccessful to temporarily or permanently bar her partner from the apartment where she and her children have continued to reside. The author could not have asked for restraining or protection order since neither option exist in the State Party. Finally, she could not flee to a shelter because none are equipped to accept her together with her children, one of whom is fully disabled. Last, but not least, the Committee also found the lack of effective legal and other measures to deal in an appropriate manner with its request for interim measures. In light of all these considerations, the Committee concluded that "the State Party has failed to fulfil its obligations and has thereby violated the rights of the author under Article 2.a), b) and e) and Article 5.a) in conjunction with Article 16"<sup>145</sup> of CEDAW, and made a number of recommendations to Hungary. The recommendations have a twofold nature: a) *recommendations concerning the author of the communication*: to take immediate and effective measures to guarantee the physical and mental integrity of the author of the communication and her family; to ensure that she is given a safe home, receives child support and legal assistance as well as reparation proportionate to the physical and mental harm undergone and the gravity of the violation of her rights, and b) *general recommendations*: to respect, protect, promote and fulfil women's human rights, including the right to be free from all forms of domestic violence; to assure victims of domestic violence the maximum protection of the law by acting with due diligence to prevent and respond to such violence; to take all necessary measures to ensure that the national strategy for the prevention and effective treatment of violence within the family is promptly implemented and evaluated; to take all necessary measures to provide regular training on CEDAW and its Optional Protocol thereto to judges, lawyers and law enforcement officials; to implement expeditiously and without delay the Committee's concluding comments of August 2002 on the combined fourth and fifth periodic report of Hungary in respect of violence against women and girls, in particular the recommendation that a specific law be introduced prohibiting domestic violence against women, which would provide for protection and exclusion orders as well as support services, including shelters; to investigate promptly, thoroughly and seriously all allegations of domestic violence and bring offenders to justice; to provide victims of domestic violence with safe and prompt access to justice, to provide offenders with rehabilitation programmes and programmes on non-violent conflict resolution methods. As we can see, the Committee has recommended a very comprehensive and systematic set of measures to be able to deal effectively with the plague of domestic violence, one of the gravest forms of structural violation of women's rights and dignity. Finally, as mentioned before, the Optional Protocol provides for a mechanism of follow-up of the views and recommendations of the Committee. According to Article 7.4 of the Protocol, the State Party shall give due consideration to the views of the Committee, together with its recommendations, and shall submit

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<sup>145</sup> *Id.*, para. 9.6.

to the Committee, within six months, a written response, including any information on any action taken in light of its views and recommendations. The State Party was also requested to publish the Committee's views and recommendations and to have them translated into the Hungarian language and widely distributed in order to reach all relevant sectors of society.

#### 4.2.3. THE INQUIRY PROCEDURE

##### 4.2.3.1. Negotiations for Inclusion of an Inquiry Procedure in the Protocol and the Compromise of the Opt Out Clause

The inclusion of an inquiry procedure is one of the most sensitive matters for many States, due to the implications that such a procedure may have. Nonetheless, most of the countries that participated in the Working Group for the ratification of an Optional Protocol to CEDAW supported its inclusion. Countries such as Cuba, China, India, and Egypt are among those who most vehemently opposed the introduction of the inquiry procedure.<sup>146</sup> The Chinese delegation believed there should only be one communication procedure in the Optional Protocol to the Convention.<sup>147</sup> On the other hand, other delegations, including the Spanish one, were firmly in favour of the inquiry procedure. The Spanish government thought that the Protocol should contain both procedures, and that the inquiry procedure would be essential to confront grave and systematic violations of women's rights.<sup>148</sup>

The inquiry procedure is a protection mechanism for the rights of women that demands cooperation and transparency from the States. This provision gives the CEDAW Committee ample power to open an inquiry in those countries where it believes grave or systematic violations of women's rights are being committed. For this reason, inclusion of this procedure has been one of the main points for debate. This clash of opinions led the President of the Working Group to propose the inclusion of Article 10<sup>149</sup> during the March 1998 sessions. The proposed article included an *opt-out clause*, which would allow any State to declare, at the moment of ratification of the Optional Protocol, that it did not want to be bound to this inquiry procedure. This solution seemed to satisfy the delegations opposed to inquiry, although the Chinese representative proposed including an opt-in rather than an opt-out clause.<sup>150</sup> According to this opt-in clause, each State, at the moment of ratification of the Optional Protocol, would declare that it acknowledges the competence of the CEDAW Committee to open an inquiry procedure. This proposal was supported by other delegations, including the Cuban and Algerian delegations. However, these same delegations, conscious of being in the minority, expressed their willingness to be "flexible" on this point.<sup>151</sup>

<sup>146</sup> *Additional Views*, *supra* note 96.

<sup>147</sup> *Id.* at 16, para. 74.

<sup>148</sup> *Id.* at 16, para. 76.

<sup>149</sup> It was Article 11(b) of the Draft Optional Protocol proposed during the 1998 sessions, but has since become Article 10 in the adopted Protocol. See Gómez Isa, *supra* note 99.

<sup>150</sup> *Additional Views*, *supra* note 96, at 16, para 74.

<sup>151</sup> *Commission on the Status of Women Report on the 42d Session*, U.N. ESCOR, 42d Sess., Annex 2, Supp. No. 7, at 78, U.N. Doc. E/CN.6/12, 1998.

As a result of this flexibility, the Optional Protocol to CEDAW has incorporated an inquiry procedure. However, in order to reach a minimum of consensus, the opt-out clause had to be accepted.

#### 4.2.3.2. OPERATION OF THE INQUIRY PROCEDURE

This inquiry procedure is included in Articles 8, 9, and 10 of the Protocol. Article 8.1 describes the circumstances under which the Committee can initiate an inquiry and the extent of State cooperation that is required. If the Committee receives reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned.

Once the State has submitted its observations regarding the alleged violations the Committee will analyze them. Then, "the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee."<sup>152</sup> Furthermore, "where warranted and with the consent of the State Party, the inquiry may include a visit to its territory."<sup>153</sup> Although the procedure gives the CEDAW Committee ample powers to investigate, it must always count on the cooperation of the State under investigation. Additionally, procedure requires this inquiry to "be conducted confidentially."<sup>154</sup>

When the inquiry is complete, the Committee will communicate its conclusions, comments, and recommendations to the State Party involved.<sup>155</sup> The State then has six months to submit its own observations to the Committee.<sup>156</sup> Furthermore, the Committee may invite the State to include in subsequent reports, required by Article 18 of CEDAW,<sup>157</sup> "details of any measures taken in response to an inquiry."<sup>158</sup> As discussed previously, an opt-out clause had to be admitted into the framework of the inquiry procedure due to the need for a consensus. Through this compromise, the States that objected to this type of procedure could accept the Protocol without being bound by the inquiry procedure. This was, obviously, a necessary sacrifice, if the inquiry procedure was to be included in the Protocol. Many States still absolutely refuse to accept the inquiry procedure, because of its potential implications. The opt-out clause is included in Article 10 of the Protocol, which states that "[e]ach State Party may, at the time of signature or ratification of this Protocol or accession hereto, declare that it does not recognize the competence of the Committee provided for in Articles 8 and 9".<sup>159</sup>

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<sup>152</sup> *Optional Protocol to CEDAW*, *supra* note 2, Art. 8, para. 2.

<sup>153</sup> *Id.* Art. 8, para. 2.

<sup>154</sup> *Id.* Art. 8, para. 5.

<sup>155</sup> *Id.* Art. 8, para. 3.

<sup>156</sup> *Id.* Art. 8, para. 4.

<sup>157</sup> Under Article 18 of CEDAW, States must submit a report to the Committee within one year after ratification and every five years thereafter. CEDAW, *supra* note 1, Art. 18.

<sup>158</sup> *Optional Protocol to CEDAW*, *supra* note 2, Art. 9, para. 1.

<sup>159</sup> *Id.* Art. 10.

The inquiry procedure has been used once by the Committee to investigate the abduction, rape and murder of women in and around Ciudad Juárez (Chihuahua, Mexico), and a very challenging report has been issued by the Committee with detailed findings and demanding recommendations to the Government of Mexico<sup>160</sup>. The procedure was initiated when the NGOs Equality Now and Casa Amiga, an international and a local NGO respectively, requested in October 2002 the Committee to conduct an inquiry under Article 8 of the Optional Protocol<sup>161</sup>. The two NGOs provided specific and precise information about the alleged violations of women's human rights. In January 2003 the Committee requested two members of the Committee (according with Article 82 of its Rules of Procedure) to undertake a detailed examination of the information provided. Taking into account this detailed examination by the two members, the Committee concluded that the information provided by the two NGOs "was reliable and that it contained substantiated indications of grave and systematic violations of rights set forth in the Convention"<sup>162</sup>. In accordance with Article 8.1 of the Optional Protocol, the Committee decided to invite the Government of Mexico to cooperate with it in the examination of the information and, in order to do that, to submit its observations by May 2003. On 15 May Mexico submitted its observations, including information about different actions taken to address the situation in Ciudad Juárez. In the observations, the Government also invited the Committee to visit the country and committed to guarantee the conditions and facilities necessary to conduct the inquiry in total freedom.

On June 2003 Casa Amiga, Equality Now and the Mexican Committee for the Defence and Promotion of Human Rights submitted additional information to the Committee. The new information referred to "newly-discovered murders, the ongoing impunity of those responsible, threats directed towards those calling for justice for women, growing frustration on account of the authorities' lack of due diligence in investigating and prosecuting the crimes in an appropriate manner and an emerging pattern of irregularities and incidents pointing to the possible complicity of the authorities in the continuing violence against women in Ciudad Juárez"<sup>163</sup>. In July 2003, after having examined carefully the information submitted by the Government and the new information provided by NGOs just mentioned, the Committee decided to conduct a confidential inquiry under Article 8.2 of the Optional Protocol. For that purpose, it nominated two of its members (Ms. María Yolanda Ferrer Gómez and Ms. Maria Regina Tavares da Silva) to conduct the inquiry. According to Article 8.2 abovementioned, the Committee requested the Government of Mexico to consent to a visit by the two members to be carried out in October 2003. On August 2003 the Government replied positively and made a commitment to provide all the assistance necessary to guarantee the adequate conducting of the visit. The official visit of the two experts of the Committee took place from 18<sup>th</sup> to 26<sup>th</sup> October 2003,

<sup>160</sup> CEDAW/C/2005/OP.8/MEXICO, 32<sup>nd</sup> session, 10-28 January 2005.

<sup>161</sup> Mexico had ratified the Optional Protocol on 15 March 2002. Therefore, the inquiry procedure was applicable to Mexico.

<sup>162</sup> CEDAW/C/2005/OP.8/MEXICO..., *op. cit.*, para. 4.

<sup>163</sup> *Id.*, para. 6.

and visited both the Federal District and State of Chihuahua (Chihuahua City and Ciudad Juárez). The experts conducted interviews with official authorities, organizations of civil society and the mothers of the victims.

In the light of all the information obtained by the experts both before and during the visit to Mexico, the Committee finds that the facts alleged "constitute grave and systematic violations"<sup>164</sup> of the provisions of the CEDAW. Besides, the Committee "is greatly concerned at the fact that these serious and systematic violations of women's rights have continued for over 10 years, and notes with consternation that it has not yet been possible to eradicate them, to punish the guilty and to provide the families of the victims with the necessary assistance"<sup>165</sup>. Finally, the Committee is also aware that the methods used in the murders and disappearances in Ciudad Juárez have been also used more recently in Chihuahua City and, apparently, in other parts of Mexico<sup>166</sup>. These facts have led the Committee to conclude that "we are faced not with an isolated although very serious situation, nor with instances of sporadic violence against women, but rather with systematic violations of women's rights, founded in a culture of violence and discrimination that is based on women's alleged inferiority, a situation that has resulted in impunity"<sup>167</sup>.

Taking into consideration all these findings and conclusions, the Committee made a whole set of precise and concrete recommendations to the Government of Mexico. These recommendations include, among others, the following: the need of coordination and participation at all levels of authority, with respect to both their mutual relations and to their relations with civil society, with a view to increasing the effectiveness of the mechanisms and programmes adopted; incorporate a gender perspective into all investigations, policies to prevent and combat violence, bearing in mind the specific characteristics of gender-based violence against women; constant consultation and dialogue with civil society organizations; investigate thoroughly and punish the negligence and complicity of public authorities in the disappearances and murders of women, the fabrication of confessions under torture, their tolerance of persecution, harassment or threats directed against victims' relatives, members of organizations representing them and other persons involved in defending them; establish early warning and emergency search mechanisms for cases involving missing women and girls in Chihuahua State; guarantee that the mothers and relatives of the victims be treated with due respect, consideration, compassion, and sympathy for their grief, and punish the authorities responsible for this cruel and inhuman treatment; urgently implement and strengthen effective measures for the protection

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<sup>164</sup> *Id.*, para. 259.

<sup>165</sup> *Id.*, para. 260.

<sup>166</sup> There are some worrying reports of these methods being also used in other countries of the region. According to the UN Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, "the pattern of murders of women in Guatemala show similarities with those reported in El Salvador, Honduras and Mexico. The rate at which women are being killed, however, is much higher in Guatemala. Although 370 women were killed in Chihuahua, Mexico, over a 10-year period (1993 to 2003), nearly the same number of women was killed in Guatemala in 2003 alone", E/CN.4/2005/72/Add.3, 10 February 2005, *Mission to Guatemala*. See also *Amnesty International*: "Intolerable killings. Mexico: 10 years of abductions and murder in Ciudad Juárez and Chihuahua", AMR 41/026, 2003.

<sup>167</sup> *Id.*, para. 261.

of persons and institutions working to clear up the facts; sensitize all state and municipal authorities to the need for violence against women to be regarded as a violation of fundamental rights; organize, with the active participation of civil society, campaigns to eradicate discrimination against women, promote equality between women and men and contribute to women's empowerment; include in educational and training programmes information and sensitization modules on equality and on gender violence as a violation of human rights; promote training and capacity-building for public officials, judges and judicial personnel in the area of gender violence and human rights; set up violence prevention programmes and policies; measures of economic, medical and psychological reparation for victims of violence and the relatives of the murdered and abducted women...

As we can see, the inquiry procedure may become a useful tool to face this kind of grave and systematic violations of women's rights, as the case just analysed shows. On the other hand, the usefulness in practice of the procedure to really put an end to structural violations of women's dignity remains to be seen.

#### 4.2.4. THE PROHIBITION AGAINST RESERVATIONS TO THE OPTIONAL PROTOCOL

One final problem, discussed *ad nauseam* by the Working Group, was whether to allow reservations to the Optional Protocol to CEDAW. For many delegations, including the Spanish one, it was essential that the Protocol, given its fundamentally procedural character, not allow for the possibility of including reservations. Allowing reservations could seriously weaken the Protocol, contrary to its aim of increasing the efficacy of CEDAW.<sup>168</sup> In this respect, the statements of Silvia Cartwright, an expert from the CEDAW Committee, were especially eloquent. In her opinion, one of the main reasons for the poor efficacy of CEDAW was that some of the States made a great number of reservations. In many cases, these reservations work against the object and purpose of the Convention itself. For this reason, Cartwright believed it would be desirable to include an article that would expressly prohibit parties from establishing reservations at the moment of its ratification. One way to do this would be to insert the concerns of the States into the Protocol's text so that the parties would not have to resort to stating reservations. With the goal of avoiding reservations at all costs, during the March 1998 sessions the President of the Working Group handed out a document that studied the possibility of including, within the Protocol itself, any problems that the States were likely to face.<sup>169</sup> As a result, the Optional Protocol to CEDAW rejects the possibility of formulating reservations. This is, without a doubt, one of the Protocol's most positive aspects, since this action may set a good precedent for future developments in international human rights law. Thus, according to Article 17, "[n]o reservations to this Protocol shall be permitted."<sup>170</sup>

<sup>168</sup> *Commission on the Status of Women Report on the 42d Session, supra* note 141.

<sup>169</sup> This is an extremely valuable document because it attempts to address the various problems that the States likely would face in ratifying the Optional Protocol and tries to include these obstacles in the Protocol's text. *Reservations and the Draft Optional Protocol, March 1998.*

<sup>170</sup> *Optional Protocol to CEDAW, supra* note 2, art. 17.

Naturally, this article has inspired a large number of interpretative statements. The Algerian government expressed one of the most interesting opinions, arguing that the limitation against reservations to the Protocol should not become a precedent to either the Vienna Convention on the Law of Treaties or customary international law prohibiting adhesion to international agreements.<sup>171</sup> This delegation emphasized that it accepted Article 17 of the Protocol simply because this action is optional, of a procedural nature, and because it did not want to break the consensus.<sup>172</sup> The delegations from China, Egypt, India, Israel, and Jordan<sup>173</sup> expressed a similar opinion. All indicated that the prohibition of reservations established by Article 17 of the Optional Protocol should not be considered a precedent for future documents and for the development of international human rights law.<sup>174</sup> Lastly, the United States likewise made known its "serious concern with Article 17", which it considered "contrary to the well established practice of permitting appropriate reservations."<sup>175</sup>

## 5. Conclusion

Ratification of the Optional Protocol to CEDAW will strengthen the protection mechanisms of women's rights. Furthermore, it will place the Convention alongside the most important human rights treaties adopted by the United Nations. The existence of more demanding protection mechanisms in the Protocol should also encourage better compliance from States Parties. Mechanisms such as the individual communications and inquiry procedures will force the States that ratify the Protocol to initiate significant efforts towards a better and more effective application of CEDAW. States Parties will take these positive steps, if only as a means to avoid being called before the CEDAW Committee. Likewise, the CEDAW Committee will contribute, through its opinions and recommendations, to a better understanding of the Convention. The Committee's expanded powers will lead, above all, to a better and more rigorous application of the Convention by the States. In this sense, the Committee will be responsible for developing a very interesting body of jurisprudence on diverse aspects of the Convention.

The active participation of States is required to strengthen the movement for the defense of women's rights. This need became clear during the process of creating and discussing the Draft Optional Protocol when States' participation was relatively scarce.<sup>176</sup> According to the Inter-American Institute of Human Rights, which has been an important lobby in support of the Optional Protocol, the women's move-

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<sup>171</sup> *Interpretative Statements*, *supra* note 113, at 59.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 61.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 71.

<sup>176</sup> This lack of participation has been especially serious in the case of Spain, which showed scarce familiarity with CEDAW and took almost no part in the discussions and negotiations surrounding the Optional Protocol.

ment has had limited participation in elaborating and negotiating the Protocol.<sup>177</sup> A small group of NGOs and women were involved in the technical and legal aspects of the Protocol. However, this process of elaborating the Protocol did not involve a defined political strategy from within the women's movement. The Institute has expressed concern that this process will not become strong until the women's movement claims the document as its own.<sup>178</sup> At this point, States Parties must disseminate information about the Protocol's content in order to make women aware of the new protective mechanisms available to advance their human rights.<sup>179</sup> The Protocol itself establishes that "each State Party undertakes to make widely known and to give publicity to the Convention and this Protocol."<sup>180</sup>

Finally, as its name implies, the Protocol is an optional instrument. Therefore, the effectiveness of the new mechanisms depends on ratification by States Parties to CEDAW. Once the General Assembly of the United Nations adopted the text of the Protocol in October 1999, the process of ratification was swift and the Optional Protocol entered into force on December 22, 2000. As of 9 March 2006, seventy States have ratified the Optional Protocol to CEDAW. However, as a result of the inclusion of stronger enforcement mechanisms, many States will be reticent to ratify this instrument. Obviously, those States that are responsible for serious violations of women's rights and that been the most obstructionist during the elaboration process are not likely to ratify the Optional Protocol. The international community should encourage these States to change their positions in this regard. All States Parties, organizations, and individuals have the responsibility to give this instrument life for use in the fight against discrimination of all women.

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<sup>177</sup> *Protocolo Facultativo*, *supra* note 104, at 143-44.

<sup>178</sup> *Id.*

<sup>179</sup> We must admit that, in this case, the Spanish government has already adopted measures to transmit the content of both the Convention and the Protocol. In the first place, it has edited a bilingual English-Spanish version of CEDAW and the Protocol. *Ministerio de Trabajo y Asuntos Sociales-Instituto de la Mujer*, "La Convención sobre la Eliminación de Todas las Formas de Discriminación contra la Mujer y el Protocolo Opcional a la Convención", 1999. Likewise there has been a Seminar on the Protocol. Seminar, "El Protocolo Opcional a la Convención sobre la Eliminación de Todas las Formas de Discriminación contra la Mujer", *Instituto de la Mujer*, 1999. The Seminar was held on May 25, 1999, with the participation of Jane Connors, from the Division for the Advancement of Women of the United Nations Social and Economic Affairs Department, and of Aloisia Wörgetter, President of the Working Group for the elaboration of an Optional Protocol to CEDAW.

<sup>180</sup> *Optional Protocol to CEDAW*, *supra* note 2, Art. 13.



# The Convention on the Rights of the Child: Orientation and Conceptualization of Children's Rights

Jan C. M. Willems

**Summary:** 1. Introduction. 2. Orientation. 3. Conceptualization. 4. Conclusions.

## 1. Introduction

The Convention on the Rights of the Child (New York, 20 November 1989; in force: 2 September 1990; states party: 192<sup>1</sup>; with two additional Protocols<sup>2</sup>)—hereafter: CRC—adds a whole new dimension to human rights, and therefore also to new concepts which incorporate human rights, such as human security, sustainable human development and good governance. To a certain extent these new concepts revitalize—and in a sense globalize—older ones, such as democracy and the rule of law, collective security, and the four freedoms (freedom from fear, freedom from want, freedom of speech and freedom of belief). All these concepts, and the national, international and universal values they represent, will be influenced by the new dimension of children's rights. A first sign of this is the fact that children and their rights and best interests are included in international documents in which these concepts play an important part<sup>3</sup>.

Women's rights may be perceived as adding a gender dimension to human rights, but in which sense, and to which degree may children's rights be perceived as adding a new dimension? Children's rights, as codified in the Convention on the Rights of the Child, add a "development-of-personality"<sup>4</sup> dimension to human rights, and this specifically in relation to the foundations in (early) childhood of individual human—i.e. personal—development. Development of personality starts at birth (and even before birth) and continues for the whole of one's life, although it

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<sup>1</sup> The 191 UN member states (see [www.un.org/Overview/growth.htm](http://www.un.org/Overview/growth.htm)), minus Somalia and the USA (signatories only), and plus the Holy See (Vatican City), the Cook Islands and Niue (both formally part of New Zealand): see [www.ohchr.org/english/countries/ratification/11.htm](http://www.ohchr.org/english/countries/ratification/11.htm).

<sup>2</sup> Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (25 May 2000, in force: 18 January 2002, available at [www.ohchr.org/english/law/crc-sale.htm](http://www.ohchr.org/english/law/crc-sale.htm)) and Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (25 May 2000, in force: 12 February 2002, available at [www.ohchr.org/english/law/crc-conflict.htm](http://www.ohchr.org/english/law/crc-conflict.htm)); states party: 101, respectively 102 (including the USA) as of 7 October 2005.

<sup>3</sup> See for instance the 2005 World Summit Outcome, paras. 12, 128, 141-142, in Appendix 1 of this contribution.

<sup>4</sup> In Dutch: "persoonswording" (becoming a person), on which see WILLEMS, J.C.M. (1999), *Wie zal de Opvoeders Opvoeden? Kindermishandeling en het Recht van het Kind op Persoonswording [Who will Educate the Educators? Child Abuse and the Right of the Child to Become a Person (with a summary in English)]*, Ph.D. Universiteit Maastricht 1998, The Hague: T.M.C. Asser Press, 1999.

may be blocked, even far into adult life, by unresolved trauma or other unresolved developmental c.q. psychological damage<sup>5</sup>.

Development of personality begins with brain development, and 85 per cent of human brain development (the development of connections in the brain) takes place in the first three years of life<sup>6</sup>. Severe forms of child abuse, neglect and exploitation may cause lasting brain damage. As Perry observes: “[All kinds of] studies point to the need for children (...) to have both stable emotional attachments with and touch from primary adult caregivers, and spontaneous interactions with peers. If these connections are lacking, brain development both of caring behavior and cognitive capacities is damaged in a lasting fashion.”<sup>7</sup> (See also Appendix 2)

Development of personality is holistic<sup>8</sup> development: interrelated and interacting physical (especially brain), emotional, social, moral and intellectual development (see also Articles 27.1, 29.1 sub a, and 32.1 CRC). A human being’s first developmental task is development of secure emotional attachment with his or her primary caregivers. Secure attachment is positively correlated with a person’s resilience and healthy relationships later in life. One in three children (in the developed world) is not securely attached<sup>9</sup>, which constitutes a serious risk factor for further healthy (emotional) development. Witness to this may be the fact that mental ill health affects one in four adults in the EU (European Union) every year (see Appendix 6).

The foundations for mental health (and related physical health) and healthy development of personality are laid in (early) childhood. Adverse childhood experiences (ACEs),<sup>10</sup> especially child abuse, neglect and exploitation (see below), constitute serious risk factors for mental and physical health in adult life. The more adverse childhood experiences an adult carries in his or her knapsack, the greater the chances are that he or she: smokes, has a sexually transmitted disease, is promiscuous, is addicted to alcohol or drugs, suffers

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<sup>5</sup> See *The Adverse Childhood Experiences [ACE] Study* and other publications available at [www.acestudy.org](http://www.acestudy.org); see also [www.childtrauma.org](http://www.childtrauma.org), [www.zerotothree.org](http://www.zerotothree.org), [www.granitescientific.com](http://www.granitescientific.com), [www.avoicetofreedom.com/Trauma&Civilization.doc](http://www.avoicetofreedom.com/Trauma&Civilization.doc)

<sup>6</sup> WOLZAK, A., “Hersenen in de hoofdrol”, *Tijdschrift over kindermishandeling*, March 2005, pp. 3-5.

<sup>7</sup> Perry, B.D., “Childhood experience and the expression of genetic potential: what childhood neglect tells us about nature and nurture”, *Brain and Mind* 2002, p. 79.

<sup>8</sup> For the term “holistic” as used by the Committee on the Rights of the Child — both in relation to child development and school education as well as in relation to the interdependence and indivisibility of all human and especially children’s rights — see the Committee’s General comments (available at [www.ohchr.org](http://www.ohchr.org)) No. 1 (*The aims of education*, 2001), paragraphs 1, 12 and 13; No. 3 (*HIV/AIDS and the rights of the child*, 2003), section III, heading and paragraph 4; No. 5 (*General measures of implementation of the CRC*, 2003), paragraph 12 and Article 6, paragraph 18 and paragraph 62; and No. 6 (*Treatment of unaccompanied and separated children outside their country of origin*, 2005, unedited), section II, last paragraph.

<sup>9</sup> Van Ijzendoorn, see [www.childandfamilystudies.leidenuniv.nl](http://www.childandfamilystudies.leidenuniv.nl) See also his and others’ contributions on [www.excellence-earlychildhood.ca](http://www.excellence-earlychildhood.ca), go to *Encyclopedia on Early Childhood Development*, click on Attachment.

<sup>10</sup> Adverse Childhood Experiences (ACEs) are: growing up (prior to age 18) in a household with: recurrent physical abuse; recurrent emotional abuse; sexual abuse; an alcohol or drug abuser; an incarcerated household member; someone who is chronically depressed, suicidal, institutionalized or mentally ill; mother being treated violently; one or no parents; emotional or physical neglect. ACEs are surprisingly common, they happen even in “the best of families”, they have long-term, damaging consequences (Information taken from [www.acestudy.org](http://www.acestudy.org)).

depression, attempts suicide, suffers a chronic lung disease, suffers from heart problems, bone fractures (may be due to accident proneness), diabetes or obesity<sup>11</sup>.

The World Health Organization's definition of child abuse (child abuse and neglect; child maltreatment; child abuse, neglect and exploitation) reads as follows: "Child abuse or maltreatment constitutes all forms of physical and/or emotional ill-treatment, sexual abuse, neglect or negligent treatment or commercial or other exploitation resulting in actual or potential harm to the child's health, survival, development or dignity in the context of a relationship of responsibility, trust or power."<sup>12</sup>

For a classification of child abuse and neglect (CAN), with subtype definitions and severity ratings, see the MMCS (Modified Maltreatment Classification System).<sup>13</sup> Child abuse, neglect and exploitation (CANE) affects probably one in ten children in the developed world, and many more in the developing world (think only of child labour or sale of children, lack of education, genital mutilation of girls and other harmful and traumatizing traditional practices). Due to the complexity of subtype definitions and severity ratings, as well as many other factors, exact data on the scope of CAN in the developed and developing world are not available. More and more studies are being conducted, however. The fragmented data that we do have point to a serious underrating of the problem of CAN.

One researcher<sup>14</sup> reports the following: "We conducted an anonymous survey of parents in North & South Carolina and asked about the frequency of specific abusive behaviors and acts"<sup>15</sup>. We have estimated that the actual rate of abuse is 40 times higher than the official reports in our two states and sexual abuse occurring at a rate about 15 times higher than official reports." To which he adds: "The obvious implication is that we can't just grow the protective service system by 15 or 40 times; we are going to need to devote great energy toward prevention."

We used to think that approximately 1 to 3 per cent of children in the developed world are victims of CAN, but according to a 2001 UK study<sup>16</sup>, in the UK "16% of children experienced serious maltreatment by parents"<sup>17</sup>. "In all, *one in four* young people said that there were things that had happened to them during their childhood which they found difficult to talk about. (...) [H]ardly any of the young people had told police, social services, teachers or other professionals."<sup>18</sup>

<sup>11</sup> WOLZAK, A., "Hersenen in de hoofdrol", *op. cit.*

<sup>12</sup> see [www.who.int](http://www.who.int).

<sup>13</sup> ENGLISH, D. J. & the LONGSCAN Investigators (1997), *Modified Maltreatment Classification System (MMCS)*, available at [www.iprc.unc.edu/longscan](http://www.iprc.unc.edu/longscan); as modified from the *Maltreatment Classification System* outlined in: BARNETT, D., MANLY, J.T. and CICHETTI, D., "Defining Child Maltreatment: The interface between policy and research", in: D. CICHETTI and S.L. TOTH (eds.), *Advances in Applied Developmental Psychology: Child Abuse, Child Development and Social Policy*. Norwood, NJ: Ablex Publishing Corp., Chapter 2, 1993, pp. 7-73.

<sup>14</sup> Des Runyan, list Child Maltreatment Researchers, e-mail 14 March 2005.

<sup>15</sup> See THEODORE, A.D., J.J. CHANG *et al.*, "Epidemiologic features of the physical and sexual maltreatment of children in the Carolinas", *Pediatrics*, March 2005, pp. e331-e337 (<http://pediatrics.aappublications.org/cgi/content/full/115/3/e331>).

<sup>16</sup> NSPCC, *Child Maltreatment in the United Kingdom*.

<sup>17</sup> see [www.nspcc.org.uk/html/home/newsandcampaigns/factsandfigures.htm](http://www.nspcc.org.uk/html/home/newsandcampaigns/factsandfigures.htm)

<sup>18</sup> See [www.nspcc.org.uk/html/home/informationresources/hiddenchildabusesurvey.htm](http://www.nspcc.org.uk/html/home/informationresources/hiddenchildabusesurvey.htm). On US estimates see Appendix 2 and check websites mentioned below.

On child exploitation in the developing world, UNICEF's *The State of the World's Children*<sup>19</sup> offers yearly statistics. ACEs (adverse childhood experiences) other than CANE are likely to be even more common, affecting the lives, and personal development, of many more children in the developing and developed world (CANE and other preventable ACEs might affect one in four or even one in three children in the developed world alone). Individual consequences depend on the balance of risk and protective factors in each child's life. Poverty, poor mental health and ignorance of parents are serious risk factors for children (which underlines the enormous importance of Articles 11, 12 and 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and Articles 18.2, 24.2 sub e-f, 24.3, 27.3, 28-29 and 39 CRC). However, there may be all kinds of risk factors, as well as protective factors, in children themselves, their families, communities and societies<sup>20</sup>.

In this contribution, I will try to shed some light on the CRC's development-of-personality dimension to human rights, as asserted above. In order to do so, we have to ask ourselves a few preliminary questions first. For instance, how do children's rights relate to the human rights project? When did they come in? How do they fit in? The proposed answers to these questions form the orientation part of this contribution. To further explore the CRC's new dimension to human rights, two new concepts are introduced: the concept of transgenerational discrimination (or transism) and the concept of the Trias pedagogica.<sup>21</sup> If transism is our world's reality, both in the developed and the developing world: we are not doing what we can do to stop this discrimination ("thesis"), then children's rights: the things we can do and must do, are the "antithesis", and the Trias pedagogica: the world as it can be and should be, for children, caregivers and societies, is the "synthesis". The explanation and elaboration of this "dialectics" form the conceptualization part of this contribution. The content of the CRC is discussed throughout this contribution. Occasionally, reference is made to the CRC's implementation (treaty body monitor-

<sup>19</sup> Available at [www.unicef.org](http://www.unicef.org).

<sup>20</sup> For further information on these and related issues, see DELFOS, M.F., "The developmental damage to children as a result of the violation of their rights", in: WILLEMS, J.C.M. (ed.), *Developmental and Autonomy Rights of Children; Empowering Children, Caregivers and Communities*, Antwerpen: Intersentia, 2002, pp. 47-68 (especially in relation to sexual abuse) and WOODHEAD, M., "Psychosocial impacts of child work: A framework for research, monitoring and intervention", *The International Journal of Children's Rights* 2004, pp. 321-377 (especially in relation to child work and child labour). See also the site on the UN Secretary General's Study on Violence Against Children, [www.violencestudy.org](http://www.violencestudy.org), and see NGO (non-governmental organizations) and professional sites, such as [www.ispcan.org](http://www.ispcan.org), [www.apsac.org](http://www.apsac.org), [www.raak.org](http://www.raak.org) (Dutch), [www.nyspcc.org](http://www.nyspcc.org), [www.nspcc.org.uk](http://www.nspcc.org.uk), [www.baspcan.org.uk](http://www.baspcan.org.uk), [www.preventchildabuseny.org](http://www.preventchildabuseny.org), [www.childrencampaign.org](http://www.childrencampaign.org), [www.crin.org](http://www.crin.org), [www.childrensdefense.org](http://www.childrensdefense.org), [www.cssp.org](http://www.cssp.org), [www.unh.edu/ccrc](http://www.unh.edu/ccrc) (Crimes against Children Research Center, University of New Hampshire). Most of these sites have links to other sites.

<sup>21</sup> On these concepts see also WILLEMS, J.C.M. (2002), "The children's law of nations: The international rights of the child in the Trias pedagogica", in: WILLEMS, J.C.M. (ed.), *Developmental and Autonomy Rights of Children; Empowering Children, Caregivers and Communities*, Antwerpen: Intersentia, 2002, pp. 69-102 (also available at <http://arno.unimaas.nl/show.cgi?did=3150>); WILLEMS, J.C.M. (2005), "Children's rights and the prevention of child abuse and neglect: The quest for a Trias pedagogica of children, parents and society", in: WESTENDORP, I. & WOLLESWINKEL, R. (eds.), *Violence in the Domestic Sphere*, Antwerpen/Oxford: Intersentia, 2005, pp. 151-182.

ing and interpretation), especially to General Comments by the Committee on the Rights of the Child<sup>22</sup>.

## 2. Orientation

The international human rights movement, which we shall label the human rights project, started in 1945 with the Charter of the United Nations — hereafter: UN Charter or Charter. In the past 60 years, the human rights project has greatly influenced international law. Some even argue that human rights now should be seen as the first chapter of international law. Not just a new chapter, but the first one: the chapter that adds a new dimension to the other chapters, the dimension of human dignity.

International law developed over several centuries. In 1625, the exiled Dutchman Hugo Grotius published in Paris his famous *On the Law of War and Peace* (in the world's lingua franca of his time: *De Jure Belli ac Pacis*). He is seen as one of the first, if not the first author, who tried to separate international law from (catholic) theology, thus creating a new, in the sense of independent discipline, acceptable to all cultures and religions. The fundamental principles that sustain human societies, local, national and international, and ultimately the society of all humankind, have validity, he wrote “even if we should concede (...) that there is no God, or that the affairs of men are of no concern to Him”<sup>23</sup>.

After creation, God could not change human nature, and human nature is thus that men have to form societies in order to survive and prosper, ultimately, Grotius believed, a society of mankind. Societies are not possible without certain values or fundamental principles, which are at the basis of different branches of law as these branches developed over the ages. Grotius mentions five such principles: “abstaining from that which is another's; the restoration to another of anything of his which we may have, together with any gain which we may have received from it; the obligation to fulfil promises; the making good of a loss incurred through our fault; and the inflicting of penalties upon men according to their deserts”<sup>24</sup>.

All the chapters of international law that were known in 1625 and developed or were added in the centuries thereafter, have been preceded, in a few decades since 1945, by a new chapter, chapter one: human rights. At the basis of human rights, as a concept and as a branch of law, lies the principle of human dignity. Human dignity, as a Charter principle, mentioned in the UN Charter's preamble (“the dignity and worth of the human person”), may be added to the five Grotian principles mentioned above. Together, they form the six fundamental principles underlying all law, national and international. They are the common legal heritage of mankind, a heritage some of us denote by the term natural law. Treaty and custom may not be contrary to these

<sup>22</sup> For further information on content and implementation of the CRC see HODGKIN, R. & NEWELL, P., *Implementation Handbook for the Convention on the Rights of the Child*, Geneva/New York: Unicef, 2002 (second ed.).

<sup>23</sup> *De Jure Belli ac Pacis*, Prolegomena, para. 11.

<sup>24</sup> *De Jure Belli ac Pacis*, Prolegomena, para. 8.

fundamental principles — to the degree that they are, they turn legal evolution into devolution. The Grotian term for international law: the law of nature and of nations, bore witness to that conviction. The last principle in time: human dignity, is the first in hierarchy if we accept human rights law as the chapter one of international law.

Other international instruments that refer to human dignity are the Universal Declaration of Human Rights (twice in its preamble and in Article 1) and the ensuing UN human rights treaties (see below). The Charter of Fundamental Rights of the European Union (Part II of the Treaty establishing a Constitution for Europe, TCE) starts with a chapter 1 (Part II TCE title 1) on Dignity. Article 1 (TCE Article II-61), *Human dignity*, reads as follows: Human dignity is inviolable. It must be respected and protected.

Human dignity is a concept that refers to the equal rights and to the inherent dignity of all human beings. Human dignity as a concept contains a double message: (1) no person is superior or inferior because of sex, race, religion, birth, etc.; (2) every person is entitled to respect for his or her personal integrity. The first message is the essence of democracy, the second message is the essence of the rule of law. In the modern world, believing that you are superior because of your sex, religion, etc. is seen not only as a lack of respect but somehow also as a lack of self-respect. Psychological frustration or compensation is suspected. Childrearing styles or practices, either culturally embedded or in a particular family, may be the root causes of such frustration or compensation. The same is probably true for those who violate the personal integrity of others. For an understanding of the mechanisms at work here see the pioneering work of Alice Miller<sup>25</sup>.

Self-respect (or rather “positive core self-evaluations: self-esteem, generalized self-efficacy, locus of control, and emotional stability”<sup>26</sup>) is linked to personal development and thus to mental health<sup>27</sup>. Mental health is a broad concept that includes or is related to such concepts as personal growth, empathy and emotional intelligence (see also the WHO definition of mental health in Appendix 6). The two messages of inherent dignity and equal rights overlap, just as democracy and the rule of law do. The inherent dignity of the other is a message to me to respect his or her personal integrity, but the degree to which I am able to do so, depends on my self-respect, and hence on my mental health. The same goes for my respect or disrespect for the equal rights of others. Although a lack of psycho-education or of human rights education may also play a role.

The CRC seems to recognize this in its Articles 39 (physical and psychological recovery and social reintegration of child victims) and 40 (reintegration of child offenders).

Article 39 CRC (emphasis added).—States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse;

<sup>25</sup> Available at [www.alice-miller.com](http://www.alice-miller.com), for a schematic overview see Appendix 4.

<sup>26</sup> JUDGE, T. A. et al., “Emotional stability, core self-evaluations, and job outcomes: A review of the evidence and an agenda for future research”, *Human Performance* 2004, pp. 325-346 (abstract available at [www.leaonline.com](http://www.leaonline.com)).

<sup>27</sup> MANN, M. et al., “Self-esteem in a broad-spectrum approach for mental health promotion”, *Health Education Research* 2004, pp. 357-372 (abstract available at <http://her.oxfordjournals.org>).

torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the *health, self-respect and dignity* of the child.

Article 40.1 CRC (emphasis added).—States Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with *the promotion of the child's sense of dignity and worth*, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

In relation to psycho-education and/or human rights education important CRC provisions are:

Article 29.1 CRC.— States Parties agree that the education of the child shall be directed to: (a) the development of the child's personality, talents and mental and physical abilities to their fullest potential; (b) the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations (...).

Article 17.— States Parties recognise the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. To this end, States Parties shall: (a) encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of Article 29 (...).

Article 42.— States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

Human dignity can, in my view, best be described as the inherent right of every individual to be respected as a person, and to be treated as such, and the inherent duty of every individual to both respect others (treat others as human beings and not as objects or means) and not to "deny oneself", that is to develop his or her own self-respect. In brief: human dignity is, or is about, the combination of respect for others and self-respect. This combination refers to both personal (physical and mental) health and personal (physical and mental) integrity as basic human rights.

If I am correct in saying that human dignity is about respect and self-respect, then the main mission of the human rights' movement, the principle aim of the human rights' project should be to promote and protect the coming into being and the development of self-respect and respect for others in human beings from the moment they are born (and even earlier, starting before birth, see the ninth preambular paragraph of the CRC). This is where children's rights come in, because children's rights are precisely about that: the coming into being and the development of self-respect and respect for others in the youngest of human beings, and the ones that are most eager to learn: children. Human dignity and the development of human

dignity start at birth (and even before then), in the way an infant is treated, in the way a child is raised and educated. Human dignity begins in (early) childhood. With the adoption of the CRC in 1989, the human rights movement finally seems to have reached that conclusion.

Self-respect is seen, at least by the present author, as the basis, the only solid and sustainable basis, of respect for others. In this sense, we can say that the basis of human dignity is the human dignity which with children are treated. The assumption on which this contribution is based — and the body of evidence to support this assumption, in psychology and other disciplines, is still growing — is that human dignity originates in a Trias pedagogica, a healthy child development triad, of children, caregivers and communities, c.q. children, parents and the state, which triad is based on the human rights of children, women, (adolescents as) parents-to-be, parents and other caregivers, professional or otherwise. If this assumption is correct, and fully justified, then “the best interests of the child” is the paramount human right. Or at least something very close to it. For the moment, let us hope that some day in the near future human rights lawyers may conclude that children’s rights have become human rights’ chapter one: the chapter that adds a new dimension to the other chapters of human rights law.

In this contribution we explore one of the greatest achievements of the human rights project: the launching of the children’s rights project. The main instrument of this latter project is the Convention on the Rights of the Child (CRC). However, we will look at the CRC from two specific angles, a negative one: discrimination (and how to eliminate it), and a positive one: emancipation (and how to promote it). Those two angles are not specific for the CRC, all human rights and human rights treaties can be studied from those two angles. What is specific for the CRC is the rather complex nature of both the negative angle of discrimination and the positive angle of emancipation. In order to come to grips with this complex nature, two concepts are introduced, the negative concept of transgenerational discrimination (or transism), and the positive concept, mentioned above, of the Trias pedagogica. Both concepts are of an interdisciplinary nature. Neither transism nor the Trias pedagogica can be fully understood without some psychological, pedagogical and statistical information on the transgenerational transmission of trauma, of insecure attachment, of poor mental health or inadequate childrearing styles or practices, on the one hand, and on the developmental aspects of the best interests of the child, and the definition, scope and consequences of its opposite: child abuse, neglect and exploitation, on the other hand. Therefore, information on these issues, and sources that can assist us to delve further into them, were already given in the introduction. So, let us turn back to the human rights project in order to see how it developed — and should further develop — into the children’s rights project.

Let us go back to the UN Charter. According to the Charter, the United Nations (UN) is about two ideas and two ideals. The two ideals are: no more wars (in the preamble of the Charter: “to save succeeding generations from the scourge of war”), and human rights for all (in the preamble of the Charter: “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women (...), and (...) to promote social progress and better stand-



ards of life in larger freedom'). The Second World War and the Nazi genocide<sup>28</sup> fueled both ideals. The two ideas to realize these ideals are: collective security (as codified in the Charter, see Articles 2.4, 25, 39 juncto 41 and 42, 51 and 103), and the four freedoms (pre-dating the Charter by a few years, and codified several years later).

These four freedoms are: freedom from fear and freedom from want, and freedom of speech and freedom of belief. Today, they may be seen as the summarization of the body of human rights (interrelated, interdependent and mutually reinforcing personal, civil, political, social, cultural and economic rights) as it developed, on the basis of a few Charter references, in the decades after the Charter was adopted. Before turning back to the UN Charter, let us first try to link the original or core content of the four freedoms to present-day children's rights. The concept of the four freedoms was introduced by US president Franklin Delano Roosevelt in 1941 — at the eve of the US's involvement with the Second World War — in his *State of the Union* address to Congress<sup>29</sup>. How may the essence of Roosevelt's four freedoms be translated into modern human and especially children's rights?

Roosevelt's first freedom: freedom from fear, may now be seen as referring to personal security: freedom from fear of both public (inter-state and intra-state) and private violence, including (physical and mental) violence in the domestic sphere, to which correspond especially the right to life and the right to personal integrity. The (non-binding) Charter of Fundamental Rights of the European Union (proclaimed in 2000), incorporated as part II of the Treaty establishing a Constitution for Europe (TCE, signed in 2004, not in force) makes explicit mention of the right to personal integrity in its Article 3.1 (TCE Article II-63.1), *Right to the integrity of the person*: Everyone has the right to respect for his or her physical and mental integrity. Article 24.1, first sentence of the Charter of Fundamental Rights (TCE Article II-84.1, first sentence), *The rights of the child*, adds to this: Children shall have the right to such protection and care as is necessary for their well-being. This article is based on the CRC. In the CRC itself, see for the right to life and rights related to children's personal (physical and mental) integrity Articles 6.1 and 19, as well as 9-11, 20 and 32-38 CRC.

Roosevelt's second freedom: freedom from want, refers to the primary necessities of life: the right to survival — for children: survival and development (see Article 6.2 CRC) — and to (other) social rights, including — for children: health care, including prenatal care, parenting education and preventive care (Article 24.2 sub d-f CRC); material (financial and other) parental support, especially with regard to nutrition, clothing and housing (Article 27.3 CRC); parental assistance with regard to child-rearing (Article 18.2 CRC); affection-based and "age"-appropriate ("in a manner consistent with the evolving capacities of the child") direction and guidance by parents and/or other caregivers (sixth preambular paragraph juncto Articles 3, 5, 19.2 and 20 CRC); primary, secondary, vocational and higher education and vocational information and guidance (Article 28 CRC); education which prepares the

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<sup>28</sup> The UN General Assembly decided on 1 November 2005 that the UN will designate 27 January — the anniversary of the liberation of the Auschwitz death camp — as an annual International Day of Commemoration to honour the victims of the Holocaust (Holocaust Remembrance Day): see [www.un.org/News/Press/docs/2005/ga10413.doc.htm](http://www.un.org/News/Press/docs/2005/ga10413.doc.htm).

<sup>29</sup> Available at [www.americanrhetoric.com/speeches/fdrthefourfreedoms.htm](http://www.americanrhetoric.com/speeches/fdrthefourfreedoms.htm).

child for democratic citizenship (“responsible life in a free society”: Article 29.1 sub d CRC), which includes, in my view, preparation for parenthood; leisure and play (Article 31.1 CRC); social security (Article 26 CRC); and therapy for and social reintegration of child victims of abuse, neglect and exploitation (Article 39 CRC). Article 4 CRC requires states to invest in social rights (in my view, this refers to all rights that cost money<sup>30</sup>) to the maximum extent of its available resources.

The third and fourth freedom: freedom of speech and freedom of belief, refer to democracy and the rule of law, to civil and political rights, to tolerance and identity, to participation and integration. For children, see Articles 7, 8, 12-17, 29, 30, 31.2 and 40 CRC. These Articles should be linked, in my view, to Article 3.1 and Article 18.1: the best interests of the child as primary state and basic parental concern. The best interests of the child are about a child’s well-being and healthy development, and participation — to be included, to belong, to be needed, to be heard, to be challenged, to matter — is a basic psychosocial and developmental need. Participation, therefore, is “protected” participation: protected by the direction and guidance of caring adults who are empowered to act “in a manner consistent with the evolving capacities of the child” (Articles 5 and 14.2 CRC).<sup>31</sup>

According to some authors, the best interests of the child (Article 3 CRC as a general CRC principle) is a paternalistic concept, and participation (“respect for the views of the child”: Article 12 CRC as a general CRC principle) is quite the opposite.<sup>32</sup> I think they should take a closer (and more interdisciplinary) look at the CRC (and study the developmental psychology aspects of the best interests principle). As Lansdown<sup>33</sup> observes: “There is a growing body of evidence indicating that where children are given opportunities to participate, they acquire greater levels of competence, which in turn enhances the quality of participation (...). Children are not merely passive recipients of environmental stimulation, but actively engage with their surroundings in purposeful ways, even from babyhood. (...)T]he experience of involvement in shared activities with both adults and peers, where there is a presumption of ability to complete a task successfully, encourages children’s development. Within any given culture, children’s capacities to participate effectively are directly influenced by the level of adult support provided, the respect with which they are treated, the trust and confidence invested in them and the opportunity to take increasing levels of responsibility.’

In sum, the four freedoms overlap, especially for children. This should come as no surprise: children’s basic (developmental) needs — which include participation

<sup>30</sup> See also General comment No. 4 (2003): *Adolescent health and development in the context of the Convention on the Rights of the Child*, of the Committee on the Rights of the Child (available at [www.ohchr.org](http://www.ohchr.org)), paragraph 7.

<sup>31</sup> See also General comment No. 4, paragraphs 3, 4, 14, 22-24 and 35-36.

<sup>32</sup> Other general CRC principles are non-discrimination (Article 2) and the right to life, survival and development (Article 6): see Revised General guidelines for periodic reports submitted by states parties under Article 44.1 sub b CRC (adopted 3 June 2005, into force as from 1 January 2006; unedited, available at [www.ohchr.org/tbr/crc/Revised\\_Guidelines\\_Periodic\\_Reports.pdf](http://www.ohchr.org/tbr/crc/Revised_Guidelines_Periodic_Reports.pdf)).

<sup>33</sup> LANSDOWN, G., *Can you hear me? The right of young children to participate in decisions affecting them*, Working Papers in Early Childhood Development, The Hague: Bernard van Leer Foundation, 2005, p. 7 (available at [www.bernardvanleer.org/publications](http://www.bernardvanleer.org/publications)).

and civil rights — overlap. This implies that all freedoms, not just the “freedoms from”, require state investments and all kinds of state action. Accordingly, and contrary to its wording, Article 4 CRC, on maximum extent state investments, should be seen as referring not only to social rights (social rights in a traditional sense), but to all rights that cost money. After all, personal security and integrity, also, if not first of all, of children have to be protected not only through non-intervention by the state (requiring, by the way, state investments to educate and supervise state as well as professional actors so that they know when to act and when not to act: see Article 3.3 CRC), but also through (pro-active) state prevention (Articles 18.2, 19.2, 24, 27.3 CRC), intervention (Article 19.2 CRC) and reparation (Article 39 CRC) when private actors — parents or other caregivers — are the (potential) perpetrators.

Freedom from fear and freedom from want are at the basis of a new concept in international law (and the social sciences) since about a decade: human security (on which see Appendix 1, paragraph 143). Democracy and the rule of law (see Appendix 1, paragraphs 11 and 135) may be associated with another rather new concept: good governance<sup>34</sup>. However, good governance is broader than democracy and the rule of law, it is basically about the question whether “the institutions of governance [are] effectively guaranteeing the right to health, adequate housing, sufficient food, quality education, fair justice and personal security”<sup>35</sup>. The right to health includes mental health (see Article 12.1 ICESCR, on mental health in the EU see Appendix 6). And personal security includes, of course, personal security of children (Article 19 CRC). Especially in relation to children’s rights, concepts such as good governance are global concepts, applicable to both the developing and the developed world.

Let us once again go back to the UN Charter and its two ideas. We have looked at Roosevelt’s idea of the four freedoms (at once connecting it to children’s rights), and we will come back to it to see to which degree it was codified in — and especially after — the Charter. But first, we have to say a few words about collective security, the UN Charter’s first and central idea. Collective security originally was about preventing and stopping wars of aggression, about collectively acting in situations where peace between states was collapsing. The Charter deals with collective security in its Chapter VII. The Security Council is the central organ when it comes to collective security. When it invokes Article 39 of the Charter, it can make binding decisions in the name of the international community, ultimately including (the authorization of) the use of armed force (Article 39 juncto Article 42). More and more, the Security Council is also supposed to protect human security, to act — ultimately with military means — when human rights are collapsing. Especially when genocidal acts are (about to be) committed within a state (see Appendix 1, paragraphs 9, 138-140 and 143).

Collective security is about the protection of peace, first of all negative peace: no wars. More and more, it is also about the protection of positive peace: human security, especially freedom from fear and the restoration of good governance, democracy and the rule of law (humanitarian intervention), but also freedom from

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<sup>34</sup> To which several websites are devoted, see for instance “What is good governance?” at [www.unescap.org/huset/gg/governance.htm](http://www.unescap.org/huset/gg/governance.htm).

<sup>35</sup> [www.unhcr.ch/development/governance-01.html](http://www.unhcr.ch/development/governance-01.html).

want (humanitarian assistance). Both center around the notion of violence: no violence between states, no violence within states. No violence within states means no violence by the state and state protection against violence by non-state actors. However, there are many forms of violence. Violence may be physical and psychological, incidental and structural, brutal and subtle. It may take the shape of poverty, of ignorance, of racism, of sexism, and, as we will see later on, of transism. This brings us back to the four freedoms, which are intended to provide the answer to these forms of human violence. These four freedoms summarize in a few words the human rights in the Universal Declaration of 1948.

The Universal Declaration claims to be a common standard of achievement for all peoples and all nations, and in a sense for all individuals, as members of their respective societies, as members of professional or other groups within society ("organs of society"), and as members of the human family. All individuals have duties, specifically with respect to teaching and educating the next generation. This notion of a common standard of achievement has led to the drawing up of human rights treaties, which in turn lead to, or should lead to, new national laws and policies. This process of international treaty-making and national law-making (and policy-making) to promote and protect human rights, is called the human rights project, which includes a women's rights project and a children's rights project. The original text of this universal and comprehensive human rights project is the Universal Declaration.

The preamble of the Universal Declaration is followed by a list of rights. This list starts with a philosophical Article 1, and ends with a philosophical Article 29. By philosophical, I mean that the articles in question tell us something about the image of the human being of the Universal Declaration. These two articles give us important information not only on how to look at human rights but also on how to look at ourselves and our place in the modern world. After all, the Universal Declaration, being the original text of international human rights law, may be seen as the most sacred secular text in the modern world.

By sacred, I mean no more and no less than that it may help us to give meaning to our lives, in combination with other texts that may be sacred to us, but that may not be secular texts, let alone texts with a legal import. Other texts, especially religious texts, may ask more from us, but their standards, or the interpretation thereof, may not fall below the common standard of achievement of the Universal Declaration.

Mankind may just as well unlearn to read and write as unlearn the common wisdom of the human rights contained in the Universal Declaration. A common wisdom that has been revealed to mankind not overnight but through the pain and struggle of many centuries, many cultures, and many generations, after a long and painful process of cultural evolution. There is only one escape from cultural evolution: devolution, which means trying to undo history, to un-educate our children, that is stopping to pass on to our children what earlier generations have passed on to us. Future generations are then robbed from the common cultural heritage of mankind. It has happened before, in the Dark Ages (see Appendix 2). But the common wisdom of the ancients has been given back to us by humanists like the Dutchmen Erasmus and Grotius, who could read Greek and Latin, Hebrew and Arabic.

In an age of bloody wars of religion, Hugo Grotius tried, in his *On the Law of War and Peace* (1625), to reduce warlike violence by building a system of international law based on general principles. These principles had, in his view, developed over time due to man's need and urge to live in a peaceful and organized society — ultimately, as he saw it, a society of mankind. Being the common cultural heritage of his age, these principles were valid for all nations and religions. They formed a core of universal natural (we would say cultural) law. Every individual should follow his or her conscience and refuse to participate in a war that was unjust according to these universal principles. Rulers should respect this individual right and duty<sup>36</sup>. The individual autonomy and responsibility in relation to warfare as stipulated by Grotius, may be seen as the heart of human rights, as they were to develop in and after the age of the French and American revolutions, to ultimately become part of international law more than three centuries after Grotius' book. Which brings us back to the UN and the Universal Declaration of Human Rights.

Article 1 of the Universal Declaration says: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood". Let me translate this immediately into the language of children's rights — although this language, as we have seen, dates from 1989, more than forty years later. This would probably be the result: All children are born free and equal in dignity and rights. They should receive a healthy upbringing in order to become rational, moral and authentic persons, who act towards one another in a spirit of solidarity.

Article 29.1 of the Universal Declaration says: "Everyone has duties to the community in which alone the free and full development of his [or her] personality is possible". This article takes the just born babies of Article 1 into adulthood and implies (1) that not only children but also adults should continuously — or continue to — develop their personality, (2) that developing one's personality is the essence of freedom, and (3) that full development, development towards one's fullest potential, is impossible without responsibilities towards the communities in which a baby is born: family; the child grows up: school and neighbourhood; and the youngster or young adult assumes responsibilities for his or her partner, children, colleagues and fellow citizens: society, and to some degree the society of mankind: human society.

Article 29.1 of the Universal Declaration is not a dead letter. It is reflected in the preamble of the International Covenants on Economic, Social and Cultural Rights, and on Civil and Political Rights (ICESCR and ICCPR), and of the Charter of Fundamental Rights of the European Union (Part II of the Treaty establishing a Constitution for Europe). The preambles of ICESCR and ICCPR conclude by stating "that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant." The preamble of the Charter of Fundamental Rights of the EU concludes by stating: "Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations." Article 29.1 of the Universal Declaration of Human Rights is more than reflected in the CRC.

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<sup>36</sup> VERMEULEN, B., "Grotius on conscience and military orders", *Grotiana (New Series)* 1985, pp. 3-19.

Another Article 29.1, Article 29.1 of the Convention on the Rights of the Child, translates the language of rights-that-involve-responsibilities<sup>37</sup> into the language of children's rights. Article 29.1 CRC says (among other things): States Parties agree that the education of the child shall be directed to: (a) the development of the child's personality, talents and mental and physical abilities to their fullest potential; (d) the preparation of the child for responsible life in a free society (...).

This article, on the aims of school education, implies what a healthy upbringing, including good school education, should aim at: the free and full development of the child as a person and as a citizen (member of a free, that is democratic society). Here we see that children's rights are, among other things, about the (participatory) preparation of children for democratic citizenship. Democratic citizenship should, in my view, be understood to include responsible parenthood. It is very important to realize this, because without responsible parenthood ("what does society, on the basis of children's rights, expect from parents?") — and therefore parenting education and parental assistance and support ("what can parents, on the basis of children's rights, expect from society?") — children's rights are deprived of their meaning.<sup>38</sup>

The Committee on the Rights of the Child (see Article 43.1 CRC) has interpreted Article 29.1 CRC in its first General comment: *The Aims of Education* (2001). The Committee observes: "Article 29.1 is of far-reaching importance. The aims of education presented and agreed upon by all states parties promote, support and protect the core value of the Convention: the human dignity and the equal and inalienable rights innate to every child. These aims, set out in the five sub-paragraphs of Article 29.1 are all linked directly to the realization of the child's human dignity and rights, taking into account the child's special developmental needs and diverse evolving capacities".

What the Committee labels the "core value" of the Convention: "the child's human dignity and rights, taking into account the child's special developmental needs and diverse evolving capacities", may at the same time be seen as the "object and purpose" of the CRC. For this (undefined) term of treaty law, referring to a treaty's essence qua cause and goal (*causa finalis*), see Articles 18, 19 sub c and 31.1 of the Vienna Convention on the Law of Treaties as well as Article 51.2 CRC.

The alpha-and-omega, or the *causa finalis*, or — in treaty law terminology — the "object and purpose" of the human rights project is, as we have seen, human dignity as it relates to (the development of) respect and self-respect and thus to (the promotion of) mental health. How do human rights and, more specifically, children's rights express this object-and-purpose?

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<sup>37</sup> This dignitarian language (based on human dignity, and thus integrating and balancing freedom, equality and solidarity; as opposed to libertarian language: based on an over-individualistic concept of freedom) should not be confused with communitarianism, which appears to take this language in a community, or even "communities first" direction (see, e.g., [www.gwu.edu/~ccps/platformtext.html](http://www.gwu.edu/~ccps/platformtext.html)), rather than in the direction of state obligations, based on human rights and specifically children's rights, to create and improve infrastructures for healthy child development in families, schools and neighbourhoods.

<sup>38</sup> See also the Council of Europe, Division for Citizenship and Human Rights Education, website on Education for Democratic Citizenship (EDC): [www.coe.int/edc](http://www.coe.int/edc) ([www.coe.int/T/E/Cultural\\_Co-operation/education/E.D.C](http://www.coe.int/T/E/Cultural_Co-operation/education/E.D.C)).

### 3. Conceptualization

Let us for a moment turn back to the human rights project. If you visit the site of the Office of the High Commissioner for Human Rights<sup>39</sup>, you can see how this project developed from the Universal Declaration of Human Rights to the general twin treaties of 1966: ICESCR and ICCPR (the International Covenants on Economic, Social and Cultural Rights, and on Civil and Political Rights) — the three instruments together constituting the International Bill of Human Rights — and to the specific treaties of 1965, 1979, 1984, 1989 and 1990: ICERD (International Convention on the Elimination of All Forms of Racial Discrimination), CEDAW (Convention on the Elimination of All Forms of Discrimination Against Women), CAT (Convention Against Torture and other cruel, inhuman or degrading treatment or punishment), CRC (Convention on the Rights of the Child) and ICRMW (International Convention on the protection of the Rights of all Migrant Workers and members of their families).

Each one of the above mentioned treaties has its own (general or more specific) object and purpose within the broader object and purpose of the human rights (and children's rights) project.

Both this broader object and purpose and the object and purpose of each treaty (maybe with the exception of CAT) may be studied from a negative and from a positive angle. The negative one being: discrimination — and how to eliminate it; and the positive one: emancipation — and how to promote it. Sustainable human development (see Appendix 7) may be seen as a more global and more “globalized” term for emancipation. The opposite of sustainable human development is devolution (see Appendix 2). We will take a short look at five treaties to illustrate this: ICCPR, ICESCR, ICERD, CEDAW and CRC.

The International Covenant on Civil and Political Rights (ICCPR, 1966) translates (most of) the freedom-of-speech-and-belief rights (personal, civil and political rights; in brief: civil rights, or civil and political rights) listed in the Universal Declaration of Human Rights into binding treaty law. It obliges states “to respect and to ensure to all individuals within [their] territory and subject to [their] jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’ (Article 2.1 ICCPR), as well as to “guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’ (Article 26 ICCPR).

Although the ICCPR contains an article on children (Article 24<sup>40</sup>), it does not say anything on the creation of conditions whereby everyone may be raised and educated to enjoy his or her (civil and political) rights. More specifically, it does not say anything on the (participatory) preparation of children for (democratic) citizen-

<sup>39</sup> OHCHR: [www.ohchr.org](http://www.ohchr.org).

<sup>40</sup> See also General comment No. 17 (1989): *Article 24 (Rights of the child)*, of the Human Rights Committee (available at [www.ohchr.org](http://www.ohchr.org)). For a compilation of all General comments adopted by the treaty bodies until 12 May 2004, see document HRI/GEN/1/Rev.7 (also available at [www.ohchr.org](http://www.ohchr.org)).

ship and (responsible) parenthood. Article 23.1 ICCPR<sup>41</sup> stipulates that the “family” (which we shall define, for the sake of this contribution, as any non-institutional group unit in which children are raised) is entitled to protection by society and the state. Neither this article nor any other article of the ICCPR, however, addresses in any way the social and pedagogical infrastructure needed to empower families and (thus) to guarantee healthy child development as the basis for the enjoyment of (civil and political) rights.

The International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966) translates (most of) the freedom-from-fear-and-want rights (social, cultural and economic rights; in brief: social rights) listed in the Universal Declaration into binding treaty law. The list of social rights in the Universal Declaration begins with Article 22, which states that such rights (or at least some of them) are indispensable for a person’s dignity and the free development of his or her personality. The ICESCR imposes obligations on states to emancipate their citizens and other inhabitants from poverty and ignorance. Poverty not only refers to physical poverty (see Article 11 ICESCR on an adequate standard of living), but also to mental poverty. Mental poverty refers both to poor mental health (see Article 12 ICESCR on physical and mental health<sup>42</sup>) and to poor education (see Article 13 ICESCR<sup>43</sup>), c.q. ignorance. Article 13 ICESCR reflects Article 22 of the Universal Declaration in that it links school education to “the full development of the human personality and the sense of its dignity.” It goes on to say that states parties “further agree that education shall enable all persons to participate effectively in a free society.” This notion of “holistic” education, aimed at full development of personality and preparation for (democratic) citizenship, is elaborated, as we have seen, in Article 29.1 CRC. For a more specific meaning of “holistic” education, see Appendix 8 (note also the EU Commission’s reference to a holistic school approach in Appendix 2).

We may conclude that the ICESCR addresses at least some of the core issues connected with the creation of conditions whereby everyone may be raised and educated to enjoy his or her (social) rights. In relation to school education, it does say something, or at least give some clues, on the (participatory) preparation of children for (democratic) citizenship. Moreover, Article 10 ICESCR may be understood to directly approach the issue of (responsible) parenthood. Article 10.1 stipulates that “[t]he widest possible protection and assistance should be accorded to the family (...) particularly for its establishment and while it is responsible for the care and education of dependent children.” To which Article 10.2 adds: “Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.” This, too, goes at least some way in addressing the social and pedagogical infrastructure needed to empower families and to guarantee

<sup>41</sup> See also General Comment No. 19 (1990): *Article 23 (The family)*, of the Human Rights Committee (available at [www.ohchr.org](http://www.ohchr.org)).

<sup>42</sup> See also General Comment No. 14 (2000): *The right to the highest attainable standard of health* (Article 12), of the Committee on Economic, Social and Cultural Rights (available at [www.ohchr.org](http://www.ohchr.org)).

<sup>43</sup> See also General Comment No. 13 (1999): *The right to education* (Article 13), of the CESCR (available at [www.ohchr.org](http://www.ohchr.org)).



healthy child development as the basis for the enjoyment of (both social and civil) rights. The ICESCR paves the way, as early as 1966, for a pro-active state involvement in child-rearing and education. Nonetheless, its language is still very vague. When does the establishment of a family begin, for instance: already before the birth of a child? And does this include school and other prenatal preparation for parenthood? How pro-active should “the widest possible assistance” of Article 10.1 be? How long should, on the basis of contemporary knowledge of early child and brain development, “a reasonable period before and after childbirth” in Article 10.2 last: from several months before birth until the first three years of life? And should, in the light of women’s rights, “mothers” not be read as “primary caregivers” (both fathers and mothers)?

The International Convention on the Elimination of all forms of Racial Discrimination (ICERD, 1965) imposes obligations on states to emancipate their citizens and other inhabitants from “racism, racial discrimination, xenophobia and related intolerance”<sup>44</sup> through “immediate and effective measures (...) in the fields of teaching, education, culture and information” (Article 7), but also through their criminal law (Article 4 sub a) and through the prohibition of organizations and propaganda (Article 4 sub b). The preamble reflects the lessons learned from Nazi propaganda: doctrines of ethnic superiority are socially dangerous (sixth preambular paragraph). As far as the elimination of such doctrines is concerned, the ICERD would probably be a more effective instrument if its supervisory treaty body, the Committee on the Elimination of Racial Discrimination, were to address preparation for democratic citizenship and for responsible parenthood, as well as pre- and postnatal parenting education and parental assistance and support, as important — if not crucial — ways to combat prejudices and promote integration. Maybe one day it will, in the light of CRC principles and provisions as they may influence the interpretation of Article 7 ICERD.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979) elaborates to a large extent the UN Charter’s preambular principle of equal rights of men and women. It imposes obligations on states to emancipate their citizens and other inhabitants from sexism and gender discrimination. Its twelfth preambular paragraph stipulates “that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields.” One of its core provisions is Article 5, which reads as follows:

Article 5 CEDAW — States Parties shall take all appropriate measures: (a) to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superior-

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<sup>44</sup> See General recommendation XXVIII (“General comment No. 28”; 2002) on the follow-up to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, of the Committee on the Elimination of Racial Discrimination. See also the CERD’s General recommendation XXIX (2002) on Article 1, paragraph 1, of the Convention (*Descent*), and the CERD’s General recommendation No. 30 (2004): *Discrimination Against Non Citizens* (all available at [www.ohchr.org](http://www.ohchr.org)).

ity of either of the sexes or on stereotyped roles for men and women; (b) to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

Article 2 sub a CEDAW requires the constitutionalization (constitutional recognition) of the principle of the equality of men and women. Constitutionalization of children's rights is not explicitly mentioned in the CRC. As a matter of principle, however, fundamental rights relating to the well-being and healthy development of children should be on an equal footing with the constitutional rights of adults, especially of parents and parents-to-be. The concept of the *Trias pedagogica* departs from the constitutional rights of women, children, parents and parents-to-be, and aims specifically at exploring the synergy of these (constitutional) rights.

What has been said above about the ICERD and its supervisory treaty body, is true for the CEDAW and its Committee on the Elimination of Discrimination Against Women as well. There are several provisions in the Convention that could inspire CEDAW to address the crucial women's and children's rights issues of preparation for responsible parenthood, parenting education and parental assistance and support as ways to combat sexist prejudices and oppression and promote the emancipation of men and women, parents and children. Of special interest in this regard is the Convention's thirteenth preambular paragraph, which points out "that the upbringing of children requires a sharing of responsibility between men and women and society as a whole."

Finally, the Convention on the Rights of the Child (CRC, 1989) imposes obligations on states to prioritize, promote and protect the best interests of the child (see Article 3 CRC), and thus to emancipate their citizens and other inhabitants from transgenerational discrimination, or transism. The "best interests of the child" is a legal concept which, as we have seen, centers around a child's well-being and healthy holistic development, or development of personality, including participation in family, school, community and society. Both children, parents and the state have responsibilities in this regard (children, of course, in accordance with their evolving capacities). The CRC obliges states to empower parents (Articles 18.2, 24.2 sub e-f, 27.3 CRC) and parents-to-be (see the "before as well as after birth" proviso in the CRC's ninth preambular paragraph as well as Article 24.2 sub d). Since some, if not most children's rights imply parental duties, states must be assumed to also be under an obligation to specify these duties in their national legal systems. The state duty to specify parental responsibilities<sup>45</sup>, and the state duty to empower parents and parents-to-be point, in my view, at the emergence of a new human right, based on children's rights and other human rights: the human right to preparation for parenthood. To integrate children's rights, traditional (constitutional) parental rights, new or more explicit parental responsibilities and duties, new parental rights or entitlements to parenting education and parental assistance and support — culminating into the

<sup>45</sup> BOELE-WOELKI, K., et al. (eds.), *European Family Law in Action*; Volume III: "Parental Responsibilities", Antwerp/Oxford: Intersentia, 2005.

just mentioned emerging human right to preparation for parenthood — into one comprehensive system of rights and duties of children, parents (and other caregivers) and the state (including “emanations” of the state such as professionals and professional organizations regulated by the state), a new concept: the concept of the Trias pedagogica, has been proposed<sup>46</sup>.

Transgenerational discrimination, or transism, is a concept inversely linked to the concept of the Trias pedagogica: the constitutional rights (and related duties) of children, parents and the state, based on international children’s rights. If the Trias pedagogica is the direction in which international children’s rights purport national legal systems to move, then transism is the direction these rights purport national legal systems to move away from. Where does the term transism come from and what does it mean?

Transism, or transgenerational discrimination, refers to two things. In the first place, transism refers to the — well-researched — transgenerational (or intergenerational) transmission of, among other things, (childhood) trauma, insecure attachment, poor mental health, lack of self-respect, identity problems and other psychosocial problems, inadequate childrearing styles or practices, antisocial behavior, domestic and other violence, child placement and other child protection measures, and, according to recent studies, even of divorce. This transmission is not a psychological law in each individual case but the examples just mentioned constitute risk factors for transmission. This statistical risk is significant but diffuse. Developmental damage to one’s own children may be caused by, for instance, one’s own unresolved childhood trauma — not trauma *per se* but *unresolved* trauma — but this is not necessarily or unambiguously the case. In the second place, transism refers to the assumption, based on a growing body of evidence, that children will never have a more equal start in life and more equal opportunities later in life, not even in the wealthiest of nations, unless states invest — to the maximum extent of their resources and possibilities (Articles 4 and 6.2 CRC) — in early childhood development, parenting education and parental assistance and support, holistic school education which prepares children for democratic citizenship and responsible parenthood, and full and meaningful youth employment. If we put these two elements together, we may draw the following conclusion. Due to a lack of empowerment of children, caregivers and communities by society and the state, the transgenerational cycle of developmental damage inflicted on children continues to exist as a major risk factor for human development, especially personal development and physical and mental health of the general population, and as a major cause of socioemotional and/or socioeconomic exclusion of specific socioemotionally and/or socioeconomically disadvantaged or vulnerable groups in

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<sup>46</sup> WILLEMS, J.C.M. (2002), “The children’s law of nations: The international rights of the child in the Trias pedagogica”, in: WILLEMS, J.C.M. (ed.), *Developmental and Autonomy Rights of Children; Empowering Children, Caregivers and Communities*, Antwerpen: Intersentia, 2002, pp. 69-102 (also available at <http://arno.unimaas.nl/show.cgi?did=3150>); WILLEMS, J.C.M., “Children’s rights and the prevention of child abuse and neglect: The quest for a Trias pedagogica of children, parents and society”, in: WESTENDORP, I. & WOLLESWINKEL, R. (eds.), *Violence in the Domestic Sphere*, Antwerpen/Oxford: Intersentia, 2005, pp. 151-182.

society. Occasionally, this exclusion may erupt into violence, as we witness today (November 2005) in the French *banlieues*.

In relation to the transgenerational (or intergenerational) transmission of (socioemotional and) socioeconomic poverty, special reference should be made to The Worst Forms of Child Labour Convention<sup>47</sup>. Article 3 of this Convention gives a definition of the worst forms of child labour<sup>48</sup>.

Article 3 — For the purposes of this Convention, the term *the worst forms of child labour* comprises: (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances; (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties; (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

In the CRC, two provisions may prove to be of crucial importance in the struggle against transism: Article 2, on non-discrimination (in conjunction with other CRC rights), “irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status”; and Article 24.3, which puts states under the obligation to “take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.” In the future, Article 24.3 may be put in a broader perspective than familial and societal practices such as the genital mutilation of girls, preferential treatment of boys, or corporal punishment of children. Certainly if Article 2 and Article 24.3 are put together. In my view, an extremely harmful traditional societal and state “practice” — not yet recognized as such in the literature on children’s rights — is the formal concept of parental rights c.q. the culture of formal privacy and/or formal equality. What is meant by that?

Let us explore the notion of transgenerational discrimination a little bit further. If a state were to treat blind people the same as all other people, there will be cases in which such equal treatment constitutes discrimination. Blind people have special provision, protection and participation rights (for children, see Article 23 CRC), and if these rights are not met, the result may very well be that they are excluded from society. The same goes for people who want to start a family. Children’s rights imply that these parents-to-be should be prepared for parenthood, that parenthood and parenting should be facilitated as much as possible by the state, and that parents or parents-to-be who have or may have certain handicaps — in terms of their mental

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<sup>47</sup> ILO-Convention 182: Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, Geneva 17 June 1999; in force: 19 November 2000; states party: 156; available at [www.ilo.org/ilolex/cgi-lex/convde.pl?C182](http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182).

<sup>48</sup> See also the ILO’s (International Labour Organization) International Programme on the Elimination of Child Labour (IPEC) at [www.ilo.org/public/english/standards/ipecc](http://www.ilo.org/public/english/standards/ipecc) (and see Woodhead 2004).

health, their standard of living/housing or their childrearing capabilities (through lack of knowledge, lack of parental awareness or otherwise) — should enjoy special provision, protection and participation rights. However, reality shows otherwise. In most states, parental rights are not yet linked, let alone integrated with children's rights. Parental rights (and their limits) are defined not in terms of combined parental and societal responsibilities (what does society expect from parents and what can parents expect from society?), but in terms of damage inflicted on children. Serious damage may lead to state intervention, and state intervention may limit, through the courts, parental rights. This is the traditional formal concept of parental rights, also called parental autonomy, or (family) privacy. Parents are "autonomous" until the state intervenes. This traditional formal concept of parental autonomy, or privacy, leads to a situation in which "blind" people are treated the same as all other people, that is as long as no one reports the damage they cause. This damage often is of a transgenerational nature. Parents who are not prepared, who are emotionally or pedagogically "handicapped" or ill-equipped, may transmit their poor mental health to the next generation, and so on. Their children are at risk, they may develop developmental damage, leading to poor (physical and) mental health in adult life, and so on. Treating all parents and parents-to-be the same keeps the cycle of transgenerational transmission of poor mental health and poor childrearing capabilities intact. Although this is not necessarily the case, this constitutes a risk factor for children of such a grave nature and of such a large scope that the term transgenerational discrimination seems justified here. Transgenerational discrimination, or transism, is a new concept used to denounce the equal treatment of all parents and parents-to-be.

The opposite is true as well. One does not have to tell a blind man, or woman, that he or she cannot drive a car. No blind person will think of this as discrimination and take offence. However, people will feel discriminated, seriously discriminated, if they are told that they cannot raise their child, even if for others their mental and/or emotional handicaps are obvious, yes, even after court intervention. They have never been told beforehand that certain handicaps may make it impossible, even with the best of assistance and support, to raise one's children. Not preparing children and adolescents for democratic citizenship and not preparing adolescents and young persons for responsible parenthood as an integral part of democratic citizenship, but intervening in families after children have been damaged, is stigmatizing. At least, that is the way many people feel it — and not without reason.

#### 4. Conclusion

The concept of children's rights was adopted by the League of Nations in 1924 and by the General Assembly of the United Nations on 20 November 1959, to be translated and greatly elaborated into principles and provisions of treaty law on 20 November 1989, day of birth of the Convention on the Rights of the Child. At the end of this contribution, which conclusion may be drawn on the meaning and the future — the "object and purpose" — of this concept?

Children's rights is a concept that basically has to do with two things: (1) children are not the property of their parents or other caregivers, nor of anybody else, they are subjects and persons in their own right; and (2) children are entitled to the best society has to offer regarding their healthy holistic development, especially their pre-school emotional development and their physical and emotional well-being during the first years of life, the years of brain, attachment and personality formation and organization. However, even the wealthiest liberal democracies seem to have little understanding of the enormous damage caused to individuals, families and society by not preparing adolescents to parenthood, by not offering parenting education to parents-to-be and young parents, and by not monitoring the healthy emotional development of infants and children as an integral part of medical checkups and of the monitoring of school achievements — and following up on the outcomes by offering parents assistance and support. Rather than setting the example for — and assisting — developing states, developed states still seem to be reluctant to end the cycle of transgenerational discrimination. They have hardly begun to implement children's rights and integrate them with parental (and other adults') rights and responsibilities. In most states, the first steps towards a constitutional Trias pedagogica of children, parents and the state still have to be taken.

In a constitutional Trias pedagogica, parents-to-be, young parents, all parents benefit from and are empowered by knowledge on child development, especially on early child development. Knowledge is transmitted to parents so that developmental damage no longer is transmitted to the next generation. Parenting education may not always be enough, and facilitation of parenthood and parenting, as well as individual parental assistance and support may be necessary. As, for instance, Grossmann&Grossmann<sup>49</sup> remark: "Because the young child's experiences with both mother and father have such a far-reaching impact, parents may need help in four domains: a) understanding child development in general; b) understanding the specific signals of emotional well-being for their individual child, especially if it is a child with special needs; c) organizing sufficient time for sensitive interactions; and d) finding an adequate substitute caregiver for times when the parents cannot care for the young child themselves."

In sum, child development is crucial to human development, and therefore children's rights are crucial to human rights. At the same time, children's rights require a great deal of interdisciplinary insight. The human rights community would greatly benefit from a more comprehensive understanding of children's rights. With regard to such an interdisciplinary and comprehensive understanding of children's rights, the human rights project is still in its infancy. But, of course, we are all there to see to it that this infant is going to be loved, cared for, touched, cuddled and nurtured.

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<sup>49</sup> GROSSMANN, K. & GROSSMANN, K.E., "The impact of attachment to mother and father at an early age on children's psychosocial development through young adulthood" in: TREMBLAY, R.E. *et al.* (eds.), *Encyclopedia on Early Childhood Development [online]*, Montreal, Quebec: Centre of Excellence for Early Childhood Development, 2005, pp. 1-6 (available at: [www.excellence-earlychildhood.ca/documents/GrossmannANGxp.pdf](http://www.excellence-earlychildhood.ca/documents/GrossmannANGxp.pdf); accessed 11 November 2005)

## Appendix 1

Excerpts from the **2005 World Summit Outcome** (General Assembly A/60/L.1, 20 September 2005, available at [www.un.org/summit2005/documents.html](http://www.un.org/summit2005/documents.html))

1. We, Heads of State and Government, have gathered at United Nations Headquarters in New York from 14 to 16 September 2005.

9. We acknowledge that peace and security, development and human rights are the pillars of the United Nations system and the foundations for collective security and well-being. We recognize that development, peace and security and human rights are interlinked and mutually reinforcing.

10. We reaffirm that development is a central goal by itself and that sustainable development in its economic, social and environmental aspects constitutes a key element of the overarching framework of United Nations activities.

11. We acknowledge that good governance and the rule of law at the national and international levels are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger.

12. We reaffirm that gender equality and the promotion and protection of the full enjoyment of all human rights and fundamental freedoms for all are essential to advance development and peace and security. We are committed to creating a world fit for future generations, which takes into account the best interests of the child.

### *Human rights*

121. We reaffirm that all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing and that all human rights must be treated in a fair and equal manner, on the same footing and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, all States, regardless of their political, economic and cultural systems, have the duty to promote and protect all human rights and fundamental freedoms.

125. We resolve to improve the effectiveness of the human rights treaty bodies, including through more timely reporting, improved and streamlined reporting procedures and technical assistance to States to enhance their reporting capacities and further enhance the implementation of their recommendations.

128. We recognize the need to pay special attention to the human rights of women and children and undertake to advance them in every possible way, including by bringing gender and child-protection perspectives into the human rights agenda.

### *Democracy*

135. We reaffirm that democracy is a universal value based on the freely expressed will of people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. We also reaffirm that while democracies share common features, there is no single model of democracy,

that it does not belong to any country or region, and reaffirm the necessity of due respect for sovereignty and the right of self-determination. We stress that democracy, development and respect for all human rights and fundamental freedoms are interdependent and mutually reinforcing.

*Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity*

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter of the United Nations, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

*Children's rights*

141. We express dismay at the increasing number of children involved in and affected by armed conflict, as well as all other forms of violence, including domestic violence, sexual abuse and exploitation and trafficking. We support cooperation policies aimed at strengthening national capacities to improve the situation of those children and to assist in their rehabilitation and reintegration into society.

142. We commit ourselves to respecting and ensuring the rights of each child without discrimination of any kind, irrespective of the race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status of the child or his or her parent(s) or legal guardian(s). We call upon States to consider as a priority becoming a party to the Convention on the Rights of the Child.



*Human security*

143. We stress the right of people to live in freedom and dignity, free from poverty and despair. We recognize that all individuals, in particular vulnerable people, are entitled to freedom from fear and freedom from want, with an equal opportunity to enjoy all their rights and fully develop their human potential. To this end, we commit ourselves to discussing and defining the notion of human security in the General Assembly.

**Appendix 2**

Excerpts from an interview with **Bruce Perry** (Child Trauma Academy) by Lou Bank (taken from [www.childtrauma.org/ctamaterials/loubank.asp](http://www.childtrauma.org/ctamaterials/loubank.asp))

Maltreatment of a child will always result in some loss of that child's potential and often can result in such impaired development that the child will develop severe problems such as pervasive anxiety, depression, substance abuse and dependence, school failure, vulnerability to future abuse, violent sociopathy, or criminality. Abused children absorb the pain and either pass it on to others in a destructive way (e.g., violence) or keep it and let it eat at themselves like a cancer. These "social ills" rob the individual and, in the end, rob our society of the benefits these individuals could have made to us. Without understanding how maltreatment of children is related to the health and capacity of a society, we will never truly meet our potential — as individuals, as families, as communities, and as a culture. If we can make these connections, change the ways we treat women and children, and provide enriched, predictable, nurturing environments for our growing children, we can experience, as a species, transformation of amazing proportions. The human species 20,000 years ago had the same potential as today, yet there were few "manifestations" of our true potential — we were brutal, cruel, and devoid of complex abstract art or culture. The elements of "humanity" — those things that we have created — are not really genetic. They are creations of thousands of generations of experience. And during this time we have slowly moved to a more "humane" set of values — we are trying to rid ourselves of racism, sexism, random predatory violence. Yet each generation, we have to re-create for our children an environment which can nurture those "humane" qualities — and all too often we are failing to do so. We are raising children in an "incubator of terror", and creating impulsive, aggressive, anxious, and fearful children who fall far short of their potential.

By [elements of ] humanity, I mean those elements of our existence which we have "created" — the by-products of culture — our language, religious beliefs, political structures, arts and sciences. We are at great risk of losing these things, cultural devolution can take place in a generation. This is seen in what happened to the Native Americans, it is seen in what [happened] in Bosnia, it is seen in certain parts of our inner cities — the loss of cultural "DNA": beliefs, language, childrearing practices, elements of humanity. As Andrew [Andrew Vachss, see [www.vachss.com](http://www.vachss.com), and see Vachss' statement below] says: each generation of children is "Another

Chance to Get It Right” — but that depends on what we provide for our children, what structure, what education, what beliefs, what love, what pain.

All experiences change the brain in some fashion. During childhood, however, it is clear that the brain is being shaped, literally formed by experience. Since the brain determines what we are as individuals, if we can understand how the brain is shaped and changed by childhood experiences, we can begin to answer some important questions about maltreatment of children. We are trying to understand how it is that one child can be beaten and humiliated and end up being a caring and productive (but depressed) person and how another with apparently similar childhood trauma can end up being a remorseless predator. To answer some of these questions, we need to know how nerve cells change and how the brain grows in the face of traumatic experience. Our research ranges from very basic molecular neuroscience, such as looking at how nerve cells connect to each other and develop, to very clinically oriented work with children.

The pervasive nature of the neglect, abuse, and traumatization of children is hard to truly communicate. Conservative estimates indicate that over 4 million American children each year are exposed to some severe form of abuse or neglect. This means that by the time a child reaches age 20, over 20 percent of our population has experienced severe traumatic stress, often in a chronic way. This means that 16 to 20 million children and adolescents currently are at risk for developing trauma-related problems (such as post-traumatic stress disorder). To put this in perspective, during the entire ten-year Vietnam era, 3.14 million American soldiers served in a combat setting. Of these, over 1 million developed emotional, behavioral, and physical problems related to their one year exposure to traumatic stress. These soldiers rotated out of combat. These children can't. They stay on the front — day in and day out — for years. And they carry their wounds into adolescence and adulthood, all too often without the benefit of any medical, social, or political support for these wounds.

One of the most important facts about the development of the brain is that early in life — say the first three years — experiences organize the brain and determine how that individual will function, in large part, for the rest of [his or her] life. Many capacities, while not completely lost, are tremendously difficult to grow after this window of opportunity is lost. One of the most important of these capacities is the ability to be attached to — and to “love” — others. The part of the brain that allows us to feel pleasure and positive emotional connection to others is dependent upon consistent, nurturing experiences during the first few years of life. The child left alone, inconsistently touched or smiled at, infrequently “cuddled” will have a brain with an undeveloped area. This is a biological, physical phenomenon. These parts of the brain grow just like a muscle. And without “exercise” the muscle atrophies. So it is with these parts of the brain. Without “love” at these critical times, that part of the brain atrophies. And, as stated before, it appears that this atrophy can be permanent and almost impossible to reverse. This leads to clear implications for public policy and for how we should target our intervention dollars. Currently, we are missing the windows of opportunity. There is a tremendous mismatch between where we spend most of our intervention dollars (adults) and when the brain is most easily changed (early childhood).

It is important to keep in mind the difference between neglect and a traumatic experience. The absence of a set of critical experiences in childhood — love, touch, education — can lead to permanent absences of capabilities. And this is reflected by the lack of growth of parts of the brain. While a traumatic experience is not an absence of experience, it is the abnormal and persisting presence of a response which, in turn, alters an existing part of the brain. It is so much easier to treat and change a part of the brain that has been influenced by a trauma, than it is to try to “grow” a part of the brain after the critical periods in childhood are over.

If we cannot structure our schools, our communities, and our social agencies in a manner that will identify, protect, and, at a minimum, provide hope to our children, we will be swept away by the inevitable decay of socio-cultural devolution. Similar deterioration of pre-existing cultural achievements was seen after the fall of the Roman Empire — the Dark Ages — where, for centuries, no new literature or significant art was produced. Abstract cognition disappeared in Western Europe. The planet was populated by generation after generation of superstitious, brutal, racist, misogynist, and non-creative people. We are not as far from that as we like to think. Repression, oppression, superstition, racism, sexism, and reactionary and simplistic views of the world persist — and, without smart and aggressive research and training, these anti-humane qualities may prevail. If we provide enriched, nurturing, predictable, and safe environments for our children, they will create an enriched, safe, and humane society. If we keep raising our children with ignorance, unpredictability, and fear, we will have a rigid and reactionary society. It is our choice — our responsibility — our opportunity.

### Appendix 3

**Andrew Vachss** (lawyer, author, juvenile justice and child abuse consultant), *Andrew Vachss’ Statement* (taken from [www.childtrauma.org/links/andrew.asp](http://www.childtrauma.org/links/andrew.asp); see also [www.vachss.com](http://www.vachss.com))

Every year, millions of children in the United States are victimized by severe abuse. This maltreatment takes many forms, but all have this in common: they rob children of some percentage of their potential, some vital human piece of themselves. And by such robbery, all America is looted. The problem has been documented to the point of nausea. The media dutifully reports the body counts, but the one-sided war rages on. Domestic violence, sexual exploitation, rape, sociopathic plundering, homicide ... we are under siege even as our “protective” institutions rot from within.

We know the root cause of our societal ills and evil — the transgenerational maltreatment of children. We know today’s victim can be tomorrow’s predator. We know that while many heroic survivors refuse to imitate the oppressor, the chains remain unbroken as abused children turn the trauma inward and lose their souls to self-inflicted wounds ... from drug and alcohol abuse to depression and suicide. Their lives are never what they could have, should have been.

We know the enemy, but where is the counter-attack? More social engineering? More pious whining? More networking? More conferences? More unfocused,

blundering incompetence? There is a Rosetta Stone<sup>50</sup> to societal decay. Child abuse, simply, modifies development of the brain. It alters “processing” so that the abused child (of whatever age) assimilates and responds to stimuli in distinctly aberrant ways. Most of those ways are self-destructive. Some destroy others. All destroy us as a country.

#### Appendix 4

**Alice Miller**, *The Roots of Violence* (available at [www.alice-miller.com/sujet/framen.htm](http://www.alice-miller.com/sujet/framen.htm), *Flyers*)

For some years now, there has been proof that the devastating effects of the traumatization of children take their inevitable toll on society (...). This knowledge concerns every single one of us and — if disseminated widely enough — should lead to fundamental changes in society, above all to a halt in the blind escalation of violence. The following points are intended to amplify my meaning:

1. All children are born to grow, to develop, to live, to love, and to articulate their needs and feelings for their self-protection.

2. For their development, children need the respect and protection of adults who take them seriously, love them, and honestly help them to become oriented in the world.

3. When these vital needs are frustrated and children are, instead, abused for the sake of adults’ needs by being exploited, beaten, punished, taken advantage of, manipulated, neglected, or deceived without the intervention of any witness, then their integrity will be lastingly impaired.

4. The normal reactions to such injury should be anger and pain. Since children in this hurtful kind of environment are forbidden to express their anger, however, and since it would be unbearable to experience their pain all alone, they are compelled to suppress their feelings, repress all memory of the trauma, and idealize those guilty of the abuse. Later they will have no memory of what was done to them.

5. Disassociated from the original cause, their feelings of anger, helplessness, despair, longing, anxiety, and pain will find expression in destructive acts against others ([from] criminal behavior [to] mass murder) or against themselves (drug addiction, alcoholism, prostitution, psychic disorders, suicide).

6. If these people become parents, they will then often direct acts of revenge for their mistreatment in childhood against their own children, whom they use as scapegoats. Child abuse is still sanctioned (...) in our society as long as it is defined as child-rearing. It is a tragic fact that parents beat their children in order to escape the emotions stemming from how they were treated by their own parents.

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<sup>50</sup> After many years of studying the Rosetta Stone and other examples of ancient Egyptian writing, Jean-François Champollion deciphered hieroglyphs in 1822 ([www.ancientegypt.co.uk/writing/rosetta.html](http://www.ancientegypt.co.uk/writing/rosetta.html)).

7. If mistreated children are not to become criminals or mentally ill, it is essential that at least once in their life they come in contact with a person who knows without any doubt that the environment, not the helpless, battered child, is at fault. In this regard, knowledge or ignorance on the part of society can be instrumental in either saving or destroying a life. Here lies the great opportunity for relatives, social workers, therapists, teachers, doctors, psychiatrists, officials, and nurses to support the child and to believe her or him.

8. Till now, society has protected the adult and blamed the victim. It has been abetted in its blindness by theories, still in keeping with the pedagogical principles of our great-grandparents, according to which children are viewed as crafty creatures, dominated by wicked drives, who invent stories and attack their innocent parents or desire them sexually. In reality, children tend to blame themselves for their parents' cruelty and to absolve the parents, whom they invariably love, of all responsibility.

9. For some years now, it has been possible to prove, through new therapeutic methods, that repressed traumatic experiences of childhood are stored up in the body and, though unconscious, exert an influence even in adulthood. In addition, electronic testing of the fetus has revealed a fact previously unknown to most adults, that a child responds to and learns both tenderness and cruelty from the very beginning.

10. In the light of this new knowledge, even the most absurd behavior reveals its formerly hidden logic once the traumatic experiences of childhood need no longer remain shrouded in darkness.

11. Our sensitization to the cruelty with which children are treated, until now commonly denied, and to the consequences of such treatment will as a matter of course bring to an end the perpetuation of violence from generation to generation.

12. People whose integrity has not been damaged in childhood, who were protected, respected, and treated with honesty by their parents, will be — both in their youth and in adulthood — intelligent, responsive, empathic, and highly sensitive. They will take pleasure in life and will not feel any need to kill or even hurt others or themselves. They will use their power to defend themselves, not to attack others. They will not be able to do otherwise than respect and protect those weaker than themselves, including their children, because this is what they have learned from their own experience, and because it is this knowledge (and not the experience of cruelty) that has been stored up inside them from the beginning. It will be inconceivable to such people that earlier generations had to build up a gigantic war industry in order to feel comfortable and safe in this world. Since it will not be their unconscious drive in life to ward off intimidation experienced at a very early age, they will be able to deal with attempts at intimidation in their adult life more rationally and more creatively.

## Appendix 5

Excerpts from **Alice Miller**, *The Childhood Trauma* (taken from [www.vachss.com/guest\\_dispatches/alice\\_miller2.html](http://www.vachss.com/guest_dispatches/alice_miller2.html))

We all know — or, today, we *should* all know — that physical punishment only produces *obedient* children but cannot prevent them from becoming violent

or sick adults precisely *because* of this treatment. This knowledge is now scientifically proven and was finally officially accepted by the American Academy of Pediatrics in 1998. Contrary to common opinion prevalent as recently as fifteen years ago, the human brain at birth is far from being fully developed. It is use-dependent, needing loving stimulation for the child from [his or] her first day on. The abilities a person's brain can develop, depend on experiences in the first three years of life.

Studies on abandoned and severely maltreated Romanian children, as an example, revealed striking lesions in certain areas of the brain. The repeated traumatization has led to an increased release of stress hormones which have attacked the sensitive tissue of the brain and destroyed the new, already built-up neurons. The areas of their brains responsible for the "management" of their emotions are twenty to thirty percent smaller than in other children of the same age. Obviously, all children (not only Romanian) who suffer such abandonment and maltreatment will be damaged in this way.

The neurobiological research makes it easier for us to understand the way Nazi's like Eichmann, Himmler, Hoss and others functioned. The rigorous obedience training they underwent in earliest infancy stunted the development of such human capacities as compassion and pity for the sufferings of others. Their total emotional atrophy enabled the perpetrators of the most heinous crimes imaginable to function "normally" and to continue without the slightest remorse to impress their environment with their efficiency in the years after the war. Dr. Mengele could make the most cruel experiments with Jewish children in Auschwitz and then live for thirty years like a "normal" well adjusted man.

Those turn-of-the-century [around 1900] children who were (...) systematically subjected to obedience drilling were not only exposed to corporal correction but also to severe emotional deprivation. The upbringing manuals of the day described physical demonstrations of affection such as stroking, cuddling and kissing as indications of a doting, mollycoddling attitude. Parents were warned of the disastrous effects of spoiling their children, a form of indulgence entirely incompatible with the prevalent ideal of rigor and severity. As a result, infants suffered from the absence of direct loving contact with the parents, which also caused certain areas of the brain to remain underdeveloped.

Working toward a better future cannot be done without legislation that clearly forbids corporal punishment toward children and makes society aware of the fact that children are people too. The whole society and its legal system can then play the role of a reliable, enlightened and protecting witness for children at risk, children of adolescent, drug addicted criminals who may themselves become predators without such assistance. The only reason why a parent might smack his children is the parent's own history. All other so-called reasons, such as poverty and unemployment, are pure mystification. There are unemployed parents who don't spank their children and there are many wealthy parents who maltreat their children in the most cruel way and teach them to minimize the terror by calling it the right education. With a law prohibiting corporal punishment towards children, people of the next generation will not have recorded the highly misleading information in their brain, an almost irreversible damage. They will be able to have empathy with a child and

understand what has been done to children over millennia. It is a realistic hope to think that then (and only then) the human mind and behavior *will* change. With a law that forbids spanking every citizen becomes an enlightened witness.

## Appendix 6

Excerpts from **Commission of the European Communities**, *Green Paper: Improving the mental health of the population. Towards a strategy on mental health for the European Union*, Brussels, 14 October 2005, COM(2005) 484 final (available at [http://europa.eu.int/comm/health/ph\\_determinants/life\\_style/mental/green\\_paper/mental\\_gp\\_en.pdf](http://europa.eu.int/comm/health/ph_determinants/life_style/mental/green_paper/mental_gp_en.pdf))

Mental ill health affects every fourth citizen and can lead to suicide, a cause of too many deaths;

Mental ill health causes significant losses and burdens to the economic, social, educational as well as criminal and justice systems (...).

There is no health without mental health. For *citizens*, mental health is a resource which enables them to realise their intellectual and emotional potential and to find and fulfil their roles in social, school and working life. For *societies*, good mental health of citizens contributes to prosperity, solidarity and social justice. In contrast, mental ill health imposes manifold costs, losses and burdens on citizens and societal systems.

### *Mental health, mental ill health and its determinants*

The WHO describes *mental health* as: "a state of well-being in which the individual realizes his or her abilities, can cope with the normal stresses of life, can work productively and fruitfully, and is able to make a contribution to his or her community" (WHO, *Strengthening mental health promotion*, Geneva 2001 (Fact sheet no. 220).

*Mental ill health* includes mental health problems and strain, impaired functioning associated with distress, symptoms, and diagnosable mental disorders, such as schizophrenia and depression.

The mental condition of people is determined by a *multiplicity of factors* (...), including biological (e.g., genetics, gender), individual (e.g., personal experiences), family and social (e.g., social support) and economic and environmental (e.g., social status and living conditions).

### *The health dimension*

More than 27% of adult Europeans are estimated to experience at least one form of mental ill health during any one year (...).

The most common forms of mental ill health in the EU are anxiety disorders and depression. By the year 2020, depression is expected to be the highest ranking cause of disease in the developed world. Currently, in the EU, some 58.000 citizens

die from suicide every year (...), more than the annual deaths from road traffic accidents, homicide, or HIV/AIDS. (...)

### *The impact on prosperity, solidarity and social justice*

The implications of mental ill health are manifold:

Mental ill health costs the EU an estimated 3%-4% of GDP, mainly through lost productivity. Mental disorders are a leading cause of early retirement and disability pensions.

Conduct and behavioural disorders in childhood incur costs for the social, educational as well as criminal and justice systems (...).

Further intangible costs concern how society treats mentally ill and disabled persons. Despite improved treatment options and positive developments in psychiatric care, people with mental ill health or disability still experience social exclusion, stigmatisation, discrimination or the non-respect of their fundamental rights and dignity. (...)

### *Promoting mental health and addressing mental ill health through preventive action*

Promotion of mental health and prevention of mental ill health address individual, family, community and social determinants of mental health, by strengthening protective factors (e.g., resilience) and reducing risk factors (...).

*Risk factors:* access to drugs and alcohol; displacement; isolation and alienation; lack of education, transport, housing; neighbourhood disorganisation; peer rejection; poor social circumstances; poor nutrition; poverty; racial injustice and discrimination; social disadvantage; urbanisation; violence and delinquency; war; work stress; unemployment.

*Protective factors:* empowerment; ethnic minorities integration; positive interpersonal interactions; social participation; social responsibility and tolerance; social services; social support and community networks.

(WHO: *Prevention of Mental Disorders. Effective Interventions and Policy Options, Summary Report*, Geneva 2004, p. 21.)

### *Building mental health in infants, children and adolescents*

As mental health is strongly determined during the first years of life, promoting mental health in children and adolescents is an investment for the future. Teaching parenting skills can improve child development. A holistic school approach can increase social competencies, improve resilience, and reduce bullying, anxiety and depressive symptoms.

### *Some successful actions identified through EU-projects:*

Babies and children: address postnatal depression in mothers; improve parenting skills; home visits of nurses to assist future and new parents; interventions of nurses at school.



Adolescents and young people: conducive school environment and ethos; re-source packs on mental health for students, parents and teachers.

### *Targeting vulnerable groups in society*

Low social and economic status increases vulnerability for mental ill health. Job loss and not being in employment can lower self-esteem and lead to depression. Migrants and other marginalised groups are at increased risk for mental ill health. Interventions for the unemployed to re-enter the labour market can be cost effective. Support to vulnerable groups can improve mental health, strengthen social cohesion, and avoid associated social and economic burdens.

### *Some successful actions identified through EU-projects:*

Counselling for groups at risk; support to enter the labour market; supported employment for those with mental ill health or disability.

## **Appendix 7**

**Sustainable human development** (excerpts from Ayesha Dias, *Human Development Report 2000 Background Paper: Human Rights, Environment And Development: With Special Emphasis On Corporate Accountability*, available at [http://hdr.undp.org/docs/publications/background\\_papers/Dias2000.html](http://hdr.undp.org/docs/publications/background_papers/Dias2000.html))

Sustainable human development (SHD) is development that places people at the centre of all development activities. The central purpose of SHD is to create an enabling environment in which all human beings lead secure and creative lives. Sustainable human development is directed towards the promotion of human dignity and the realization of all human rights, economic, social, cultural, civil and political. (...)

The concept of sustainable development originated with the Report of the World Commission on Environment and Development (WCED), *Our Common Future* (the Brundtland Report) of 1987, which defined sustainable development as "development which meets the needs of the present generation without compromising the ability of future generations to meet their own needs" Conceptually, sustainable development can be conceived of as integrating three "pillars": international environmental law, international human rights law and international economic law. "The integrated structure of sustainable development is such that it requires support from each of the pillars." (...).

In stating that "human beings are at the centre of concern for sustainable development" and that they are "entitled to a healthy and productive life in harmony with nature" Principle 1 of the Rio Declaration of the UN Conference on Environment and Development employed language of human rights law, the second pillar of sustainable development. (...). After it was established in recent years that gross violations of human rights are threats to peace and security under Chapter VII of the UN Charter, there are signs that this concept might be expanded to include "the non-military sources of instability in the economic, social, humanitarian and ecological fields" (...).

## Appendix 8

A note on **holistic education** (taken from [www.infed.org/biblio/holisticeducation.htm](http://www.infed.org/biblio/holisticeducation.htm))

Throughout the 200-year history of public schooling, a widely scattered group of critics have pointed out that the education of young human beings should involve much more than simply molding them into future workers or citizens. The Swiss humanitarian Johann Pestalozzi, the American Transcendentalists, Thoreau, Emerson and Alcott, the founders of “progressive” education — Francis Parker and John Dewey — and pioneers such as Maria Montessori and Rudolf Steiner, among others, all insisted that education should be understood as the art of cultivating the moral, emotional, physical, psychological and spiritual dimensions of the developing child. During the 1970s, an emerging body of literature in science, philosophy and cultural history provided an overarching concept to describe this way of understanding education — a perspective known as *holism*. A holistic way of thinking seeks to encompass and integrate multiple layers of meaning and experience rather than defining human possibilities narrowly. Every child is more than a future employee; every person's intelligence and abilities are far more complex than his or her scores on standardized tests.

Holistic education is based on the premise that each person finds identity, meaning, and purpose in life through connections to the community, to the natural world, and to spiritual values such as compassion and peace. Holistic education aims to call forth from people an intrinsic reverence for life and a passionate love of learning. This is done, not through an academic “curriculum” that condenses the world into instructional packages, but through direct engagement with the environment. Holistic education nurtures a sense of wonder. Montessori, for example, spoke of “cosmic” education: Help the person feel part of the wholeness of the universe, and learning will naturally be enchanted and inviting. There is no one best way to accomplish this goal, there are many *paths of learning* and the holistic educator values them all; what is appropriate for some children and adults, in some situations, in some historical and social contexts, may not be best for others. The art of holistic education lies in its responsiveness to the diverse learning styles and needs of evolving human beings.

This attitude toward teaching and learning inspires many home-schooling families as well as educators in public and alternative schools. While few public schools are entirely committed to holistic principles, many teachers try hard to put many of these ideas into practice. By fostering collaboration rather than competition in classrooms, teachers help young people feel connected. By using real-life experiences, current events, the dramatic arts and other lively sources of knowledge in place of textbook information, teachers can kindle the love of learning. By encouraging reflection and questioning rather than passive memorization of “facts” teachers keep alive the “flame of intelligence” that is so much more than abstract problem-solving skill. By accommodating differences and refusing to label children, for example, as “learning disabled” or “hy-peractive”, teachers bring out the unique gifts contained within each child's spirit.

# EXTRA-CONVENTIONAL PROTECTION OF HUMAN RIGHTS



# Extra-conventional protection of Human Rights<sup>1</sup>

José L. Gómez del Prado

**Summary:** 1. UN Extra-conventional mechanisms or Special Procedures. 1.1. Structural elements and historical evolution. 1.2. The 1503 Confidential Procedure. 1.3. The 1235 Public Procedure. 1.4. Functioning of the system. 2. The UN High Commissioner for Human Rights. 2.1 Coordination. 3. Concluding Observations.

“The World Conference on Human Rights underlines the importance of preserving and strengthening the system of special procedures, rapporteurs, representatives, experts and working groups of the Commission on Human Rights”<sup>2</sup>.

“To investigate specific country situations and review new and critical issues, the Organization relies upon a range of rapporteurs, high-level representatives and working groups that are collectively known as the human rights special procedures. These procedures are vital instruments and, over the years, have helped to advance the cause of human rights”

Kofi Annan<sup>3</sup>

For the victims of human rights abuses the UN Programme of Human Rights has constituted, since its inception, a symbol of hope. It has been seen as a last resort for the Organization to become the “voice of the voiceless”. Unfortunately, during the greatest part of the “Cold War” the United Nations remained deaf and mute to the grave human rights violations occurring in the world. Confronted to the overwhelming flow of allegations from victims and non-governmental organizations, the UN Commission of Human Rights already in 1947<sup>4</sup> declared itself incompetent to adopt any measure regarding any type of complaint concerning human rights. It refused to deal with individual petitions. Instead, the Commission confined itself to promotional activities providing guidelines to be followed by the Secretariat. However, Member States, advocating the principle of national sovereignty, declared themselves against whatever measure which could have been taken in regard with those allegations as well as to the fact that the United Nations could acknowledge receipt of the communications reaching it.

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<sup>1</sup> The UN terminology used for this type of protection is known as Special Procedures.

<sup>2</sup> “Vienna Declaration and Programme of Action, 1993 World Conference on Human Rights”, United Nations document, A/CONF.157/23, paragraph 95.

<sup>3</sup> “Strengthening the United Nations: an agenda for further change”, Report of the Secretary-General, United Nations document A/57/387, paragraph 55.

<sup>4</sup> Commission on Human Rights, Report of its First Session, UN document E/259.

In the course of the past sixty years, Governments have reluctantly agreed to the need of establishing an international system of human rights protection<sup>5</sup>. They have opted, nonetheless, for the longest and most complex course: a conventional protection system of human rights. By adopting such a path national authorities were assured that for a substantive number of years the international community would not be able to interfere in the human rights domestic treatment governments provided to the individuals living under their jurisdiction. In order to build such an international system a long process has been necessary. As a first stage, long political negotiations in order to elaborate and translate human rights norms into declarations which later on could become international treaties to be signed and ratified by States. Once again long political negotiations have taken place before the adoption of such treaties. Moreover, the system offers in most cases the possibility for State parties to introduce reservations which weaken the application of a given international instrument. As a second stage, the creation of treaty-bodies to monitor the application of the provisions of the international human rights treaties. Additionally in a number of cases, the establishment of optional quasi-judicial procedures to consider individual complaints.

The international system of conventional mechanisms is slow and leaves outside its scope not only a number of States which are not parties to the two Covenants and other international conventions but also types of violations which have not been foreseen in those instruments. Moreover, the optional quasi-judicial procedures in addition of being voluntarily are not foreseen in all the international human rights treaties. The conventional mechanisms constitute a limited and imperfect system which improves progressively throughout the years but which still has a long way to go before it becomes truly universal<sup>6</sup>.

## 1. United Nations Extra-conventional mechanisms or Special Procedures

The credibility of the human rights programme and the UN action depends on the capacity of the Organization in investigating efficiently victims' complaints and responding to their demands for humanitarian assistance. Moreover, the programme should function as a reliable early warning system enabling the United Nations to respond quickly to emergency situations. Above all, it should stop and prevent human rights violations to continue. With the aim to alleviate expeditiously the suffering of the victims and in order to rehabilitate the credibility which the UN had lost during its first twenty years of existence, the Organization has developed a system of special procedures or extraconventional mechanisms.

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<sup>5</sup> The "no power to act doctrine" of the Commission on Human Rights seems to have been the result of an agreement between the two major powers (USA-USSR) during the Cold War period which gave preference to a slow motion process allowing the drafting (1946-1966) of the two International Covenants on Human Rights.

<sup>6</sup> During the last 25 years of the xxth. century, between 1975 and 2000, for example, the UN Office of the High Commissioner for Human Rights received over 400.000 individual complaints which were dealt with under the framework of special procedures or extra-conventional mechanisms. During this same period of time only some 800 individual complaints were considered under the framework of conventional mechanisms.

These mechanisms are subsidiary bodies of the UN Commission on Human Rights with the capability of fact finding<sup>7</sup>. They collect and analyze information with regard to a given situation or issue of grave human rights violations. The subsidiary bodies are integrated by *international prominent independent experts*, recognized by their impartiality, independence and competence in the subject. Such subsidiary bodies may be *unipersonal* (special rapporteur, representative, envoy, expert, etc...) or *collective* (working group or *ad hoc* committee, integrated each of them by five experts). As defined by the mandate holders themselves "the hallmarks of the special procedures system are its independence, impartiality and objectivity. Its ability to monitor the situation in any country of the world in relation to the specific mandates established by States within the framework of the Commission on Human Rights ensure that it plays a crucial role within the overall United Nations human rights system. It is uniquely placed to act as an early warning system in relation to situations involving serious human rights violations. It is thus essential that the special procedures be accorded full and free access to all countries"<sup>8</sup>.

These special rapporteurs, representatives, envoys, experts are individuals of recognized international standing in the field of human rights. Their impartiality, independence and competence have increasingly been manifested in the course of the years. If at the beginning of the creation of the extraconventional instruments the choice of the Commission was to appoint diplomats, the emphasis nowadays is to assign the extraconventional mandates more and more to academics, lawyers, representatives of civil society and former and current NGOs' activists, university professors of social and political sciences as well as public international law professors and human rights experts. It has been increasingly pointed out that the independence and impartiality of mandate holders are incompatible with the appointment of individuals holding position within the executive or the legislative branches of their Governments. They serve in their personal capacity for a maximum period of six years during which they do not receive salaries or compensation for their work. The information they collect allows UN monitoring organs such as the Commission on Human Rights, the Economic and Social Council, the General Assembly and, most recently in a number of cases, the Security Council to examine allegations of human rights violations, consider a given situation or phenomenon and adopt the necessary measures outside of the strictly conventional system.

For many years the UN practice has not prevented an expert to serve in two different extraconventional mandates nor to a member of a treaty-body to be appointed as special rapporteur of an extraconventional mechanism. R. Garreton was appointed Special Rapporteur on Zaire/Congo while serving as a member of the Working Group on Arbitrary Detention. A member of the Committee against Torture, A. Movramatis, was appointed Special Rapporteur on Iraq. However, this approach does not seem to be the practice of the Commission anymore.

<sup>7</sup> The terms "instruments", "procedures", "mechanisms" and "mandates" are synonyms and have the same connotation. In the present article they are used indistinctly.

<sup>8</sup> Report of the twelfth meeting of special rapporteurs/representatives, independent experts and chairpersons of working groups of special procedures of the Commission on Human Rights and of the advisory service programme, United Nations document, E/CN.4/2006/4.

The extraconventional mechanisms are relatively recent and in continuous evolution approach. It covers over 190 UN Member States. The fact finding methodology utilized by the subsidiary bodies aims at verifying that a given situation conforms or violates the human rights norms established by the international community. The Universal Declaration of Human Rights is the fundamental instrument on which the extraconventional mechanisms rely to appraise to what extent human rights norms have been violated. However, in analyzing the situation in a given country, these bodies take into account all the international human rights treaties the given State has adhered to as well as other pertinent international instruments.

The system of extraconventional mechanisms is fundamentally based on resolutions 1503 and 1235 (both of the Economic and Social Council), the thematic procedures of the Commission and the UN advisory services programme. Since its creation in 1994, the UN Office of the High Commissioner for Human Rights fulfils an important role in coordinating the extraconventional system. In addition, the High Commissioner implements a number of protection mandates of the system.

In opposition to the mechanisms established under international human rights treaties, the extraconventional ones result from resolutions of UN organs. In this article, we shall limit ourselves to the procedures which are set in motion by the UN Commission on Human Rights and considered annually by this organ. The reason for this is obvious. Different UN organs may at a given point in time establish an extraconventional mechanism to investigate a given situation. This has been the case by the Security Council in relation with former Yugoslavia or Rwanda; or the peace operations regarding a given country established by the Security Council or the General Assembly. UN Specialized Agencies, such as the International Labour Organization or UNESCO, may as well establish those mechanisms at a given time finding the basis for it in their respective constitutions which have created these organizations.

Nonetheless, those extra-conventional instruments created by other UN organs or Specialized Agencies do not constitute as is the case for the ones established by the UN Commission on Human Rights a structural permanent system of special procedures recognized by the UN system. In addition, one of the most important functions of the extraconventional mechanisms is to make up for shortfalls of the conventional system of human rights protection. For these reasons we shall limit ourselves to the extraconventional mechanisms which are examined in the framework of the UN Commission on Human Rights. It is also worth noting that the UN Commission on Human Rights and the High Commissioner for Human Rights both carry out responsibilities under the two systems of international protection: the conventional and the extraconventional. We shall also take into account the significant reform which is currently taking place in the context of the 2005 World Summit of Heads of State and Government. Indeed, Member States are presently discussing at the General Assembly in New York, among other things, the reform of the Commission on Human Rights. They are considering the Secretary's-General proposal for a Human Rights Council to replace the present Commission on Human Rights as well as the Plan of Action submitted by the High Commissioner for Human Rights<sup>9</sup>.

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<sup>9</sup> See the Final observations of the present article.



The extra-conventional mechanisms may be classified into two main categories: *geographic instruments* which examine the situation in a given country (either through a confidential or a public procedure); *thematic instruments* which consider global issues or phenomena or specific groups of the population all over the world such as torture, arbitrary detention, education or indigenous people and migrant workers (only under the public procedure). In turn, the thematic instruments may be grouped as follows: (i) economic, social, cultural and solidarity rights; (ii) self-determination, civil and political rights, and (iii) human rights of specific groups of the population.

In 2005, the UN Commission on Human Rights maintained: (a) under the *confidential geographic procedure* the consideration of the situation in 2 countries; (b) under the *public procedure both geographic and thematic* the consideration of 50 mandates. This figure includes the geographic mandates assigned either to the Secretary-General (Cyprus) or the High Commissioner for Human Rights (Colombia, Nepal, Sierra Leone and Timor Leste) on which they inform directly to the Commission. Indeed, we have considered that the mandates given to the Secretary-General and the High Commissioner contain many of the requirements of the extra-conventional mechanisms. A *strictu sensu* interpretation would argue that such procedures are not subsidiary bodies created by the Commission and do not integrate independent experts<sup>10</sup>. However, the Secretary-General and the High Commissioner constitute an alternative between the 1503 confidential procedure and the public procedure of a special rapporteur or independent expert which the Commission exploits when it deems necessary, as has been the case with Sierra Leone<sup>11</sup>, or in the framework of the UN Advisory Services Programme in the context of geographic mandates of experts nominated directly by the Secretary-General as are presently the cases of Cambodia, Haiti, Liberia and Somalia to mention some. And that the public procedure of special rapporteurs also overlaps into the UN Advisory Services Programme by requesting the Secretary-General to nominate an independent expert on each occasion the Commission considers that to impose a special rapporteur to a given country is a too severe sanction when there have been signs of change by the national authorities towards a democratic process.

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<sup>10</sup> In 2005 there were 27 thematic mandates and 14 country mandates integrated by independent experts.

<sup>11</sup> In its resolution 1999/1, the Commission decided at its fiftyfifth session to discontinue consideration of the human rights situation in Sierra Leone under Economic and Social Council resolution 1503 (XLVIII) and to take up consideration of the matter under the public procedure provided for by Commission resolution 8 (XXIII) of 16 March 1967 and Economic and Social Council resolution 1235 (XLII) of 6 June 1967, under the agenda item entitled "Question of the violation of human rights and fundamental freedoms in any part of the world". The Commission requested the United Nations High Commissioner for Human Rights to apprise the Commission at its fiftysixth session of the reports of the SecretaryGeneral about violations of human rights and international humanitarian law in Sierra Leone, including, to the extent possible, references contained in reports submitted to the Commission on Human Rights. Since 2000, the Commission has examined the reports of the High Commissioner. In 2002 the High Commissioner presented her report on Sierra Leone under document E/CN.4/2002/37. Since then she has continued to submit as requested annual reports to the Commission. Her last report on Sierra Leone was presented in 2005 under document E/CN.4/2005/113.

It should also be pointed out that since its creation in 1994 the institution of the High Commissioner for Human Rights has represented an additional mechanism of information and fact-finding. The Commission utilizes it in a number of occasions in order to monitor and follow up human rights situations in given countries. The best example to illustrate this point is the case of Occupied Palestine. In 2000, the Commission decided to request to Mary Robinson, the then High Commissioner, to carry out an *in situ* mission to Occupied Palestine to inform the Commission on the prevailing human rights situation. The request was made despite the fact that there was already a Special Rapporteur informing the Commission annually about the human rights situation in Occupied Palestine.

Another example that may also serve to illustrate this viewpoint concerns the situation of human rights in the Republic of Chechnya (Russia). In 1996 the Commission, taking into account the prevailing human rights situation there, decided to request the Secretary-General to report to it. The report of the Secretary-General was submitted to the Commission in 1997. That report has been one of the few UN public documents describing what was going on in Chechnya<sup>12</sup>. The Commission since then has attempted to debate about Chechnya in public but the Russian Federation has managed to block any proposal. The last attempt was in 2004, when a draft resolution on the situation of Chechnya was defeated in a roll-call vote. An additional reason for including the geographic mandates under the responsibility of the Secretary-General as extraconventional instruments emanates from the fact that in the past a number of situations such as Poland and Bougainville (Papua New Guinea) were assigned to him. In such cases, the Secretary-General nominated UN high ranking officials to investigate and report on the situation.

Table 1  
**Extra-conventional mechanisms**

|  | Geographic | Thematic |
|--|------------|----------|
| ECOSOC 1503 Resolution*                                      | XXX        |          |
| ECOSOC 1235 Resolution**                                     | XXX        | XXX      |
| Advisory Services under General Assembly 926(X) resolution** | XXX        |          |
| Secretary-General/High Commissioner**                        | XXX        |          |

\* Confidential.

\*\* Public.

In 2005, 52 special procedures (50 public and 2 confidential) formed the system of extraconventional human rights protection on which the United Nations bases

<sup>12</sup> In order to describe the human rights situation in the Republic of Chechnya (Russia) the Secretary-General collected all available information throughout the United Nations programmes and bodies, its specialized agencies, the Organization for Security and Cooperation in Europe, the International Committee of the Red Cross, non-governmental organizations as well as the information furnished by the government of Russia, UN document, E/CN.4/1997/10.

itself in order to apply and monitor the international human rights norms embodied in the Universal Declaration of Human Rights as well as relevant UN human rights treaties, declarations and other international instruments. The fifty-two mandates were the following:

- A) **Geographic mandates relating to a specific country:** (i) *Under the confidential procedure:* Kyrgyzstan and Uzbekistan; (ii) *Under the public procedure:* Afghanistan, Belarus, Burundi, Cambodia, Chad, Colombia, Cuba, Cyprus, Democratic Republic of the Congo, Democratic People's Republic of Korea, Haiti, Liberia, Myanmar, Nepal, Palestinian occupied territories, Sierra Leone, Somalia, Sudan, and Timor Leste.
- B) **Thematic mandates dealing with global issues under the public procedure:** (i) *Economic, social, cultural and solidarity rights:* Right to development, Illicit dumping of toxics, Effects of structural adjustment and foreign debt, Extreme poverty, Transnational corporations, International solidarity, Right to education, Right to housing, Right to food, Right to health. (ii) *Self-determination, civil and political rights:* Enforced disappearances, Summary executions, Torture, Mercenaries, Freedom of religion, Arbitrary detention, Freedom of expression, Racism, Independence of judges and lawyers, Impunity, Counter terrorism. (iii) *Human rights of specific groups of the population:* Children and armed conflicts, Sale of children, Violence against women, Human trafficking in women and children, Internally displaced persons, Migrants, Indigenous people, Minorities, People of African descent, Human rights defenders.

### 1.1. *Structural elements and historical evolution*

Every year, the UN Commission on Human Rights meets in Geneva from March to April for a period of six-weeks. The Commission is the UN organ which sets standards to govern the conduct of States, but it also acts as a forum where countries large and small, non-governmental groups and human rights defenders from around the world can voice their concerns. The Commission is composed of 53 States Members of the United Nations<sup>13</sup>. Over 3.000 delegates from member and observer States and from non-governmental organizations participate. During its regular annual session, the Commission adopts about a hundred resolutions, decisions and Chairperson's statements on matters of relevance to individuals in all regions and all types of circumstances. These resolutions and decisions are adopted by the simple majority of the 53 members of the Commission (the only ones with the right to vote). A number of the resolutions and decisions establish the subsidiary bodies of the extraconventional mechanisms. The mandates, competencies, sources of information to be used, objectives the reports should aim at, length of the mandate, etc... are all

<sup>13</sup> The geographical distribution of the 53 State members of the Commission is as follows: Africa (15); Asia (12); Western Europe and other countries (10); Eastern Europe (5); Latin America and Caribbean (11).

spelled out in those resolutions. The Economic and Social Council (ECOSOC) will in turn have to endorse the Commission's resolutions in particular in order to approve the expenditures incurred by the mandates of the subsidiary bodies.

The resolutions adopted by the UN Commission and ECOSOC constitute the juridical basis permitting the creation of fact-finding subsidiary extraconventional bodies. In establishing such subsidiary bodies the aim of the Commission is to assist in better fulfilling the objectives and principles of the UN Charter. At the same time Member States of the Organization, pursuant to Article 55 of the Charter, must cooperate with the United Nations in order to attain such objectives and adhere to its principles among which the "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

In pursuance to their respective mandates the extraconventional subsidiary bodies present every year reports to the Commission on Human Rights regarding specific countries or issues. On these occasions, the Commission may decide whether it is necessary to broaden the mandates, to change or terminate them. The Commission examines and discusses the reports of the extraconventional instruments under all the substantive items of its agenda. In 2005, for example, the extraconventional instruments were present in 14 out of the 21 items that the Commission considered, as follows: **Item 3. Organization of the work of the session** (*Situation of human rights in Colombia and in Sudan*); **Item 5. The right of peoples to self-determination and its application** (*The use of mercenaries*); **Item 6. Racism, racial discrimination, xenophobia and all forms of discrimination** (*Racism and People of African descent*); **Item 7. The right to development** (*Right to development*); **Item 8. Question of violation of human rights in the Occupied Arab territories, including Palestine** (*Occupied Palestine*); **Item 9. Question of violation of human rights and fundamental freedoms in any part of the world. a) (Cyprus, Cuba, Democratic People's Republic of Korea, Belarus, Myanmar; b) 1503 Confidential procedure** (*Kyrgyzstan, Uzbekistan*); **Item 10. Economic, social and cultural rights** (*Adverse effects of the illicit dumping of toxic and dangerous products and wastes, Effects of structural adjustment and foreign debt, Right to food, Adequate housing, Extreme poverty, Right to education, Right to health*); **Item 11. Civil and political rights** (*Torture, Arbitrary detention, Disappearances, Summary executions, Freedom of expression, Independence of judges and lawyers, Freedom of religion*); **Item 12. Integration of the human rights of women and gender perspective** (*Trafficking in persons, Violence against women*); **Item 13. Rights of the child** (*Sale of children, Children and armed conflicts*); **Item 14. Specific groups and individuals** (*Migrants, Internally displaced*); **Item 15. Indigenous issues** (*Indigenous people*); **Item 19. Advisory services and technical assistance in the field of human rights** (*Cambodia, Somalia, Burundi, Liberia, Democratic Republic of Congo, Chad, Sierra Leone, Afghanistan, Haiti, Nepal, Timor Leste*).

Members of the Commission, observer states, intergovernmental as well as non-governmental organizations with consultative status with the United Nations may intervene in the discussions regarding given human rights situations. NGO's often provide the testimony of victims of human rights violations in addition of presenting written and oral information. Formal and informal consultations and negotiations follow these discussions regarding the language and terminology which will

be used in the elaboration of the draft resolutions to be adopted by the Commission. The text of these resolutions constitute the recommendations the international community addresses to a given government (or to deal with a particular world issue) to improve a specific human rights situation. Draft resolutions are in general approved by consensus without a vote. In many cases, however, a vote is needed and often a roll-call vote. In the cases where a resolution has been adopted with a vote the moral sanction is even greater due to the fact that the interested government has not showed any disposition to cooperate with the Commission.

The place in the Commission's agenda under which the extraconventional instruments are considered is related to the type of phenomenon the subsidiary body is going to study. But, it is also in relation to the type of message the Commission wishes to send to the international community. A hierarchy is, thus, established which starts at the top with the mandates that are considered under the most important items in terms of the gravity of human rights violations (items 9, 10 and 11) down at the bottom to the items that deal with issues of human rights promotion and advisory services and technical cooperation (items 17 and 19) going through items such as colonial, alien or foreign occupation and the right to development (political items which are dealt with at the beginning of the work of the Commission as a concession to Third World countries) and items relating to the human rights of specific groups of the population. The case of Colombia, and more recently Sudan, which are examined under a procedural item 3 dealing with the Organization of the work of the session are not unique and are of special interest. They represent a concession of the Commission to some reluctant States to cooperate and debate their situations in public but not under an agenda item which would indicate grave violations. The Colombian Government would have never accepted to discuss the report of the High Commissioner on the situation in that country under a substantive item touching grave violations of human rights. The agenda item dealing with the organization of the work of the session does not evoke a situation of mass and grave violations and this is the reason why it has been accepted by the Colombian authorities. In the past, under such item 3, other grave situations of human rights have also been dealt with such as those occurring in Burundi, Chechnya (Russia), Guatemala, Somalia and Togo.

A hierarchy exists as well in the designation of the mandate holder of an extraconventional procedure. In establishing a subsidiary extraconventional body, the Commission may nominate or request the Secretary-General to nominate a special rapporteur, a representative, an envoy, a working group, or an expert. The nomination of a mandate holder is made by the Chairperson of the Commission after consultations with its Bureau. In general, the designation of a special rapporteur of the Commission together with the consideration of his(her) report under item 9 of the agenda (geographic mandates) implies the greatest sanction to a given country. A sanction less severe results when the mandate holder is an envoy, representative or expert and even less severe when is nominated by the Secretary-General and not by the Commission. In theory, the most favorable reports for a given country under scrutiny should be those emanating from experts nominated by the Secretary-General in order to assist a government (item 19) coming out from a period of grave human rights violations and entering into the consolidation of a democratic process.

On the other hand, one could also expect that the reports of special rapporteurs established under item 9 of the Commission's agenda would convey the strongest critics to the authorities of a State committing or permitting by omission grave human rights violations. Those theoretic criteria, however, have nothing to do with the personality of the mandate holder who disposes of a great liberty to elaborate his (her) report in accordance with his (her) appreciation and evaluation of the situation on the basis of the information that has been gathered. Thus, for instance, there have been reports written by the Special Rapporteur on Guatemala (those of Lord Colville), nominated by the Commission, which were very favorable to the Government of Guatemala and widely criticized by human rights non-governmental organizations. Instead, the reports of the expert (Mónica Pinto) on Guatemala, nominated by the Secretary-General in order to facilitate advisory services and assistance to the authorities of that country, constituted a very objective analysis of what was going on in Guatemala, a strong criticism to the Government and were always well received and endorsed by the Guatemalan civil society<sup>14</sup>. Both experts examined the same situation, but each of them through a prism of different personal values.

At this juncture, it is worth underlining that some mandates such as Haiti and Equatorial Guinea, following the political pressures under given circumstances at the moment when the Commission was in the process of adopting the decision to assign a mandate, have seen the appointment of a special rapporteur then that of an expert to come back to a rapporteur and finalized with an expert. Equatorial Guinea, for example, had a special rapporteur in 1979 and 1980, then an expert to provide assistance to the government from 1981 to 1993. The mandate was transformed in that of a special rapporteur from 1993 to 2001 to finalize with an expert in 2002. All this was carried out independently of the human rights situation in the country which had not ameliorated in the course of those 23 years.

In general, for a given mandate the Commission appoints an independent expert from other region and preferably from a country which has hardly any links (political, economic, financial, commercial, etc...) with the country in question. The mandate holders have emphasized that there should be any links between a given region and any particular mandate. However, this has not always been the case. United Kingdom was extremely active in the nomination by the Commission of the Special Rapporteur on Guatemala. The reason behind such interest may be attributed to the conflict prevailing at the time between Guatemala and Belize, a former UK colony<sup>15</sup>. Another example that may be cited is that French experts have been regularly be assigned to carry out the mandate on Haiti, a former French colony<sup>16</sup>.

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<sup>14</sup> The same judgement could be applied to the Independent expert on the situation of human rights in Afghanistan, Professor Cherif Bassiouni. Apparently, his independent views were not appreciated by the United States and some members of the Commission who managed to terminate his mandate in 2005.

<sup>15</sup> For the appointment of Lord Colville as Special Rapporteur on Guatemala see I. Guest, *Behind the Disappearances: Argentina's dirty war against human rights and the United Nations*, University of Pennsylvania Press, 1990.

<sup>16</sup> The present expert L. Joinet is a French national but two others French experts were already assigned with the Haiti mandate in the past.

### 1.2. *The 1503 Confidential Procedure*

In 1970, The Economic and Social Council adopted resolution 1503 (XLVIII) whereby it established a confidential permanent procedure. The Sub-Commission was charged with the function to examine and evaluate the admissibility of the communications that were received at the United Nations regarding allegations showing a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms occurring in any country of the world. Until 2000, a working group of the Sub-Commission (Group of Communications) and the Sub-Commission in plenary were responsible to examine all the communications comprised in a list established by the Secretary-General (Office of the High Commissioner for Human Rights) with the view to determining whether or not it was convenient to submit to the Commission on Human Rights specific country situations which might reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms. In 2000, the 1503 confidential procedure was revised and amended during the fifty-sixth session of the Commission on Human Rights in order to make it more efficient, to facilitate dialogue with the Governments concerned, to provide for a more meaningful debate in the final stages of a complaint before the Commission on Human Rights and to enhance the effectiveness of the Commission's mechanisms. Since then, the Group of Communications submits its report directly to the Commission's Group. These revised changes were approved in Economic and Social Council resolution 2000/3.

The 1503 confidential procedure, the oldest human rights complaint mechanism in the United Nations system, has influenced the system of extra-conventional instruments at its outset between 1970 and 1980, in a phase which preceded the adoption of the specific geographic country mandates under the public procedure. All the countries that were assigned under the public procedure at a given point in time to a subsidiary body had been previously been scrutinized under the 1503 confidential procedure. Such were the cases for Afghanistan, Bolivia, Chile, Equatorial Guinea, El Salvador, Guatemala and Iran.

The 1503 confidential procedure allows the United Nations to receive and examine individual human rights complaints. Any individual or group claiming to be the victim of such human rights violations may submit a complaint, as may any other person or group with direct and reliable knowledge of such violations. Where an NGO submits a complaint, it must be acting in good faith and in accordance with recognized principles of human rights. The organization should also have reliable direct evidence of the situation it is describing. However, the complaints are not examined individually but to the extent they configure a *situation* that appears to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms in a given country or region. The 1503 confidential procedure follows several phases within an annual cycle between the sessions of the Sub-Commission and the Commission on Human Rights.

At the outset, the Office of the High Commissioner for Human Rights summarizes the individual communications received and elaborates monthly confidential lists. These confidential lists with the observations that governments may have made are sent to the members of the Working Group on Communications of the Sub-Com-

mission. Ill-founded communications, such as communications raising issues that fall outside the scope of the Universal Declaration, are screened out by the secretariat, with the approval of the Chairperson-Rapporteur of the Working Group on Communications. Such communications are not sent to the Governments concerned or submitted to the Working Group on Communications. The fact that a communication is being transmitted to the State and acknowledged to the complainant does not imply any judgment on the admissibility or merits of the communication.

According to the new guidelines, a Working Group on Communication is designated on a yearly basis by the Sub-Commission on the Promotion and Protection of Human Rights from among its members. This body is geographically representative of the five regional groups. Appropriate rotation is encouraged. The Working Group on Communications meets annually during two weeks immediately after the Sub-Commission session in order to examine the communications (complaints) received from individuals and groups alleging human rights violations contained in the lists elaborated by the secretariat. The Group also examines any government responses and observations. Those lists have been previously sent by the secretariat to the interested government providing a deadline of 12 weeks to answer before the Group meets.

In pursuance with Sub-Commission resolution 1 (XXIV) of 1971, the Group on Communications has to decide what communications may be accepted for examination on the basis of the following criteria: (a) No communication will be admitted if it runs counter to the principles of the Charter of the United Nations or appears to be politically motivated; (b) A communication will only be admitted if, on consideration, there are reasonable grounds to believe —also taking into account any replies sent by the Government concerned— that a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms exists; (c) Communications may be submitted by individuals or groups who claim to be victims of human rights violations or who have direct, reliable knowledge of violations. Anonymous communications are inadmissible as are those based only on reports in the mass media; (d) Each communication must describe the facts, the purpose of the petition and the rights that have been violated. As a rule, communications containing abusive language or insulting remarks about the State against which the complaint is directed will not be considered; (e) Domestic remedies must have been exhausted before a communication is considered —unless it can be shown convincingly that solutions at the national level would be ineffective or that they would extend over an unreasonable length of time; (f) submission of complaints overlapping with other procedures in the United Nations system and the duplication of complaints already considered by such procedures should be avoided.

Where the Working Group on Communications identifies reasonable evidence of a consistent pattern of gross violations of human rights, the matter is referred to the Working Group on Situations of the Commission. The Office of the High Commissioner must inform immediately the interested governments of the measures adopted in their respect. The Group on Situations comprises, as before, five members nominated by the regional groups, due attention being paid to rotation in membership. It meets at least one month prior to the Commission to examine the particular situations forwarded to it by the Working Group on Communications



and decides whether or not to refer any of these situations to the Commission. The Working Group has a variety of options for dealing with the situations before it. It may forward a situation to the Commission, in which case the Working Group usually makes specific recommendations for action. Alternatively, it may decide to keep a situation pending before it or to close the file.

As with the Working Group on Communications, the proceedings of the Working Group on Situations are confidential and based on written material only, so that neither Governments nor complainants appear before it. Governments are advised of the decisions of the Working Group, including any recommendations made to the Commission.

Subsequently, it is the turn of the Commission to take a decision concerning each situation brought to its attention in this manner. Approximately a month after the previous stage (usually March), the Commission on Human Rights, meeting in closed session, considers the situations referred to it by the Working Group on Situations. Representatives of the Governments concerned are invited to address the Commission and answer questions. At a subsequent meeting shortly thereafter, the Commission considers its final decision, again in closed session. Representatives of the Government concerned may also be present at this point.

The Commission has a variety of options for dealing with situations that come before it, it may:

- wish to keep a situation under review (confidential) in the light of any further information received. This was the decision adopted at the time regarding Eastern Germany, Argentina, Indonesia, Philippines and Turkey;
- keep it under review and appoint an independent expert. The Commission requested the Secretary-General to offer his good offices with the governments of Ethiopia, Equatorial Guinea, Haiti, Paraguay and Uruguay;
- discontinue the matter under the 1503 procedure and take it up instead under a public procedure. This was the case for the already above-mentioned countries, Afghanistan, Bolivia, Chile, Equatorial Guinea, El Salvador, Guatemala, Haiti, Iraq, Iran and Zaire;
- discontinue the matter when no further consideration is warranted. This was the decision taken by the Commission regarding Mozambique, Gabon, Japan, Malaysia, Pakistan and Venezuela.

The Commission may also make recommendations to its parent body, the Economic and Social Council.

After the Commission has considered the situations before it, the Chairperson announces at a public meeting the names of the countries examined under the 1503 procedure and those of countries no longer dealt with under the procedure. All initial steps in the process are confidential until a situation is referred to the Economic and Social Council. Since 1978, however, the Chairperson of the Commission on Human Rights has announced the names of countries that have been under examination. Thus, if a pattern of abuses in a particular country remains unresolved in the early stages of the process, it can be brought to the attention of the world community through the Economic and Social Council—one of the principal bodies of the United Nations.

Eighty-four countries have been examined under the 1503 confidential procedure in the course of the last 30 years (1974-2004). The geographic distribution has been as followed: Africa (27), Asia (28), East European countries (10), Latin America and Caribbean (15) and Western European and other countries (4). Table 2 provides additional information on the countries examined under the 1503 confidential procedure.

Table 2  
**Countries examined under the 1503 Confidential Procedure  
 during the period 1974-2004**

| Africa                        | Asia                 | Eastern European countries | Latin America and Caribbean | Western European and other countries |
|-------------------------------|----------------------|----------------------------|-----------------------------|--------------------------------------|
| Benin                         | Afghanistan          | Albania                    | Antigua/Barbuda             | Germany                              |
| Bostwana                      | Bahrain              | Armenia                    | Argentina                   | Portugal                             |
| Burundi                       | Brunei/Durassalam    | Azerbaijan                 | Bolivia                     | United Kingdom                       |
| Central African Republic      | Myanmar              | Czech Republic             | Brazil                      | United States                        |
| Chad                          | Indonesia            | Estonia                    | Chile                       |                                      |
| Democratic Republic of Congo  | Iran                 | German Democratic Republic | El Salvador                 |                                      |
| Djibouti                      | Iraq                 | Latvia                     | Grenade                     |                                      |
| Equatorial Guinea             | Israel               | Lithuania                  | Guatemala                   |                                      |
| Ethiopia                      | Japan                | Moldova                    | Guyana                      |                                      |
| Gabon                         | Cambodia             | Slovenia                   | Haiti                       |                                      |
| Gambia                        | Republic of Korea    |                            | Honduras                    |                                      |
| Kenya                         | Kuwait               |                            | Paraguay                    |                                      |
| Liberia                       | Kyrgyzstan           |                            | Peru                        |                                      |
| Malawi                        | Lao Peoples Republic |                            | Uruguay                     |                                      |
| Maldives                      | Lebanon              |                            | Venezuela                   |                                      |
| Mali                          | Malaysia             |                            |                             |                                      |
| Mozambique                    | Nepal                |                            |                             |                                      |
| Nigeria                       | Pakistan             |                            |                             |                                      |
| Popular Republic of the Congo | Philippines          |                            |                             |                                      |
| Rwanda                        | Saudi Arabia         |                            |                             |                                      |
| Sierra Leone                  | Syria                |                            |                             |                                      |
| Somalia                       | Thailand             |                            |                             |                                      |
| Sudan                         | Turkey               |                            |                             |                                      |
| Togo                          | United Arab Emirates |                            |                             |                                      |
| Tanzania                      | Uzbekistan           |                            |                             |                                      |
| Uganda                        | Viet-Nam             |                            |                             |                                      |
| Zambia                        | Yemen                |                            |                             |                                      |
| Zinbabwe                      |                      |                            |                             |                                      |

The practice shows that for some countries such as Haiti, Myanmar, Paraguay, Philippines, and Uzbekistan, the Commission resorted to nominate special representatives or independent experts to deal with the situation. In other cases, such as Uruguay, the Commission requested the Secretary-General to have direct contacts with the authorities and exert his "good offices" in order to obtain additional information.

Recently, at the request of the Governments concerned, the documentation examined by the Commission on Human Rights under the confidential 1503 procedure in relation to the situation of human rights in the following countries, has been made public and is available for distribution to interested individuals and organizations: Argentina, examined between 1980 and 1985; Uruguay, examined between 1978 and 1985; Paraguay, examined between 1978 and 1990.

Historically, the 1503 confidential procedure represented when it was established a considerable advance in the protection of human rights. For the first time a mandate permitted an international permanent mechanism to examine individual complaints, in spite of the fact that the procedure was incomplete and had a number of limitations due to its confidential character and the strong criteria of admissibility. However, governments soon started to utilize this confidential procedure while at the same time they continue to violate human rights. Theo van Boven, while responsible of the UN Division of Human Rights, did not hesitate to raise the question as to whether certain procedures were not in "danger of becoming screens of confidentiality to prevent cases discussed thereunder from being aired in public?"<sup>17</sup>

As the 1235 public procedure was set in motion, one could have thought that the confidential procedure had no reason to continue and that it could very well be replaced. However, for obvious political reasons States prefer the confidential procedure which offers them more guarantees throughout all the phases of the inquiry. Also, at the time of the revision of the 1503 confidential procedure in 1999 in order to enhance the effectiveness of the work of the Commission, many voices advocated for the suppression of the confidential procedure. Nevertheless, the recommendations of the Bureau of the Commission to rationalize its work proposed only to suppress one of the phases of the procedure which implied the involvement of the Sub-Commission in plenary. The upgrading of the Commission on Human Rights to a Human Rights Council which is under consideration by the General Assembly provides yet another excellent occasion for discontinuing the 1503 confidential procedure.

### 1.3. *The 1235 Public Procedure*

#### 1.3.1. SUBSIDIARY GEOGRAPHIC BODIES

By 1967, the Commission on Human Rights had behind it more than twenty years of work but had not yet been able to set up a protection mechanism enabling the UN to receive and examine individual complaints alleging human rights violations publicly. The adoption of Economic and Social Council resolution 1235 (XLII) establishing for the first time a public procedure permitted to fill up this important gap. Already in 1963, the General Assembly had set up a mandate of a group of independent experts on South Viet-Nam lead by the Chairman of the Commission in order to investigate the discriminations and persecutions the Buddhist community

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<sup>17</sup> Th. VAN BOVEN, *People Matter: Views on International Human Rights Policy*, Meulenhoff, Amsterdam, 1982.

was suffering. Within this context, one may say that the mandate on South Vietnam is a precursor to the public procedure triggered off by 1235 resolution.

Economic and Social Council resolution 1235 (XLII) was the reply of the international community to the problem posed by the individual complaints which arrived to the United Nations regarding issues such as *apartheid* and racial discrimination in Rhodesia and South Africa which could not be treated anymore in a confidential manner<sup>18</sup>.

Under this resolution, the Commission on Human Rights and its Sub-Commission<sup>19</sup> are authorized to examine the information contained in the lists elaborated by the Secretary-General, in accordance with ECOSOC resolution 728 (XXVIII), relating to gross violations of human rights and fundamental freedoms, such as the policy of *apartheid* carried out in South Africa.

The getting under way of resolution 1235 coincided with the process of decolonization and the arrival to the United Nations of recently independent countries from Africa and Asia. The membership of the Commission on Human Rights itself was reshaped in 1966. Until then the Western European and other countries had a comfortable majority among its 21 members. With the new membership introduced in 1966 the Commission was enlarged to 32 members 20 of which were representatives of the former African and Asian colonies. No sooner their independence obtained than these countries gave the highest priority and concerns to the human rights situation in Southern Africa and in the Palestinian occupied territories by Israel. The new members were determined to empower the Commission with matters of racism and racial discrimination giving higher priority to the extraconventional mechanisms of the Commission than to the conventional instruments which were still being elaborated. Both issues would become permanent items of the Commission's agenda. The first mandates to be adopted by the United Nations were the Group of Experts for Southern Africa and the Special Committee to investigate Israeli Practices Affecting the Human Rights of Palestinians and Other Arab Peoples in Occupied Territories.

The decisive argument leading to the creation of the two subsidiary bodies was the relation between the grave human rights violations in these two regions and the fact that such situations represented a threat to peace and international security.

At its beginning, the new public procedure was narrowly connected to matters of colonization. The Commission, thus, limited itself to examine situations of human rights violations in Southern Africa and in the Arab Territories Occupied by Israel. In 1975, a qualitative change intervened. The public procedure was then uti-

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<sup>18</sup> It is in the context of decolonization that the Commission on Human Rights started to recover its authority regarding human rights violations. In fact, it was the Committee on Decolonization established by General Assembly resolution 1514 (XV) who exhorted the Commission on Human Rights in 1965 to consider individual petitions concerning human rights violations in the territories under Portuguese administration as well as in South Africa, and South Rhodesia. ECOSOC would in March 1966 authorize the Commission to consider as a matter of urgency and importance the question of "human rights violations and fundamental freedoms... in all countries" (ECOSOC resolution 1102 (XL)).

<sup>19</sup> Following the changes introduced in 2000, the Sub-Commission does not examine anymore human rights violations occurring in a given country except under the 1503 confidential procedure.

lized by the Commission to establish new mandates in order to examine situations in Latin America, African, Asian and Eastern European countries. Under the public procedure the Commission has considered the situation in some 36 countries and regions (mandates assigned to the Secretary-General and the High Commissioner have been taken into consideration). This figure corresponds not even to half of the 84 countries that have been examined under the 1503 confidential procedure as shown in Table 2 above.

In 1975, a decisive threshold was crossed when a subsidiary body was created to investigate the human rights situation in Chile after the coup d'état and the overthrow of the constitutionally elected Government of Salvador Allende. Following a recommendation of the Sub-Commission shocked by the crimes, enforced disappearances, arbitrary detention and other grave violations perpetrated by the new authoritarian regime, the Commission decided to establish a working group to investigate the situation in Chile. In 1978 a special rapporteur replaced the working group. The mandate was carried out till 1990, at which time the Commission terminated the mandate as Chile had constitutionally elected a new government and entered into a democratic process.

The new impetus attained with the development of the Chile mandate completely transformed the 1235 public mechanism. As a matter of fact, in doing so the Commission became aware that the public mechanism allowed investigating human rights situations all over the world. A perspective that was unimaginable in the initial framework of that procedure. Following the mandate on Chile, extraconventional mechanisms were set up to consider human rights situations in Cyprus, Equatorial Guinea, Bolivia, El Salvador, Poland, Guatemala, Iran, Afghanistan, Cuba, Haiti, Romania, Occupied Kuwait, Iraq, Former-Yugoslavia, Myanmar, Sudan, Occupied Palestine, Cambodia, Bougainville (Papua New Guinea), Zaire/Congo, Somalia, Rwanda, Burundi, Colombia, Chechnya (Russia), Timor Leste, Nigeria, Sierra Leone, Liberia, Belarus, North Korea, Chad and Nepal.

Four different types of situations have been identified within which the geographic subsidiary bodies are mandated to monitor: (a) illegal occupation, situations which amount to a breach of Article 2.4 of the UN Charter; (b) internal armed conflicts; (c) transitional situations which include those arising after changes are taking place leading to a democracy after years of military rule; (d) normal situations in which the root causes of gross human rights violations are to be ascribed to factors which are intrinsic to the policy and culture of a given State<sup>20</sup>.

Although the character of those mandates is essentially humanitarian, a sanction is imposed by the international community each time a country subsidiary body is created. Most governments perceive them as an accusation and try to avoid them. Those mandates constitute a means in the hands of the international community allowing to succour people suffering grave human rights violations and try to find an urgent solution to those crisis. At the same time the international community may justify the withdrawal of economic aid by the fact that a given country has been imposed a human rights subsidiary body by the UN Commission on Human Rights.

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<sup>20</sup> Ingrid Nifosi, Ph.D. thesis on *The UN Special Procedures in the Field of Human Rights*, Scuola Superiore S. Anna, Pisa, Italy, 2003.

Those procedures were conceived at its beginning not to take care of individual situations but to deal with global situations of grave and massive human rights violations. However, as those mechanisms were set in motion and started to investigate given situations, a conceptual separation was made as to how to apply the 1503 procedure (global situations) and the 1235 procedure (which takes care of both concrete cases through the individual and urgent actions as well as of global situations).

The 1235 public procedure differs in many aspects from the 1503 confidential procedure, in particular:

- It is a public procedure. Its reports are widely distributed and examined by the Commission on Human Rights, the General Assembly or both in sessions open to the public;
- The admissibility criteria are very flexible. It is not necessary, for instance, to have used and have exhausted all domestic remedies. It corresponds to the relevant subsidiary body to establish the pertinent criteria as well as its internal rules of procedures to fulfil the mandate;
- The sources of information that the mandates established under the public procedure may consult are more diverse and ample than the ones of the 1503 procedure;
- The consent of the interested state, compulsory for the 1503 procedure, is not needed. It is true that it is always desirable in order to obtain a better cooperation to have the consent of a given government, but it is not essential.
- The geographic mandates of the 1235 mechanism are temporary mandates which are generally renewed every year by the Commission.

By the fact of being an open procedure whose reports are examined by the Commission in public, not only the 53 States members of the Commission may participate in the debates but also all UN Member States in their quality of observers, the intergovernmental and the non-governmental organizations with a special status with UN. The participation of civil society through those organizations has been of vital importance. It has permitted not only to provide publicly relevant information concerning what was going on at a given point in time in a specific country, but has also allowed to bring to Geneva victims of human rights violations to testify before the Commission.

Summarizing, one may state that with the 1235 public procedure the Commission has equipped itself with an efficient mechanism to protect human rights on the basis of the reports prepared by the geographical subsidiary bodies of investigation. As it has been already pointed out, such subsidiary bodies may be established without the consent of the interested state. The sources of information are not limited and the geographical bodies may interview witnesses as well as victims and consult official governmental documents without applying narrow criteria of admissibility in order to exhaust the domestic remedies.

The 1503 confidential procedure and the 1235 public procedure share some common elements such as the sending of allegations of violations to the respective governments to enable them to make the relevant observations; the visits *in situ* in order to better evaluate a given situation; the interviewing of the victims and witnesses, or the sending of humanitarian individual and urgent actions.

### **Example of a subsidiary organ established under an extraconventional geographic mandate: Afghanistan**

Since 1982, the situation of human rights in Afghanistan has been under review at the Commission on Human Rights. In 2003, the Commission established a new mandate whereby it requested the Secretary-General to appoint an independent expert. Since his appointment, the independent expert has conducted two missions to Afghanistan, conducted extensive research and engaged in a broad array of consultations.

In his last report<sup>21</sup> the expert indicated that Afghanistan was currently engaged in a complex process of national reconstruction and development following more than 23 years of sustained and highly destructive conflict within a general context of extreme poverty, limited resources and stagnated development. The initial phase of democratic transition was coming to a close with significant advances in nation-building, a new constitution, presidential elections, and establishment of a national human rights institution, upcoming parliamentary elections, and a growing overall sense of State legitimacy. However, the long-term success of the country's political transition, he pointed out, required significant and immediate attention to the rule of law, justice and human rights in order to assist Afghan society in processing claims and disputes, addressing past atrocities, preventing future violations, and enabling the State to consolidate its role as the primary guarantor of security, stability and fundamental rights.

The independent expert welcomed progress made in the protection of human rights and the development of national capacity as well as the commitment of the Government to implement policies that respect human rights norms, despite limited resources. However, he indicated an array of continuing violations including: repressive acts by factional commanders; arbitrary arrest and other violations by State security forces, including intelligence entities; unregulated activities of private security contractors; severe threats to human rights posed by the expanding illegal drug industry; sub-standard conditions in prisons; egregious violations of women's rights by the State and as related to an array of social practices; abuses linked to customary law decisions; violations of children's rights; inadequate attention to the disabled; land claims and other issues faced by returning refugees and internally displaced persons; and arbitrary arrest, illegal detentions and abuses committed by the United States-led Coalition forces.

The independent expert drew attention to a number of pressing human rights issues that demand the immediate attention of the Government and the international community, including: (a) The continued power and influence of factional commanders<sup>22</sup> involved in illegal land seizures, extortion and intimidation; (b) Arbitrary arrest and routine violations of the administration of justice by the Afghan National Police (ANP); (c) The absence of due process in the arrest and detention of persons and the use of torture by various government intelligence entities, including those associated with the National Security Directorate, the Ministry of Defence and the Ministry of the Interior; (d) Unregulated activities of private security contractors who have been associated with a variety of human rights violations; (e) Severe threats to national security and the protection and promotion of human rights posed by the rapidly expanding illegal drug industry,

<sup>21</sup> United Nations document, E/CN.4/2005/122.

<sup>22</sup> "Factional commanders" refers to individuals who retain command and control over irregular forces that vary in size, strength and relation to ethnic and/or tribal systems, and continue to engage in violent activities that threaten or challenge the legal rule of the State.

which fuels corruption and provides significant economic power to factional commanders and others; (f) Conditions in prisons, particularly with regard to women and children, which violate the United Nations Standard Minimum Rules for the Treatment of Prisoners and other human rights instruments. While some improvements had been made at Pol-e Charkhi since his last visit, other detention facilities displayed appalling conditions that demanded immediate attention; (g) Egregious violations of women's human rights including improper arrest and detention, violations of due process rights, severe limitations on women's access to justice, and high levels of violence against women, especially domestic violence; (h) Elements of customary law that represent human rights violations, including the continued practise of private detentions as punishment for women and the transfer of women through forced marriages as compensation for killings; (i) Trafficking in children, abusive child labour and other violations of children's human rights; (j) Inadequate attention, services, and rights for the disabled; (k) Problems faced by returning refugees and internally displaced persons related to land claims, institutional corruption, abuse and violence, often at the hands of factional commanders; (l) Actions by United States-led Coalition forces that appear to be unregulated by a Status of Forces Agreement (SOFA), including arbitrary detentions under conditions commonly described as constituting gross violations of human rights law and grave breaches of international humanitarian law.

Regarding this last issue the independent expert had received reports of serious violations by the Coalition forces from victims, AIHRC, NGOs and others. These acts included forced entry into homes, arrest and detention of nationals and foreigners without legal authority or judicial review, sometimes for extended periods of time, forced nudity, hooding and sensory deprivation, sleep and food deprivation, forced squatting and standing for long periods of time in stress positions, sexual abuse, beatings, torture, and use of force resulting in death. While it was difficult to confirm many of these allegations, a number of incidents had been publicly reported. Of particular significance were the cases of eight prisoners who had died while in United States custody in Afghanistan<sup>23</sup>. The independent expert highlighted the importance of immediately investigating these and other cases. Coalition forces—and, reportedly, PSC—detained individuals at American bases at Bagram, Kandahar and outposts, and were believed to hold individuals at a number of additional undisclosed locations. International NGOs estimated that over 1.000 individuals had been detained, often after being arrested with excessive or indiscriminate force. Detention conditions were reported as below human rights standards set by the Geneva Conventions and the United Nations. While the International Committee of the Red Cross (ICRC) visits detainees at Bagram and Kandahar, they do not have access to individuals held at other locations. An internal Pentagon investigation of detentions in Afghanistan, conducted by Brig. Gen. Charles H. Jacoby, had been completed but the report remained classified, unlike similar reports on abuses in Iraq<sup>24</sup>. The independent expert

<sup>23</sup> See *"Enduring Freedom": Abuses by US Forces in Afghanistan*, Human Rights Watch, March 2004; *An Open Letter to US Secretary of Defense Donald Rumsfeld* by Human Rights Watch, 13 December 2004; *US Investigates 8 Afghan Prison Deaths*, released by the Associated Press on 13 December 2004.

<sup>24</sup> Accounts in the press and by victims corroborate the common use of excessive force by United States forces at different locations, suggesting that techniques used in Afghanistan are related to general patterns of abuse developed for the "war on terrorism", used in Iraq and Guantanamo Bay and linked to the abuse scandal at the Abu Ghraib prison. Available United States Government reports have confirmed serious violations, most recently in the report by Vice Admiral Albert Church III.



had received accounts of actions that fall under the internationally accepted definition of torture. For example, a district governor from Paktia province who was assisting the Coalition forces was arrested, gagged, hooded and taken to a base in Urgun, where he was beaten, forced to stand in a stress position for a prolonged period of time, exposed to the cold, and denied food and water. He also reported the torture and sexual abuse of up to 20 other persons. When his identity was confirmed five days later, he was released, although the fate of the other detainees remained unclear. An investigation by the Criminal Investigative Command led to a classified report obtained by a newspaper in the United States that recommended that 28 personnel be prosecuted in connection with the deaths of detainees held by United States forces. However, to the date of his report, prosecutions had been limited, raising questions about the interest of United States officials in investigating and prosecuting these cases.

The independent expert also expressed serious concerns about the alleged transfer of some prisoners from Guantanamo Bay to Afghanistan as well as the process of informal rendition, whereby detainees were transferred to third-party countries where they are subjected to abuse and torture in clear violation of international human rights and humanitarian law. The Coalition forces' use of distinct units that answer to different command and control structures was dangerously permeating the Afghan military and security organizations and remained a source of serious human rights violations. In general, the Coalition forces' practice of placing themselves above and beyond the reach of the law must come to an end.

Finally, in his report, the Independent expert made a number of recommendations regarding: Security; Poppy cultivation and drug trafficking; Social and economic issues; The justice system; Women and children; Land and housing; Education; Strengthening civil society; Elections; National human rights institutions; Transitional or post-conflict justice; Coalition forces.

### 1.3.2. SUBSIDIARY THEMATIC BODIES

With the establishment of a subsidiary body responsible to investigate the phenomenon of enforced disappearances, the system of extraconventional protection equipped itself with new mechanisms enabling to inquire about human rights violations with a thematic focus. These mechanisms solely investigate a given phenomenon or type of violation. Contrary to the geographic mandates which deal with all types of human rights violations in a given country or region, the thematic mandates do not limit themselves to a specific country or region but encompass all countries and territories for a given type of human rights violation. The first thematic mandate was created in 1980 in order to investigate the phenomenon of enforced or involuntarily disappearances in the world. The decision of the Commission to create such mandate was determined by a series of political circumstances which are worth mentioning.

Indeed, in the course of the 1970's the practice of enforced disappearances was systematically utilized by the Latin American military regimes in place. This practice has been the cause of thousands of enforced disappearances first in Guatemala, then in Southern America, particularly in Argentina, Chile, Paraguay and Uruguay. At the end of the decade, the United Nations tried to adopt an extraconventional instrument to deal with the problem of human rights violations in Argentina. However, the Commission was confronted with a political coalition set up by the Argentinean

authorities and integrated by the United States and the Soviet Union and its allies. It should be mentioned that at the time, Argentina was the first supplier of wheat to the Soviet Union. Face to such a political blockage which managed to prevent the creation of a geographical mandate to investigate the situation in Argentina, the Commission on Human Rights opened a new avenue and invented what in the future would be known as thematic procedures<sup>25</sup>.

At the outset, the fundamental aim of the mandate was to handle globally the question of enforced disappearances. But, as the mandate was being implemented it started to deal not only with the phenomenon as such but with individual cases within a humanitarian perspective. This innovation was going to be followed by all the subsequent thematic extraconventional mechanisms set up by the Commission.

Indeed, the Working Group on Enforced Disappearance innovated and paved the way for other geographic and thematic mandates, such as summary executions, torture, arbitrary detention, etc..., to consider individual cases. Since then the Commission on Human Rights has expressly authorized some mandates such as the Working Group on Arbitrary Detention or the Special Rapporteur on the Independence of Judges and Lawyers to consider and redress individual cases of human rights abuses. Within this context, the subsidiary bodies contact the authorities of the concerned country in order to find a solution to the human rights violation which is being or has already been committed. In the case of an enforced disappearance, in order to find the location where the person in question is. If the person is being tortured in order to end such cruel treatment.

The thematic mandates neither prejudge nor condemn the action of a given government: they limit themselves to request information with a view to solving a humanitarian problem. By assuming humanitarian competences in the individual cases they handle, these mandates combine both the promotional and protection dimensions of human rights. It should be mentioned, nevertheless, that not all the thematic mandates take care of individual cases. Some thematic mandates such as the one of the Representative of the Secretary-General on Internally Displaced Persons pays only attention to the phenomenon of displacement of persons within one given country or region without accepting individual cases or sending urgent actions. The mandate holder considers that his role is to act as a catalyst between the national authorities, the United Nations and the persons who have been internally displaced in the country.

The first thematic instruments dealt with violations of *self determination, civil and political rights*. Between 1980 and 2005 subsidiary thematic bodies have been established to conduct inquiries about Enforced disappearances (1980), Massive exoduses (1982), Summary executions (1982), Torture (1985), Freedom of religion (1986), Mercenaries (1987), Arbitrary detention (1991), Freedom of expression (1993), Racism (1993), Independence of judges and lawyers (1994), Impunity (2004) and Counter terrorism (2004).

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<sup>25</sup> For a good grasp and understanding about the informal functioning of the UN Commission on Human Rights in the coulisses behind the scene, see the fascinating book of Ian GUEST, *Behind Disappearances*, University of Pennsylvania Press, 1990, already mentioned.

**Example of a subsidiary body established under an extraconventional thematic instrument dealing with civil and political rights:  
The Working Group on Enforced or Involuntary Disappearances**

The Working Group on Enforced disappearances was established in 1980 by Commission resolution 20 (XXXVI). It comprises five members, one for each region, according to the geographical representation of the United Nations. Since its establishment in 1980 till 2002, the Group had received and transmitted to the concerned governments 49.802 cases of disappearances occurred in more than 90 countries. The total number of cases being kept under active consideration, as they have not yet been clarified or discontinued, stand at 41.859 in 74 countries. The countries with more cases of disappearances had been: Iraq (16.514), Sri Lanka (12.297), Argentina (3.455), Guatemala (3.151), Peru (3.006), El Salvador (2.661), Algeria (1.133) and Colombia (1.114).

The Working Group's methods of work were revised in 2001. They are based on its mandate as stipulated originally in the Commission on Human Rights resolution and as developed by the Commission in numerous further resolutions. The parameters of its work are laid down in the Charter of the United Nations, the International Bill of Human Rights, Economic and Social Council resolution 1235 (XLI) and the Declaration on the Protection of All Persons from Enforced or Involuntary Disappearance, adopted by the General Assembly in its resolution 47/133 of 18 December 1992.

*Definition.* As stated in the preamble of the Declaration, enforced disappearances occur when persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law. Enforced disappearance has been defined as a crime against humanity in Article 7 (1) (i) of the Rome Statute of the International Criminal Court.

*Clarifications.* The basic mandate of the Working Group is to assist families in determining the fate and whereabouts of their missing relatives who, having disappeared, are placed outside the protection of the law. To this end, the Working Group endeavours to establish a channel of communication between the families and the Governments concerned, with a view to ensuring that sufficiently documented and clearly identified individual cases which families, directly or indirectly, have brought to the Group's attention are investigated with a view to clarifying the whereabouts of the disappeared persons. Clarification occurs when the whereabouts of the disappeared persons are clearly established as a result of investigations by the Government, inquiries by non-governmental organizations, fact-finding missions by the Working Group or by human rights personnel from the United Nations or from any other international organization operating in the field, or by the search of the family, irrespective of whether the person is alive or dead.

*Declaration on the Protection of All Persons from Enforced or Involuntary Disappearance.* In addition to its original mandate, the Working Group has been entrusted by the Commission on Human Rights with various tasks. In particular, the Working Group is to monitor States' compliance with their obligations deriving from the Declaration on the Protection of All Persons from Enforced Disappearance and to provide to Governments assistance in its implementation. States are under an obligation to take effective measures to prevent and terminate acts of enforced disappearance by making

them continuing offences under criminal law and establishing civil liability of those responsible. The Declaration also refers to the right to a prompt and effective judicial remedy, as well as unhampered access of national authorities to all places of detention, the right to *habeas corpus*, the maintenance of centralized registers of all places of detention, the duty to investigate fully all alleged cases of disappearance, the duty to try alleged perpetrators of acts of disappearance before ordinary (not military) courts, the exemption of the criminal offence of acts of enforced disappearances from statutes of limitation, special amnesty laws and similar measures leading to impunity. The Working Group reminds the Governments of these obligations not only in the context of clarifying individual cases but also that of taking action of a more general nature. It draws the attention of Governments and non-governmental organizations to general or specific aspects of the Declaration, it recommends ways of overcoming obstacles to the realization of the Declaration, it discusses with representatives of Governments and non-governmental organizations how to solve specific problems in the light of the Declaration, it assists Governments by carrying out on-the-spot visits, organizing seminars and providing similar advisory services. The Working Group also makes observations on the implementation of the Declaration when the concerned Government has not fulfilled its obligations related to the rights to truth, justice and reparation.

*International armed conflicts.* The Working Group does not deal with situations of international armed conflict, in view of the competence of the International Committee of the Red Cross in such situations, as established by the Geneva Conventions, of 12 August 1949 and the Additional Protocols thereto.

*Perpetrators.* In transmitting cases of disappearance, the Working Group deals exclusively with Governments, basing itself on the principle that Governments must assume responsibility for any violation of human rights on their territory. Where, however, disappearances have been attributed to terrorist or insurgent movements fighting the Government on its own territory, the Working Group has refrained from processing them. The Group considers that, as a matter of principle, such groups may not be approached with a view to investigating or clarifying disappearances for which they are held responsible.

*Basic elements.* In order to enable Governments to carry out meaningful investigations, the Working Group provides them with information containing at least a minimum of basic data. In addition, the Working Group constantly urges the senders of reports to furnish as many details as possible concerning the identity of the disappeared person and the circumstances of the disappearance. The Group requires the following minimum elements: (a) Full name of the missing person; (b) Date of disappearance, i.e. day, month and year of arrest or abduction, or day, month and year when the disappeared person was last seen. When the disappeared person was last seen in a detention centre, an approximate indication is sufficient (for example, March or spring 1990); (c) Place of arrest or abduction, or where the disappeared person was last seen (indication of town or village, at least); (d) Parties presumed to have carried out the arrest or abduction or to be holding the disappeared person in unacknowledged detention; (e) Steps taken by the family to determine the fate or whereabouts of the disappeared person, or at least an indication that efforts to resort to domestic remedies were frustrated or have otherwise been inconclusive. If a case is not admitted, the Working Group sends a response to the source indicating that the information received did not fulfil the requirements established, in order to permit the source to provide all relevant information.

*Presumption of death.* The Working Group may consider a case clarified when the competent authority specified in the relevant national law pronounces, with the

concurrence of the relatives and other interested parties, on the presumption of death of a person reported missing.

*Admissibility.* Reports on disappearances are considered admissible by the Working Group when they originate from the family or friends of the missing person. Such reports may, however, be channelled to the Working Group through representatives of the family, Governments, intergovernmental organizations, non-governmental organizations and other reliable sources. They must be submitted in writing with a clear indication of the identity of the sender; if the source is other than a family member, it must be in a position to follow up with the relatives of the disappeared person concerning his or her fate.

With regard to this last point it is interesting to note the information submitted by the Spanish "*Asociación para la Recuperación de la Memoria Histórica*" on behalf of families of Republican soldiers disappeared during the Spanish Civil War (1936-1939) to the Working Group. The Asociación estimated that more than 30.000 persons of the Republican side continue disappeared. It requested the opening of the common graves of the Civil War. Out of the 65 cases presented, the Working Group selected 25 and finally decided that some cases were admissible<sup>26</sup>.

From 1990 onwards thematic instruments carrying on *specific groups of the population* were being established: Sale of children (1990), Internally displaced persons (1992), Violence against women (1995), Children and armed conflicts (1996), Migrant workers (1999), Human rights defenders (2000), Indigenous peoples (2001), People of African descent (2002), Human trafficking in women and children (2004) and Minorities (2005).

**Example of a subsidiary body established under an extraconventional thematic instrument relating to specific groups of the population:  
Indigenous issues**

In 1996, the Commission decided that indigenous issues merited to be considered as a special separate item and that from thereon it would examine every year such issues. This decision was the culmination of more than ten years of strenuous efforts carried out by the Working Group on Indigenous Populations of the Sub-Commission, established in 1982 by ECOSOC.

On 28 July 2000, The Economic and Social Council took a historical decision by establishing a Permanent Forum on Indigenous Issues within the United Nations. The creation of this new organ responded to the need of a permanent mechanism in the UN enabling the permanent coordination among governments, UN and indigenous peoples.

Finally in 2001, the Commission on Human Rights decided<sup>27</sup> to appoint, for a period of three years, a Special Rapporteur on the situation of human rights and fundamental

<sup>26</sup> See the articles in *El País* "Mil peticiones para que la ONU investigue a los desaparecidos", lunes 1 de Julio de 2002 y "El caso de las fosas comunes de la Guerra Civil llega a la ONU: El Grupo sobre Desaparecidos estudia la petición de exhumación", miércoles 21 de agosto de 2002.

<sup>27</sup> Resolution 2001/57 of the Commission on Human Rights, approved by consensus without a vote on 24 April 2001.

freedoms of indigenous people with the following functions: (a) to gather, request, receive and exchange information and communications from all relevant sources, including Governments, indigenous people themselves and their communities and organizations, on violations of their human rights and fundamental freedoms; (b) to formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the human rights and fundamental freedoms of indigenous people; (c) to work in close relation with other special rapporteurs, special representatives, working groups and independent experts of the Commission on Human Rights and of the Sub-Commission on the Promotion and Protection of Human Rights. Since then his mandate has been renewed and he has presented annually reports to the Commission on Human Rights. His last reports<sup>28</sup> were examined by the Commission at its 2005 session.

In those reports he informs that in 2004, he undertook two official country missions, to Colombia (8-17 March 2004) and Canada (21 May-4 June 2004), to observe the situation of indigenous peoples. He continued to maintain extensive contact with indigenous representatives throughout the world and at international meetings. He also continues to cooperate actively with United Nations bodies and agencies on issues concerning indigenous peoples. In his last report he underlines that indigenous peoples are among the world's most socially marginalized and dispossessed groups. They are generally the victims of various types of discrimination and denial of their basic rights. They have been dispossessed of their lands and resources, languages, culture and forms of government, and are often denied access to basic social services (including education, health and food, water, sanitation and housing). As education is of critical importance for indigenous peoples' full enjoyment of their human rights, the Special Rapporteur had decided to focus the 2005 report on the obstacles, disparities and challenges facing indigenous peoples with regard to access to and quality of education and the cultural appropriateness of educational approaches. The report also contains examples of good practice and initiatives aimed at solving the educational problems of indigenous peoples in various countries. The Special Rapporteur recommends to Governments that they attach high priority to the objectives and principles of indigenous education and that they provide public and private agencies and institutions involved in promoting indigenous education with sufficient material, institutional and intellectual resources; he invites them to prepare, in close collaboration with indigenous communities, programmes for the training of an adequate number of bilingual and intercultural education teachers during the Second International Decade of the World's Indigenous People and invites the United Nations Educational, Scientific and Cultural Organization (UNESCO) and international cooperation partners in general to become involved in this effort.

He further recommends that indigenous universities be expanded and strengthened and that courses on indigenous peoples (including their history, philosophy, culture, art and lifestyles) be broadened at all levels of national education, with an anti-racist and multicultural focus that reflects cultural and ethnic diversity and, in particular, gender equality. The Special Rapporteur urges that special attention be paid to the relationship between indigenous peoples and the environment, and that participatory scientific research be promoted in this area (with special attention paid to vulnerable environments such as the Arctic, the forests of the far North, tropical forests and high mountain areas). The Special Rapporteur also recommends that, as

<sup>28</sup> United Nations documents, E/CN.4/2005/88 and Addenda. 1-4.

part of the effort to strengthen the various kinds of indigenous education, emphasis be placed on strengthening physical education, special training in the criminal justice system for indigenous people, education in all areas for indigenous girls and women, distance learning, adult education and continuing education.

It is recommended that universities and research institutes become more involved in the preparation of special multidisciplinary curricula for indigenous education. Lastly, he recommends that the mass media regularly include in their programming content relating to indigenous peoples and cultures in a context of respect for the principles of tolerance, fairness and non-discrimination established in international human rights instruments, and that indigenous peoples and communities be given the right to access to the mass media, including radio, television and the Internet.

In addition to the information contained in the reports on the country missions, the first addendum<sup>29</sup> describes 17 country situations and provides information on communications and replies from Governments relating to allegations of human rights violations that were received and transmitted between 15 December 2003 and 31 December 2004 as well as observations made by the Special Rapporteur where considered appropriate. The 17 countries are as follows: Australia, Bangladesh, Bolivia, Brazil, Chile, Colombia, Ecuador, Ethiopia, Guatemala, Honduras, India, Indonesia, Laos, Mexico, Nepal, Venezuela and Viet Nam.

Finally, starting in 1991 thematic instruments handling *economic, social, cultural and solidarity rights* started to be created: Right to property (1991), Illicit dumping of toxics (1995), Right to development (1998), Right to education (1998), Extreme poverty (1998), Structural adjustment/foreign debt (2000), Adequate housing (2000), Right to food (2000), Right to health (2002), Transnational corporations (2005) and International solidarity (2005).

**Example of a subsidiary body established under an extraconventional thematic instrument relating to economic, social, cultural and solidarity rights: The right to food**

The Commission established the mandate of the Special Rapporteur on the right to food in 2000. Since then he has been submitting annual reports. His fifth report<sup>30</sup> opens with an overview of the current situation of world hunger, reviews the activities carried out and addresses current situations of special concern with regard to the right to food, as well as positive initiatives being taken, including the ground-breaking progress that has been made with the adoption of internationally accepted voluntary guidelines. Finally, the report explores the emerging issue of "extraterritorial" responsibilities in relation to the right to food. Two addenda to his report inform on the realization of the right to food in Ethiopia and in Mongolia.

The shocking news, he points out, is that hunger has continued to increase again. In its 2004 report, the Food and Agriculture Organization of the United Nations (FAO) reports that hunger has increased to 852 million gravely undernourished children,

<sup>29</sup> United Nations document, E/CN.4/2005/88/Addendum 1.

<sup>30</sup> United Nations document, E/CN.4/2005/47.

women and men, compared to 842 million in 2003, despite already warning of a “setback in the war against hunger”. It is an outrage, he says, that more than 6 million small children are killed by hunger-related diseases every year, in a world that is wealthier than ever before and that already produces enough food to feed the world’s population. The Special Rapporteur is gravely concerned at persistent, man-made violations of the right to food that continue across the world. Current situations of special concern include the Darfur region of the Sudan, the situation in the Democratic People’s Republic of Korea, in Iraq and in the Occupied Palestine. He is also concerned about widespread hunger and loss of livelihoods caused by natural disasters and the failures to respond fully to the need for aid in situations such as the locust infestations across West Africa.

Moreover, he draws the attention of the Commission to the situations in Ethiopia and in Mongolia, where the fight against hunger and food insecurity is not being won, despite the efforts of those Governments and the international agencies. In the face of such bad news, the Special Rapporteur also reports on positive initiatives being taken to fight hunger at both the global and local levels. These include the commendable efforts of the Governments of Brazil and France in outlining an impressive plan for innovative financing to fight hunger and poverty. He also reports on the adoption of new internationally accepted voluntary guidelines for the progressive realization of the right to food adopted by the FAO Council in November 2004 and approved by all Governments. These are ground-breaking because they set out an internationally accepted definition of the right to food as well as practical actions to put the right to food into practice.

As part of his mandate to examine “emerging issues” with respect to the right to food, the Special Rapporteur examines current discussions that push the limits of human rights beyond their traditional boundaries towards recognizing “extraterritorial” responsibilities to the right to food. Within this context he points out that the gradual emergence of a single integrated world market, the progressive globalization of most commercial, economic and social relations between peoples and the simultaneous emergence of private transnational corporations that often have greater economic and financial power than many States, particularly in the South, means that new issues have to be addressed that challenge the traditional territorial boundaries of human rights. The Special Rapporteur identifies three new issues currently being discussed. The first is the human rights responsibilities of non-State actors, such as transnational corporations. The second is examining the human rights responsibilities of multilateral inter-State organizations such as IMF, the World Bank and WTO. The third is the issue of extraterritorial obligations—which refers to the human rights obligations of Governments towards people living outside of its own territory.

The underlying principle for all three issues is the promotion of universal human dignity as enshrined in human rights instruments. At its sixtieth session, the Commission on Human Rights examined the first issue—the responsibilities of non-State actors, particularly private transnational corporations—with respect to human rights. It is increasingly recognized that, given that many non-State actors have become more powerful than States, private corporations should bear some responsibility to respect human rights obligations. This was expressed in the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights<sup>31</sup> that were presented to the Commission. The Special Rapporteur also addressed this

<sup>31</sup> United Nations document, E/CN.4/Sub.2/2003/12/Rev.1.



issue in his last report<sup>32</sup> with a chapter on the responsibilities of corporations towards the right to food.

The second issue currently being debated relates to the human rights responsibilities of multilateral organizations such as IMF, World Bank and WTO. Given the powerful role that such organizations do play in determining economic policies, particularly in countries in the South, these organizations can have an important impact on human rights. There is no doubt, for example, that the programmes of economic reform imposed by IMF and the World Bank on indebted countries have a profound and direct influence on the situation of the right to food and food security in many countries. However, given that these organizations are intergovernmental and effectively directed by Governments to undertake such actions, it is a controversial question whether they can be considered as autonomous legal subjects with obligations under international human rights law. Some authors think that WTO is merely a mechanism for negotiation between States and that member Governments are therefore accountable for all the rules and actions of WTO. Others are of the opinion that organizations such as the World Bank and IMF, despite having State Governments on their executive council, still take autonomous actions and that it is important to consider the direct responsibilities of intergovernmental organizations as institutions in themselves. A number of studies by academics and by non-governmental organizations, such as FIAN, have pointed out, for example, that these institutions are bound directly by human rights norms in two ways. Firstly, through customary law under which there are direct obligations to human rights standard<sup>33</sup> and secondly through the responsibility of international cooperation that is enshrined in article 2 (1) of the International Covenant on Economic, Social and Cultural Rights, as well as in article 11 on the right to freedom from hunger<sup>34</sup>.

Most intergovernmental organizations are also bound to respect the principles of the Charter of the United Nations through their relationship agreements with the United Nations. This issue of the direct obligations of intergovernmental organizations is extremely important and the Special Rapporteur plans to look at this in greater detail in his next report to the Commission.

The Special Rapporteur examines then the issue of extraterritorial obligations in relation to human rights. Although the primary responsibility to ensure human rights will always rest with the national Government, in the current climate of globalization and strong international interdependence, the national Government is not always able to protect its citizens from the impacts of decisions taken in other countries. All countries should therefore ensure that their policies do not contribute to human rights violations in other countries. As S.I. Skogly has stated, the strict territorial application of human rights obligations may now be outdated<sup>35</sup>.

<sup>32</sup> United Nations document, E/CN.4/2004/10.

<sup>33</sup> See SIMMA, Bruno and ALSTON, Philip, "The sources of human Rights Law: Custom, Jus Cogens, and General Principles" 12, 1992, *Australian Year Book of International Law*, SCHERMERS, Henry G. and Niels M. BLOKKER, 1995, *International Institutional Law: Unity within Diversity*, The Hague, Martinus Nijhoff Publishers, third revised edition, pp. 824 and 998, and SKOGLY, S.I., *The Human Rights Obligations of the World Bank and the IMF*, chapter 4, London, Cavendish, 2001.

<sup>34</sup> IGOs that are not specialized agencies of the United Nations in accordance with article 63, are still under obligation to respect their member States' obligations under the Charter as recognized in article 103.

<sup>35</sup> S. SKOGLY, "The obligation of international assistance and co-operation in the International Covenant on Economic, Social and Cultural Rights", in M. BERGSMO (ed.), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide*, Dordrecht, Kluwer Law International, 2003, pp. 403-420.

The question of extraterritorial obligations with regard to human rights is becoming increasingly important for the realization of the right to food. Indeed, actions taken by one Government may have negative impacts on the right to food of individuals living in other countries. International trade in agriculture is one clear case, as it is widely recognized that subsidies to farmers in developed countries can have negative impacts on farmers and the right to food in developing countries if food products are “dumped” on developing countries<sup>36</sup>. In a globalized and interdependent world, decisions taken in one country can have very far-reaching effects on other countries. Unfortunately today, there is also an increasing lack of coherence in government policies which can mean for example, that whilst they remain committed to a rights-based approach to development, at the same time, they might engage in trade policies that could have negative effects on human rights in other countries. Development policies and programmes are not always well coordinated with trade policies programmes agreed to within the framework of WTO, IMF and the World Bank, which means well-intentioned development policies are often undermined. Developed countries, for instance, might offer development assistance for agricultural development, whilst they subsidize their agriculture and sell products at below the cost of production, in ways that can limit the possibilities for agriculture development in developing countries. In the same way, developed countries sometimes provide food aid in ways that undermine local food security, through destroying local production in developing countries.

The lack of coordination and coherence, often results in outright contradictions in policies towards development assistance and policies towards WTO. A similar “schizophrenia” persists in the policy-making of most countries. The ILO World Commission on the Social Dimension of Globalization drew the same conclusion in its recent report *A Fair Globalization: Creating Opportunities for All* (2004):

“Global coherence, like good governance, begins at home. We call on Heads of State and Government to adopt the necessary measures, at the national level, to ensure that the positions taken by their representatives in international forums promote a coherent integration of economic and social policies which focus on the well-being and quality of life of people.”<sup>37</sup>

In the opinion of the Special Rapporteur, coherence would be possible by putting human rights at the centre of all government policy and to refrain from policies and programmes that may negatively affect the right to food of people in other countries. This primacy of human rights is recognized in the Declaration and Plan of Action of the World Conference on Human Rights in Vienna (1993), where all States recognized that human rights are “the first responsibility of Governments”. This would mean for example, that in establishing trade policies, Governments would have to ensure that these policies would not have negative effects on the right to food of vulnerable people living in other countries. The issue of extraterritorial obligations in relation to human rights has been debated mostly in relation to civil and political rights. Civil and political human rights instruments contain explicit territorial and jurisdictional limitations, and it has therefore been argued that extraterritorial obligations in relation to these rights do not exist at all. However, in spite of these explicit limitations, several monitoring bodies at the international and regional levels have nonetheless affirmed that human rights obligations cannot simply stop at territorial borders. The European

<sup>36</sup> United Nations, document E/CN.4/2004/10.

<sup>37</sup> ILO World Commission on the Social Dimension of Globalization, *A Fair Globalization: Creating Opportunities for All*, 2004, para. 539.

Court of Human Rights, for instance, held in the *Loizidou v. Turkey* case that “responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory”.<sup>38</sup> Unlike civil and political rights, the legal instruments on economic, social and cultural rights do not contain any territorial or jurisdictional limitations. On the contrary, there are explicit legal commitments to cooperate for the realization of economic, social and cultural rights of all individuals without limitations. It therefore cannot be argued that extraterritorial obligations towards these rights do not exist at all. The Special Rapporteur indicates that much work is currently being done by academic institutions and non-governmental organizations to better understand the definition and content of these obligations, including studies by the International Council on Human Rights Policy,<sup>39</sup> FIAN, Bread for the World and the Evangelischer Entwicklungsdienst,<sup>40</sup> 3D-Trade-Human Rights - Equitable Economy and Realizing Rights: The Ethical Globalization Initiative,<sup>41</sup> and by many academics, including S.I. Skogly,<sup>42</sup> F. Coomans and M.T. Kamminga.<sup>43</sup> He plans to build on these studies, as well as on the work of the Committee on Economic, Social and Cultural Rights<sup>44</sup> and the Sub-Commission for the Promotion and Protection of Human Rights, including the studies by Asbjørn Eide,<sup>45</sup> to present the extraterritorial obligations of States in relation to the right to food.

He examines the legal background for extraterritorial obligations and then moves on to present a typology of the extraterritorial obligations *to respect, protect, and support the fulfilment of* the right to food. Its objective is not to suggest that extraterritorial obligations in relation to the right to food are justiciable, but to show that States have responsibilities under international law towards people living in other countries, both through their own actions and through their decisions taken as members of international organizations.<sup>46</sup>

Table 3 below shows the evolution of the public procedure of extraconventional instruments both geographic and thematic. As it has been pointed out previously, the adoption of extraconventional mechanisms reflects the priority accorded

<sup>38</sup> The European Court of Human Rights, *Loizidou* judgement of 23 March 1995, Series A. No. 310, p. 24, para. 62.

<sup>39</sup> INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, *Duties sans frontières. Human rights and global social justice*, 2003.

<sup>40</sup> FIAN, Brot für die Welt and the Evangelischer Entwicklungsdienst, *Extraterritorial State Obligations*, 2004. These organizations also presented a parallel report to the Committee on Economic, Social and Cultural Rights on compliance of Germany with its international obligations. See [www.fian.org](http://www.fian.org).

<sup>41</sup> 3D-Trade-Human Rights - Equitable Economy and Realizing Rights: The Ethical Globalization Initiative, US and EU Cotton Production and Export Policies and Their Impact on West and Central Africa: Coming to Grips with International Human Rights Obligations, 2004.

<sup>42</sup> S. Skogly 2003, *op. cit.*

<sup>43</sup> F. COOMANS and M.T. KAMMINGA (editors), *Extraterritorial Application of Human Rights Treaties*, 2004.

<sup>44</sup> See General Comments Nos. 3, 12 and 15.

<sup>45</sup> See E/CN.4/Sub.2/1999/12.

<sup>46</sup> As stated by the European Court on Human Rights, human rights obligations do not stop when States are acting as members of international organizations. European Court on Human Rights, *Waite and Kennedy v. Germany*, 1999, para. 67. See also E. PETERSMANN, “Time for integrating human rights into the law of worldwide organizations. Lessons from European Integration Law for Global Integration Law”. *Jean Monnet Working Paper 7/01*, Jean Monnet Programme Publication, 2001, p. 14.

by the United Nations to the civil and political rights against the economic, social and cultural rights in spite of the sustained proclamation of the indivisibility and interdependence of all human rights. The first extraconventional thematic instruments adopted by the UN Commission on Human Rights, together with enforced disappearances deal precisely with those fundamental rights.

Table 3  
**UN Special Public Procedures in 2005**

| Year | <i>Geographic</i>                      | <i>Thematic</i><br>Civil, political, self-determination rights & fundamental freedoms | <i>Thematic</i><br>Economic, social, cultural and solidarity rights | <i>Thematic</i><br>Specific groups of the population |
|------|--|---|---|--|
| 1963 | VietNam*                               |   |   |  |
| 1967 | Southern Africa*                       |   |   |  |
| 1968 | Special Committee on Israeli Practices |   |   |  |
| 1975 | Cyprus<br>Chile*                       |   |   |  |
| 1979 | Equatorial Guinea*                     |   |   |  |
| 1980 |  | Disappearances  |   |  |
| 1981 | El Salvador*<br>Bolivia*               |   |   |  |
| 1982 | Poland*<br>Guatemala*                  | Summary executions<br>Mass exoduses   |   |  |
| 1984 | Iran*<br>Afghanistan*                  |   |   |  |
| 1985 |  | Torture   |   |  |
| 1986 |  | Freedom of religion   |   |  |
| 1987 |  | Mercenaries   |   |  |
| 1988 | Cuba                                   |   |   |  |
| 1989 | Romania*                               |   |   |  |
| 1990 | Haiti                                  |   |   | Sale of children                                     |
| 1991 | Occupied Kuwait*<br>Iraq*              | Arbitrary detention   | Right to property*  |  |

\* Mandates terminated.

| Year | <i>Geographic</i>                                   | <i>Thematic</i><br>Civil, political, self-determination rights & fundamental freedoms | <i>Thematic</i><br>Economic, social, cultural and solidarity rights | <i>Thematic</i><br>Specific groups of the population |
|------|---|---|---|--|
| 1992 | Myanmar<br>Former Yugoslavia*                       |   |   | Internally displaced                                 |
| 1993 | Sudan<br>Cambodia<br>Palestine occupied territories | Freedom of expression<br>Racism   |   |  |
| 1994 | Zaire/Congo<br>Somalia<br>Bouganville*<br>Rwanda*   | Independence of judges & lawyers  |   |  |
| 1995 | Burundi   |   | Illicit dumping of toxics   | Violence against women                               |
| 1996 | Chechnya*   |   |   | Children and armed conflicts                         |
| 1997 | Colombia<br>Timor Leste<br>Nigeria*                 |   |   |  |
| 1998 |   |   | Right to development<br>Education<br>Extreme poverty                |  |
| 1999 |   |   |   | Migrants   |
| 2000 | Sierra Leone  |   | Structural adjustment/<br>foreign debt<br>Housing<br>Food           | Human Rights Defenders                               |
| 2001 |   |   |   | Indigenous people                                    |
| 2002 |   |   | Health  | People of African descent                            |
| 2003 | Liberia   |   |   |  |
| 2004 | Belarus,<br>North Korea,<br>Chad,<br>Nepal          | Impunity,<br>Countering<br>Terrorism  |   | Human trafficking in woman & Children                |
| 2005 |   |   | Transnational corporations,<br>International solidarity             | Minorities   |

\* Mandates terminated.

#### 1.4. *Functioning of the system*

The extra-conventional protection instruments constitute an open system in constant innovation and adaptation to international political situations. Faced against a given situation of human rights violations in a specific country, the system has a number of alternatives, including: (a) to treat the situation under the confidential procedure; (b) to continue with the confidential procedure if there is not a possibility to consider the situation under the public one. And under the confidential procedure choose the “good offices” of the Secretary-General or nominate a special envoy or expert; (c) in the case a special rapporteur of the Commission cannot be appointed under the public procedure for a given country, designate a representative either of the Commission or of the Secretary-General. And if such action is impossible, assign the mandate to the High Commissioner or charge an independent expert with a mandate under the Advisory Services and Technical Cooperation approach with a view to assist the authorities of the country; and finally, (d) as a last resort, the Commission may establish a thematic mandate for a given human rights phenomenon which would encompass all countries of the world. Such was the case with the Working Group on Enforced Disappearances, the first such thematic mandate. Faced against the impossibility of sanctioning Argentina with the establishment of a specific country mandate, the Commission created a thematic mandate which would deal with the phenomenon occurring not only in Argentina but anywhere in the world.

The methods of work of the extraconventional instruments cannot follow the stringent investigation rules of the domestic judicial procedures. If they had to do so the extraconventional instruments would be unable to adapt to a variety of situations and circumstances as well as to the susceptibilities and resistances of the States being investigated. For these reasons, it is necessary to have a wide range of procedures which can respond to a variety of situations. This spectrum may go from the “quasi-judicial” inquiries of the Working Group on Arbitrary Detention to those demanding only a minimum of formal rules such as the “direct contacts” or “good offices”. The independent experts themselves have emphasized the necessity of maintaining the “specificities of each mandate and highlighting that, as independent mechanisms, they were the *owners* of their methods of work”<sup>47</sup>.

##### 1.4.1. ALLEGED HUMAN RIGHTS VIOLATIONS

Upon receipt of a human rights allegation, mandate holders under one of the geographic or thematic public mandates determine whether the information it contains is *relevant* to their respective mandates and determine whether the allegation is *trustworthy*. The sources of information of mandate holders include non-governmental organizations, alleged victims of human rights abuses, victims, relatives and witnesses, governments and inter-governmental organizations. The source cannot

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<sup>47</sup> UN High Commissioner for Human Rights and follow-up to the World Conference on Human Rights: Effective Functioning of Human Rights Mechanisms, United Nations document, E/CN.4/2005/5.

be anonymous and the human rights allegation must be submitted in writing with the identity of the sender and contact details. Before launching an action with the Government concerned the Office of the High Commissioner for Human Rights must check the source and its reliability within the UN system and its field offices as well as with outside relevant and credible sources. In dealing with governments and other sources, and bearing in mind that the issues are often highly sensitive, mandate holders are inspired by the principles of discretion, transparency and even-handedness. Equal opportunity to comment is provided to both the source of information and the Government against whom an allegation is made.

An allegation should contain the full name of the victim (or as much information as possible to enable the identification of the victims), or the name of the community, age, sex, place of residence or origin; circumstances involved, including date and place of incident (approximate if exact data is not available); alleged perpetrators; suspected motive, contextual information if needed; where relevant, steps taken at national level (e.g. has police been contacted, involvement of other national authorities, position —if any— of the Government) or international level. It should be noted that, unlike the communication procedures under the various human rights treaties or the confidential extraconventional procedure, the exhaustion of domestic remedies is not required. In any communication with a Government, unless it is requested otherwise, the identity of the source is kept confidential, in order to protect it from possible reprisals.

Once the requisites have been met, the credibility of the allegation checked, a summary of the allegation is made and a note is drafted and sent for action to the Government<sup>48</sup> concerned from the Office of the High Commissioner on behalf of the mandate holder who requests the Government information regarding the following questions:

- Whether the facts alleged in the summary of the case are accurate. If not, details of the inquiries carried out should be provided to refute these allegations;
- In the case of death, the cause mentioned in the death certificate, and whether an autopsy has been conducted and by whom with a complete copy of the autopsy report;
- Whether a complaint, formal or informal, has been made on behalf of the victim. If so, who made the complaint and what is the relation of the complainant to the victim? To whom was the complaint made? What action was undertaken upon receipt of the complaint and by whom?
- Which is the authority responsible for investigating the allegations? Which is the authority responsible for prosecuting the perpetrators?

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<sup>48</sup> The normal channel of communication with governments is the Permanent Representative to the Office of the United Nations normally in Geneva or, in the absence of such representation, at the United Nations Headquarters in New York. Mandate holders may contact permanent representatives of States whenever they deem it necessary. The regular way of communication between a mandate holder and a Government is in writing through the UN Secretariat, but oral consultations may also be held, when this is deemed appropriate.

- Whether there are any inquiries or judicial or other procedures in connection with the case under way? If so, details of their progress to date and the timetable envisaged for their conclusion are requested to be provided. If such inquiries or procedures have been completed, details of the conclusions reached should be provided and copies of any relevant documents attached. Whether these conclusions are definitive?
- Whether the person alleged to have carried out the violation has been identified? To which unit or branch of the police, security forces, armed forces or groups cooperating with them does he/she belongs?
- Whether penal or disciplinary sanctions have been imposed on the alleged perpetrators? If so, details of the procedure followed to ascertain the penal or disciplinary responsibility of the perpetrators before imposing such penalties. If no sanctions have been imposed, why not?
- If no inquiries have been undertaken, why not? If the inquiries undertaken were inconclusive, why so?
- Whether any compensation has been provided to the family of the victim? If so, details are to be provided including the type and the amount of the compensation involved. If no compensation has been provided, why not?
- Any other relevant information or observation concerning the case.

Once the reply of the concerned government is received by the mandate holder (rapporteur, representative, expert or working group) it is transmitted to the source originating the allegation in order to allow the victim to make the pertinent observations on the information provided by the government. The observations made by the victim are then sent to the authorities so as to permit the government to comment on the observations made by the victim. All this information is summarized in the public report which the rapporteur or working group submits annually to the Commission on Human Rights.

Up to recently, with the exception of the mandate on Freedom of religion, hardly any records had been kept regarding the follow up of the communications sent to governments. The statistics kept under the mandate on Freedom of religion indicate the response of governments has varied according to years. The highest number of replies (85%) was obtained in 1994 from 27 governments and the lowest in 2003 (37%) from 24 governments. The average percentage for the period 1994-2004 fluctuates around 50%<sup>49</sup>. Also of interest are the government recipients of such communications from the extraconventional mechanisms. For the first seven months of 2004, the main recipients were: Nepal, China, Colombia, D.R. of Congo, Sudan, Pakistan, Iran, Russia, Syria and Mexico. Finally, if most of the geographic and thematic mandates request governments information regarding individual allegations of human rights abuses not all of them send the same number of communications. During the January-July 2004 period those mandates which sent the highest number of communications were as follows: Freedom of expression 422 communications covering 1064 individuals; Human Rights defenders 206 covering 290 individuals; Arbitrary detention 133 covering 591 individuals; Torture 322 covering 1231 indi-

<sup>49</sup> Figures provided by OHCHR sources.



viduals; Summary executions 166 covering 715 individuals. This pattern shows the importance of allegations regarding civil and political rights if we compare them with the communications sent by mandate holders of economic, social and cultural rights for the same period, namely: Adequate housing 2; Education 1; Health 24. According to the same statistics, the percentage of the feedback from governments was 22%.

It should be pointed out that presently over 60 per cent of the communications dispatched by the extraconventional mechanisms are joint communications sent by two or more mandate-holders which present an added value to the strength of the communication.

#### 1.4.2. FIELD MISSIONS

Field missions are an efficient tool of both the geographic and thematic mandates. Field mission visits to the concerned countries represent a good opportunity for the extraconventional instruments to better grasp and understand, through dialogue with the national authorities and civil society and the gathering of information, the prevalent situation as well as the underlying causes of human rights violations. They constitute a basic element of the monitoring activities of the extraconventional mechanisms. These visits are conducted in a spirit of cooperation between the government and the extraconventional subsidiary body. Extraconventional subsidiary bodies indicate every year to a large number of governments their interest to conduct a visit to their respective countries. However, the visits cannot be carried out till a formal invitation of the interested government has been received. A balance is, thus, struck between the States' obligations set forth in Articles 55 and 56 of the UN Charter to guarantee the enjoyment of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion and Article 2.7 concerning the respect of States' sovereignty. Under the 1946 UN Convention on the Immunities and Privileges special rapporteurs/representatives/experts of the Commission on Human Rights are accorded as experts performing mission for the United Nations "such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including time spent on journeys in connection with their missions. In particular: (...); (b) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations".

Those guarantees are of particular importance since the UN human rights experts may be sued by a given government or a commercial company as has been the case with the former Malaysian expert on the Independence of judges and lawyers, Dato Param Cumaraswamy, who was sued in Malaysian Courts for damages amounting to USD 12 million. In his case, a UN organ (ECOSOC) had to request the Advisory Opinion of the International Court of Justice which concluded that Mr. Cumaraswamy *must be regarded as an expert on mission within the meaning of the Convention* and that Malaysia had the obligation to inform the Malaysian Courts of the decision.

Pursuant to these principles, the extraconventional subsidiary bodies conduct every year field missions to an increasing number of countries (about 40) which consent to such fact-finding visits. However, a visit "*in situ*" of an extraconventional instrument requires a number of desiderata. Once the consent has been given, the national authorities of the concerned country must also provide the appropriate measures so that the visit can be conducted<sup>50</sup>.

During fact-finding missions, special rapporteurs/representatives/experts of the Commission on Human Rights, as well as United Nations staff accompanying them, should be given in particular the following guarantees and facilities by the Government that invited them to visit its country: (a) Freedom of movement, including facilitation of transportation, in particular to restricted areas; (b) Freedom of inquiry, in particular as regards: (i) Access to all prisons, detention centres and places of interrogation; (ii) contacts with central and local authorities of all branches of government; (iii) Contacts with representatives of non-governmental organizations, other private institutions and the media; (iv) Confidential and unsupervised contacts with witnesses and other private persons, including persons deprived of their liberty, considered necessary to fulfil the mandate of the independent expert; (v) Full access to all documentary material relevant to the mandate; (c) Assurances of the Government that no person, official or private individual who have been in contact with the rapporteur/representative/expert in relation to the mandate will for this reason suffer threats, harassment or punishment or to be subjected to judicial proceedings; (d) Appropriate security arrangements without, however, restricting the freedom of movement and inquiry referred to above; (e) Extension of the same guarantees and facilities mentioned above to appropriate UN staff assisting the special rapporteur/representative/expert before, during and after the visit.

Under international law, the State is deemed to be legally responsible for any violations of human rights committed under its jurisdiction, whether by its agents or by non-State entities or by private entities such as national liberation movements. Contacts with non-State entities are sometimes useful for the purpose of ascertaining the truth or otherwise of allegations that these entities are victims but also perpetrators of violations. However, any such relation must be subject to some precautions such as avoiding giving them a clandestine character by organizing the contacts preferably abroad, before or after the mission. The situation may be different when the mission takes place in a country where a peace process is under way or where parts of the national territory are under *de facto* control of non-State entities. The context of such meetings and the conditions in which they are held should ensure that the presence of the Special Rapporteur or mandate holder would not be understood as (a) endorsement of any international representative character claimed by the private entity, and (b) subject of controversy initiated by victims' associations. This has been the traditional approach for mandates relating to civil and political rights. However, with the new

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<sup>50</sup> Sometimes it is extremely difficult to obtain the formal consent of the government. The visit of the Working Group on Arbitrary Detention to Australia, for example, which was initiated in 1998 in order to examine the question of the administrative detention of asylum seekers, could not be carried out till May 2002. In 2000, the Australian Government cancelled the programme visit. It also raised a number of objections to the 2002 visit. See UN document E/CN.4/2002/77.

mandates on economic, social, cultural and solidarity rights new avenues in international human rights law are being explored. The attention of the reader is drawn to the arguments developed by the Special Rapporteur on the Right to food who is breaking new ground regarding the responsibility of three types of non State actors: (a) private transnational corporations; (b) multilateral organizations such as IMF, World Bank or WTO, and (c) extraterritorial obligations of States with regard to human rights<sup>51</sup>. Depending on the situation, and on the mandate holder's own approach to public relations, a press conference at the appropriate moment may be advisable. In most cases it is useful to issue at least a brief press release through the Media Information Officer of the Office of the High Commissioner on the eve of the mission providing essential information on the mandate, the mandate holder and the objectives of the mission. These press releases are published both in Geneva and New York and in the country to be visited. While in certain instances wide press coverage of the mission is the most effective way of raising awareness of the human rights concerns in the country, in other instances it may be advisable to retain a low profile during the mission, in particular where political sensitivities are running high.

As a means of coordination and cooperation, the extraconventional subsidiary bodies favour in general joint fact-finding missions to a given country comprising various thematic mandates.

Field missions are a catalyst in raising awareness in civil society among NGOs', churches, political parties, national human rights institutions, academic circles and the media. The implementation of the recommendations elaborated in the reports of the mandate holders and endorsed by the UN Commission on Human Rights, with the exception of some countries such as Chile and Bhutan, are often deceiving<sup>52</sup>. One should not forget, however, that very often the field missions conducted by the independent experts take place in extremely difficult situations like Afghanistan, Rwanda, Burundi, Democratic Republic of the Congo and Haiti for mentioning just a few. The likelihood to implement the recommendations elaborated by the mandate holders (geographic or thematic) after the mission to ameliorate the situation are extremely low despite the fact that the description of the human rights situation in the country constitute a valuable tool for the UN and the international community to lead their action. In this connection, it should be underlined that a number of field mission reports of experts contained valuable indicators for early warning. One could cite reports such as the one of the Special Rapporteur on summary executions regarding the situation in Rwanda before the 1994 genocide had started<sup>53</sup>; that of the Special Rapporteur in Burundi concerning mass executions; the one of the Special Rapporteur on former Yugoslavia regarding the need to create and protect militarily and effectively UN safe havens such as Srebrenica which was left unprotected causing a genocide that lead the Special Rapporteur to resign; or that of the Special

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<sup>51</sup> See above the excerpts of his report in the Example of a subsidiary body established under an extra-conventional instrument relating to economic, social, cultural and solidarity rights: The right to food.

<sup>52</sup> It should also be taken into account that the follow-up dimension of the extraconventional mechanisms has been introduced very late and not by all the procedures.

<sup>53</sup> United Nations document, E/CN.4/1994/7/Add.1

Rapporteur on Zaire about the threat of the Congolese Banyabulenges to start a civil war in the Eastern region of the country.

Geographic extra-conventional mechanisms can do the follow-up to their recommendations every year the mandate continues. For the thematic mechanisms this is extremely difficult taking into account that their mandates cover a large part if not most countries of the world. However, some thematic subsidiary bodies have developed follow-up *in situ* missions to concerned countries after a reasonable period of time.

It is of interest that the mandate holders of the special procedures have devoted a large part of their discussions at the 2005 annual meeting on the problems posed by the follow-up. They have started by defining what they consider as follow-up "a variety of measures taken to encourage, facilitate and monitor the implementation of recommendations by any of the special procedures"<sup>54</sup>. After they have envisaged the different scenarios and contexts under which the approach will differ. For instance Governments may not respond to requests for invitations from a thematic procedure or those who have already extended a standing invitation may not respond favorably to a request for a visit. In order to devise specific follow-up measures, they have also taken into account the interaction with a number of partners such as: Governments; the Office of the High Commissioner for Human Rights; the United Nations system; national human rights institutions; parliaments; civil society organizations; intergovernmental financial institutions such as the World Bank, IMF and WTO; and donors in case of mandates with a strong focus on technical cooperation. Finally, in order to facilitate follow-up measures they consider that the recommendations should be concrete, indicating priorities, acknowledging the financial implications; pointing out whether the implementation of the recommendation requires only Government action or involves a wider political reform process and specifying where implementation might involve external partners. Mandate holders also envisage for follow-up purposes to send a questionnaire to relevant partners in the countries concerned. The inputs received will constitute the basis of a report on follow-up to be submitted to the Commission on Human Rights.

They have also indicated that the High Commissioner and her Deputy could play an important role in the follow-up of the recommendations contained in their respective reports to the Commission by: (a) organizing regular meetings with the Governments concerned in order to promote follow-up to specific recommendations; (b) raising the question of recommendations in the course of official country visits; and (c) organizing workshops to follow-up on recommendations by special procedures and identifying obstacles thereto.

#### 1.4.3. URGENT ACTIONS

The urgent action is a procedure set up and used in particular, but not exclusively, by the thematic mandates (geographic mandates also resort to this type of action) in order to protect victims of human rights violations.

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<sup>54</sup> Report of the twelfth meeting of special rapporteurs/representatives, independent experts and chairpersons of working groups of special procedures of the Commission on Human Rights and of the advisory service programme, United Nations document, E/CN.4/2006/4.

This procedure is the response of one or several extraconventional instruments to a serious situation of allegations of violations (enforced disappearance, death threats, intimidation, arbitrary detention, torture, etc ...) to the most fundamental human rights. An urgent action is launched whenever a case brought to the attention of the Office of the High Commissioner indicates that the facts are sufficiently reliable to fear for the life or the physical and mental integrity of an individual. The main aim of the urgent action is to protect the victim and stop, if possible, the violation. This type of protection by the extraconventional mechanisms has been compared to a sort of "*international habeas corpus*".

The means of communication employed is the dispatch of an urgent communication to the Minister of Foreign Affairs of the State in question requesting his government to adopt the appropriate measures in order to guarantee the right to life and the physical and mental integrity of the concerned person. These actions are of a humanitarian character and do not prejudice the assessment the extraconventional subsidiary body will make of the case at a later stage. The extraconventional instruments, through the Office of the High Commissioner, contact the national authorities urgently to inform them, in the case they were not already aware, and in order to request them concrete details about the case in question. The fact that this urgent procedure operates within the United Nations emphasizes the moral pressure of the international community on governments since they have to justify what is going on in their own country<sup>55</sup>.

On some occasions, Rapporteurs or Working Groups may request a given government to stop the *refoulement* of an individual when there are grounds to fear that the person may be prosecuted, arrested, tortured or executed if he is sent back to his country of origin (for questions which do not relate to common crimes).

The last years have witnessed an increase in the use of urgent actions after the period of inactivity which followed the moving of the Office of the High Commissioner from Palais des Nations to its new headquarters in Palais Wilson. Lately, a Quick Response Desk has been created to coordinate the dispatching of allegation letters and urgent actions. This Desk coordinates, in particular, joint urgent actions to be sent to the concerned governments from different mandates instead of separate ones on the same case. Owing to the fact that joint urgent actions bear the signature of several independent experts of internationally recognized impartiality, the impact is greater than when the urgent action is only sent on behalf of one extraconventional mechanism. In addition, this system facilitates the work of the government.

The dispatching of urgent actions and allegation letters has improved following the establishment of this coordinating desk in the Office of the High Commissioner. A thematic database has also been introduced to keep records of the communications sent which provides statistics on trends of each mandate, the number of individuals covered, the number of countries to which communications have been sent, the countries with the highest number of communications and the replies received from Governments. For the period January-July 2004, for example, over 500 urgent

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<sup>55</sup> In 2001, for instance, the Working Group on Arbitrary Detention alone transmitted 79 urgent actions concerning 897 persons to 40 different governments.

communications were sent to governments of which 369 were joint communications of various mandates. Nonetheless, some important problems still remain and there is still room for amelioration. One of them is the question of the follow up to the urgent action. It seems that there is some confusion among the human rights officers working at the Human Rights Field Presences, and the geographic and thematic procedures officers at headquarters as to who is responsible for the follow up with the national authorities. Another problem is due to the success of the urgent actions procedure itself. Indeed, one may deplore in a number of cases the indiscriminate use of the urgent action procedure. Knowing the favorable impact urgent actions have on donors some junior human rights officers do not hesitate to increase the dispatching of urgent actions in order to increase the statistics with a view to obtaining more extrabudgetary resources. In a number of cases this is done for cases where the information should have been more carefully scrutinized and more caution should have been observed.

#### 1.4.4. DOUBLE STANDARDS AND POLITICAL SELECTIVITY OF COUNTRIES IN RESPONDING TO HUMAN RIGHTS SITUATIONS

At present and taken into account those assigned to the High Commissioner and the Secretary-General, there are 19 geographic mandates under the public procedure, but most of them under advisory services and the High Commissioner. Since the system is in operation the total number of countries examined under the geographic public procedure has been 36: 11 in Africa, 13 in Asia, 5 in Eastern Europe and 7 in Latin America and the Caribbean. This does not even correspond to half of the 84 countries considered under the confidential procedure. However, one has to take into account that some of the thematic extraconventional instruments such as Summary executions, Enforced disappearances, Torture, Freedom of expression, Independence of judges and lawyers or Human rights defenders make reference in their general reports to a large number of countries violating specific human rights.

The difference between the number of countries considered under the confidential and the public procedure stems from the difficulty the international community is confronted to impose a geographic mandate to a given country under the public procedure. This sort of immunity comes from the system itself which serves to denounce violations occurring in certain countries but at the same time protects from a sanction some given countries with strong political allies. The system operates in several stages as a sieve which excludes given country situations. Under each of these stages, the recriminated States are offered an occasion to show their goodwill to improve the human rights situation and have the opportunity to make the necessary political contacts with other governments to assist them so that they do not go to the following stage. This sieve eliminates the great powers, some of them permanent members of the UN Security Council. China, France, Russia, UK and USA, but also Germany, Japan and some others have a sort of immunity and it is extremely difficult if not impossible to impose to them a human rights mandate. At the same time, regional powers such as India, Mexico, Egypt, Saudi Arabia, Algeria, Brazil, Argentina, and till recently Nigeria owing to their geopolitical position and economic weight also benefit a certain degree of immunity. This is not the case for a number

of small and medium size countries with much less weight than that of the regional powers such as Guatemala, El Salvador, Bolivia, Myanmar, Belarus. The ideals of Dag Hammarskjöld that the UN should be an Organization well suited to protecting medium and small countries in a world dominated by big and strong countries and economic interests is still far to be realized.

Within this context it is worth mentioning the case of Cuba. Owing to the obstinacy and political willingness of United States, Cuba is a country to which the Commission has succeeded to impose a geographic mandate. The United States and their allies have also worked hard in order to impose a mandate on countries such as Iraq and Afghanistan when these countries were out of their control. Afghanistan has had a mandate since 1982 and Iraq since Saddam Hussein did not behave in accordance with US views and had invaded Kuwait. However, since the Coalition led by United States occupies these two countries they have managed to terminate both mandates: Iraq in 2004 and more recently Afghanistan in 2005. However, from an objective point of view one cannot infer that the human rights situation has improved in these two countries. The reports of the independent experts on Afghanistan and Iraq stand there to prove that such is not the case. In this connection, the reader is invited to go back to the excerpts of the report on Afghanistan of the Independent expert, Cherif Bassiouni, submitted to the Commission on Human Rights in 2005 which are reproduced previously in this article as an example of a geographic mandate. In his report, the Independent expert was extremely critical of the United States' policy on detainees. In an article of the BBC<sup>56</sup>, the Independent expert on Afghanistan said that there had been an intensive lobbying campaign by US officials in Geneva and that the UN Commission possibly bowed to US pressure for US support or concessions on other issues. He was quoted as saying that "The hawks in the administration... simply do not want anybody to look into the way people are being detained in Afghanistan by US forces".

Under the public procedure, the Commission decides by simple majority on the establishment of a mandate and the creation of a subsidiary body of investigation. In doing so, the Commission expresses a sanction against a given state (when a geographic mandate is created). The sanction is even greater when the resolution cannot be adopted by consensus with the agreement of the concerned State and the Commission has to vote. This has been the case for Equatorial Guinea, El Salvador, Guatemala, Iran, Afghanistan, etc...The question of double standards is then posed. A number of countries do not find enough political support and they are condemned when the vote takes place whereas others having even more catastrophic situations sometimes avoid to be sanctioned. This situation has weakened terribly the credibility of the UN Commission on Human Rights.

It should also be mentioned that the regional or interregional solidarity, such as that of Muslim countries, constitutes another important key element in avoiding to be condemned by a UN resolution in matters of human rights. Finally, behind this dynamic are the interests of the States. When the time for the voting arrives, Governments exchange their support in order not to be sanctioned by the Commission

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<sup>56</sup> BBC, article by Pam O'TOOLE, "Ex-Afghan rights chief attacks US", 30 May 2005.

with a specific geographic mandate. The voting of the sessions of the Commission is very illustrative in this regard. In 2002, for example, a core of some 20 countries<sup>57</sup> prevented that draft resolutions which would have created mandates for Chechnya (Russia) and Zimbabwe be approved. The same core of countries functioned to terminate the mandate on Iran and to weaken the mandate on Equatorial Guinea. This is not unique; on the contrary, every session of the Commission witnesses the same type of situation. In 2004, a draft resolution was defeated again by a roll-call vote which would have imposed a mandate on the situation in Chechnya. Also in 2004, two different non-actions motions were adopted to stop the creation of mandates on the human rights situation in China and in Zimbabwe.

Regarding the defeated resolutions on the human rights situation in Chechnya in roll-call votes, their contents were to establish an independent commission to investigate the allegations of human rights violations in Chechnya and facilitate free access to all detention centres to humanitarian organizations, in particular the International Red Cross Committee. With regard to Zimbabwe, the "non-action" motion stopped the consideration of a draft resolution which would have requested, among other things, to the Special rapporteurs on torture, summary executions, freedom of opinion, independence of judges and lawyers and violence against women as well as the Representative of the Secretary-General on human rights defenders to conduct field missions in Zimbabwe with a view to examining the complaints of human rights violations in that country. The "non-action" motion is a procedural tactic deployed by some governments to halt action on specific countries and avoid consideration of draft resolutions. In addition to Zimbabwe, the "no-action" motion has been utilized by China and Sudan.

Concerning the weakening of the mandate on Equatorial Guinea which until then had been considered under item 9 of the Commission's agenda, the Special Rapporteur, Gustavo Gallón, said in a press conference that the mandate had been changed following the new composition of the Commission and not because the human rights situation in the country had improved. He added that there was an agreement among the African representatives members of the Commission against all the extraconventional instruments in general but more particularly against the geographic mandates with respect to Africa. In the voting which had allowed to pass Equatorial Guinea from item 9 (Violations of human rights and fundamental freedoms in any part of the world) to item 19 (Advisory services and technical cooperation) by 32 in favor, 1 against and 20 abstentions, all the 15 African members of the Commission voted for the change as well as all the other countries which constitute the hard core of the Commission. The Special rapporteur on Equatorial Guinea emphasized that an agreement had been concluded between Nigeria and Equatorial Guinea regarding the dispute that opposes these two countries on the question of the exploitation of oil in the region which is before the International Court of Justice with the involvement of American oil companies exploiting the oil of the region and

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<sup>57</sup> Algeria, Bahrain, China, Cuba, Russia, India, Indonesia, Libya, Malaysia, Nigeria, Pakistan, Syria, Democratic Republic of the Congo, Saudi Arabia, Senegal, Sudan, Togo, Venezuela, Viet Nam and Zambia



of Equatorial Guinea. Moreover, he underlined that oil companies increasingly influence the work of the UN Commission on Human Rights.

In 2005 the only proposed text to be rejected by a roll-call vote during the session of the Commission on Human Rights was the draft resolution submitted by Cuba on the question of detainees in the area of the United States naval base in Guantanamo. If approved the resolution would have requested the Government of the United States to authorize an impartial and independent fact-finding mission by the relevant special procedures of the Commission on the situation of detainees at its naval base in Guantanamo. State members of the European Union in the Commission on Human Rights voted against the proposal even though the text followed very closely other texts already adopted in European institutions<sup>58</sup>. It should also be noted that the request put forward by Cuba was along the lines of the request made by a number of special procedures subsidiary bodies which had been endorsed by all the mandate holders of the special procedures at their annual meeting in 2004. In this connection, the reader's attention is drawn to the section on counter terrorism of this same article below.

#### 1.4.5. COMMISSION'S URGENT MECHANISM

Since 1990 an urgent new mechanism has been triggered off with the adoption by ECOSOC of its resolution 1990/48 permitting the Commission to convene extraordinary sessions when grave emergency situations of human rights occur between its ordinary sessions such as the conflict in former Yugoslavia or in Rwanda respectively in 1992 and 1994. With the adoption of this new mechanism a new avenue has been opened in the field of human rights protection allowing the establishment of timely mandates and extraconventional subsidiary bodies for a given country with substantive and wide scope terms of reference to deal urgently with a given human rights situation.

As of 2005, five extraordinary sessions have been convened, as follows: First session, August 1992 on former Yugoslavia; Second session, December 1992 on former Yugoslavia; Third, May 1994 on Rwanda; Fourth, September 1999 on East Timor; and Fifth, October 2000 on Occupied Palestine<sup>59</sup>.

The First and Second extraordinary sessions of the UN Commission on Human Rights innovated in several areas. Firstly they authorized the Special Rapporteur on former Yugoslavia to study the human rights situation in the whole region formally constituted by one country but dislocated into several ones. In addition, taken into account the gravity of the situation the Special Rapporteur was requested to submit periodic reports every two to three months instead of the usual annual reports. His mandate also specified for the first time in a UN resolution the possibility to conduct *in situ* missions. Moreover, these reports would be made available to the Security

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<sup>58</sup> The European Union, who has traditionally opposed the use of "no-action" motions, considered in 2004 using an equivalent procedural device, an "adjournment of debate" had Cuba insisted to pursue its resolution on prisoners held by USA in Guantanamo. AI Index: IOR 40/008/2005.

<sup>59</sup> However, the Commission has failed to convene special sessions to consider human rights situations in Algeria, Burundi and Sudan for example.

Council. For the first time took place a close coordination among several extraconventional mechanisms, namely: the mandates of the Special Rapporteur on former Yugoslavia, the Working Group on Enforced disappearances, the Special Rapporteur on Torture, the Special Rapporteur on Summary executions and the Representative of the Secretary-General on Internal displaced persons. Last but not least, the UN authorized the deployment of a human rights field operation in the new states constituted following up the dissolution of Yugoslavia integrated by human rights monitors to assist the Special Rapporteur in collecting information on gross human rights violations perpetrated in the given States. The human rights field operation in former Yugoslavia would serve consequently as a possible model in Rwanda and Cambodia and would open the avenue to the field presences of the Office of the High Commissioner for Human Rights.

#### 1.4.6. PARTICIPATION OF THE EXTRA-CONVENTIONAL MECHANISMS AT THE SECURITY COUNCIL

For many years Permanent Members of the Security Council were opposed to debate issues of human rights abuses and make a link between egregious human rights violations as a threat to international peace and security. However, following the grave situation of human rights violations in former Yugoslavia, the Secretary-General was requested to transmit to the Security Council the reports of the Special Rapporteur of the Commission, T. Mazowiecki, on the prevailing human rights situation in the region. More recently, in accordance with the *Arria Formula*<sup>60</sup>, mandate holders of the extraconventional mechanisms who are neither State representatives nor UN high ranking officials may provide if the Council so decides oral and written information and enter into a dialogue with its members. The Special Rapporteur on the situation of human rights in the Democratic Republic of the Congo (Roberto Garretón) and the Special Rapporteur on the human rights situation in Burundi (Keita-Bocoum), among others, have been invited to communicate to the members of the Council their observations and conclusions after having carried out their respective field missions. In addition, at present the High Commissioner on Human Rights informs regularly members of the Security Council on specific issues and human rights situations of the interest of the Council.

Moreover, before planning and initiating UN peace operations it has been recommended that when relevant the extraconventional subsidiary bodies be consulted and that a human rights component be part of the UN peace operations. It should be noted that the present Secretary-General has regularly consulted the High Commissioner on Human Rights on these issues within the framework of his new approach of the work of the Organization. The report that the Secretary-General presented to the General Assembly in 1997 on the structuring of the Secretariat, for instance, already pointed out that "human rights are fundamental for the promotion of peace

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<sup>60</sup> This procedure was introduced by a Venezuelan representative and was consolidated in the early nineties. It allows a member of the Security Council to request the holding of a special meeting to exchange points of view with a prestigious and eminent expert or institution. United Nations document E/CN.4/2001/40/Add.1, Report of the Special Rapporteur on his mission carried out in March 2001.

and security, for economic prosperity and social equity". The report contains a decision whereby the Office of the High Commissioner participates regularly in each of the phases of the activities of the Organization regarding present or potential conflicts comprising a human rights dimension<sup>61</sup>. It has also been recommended that the reports of extraconventional instruments be facilitated to the Security Council. This innovative cooperation between the High Commissioner and the extraconventional mechanisms on the one hand and the Security Council on the other represent a formidable step forward in the integration of the human rights dimension into the global UN strategy of international peace and security.

#### 1.4.7. COUNTER TERRORISM

Following the terrorist attacks of 9 September 2001 in New York and Washington many democratic governments have done like the United States and adopted a series of measures against terrorism limiting the enjoyment of human rights and fundamental freedoms. As pointed out by I. Ramonet<sup>62</sup>, encouraged by the example of these democratic governments, the most repressive ones, such as Colombia, Indonesia, China, Myanmar, Uzbekistan, Pakistan, Turkey, Egypt, Jordan and many others have taken this opportunity to hurry up and follow the trend adopting anti-terrorist measures to subjugate any form of opposition which these governments label as terrorism.

In his article, I. Ramonet states that western democracies by tradition have not been very responsive to violations of economic, social and cultural rights. The great democracies had always considered the defense of civil and political rights as a major priority. However, he wonders whether the present antiterrorist obsession is not leading our democracies away from such fundamental requirement. The author raises the question as to whether our democracies are not committing suicide by adopting emergency measures and consolidating the police at the core of the system. For the war against terror not only foreshadows more limitations to individual freedoms for the sake of security but provides more resources to military methods, insisting in the obsession to fight the symptoms forgetting the causes and continues its pursuit of past mistakes<sup>63</sup>.

A number of extra-conventional mechanisms dealing with fundamental human rights have been confronted with this new situation. They have been in contact unsuccessfully with governments where grave human rights abuses have occurred due to counter terrorist measures. Frustrated by the lack of response from national authorities, the extraconventional mechanisms have decided to resort to the press.

Indeed, the mass media is a valuable means widely used by the mandate holders of the extraconventional instruments not only in relation with their field missions but

<sup>61</sup> United Nations document A/51/950, "Renewing the United Nations: a programme of reform" Report of the Secretary-General.

<sup>62</sup> I. RAMONET, "Antiterrorisme", *Le Monde diplomatique*, Mars 2004.

<sup>63</sup> J.A. NÚÑEZ, *Londres (7-J) y Madrid (11-M) bajo el prisma del terrorismo internacional*, Globalización, IECAH, 25 July 2005.

also when they are unable to visit a given country or region owing to the resistances and political unwillingness of some governments. This has been the case with the United States in relation with terrorist measures American authorities have taken to counter this phenomenon without regard to the resulting human rights violations of such measures. In this connection it is worth mentioning the press conference various mandate holders of extraconventional mechanisms held in Geneva on 23 June 2005 concerning the unwillingness of the USA authorities to cooperate with UN extraconventional instruments concerning prisoners held at Guantanamo Bay and other military bases.

Four Independent Experts<sup>64</sup> of the United Nations Commission on Human Rights with the endorsement of all participants at the 2005 Annual Meeting of the Special Rapporteurs/representatives, independent experts and chairpersons of the working groups of the Special Procedures issued a statement for the international press gathered at Geneva.

The statement pointed out that on the first anniversary of the request made by all Independent Experts at their 2004 Annual Meeting, they deeply regretted that the Government of the United States had still not invited them to visit those persons arrested, detained or tried on grounds of alleged terrorism or other violations in Iraq, Afghanistan, or the Guantanamo Bay naval base.

The request for a visit was made following the negative response to the demand by the Working Group on Arbitrary detention in January 2002 to visit Guantanamo Bay and the United States and the lack of a response to the joint request made by the Special Rapporteurs on Torture and Health in January 2004 to visit Guantanamo Bay. Such requests were based on information, from reliable sources, of serious allegations of torture, cruel, inhuman and degrading treatment of detainees, arbitrary detention, violations of their right to health and their due process rights. Many of these allegations had come to light through declassified Government documents.

The purpose of the visit of the UN Independent Experts would be to examine objectively the allegations first-hand and ascertain whether international human rights standards that are applicable in these particular circumstances are being upheld with respect to those detained persons.

In their opinion the Independent Experts have given ample time to the United States Government to consider their request and have made themselves available for any needed consultations. In this regard, they noted with appreciation the high-level meeting organized during the sixty-first session of the Commission on Human Rights to discuss the purpose and terms of reference for the visit. Nevertheless, the lack of a definitive answer despite repeated requests suggested that the United States was not willing to cooperate with the United Nations human rights machinery on this issue. This was particularly surprising in the light of one of the recommendations made by the Government of United States in a recent position paper entitled, "Enhancing and Strengthening the Effectiveness of the Special Procedures of the Commission on Human Rights", which says that, "States should consider [country

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<sup>64</sup> Another independent expert, the Special Rapporteur on Freedom of Religion and Belief, joined on 24 June 2005 the other independent experts. She has also expressed to the United States Government the wish to visit the detention facilities of Guantanamo Bay naval base.

visits] requests seriously and in the spirit of cooperation with Special Procedures, and should respond in a timely manner”.

It is the conviction of the UN Independent Experts that no Member State of the United Nations is above international human rights law. Due to the seriousness of the allegations, the lack of cooperation and given the responsibilities to their respective mandates, they could jointly conduct an investigation based on all credible sources regarding the situation of the detainees in Guantanamo Bay. In the meantime, should the Government of the United States extend a visit to Guantanamo Bay the Independent Experts would welcome this development and would incorporate the findings from their mission into their other investigations.

The contents of the press conference which was held by the UN Independent Experts has been widely broadcast by the international media. The BBC titled this event “*US stalling UN Guantanamo visit: Investigators from the United Nations have accused the US of stalling over their repeated requests to visit detainees at Guantanamo Bay*”. BBC reported that the UN said it had evidence that torture had taken place at the prison amid reports that 520 inmates have had mental breakdowns. It quoted the UN Special Rapporteur on Torture, Manfred Nowak, pointing out that he had been given access to many countries, among them, some with very poor human rights records. More openness had been expected from the U.S.A.: “We are very disappointed that a country that always was very positive about high human rights standards and which is also reminding other states that they should actually co-operate fully with the special mechanisms of the UN Commission on Human Rights itself is not living up to these standards”, Nowak said.

The Department of Defense told BBC News the UN request was being considered. Another source added that “as for the request to visit with detainees, the ICRC [International Committee of the Red Cross] already performs this important role”. Contrary to UN extraconventional public procedure ICRC’s reports are confidential. The Committee does not publish the findings from their visits.

### **UN experts address concerns regarding Guantanamo Bay detainees**

The independent experts are:

- Leandro Despouy, Special Rapporteur on the Independence of judges and lawyers.
- Paul Hunt, Special Rapporteur on the Right of everyone to the enjoyment of the highest attainable standard of physical and mental health (“the Right to health”).
- Manfred Nowak, Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment.
- Leila Zerrougui, Chairperson-Rapporteur of the Working Group on Arbitrary Detention.

*Chronology of Requests for Visits regarding detainees at Guantanamo Bay and other locations*

22 January 2002: The Working Group on Arbitrary Detention (WGAD) sent a letter (and a reminder letter on 25 October) requesting a visit to the United States and the

military base at Guantanamo Bay in order to examine *in situ* the legal aspects of the persons concerned. On 17 December 2002, the US Government declined the request, considering that the WGAD lacked the competence to address what it considered law of armed conflict issues and not international human rights matters.

30 January 2004: Special Rapporteurs (SRs) on Torture and Health sent a joint allegation letter to the US regarding continued accounts in relation to the physical and mental integrity of persons held in Guantanamo Bay and reiterated the request to visit to gather first-hand information, evaluate the situation and make appropriate recommendations in the context of their mandates regarding the detainees.

25 June 2004: the Independent Experts at the eleventh session of the Annual Meeting of Special Procedures made a joint press release (and sent statement to the US) expressing alarm at the status, conditions of detention and treatment of prisoners and requested that four experts (SRs on the Independence of judges and lawyers (IJL), Torture, Health and WGAD) visit at the earliest possible date detainees at Guantanamo (and Iraq and Afghanistan). On 9 November 2004 the Government replied that it was willing to provide a briefing in Washington, DC. By letter dated 22 November 2004, SRs responded that they welcomed a briefing in Geneva in the context of preparation for a visit.

4 April 2005: the SRs on IJL, Torture and WGAD had a meeting with US officials at the Permanent Mission of US to discuss outstanding request to visit. The US said the request was being considered at highest levels, wanted to know the SR's terms for visit regarding their objective, access to detainees, etc.

21 April 2005: in follow up to the meeting, the four experts sent a joint letter to the US with requested details: Terms of Reference (TOR) for mission, relevant resolutions, length of visit (5 days) and requested activities (visit privately with detainees, officials, observe detention related proceedings) and asked for reply by 20 May 2005. The Government responded on 20 May indicating visit request still under serious consideration.

31 May 2005: the 4 experts on IJL, Torture, Health and WGAD sent a joint letter asking the US to provide a response to the visit by 15 June as the 1st year anniversary of the joint request approached.

#### *Chronology of Communications regarding detainees at Guantanamo Bay and other locations*

16 November 2001: the Special Rapporteur (SR) on Independence of judges and lawyers (IJL) issued a press release concerning the Presidential Military Order and impact on the rule of law, ie. setting up of military tribunals; absence of a guarantee of the right to legal representation while in detention; an executive review process to replace the right to appeal to a higher tribunal; and the exclusion of jurisdiction of any other courts and international tribunals.

16 January 2002: the SR on Torture sent an urgent appeal expressing concerns regarding the conditions of detention, inhuman treatment, restricted access to lawyers, human rights monitors and medical treatment at Guantanamo Bay. The Government responded on 3 April 2002.

18 September 2002: the SRs on Torture, IJL and Migrants sent joint allegation letter regarding cases of detention of many individuals, particularly non-US nationals, since 11 September 2001. The Government responded on 1 April 2003.

12 March 2003: the SR on IJL issued a press release expressing concern regarding the establishment and operation at Guantanamo Bay. The US will be seen as systematically evading the application of domestic and international law so as to deny these suspects their legal rights. Detention without trial offends the first principle of the rule of law.

8 May 2003: the Working Group on Arbitrary Detention (WGAD) rendered Opinion No. 5/2003 concerning the US and considered the detention to be contrary to Article 9 of both the Universal Declaration and the International Covenant on Civil and Political Rights.

7 July 2003: the SR on IJL issued a press release expressing concern about military commissions and suspension of due process. US is seen to be defying UN resolutions, including GA resolution 57/219 of 18 December 2002 and SC resolution 1456 of 20 January 2003. These resolutions affirm that States must ensure that any measures taken to combat terrorism must be in accordance with international law, including international human rights, refugee and humanitarian law.

22 October 2003: the SR on Torture sent an allegation letter to US regarding the conditions and treatment of detainees at Guantanamo Bay. The Government responded on 3 March 2004.

8 December 2003: the SR on Torture sent an allegation letter concerning return of detainees from Guantanamo and risk of refoulement. The Government responded on 3 March 2004.

3 May 2004: the SR on Torture issued a press release on allegations of abuse of Iraqi prisoners by coalition forces.

5 May 2004: the WGAD issued a press release calling on coalition authorities to allow Iraqi detainees to challenge lawfulness of detentions.

27 May 2004: the SRs on Torture and Summary executions sent a joint urgent appeal to the US regarding 22 ethnic Uighurs of Chinese nationality being held at Guantanamo Bay who had been reportedly been subject to inhumane treatment during interrogation and facing possible forcible return and execution in China.

2 July 2004: the SRs on IJL, Torture and Health sent a joint allegation letter to the US regarding the condition of six foreign nations detained in solitary confinement at Guantanamo who may be tried before a military commission without access to all due process rights guaranteed under international law.

4 Feb 2005: 6 experts (Working Group on Enforced or Involuntary Disappearances (WGEID), WGAD, Torture, Health, IJL and the Independent Expert on Afghanistan) issued a joint press release regarding continued concern re: incommunicado detention, denial of legal assistance and conditions of detention that continue at Guantanamo Bay.

#### 1.4.8. CONTRIBUTION OF THE EXTRA-CONVENTIONAL MECHANISMS TO THE ADVANCEMENT OF INTERNATIONAL HUMAN RIGHTS LAW

The extra-conventional instruments have contributed to the progress of International Human Rights Law in several ways. Firstly, they have assisted in developing it by monitoring the implementation of human rights soft law such as the UN Declaration of Enforced Disappearances by the Working Group on Enforced disappearances, the UN Declaration on Extreme Poverty by the Special Rapporteur on Extreme poverty or the UN Standard Minimum Rules for the Treatment of Prisoners and many other UN instruments by various extraconventional subsidiary bodies such as the Working Group on Arbitrary detention, the Special Rapporteur on Torture or still the geographic mandate holders. The special procedures have also been very active in advocating for the drafting of new human rights instruments such as the draft convention on enforced disappearances. Moreover, the extraconventional mechanisms

have broadened the scope of human rights standards with authoritative interpretations such as the one made of the right to life by the Special Rapporteur on Summary executions or the interpretation about the norm of the prohibition of torture and cruel, inhuman and degrading treatment or punishment by the Special Rapporteur on Torture

## 2. The UN High Commissioner for Human Rights

Pursuant to General Assembly resolution 48/141 the High Commissioner is the official with “principal responsibility” for United Nations human rights activities, with the following mandate:

- To promote and protect all human rights for all;
- To make recommendations to the competent bodies of the United Nations system for improving promotion and protection of all human rights;
- To promote and protect the right to development;
- To provide technical assistance for human rights;
- To coordinate United Nations human rights education and public information programmes;
- To play an active role in removing obstacles to the realization of human rights;
- To play an active role in preventing the continuation of human rights violations;
- To engage in dialogue with Governments with a view to securing respect for all human rights;
- To enhance international cooperation;
- To coordinate human rights promotion and protection activities throughout the United Nations system;
- To rationalize, adapt, strengthen and streamline the United Nations human rights machinery.

The establishment of the post and the nomination of the first High Commissioner for Human Rights by the General Assembly finalized a process of approximately fifty years of unsuccessful attempts which began at the time of the elaboration of the Universal Declaration of Human Rights in 1947 with the idea launched by René Cassin of a human rights procurator, followed by the proposal of Uruguay of a high commissioner or general procurator in 1950 within the framework of an International Covenant on Human Rights, to the idea advanced by Costa Rica in 1965 of a high commissioner under the UN Charter and several other proposals made during the regional conferences in the context of the World Human Rights Conference of 1993. These last proposals were respectively made by the Latin American group at the Conference of San José (Costa Rica) and the Western group at the Conference held in Strasburg (France) both in January 1993<sup>65</sup>.

<sup>65</sup> UNITED NATIONS: *The High Commissioner for Human Rights: Making Human Rights a Reality*. Notes of the High Commissioner for Human Rights-No. 1, Geneva, 1996.



It is obvious that in the mandate assigned by the General Assembly to the High Commissioner the idea of a general procurator or a type of a universal human rights defender or *ombudsman* foreseen in the first proposals has not been retained. The functions of the mandate of the High Commissioner are not to be a substitute to the extraconventional mechanisms established by the Commission. On the contrary, one of the responsibilities of the High Commissioner is precisely to coordinate the activities and actions undertaken by the geographic and thematic extraconventional mechanisms. This is done through the annual coordination meetings held at Geneva and the regular direct contacts the High Commissioner has with the Independent Experts.

Moreover, the High Commissioner is assigned specific mandates by the Commission on Human Rights, such as Colombia, Occupied Palestine, Sierra Leone or Timor Leste, in addition of those that she may assume at her own initiative. Indeed, the High Commissioner may and has the moral responsibility to intervene whenever a grave situation of human rights violations occurs. She may make a public declaration on the basis of the information her Office has been able to gather or after having witnessed the situation personally in the field. Mary Robinson has intervened each time she has considered that the situation was sufficiently serious to do so after having explored previously diplomatic and good offices contacts that might have helped to improve the situation.

#### **Example of an Urgent Request to the High Commissioner: Occupied Palestine**

From 17 to 19 October 2000, the UN Commission on Human Rights held a special session (fifth session) to examine the grave and massive human rights violations inflicted to the Palestinian people by Israel, the occupying Power. The Commission decided to request the United Nations High Commissioner for Human Rights to undertake an urgent visit to the occupied Palestinian territories to take stock of the violations of the human rights of the Palestinian people by the Israeli occupying Power, to facilitate the activities of the mechanisms of the Commission in implementation of the resolution, to keep it informed of developments and to report to the Commission in 2001 and, on an interim basis, to the General Assembly at its fifty-fifth session.

Mindful of this mandate as well as of her own mandate, the High Commissioner for Human Rights undertook an *in situ* mission to the Middle East from 8 to 16 November 2000 during which she visited the occupied Palestinian territories, Israel, Egypt and Jordan. In March 2001 she presented her report to the Commission on Human Rights summarizing the outcome of her mission.

The High Commissioner received information from numerous sources alleging serious violations of human rights, both in relation to recent events and more long-term systematic abuses originating from the occupation itself. Also alleged was a failure on the part of Israel to adhere to international humanitarian law, in particular the 1949 Fourth Geneva Convention relative to the protection of civilians in time of war, whose applicability to the occupied territories has been repeatedly reaffirmed by United Nations bodies, including the Security Council, the General Assembly and the Commission on Human Rights.

Particular areas of concern with regard to recent developments included: (i) excessive and disproportionate use of force, including alleged attacks on medical personnel; (ii) the arbitrary destruction of property; (iii) the effects on Palestinian residents of Israeli settlement activity, including restrictions on freedom of movement; (iv) the serious economic impact on the residents of the occupied territories; (v) the violations of the human rights of children; and (vi) restrictions on access to humanitarian assistance.

The High Commissioner urged that the following specific steps be taken in order to stop the escalation of violence: (a) The security forces of both sides should act in full conformity with the Code of Conduct for Law Enforcement Officials and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. Whenever force is used the principle of proportionality has to be applied and all necessary measures have to be taken to avoid loss of life or injury to civilians or damage to civilian property. (b) The construction of new settlements should cease and those located in heavily populated Palestinian areas should be removed. As well as protecting settlers, the Israeli security forces should also protect Palestinians from violence perpetrated by Israeli settlers. (c) All cases of the use of lethal force on both sides should be investigated and subjected to the processes of justice in order to avoid impunity. (d) Compensation should be provided to the victims of unlawful use of force, including for the loss of property. (e) Curfews should be imposed only in extreme circumstances and as a last resort. In no case should curfews be used as a punitive measure. In cases where a curfew is imposed, it should be done in consultation with the local communities with a view to limiting the adverse impact on the human rights of those affected. (f) The enjoyment of economic rights within the occupied Palestinian territories, including the right to development, should be protected. (g) All holy sites and access to them by all faiths should be respected. (h) The Israeli authorities should ensure freedom of movement of international and national staff of United Nations agencies and facilitate access by them to those in need of assistance. (i) Cooperation with the United Nations agencies is vital to ensure effective humanitarian assistance in the occupied Palestinian territories.

Mary Robinson's interventions have been of three types: (a) by providing information on a given situation to the international community between the sessions of the Commission which sometimes has led to the convening of an urgent session (this has been the case for Timor Leste); (b) by making public declarations to the international community through the media about a given grave situation, what some authors have denominated protection through the mass media. This has been the case for Colombia. The High Commissioner without mentioning criticized the then President of Colombia and his policy of launching a movement of half a million paramilitary volunteers to fight against the Colombian guerrilla closing his eyes and ears to the human rights violations perpetrated by such paramilitary groups, often in close collaboration with the Colombian law enforcement; (c) by providing information and recommendations to the Commission on Human Rights when it meets in Geneva. For example, her declaration of 2 April 2002 when the Commission was dealing with the question of Occupied Palestine where she emphasized the need for the Commission to send a mission to the occupied territories of Palestine by Israel. At such occasion, the Commission welcomed and endorsed the declaration and propos-

als of the High Commissioner aiming at dispatching immediately to the zone a field mission and establishing an international preventive presence to monitor the human rights violations in the occupied Palestinian territories. On that occasion, the Commission on Human Rights requested the High Commissioner to head such a mission, to travel immediately to the zone and present her conclusions and recommendations to the Commission while it was still at session<sup>66</sup>. Due to the refusal to cooperate of Israel, the occupying power, it was not possible to carry out the mission despite the fact that the human rights situation had continued to worsen. On 16 April 2002, the Commission would adopt by a roll-call vote of 41 against 2 with 9 abstentions another resolution whereby it requested the High Commissioner to inform urgently on the worsening of the human rights situation in Occupied Palestine<sup>67</sup>.

Sergio Vieira de Mello, who succeeded to Mary Robinson, and was killed in Baghdad in 2003 in a bomb attack while on mission, and Bertrand Ramcharan while Acting High Commissioner have both followed Mary Robinson's policy of action to intervene whenever it has been estimated that the human rights situation in a given country or region was sufficiently serious to do so, such as in Liberia and Iraq<sup>68</sup>. Louise Arbour, the present High Commissioner, has been outspoken about the situation of Darfur but has remained silent about the persons detained in Guantanamo or the human rights situation in Occupied Palestine.

The High Commissioner heads the Office (OHCHR) responsible in the United Nations for the international promotion and protection of human rights. Since 1997, the Office has been subjected to a number of reviews and evaluations which have made proposals for change since the mandates and operational activities of the Office have seen a substantive increase. However, while the activities have been growing the regular budget resources to finance such activities have not kept the pace. Thus, the Office has had to resort to voluntary contributions to support its core functions stipulated in the UN Charter<sup>69</sup>. This has been particularly the case for the extraconventional mandates which have been dealt with in the past by three of the substantive branches of the Office. The Research and Right to Development Branch has been responsible for the thematic mandates dealing with economic, social, cultural and solidarity rights. The Treaties and Commission Branch has been in charge of the 1503 Confidential Procedure. Finally, the various sections of the Activities

<sup>66</sup> United Nations, Commission on Human Rights resolution 2002/1, of 5 April 2002, approved by a roll-call vote of 44 against 2 with 7 abstentions.

<sup>67</sup> The High Commissioner transmitted her report (E/CN.4/2002/184) to the Commission on 24 April 2002.

<sup>68</sup> United Nations document, E/CN.4/2005/4. It should be noted that at its 2004 session the Commission on Human Rights did not renew the mandate of the Special Rapporteur on Iraq.

<sup>69</sup> At present, the human rights programme receives only 1.8 per cent of the United Nations budget. The bulk of OHCHR resources, including for key activity requested by United Nations bodies, are therefore in the form of extra-budgetary contributions. The total annual budget of OHCHR is \$86.4 million (approximately 60 per cent of which from voluntary contributions). The High Commissioner estimates that in order to address the shortcomings identified in the Secretary-General's report ("In larger Freedom", A/59/2005), and make a serious effort to step up the work of the Office along the lines suggested in this plan of action, OHCHR will need to double its overall resources over the next five to six years, "The OHCHR Plan of Action and Empowerment", Report of the UN High Commissioner for Human Rights, 2005.

and Programmes Branch (presently renamed Capacity Building and Field Operations Branch) were managing the geographical public mandates as well as the thematic self-determination, civil and political mandates and the mandates of human rights of specific groups of the population.

In the 2004-2005 Proposed Programme Budget<sup>70</sup> the Secretary-General, recognizing the value of the Special Procedures, authorized the creation of a specific Special Procedures Branch within the UN Office of the High Commissioner for Human Rights. In doing so, the Secretary-General took into consideration the recommendations made in the reports, among others, of the UN Joint Inspection Unit and the Internal Oversight Services<sup>71</sup>. The main aim in establishing a Special Procedures Branch has been to: (a) improve the quality of the reports and analyses elaborated by the special procedures by establishing clear criteria for the use of mandates and the selection of the mandate holders as well as by setting better guidelines for their operations and reporting functions; and (b) adequate the resources, human and administrative, necessary to carry out the tasks mandated to the special procedures. A strong additional criterion has been the fact that the indivisibility and interdependence of all human rights (civil, political, economic, social and cultural) had not yet been translated since the 1993 Vienna Conference into the structural organization of the Office of the High Commissioner.

In order to do so, it was thought necessary to integrate into an administrative and operational unit all the mandates regarding the extraconventional instruments scattered throughout the several branches of the UN Office of the High Commissioner for Human Rights. In 2004, the newly created Special Procedures Branch was handling most of two types of mandates: those related to *self-determination, civil and political rights*, and those pertaining to the *human rights of specific groups of the population*. It was expected to integrate in the Branch, as from the start of the biennium 2005-2006, also the mandates dealing with economic, social, cultural and solidarity rights. Regarding the geographic mandates concerning a specific country, the decision by the High Commissioner was to maintain for operational reasons those mandates under the branch responsible for capacity building and field operations which comprised specific regional sections and country desks and which is responsible for the Human Rights Field Presences. Such a decision is in consonance with Action 2 taken by the Secretary-General following the Millenium Declaration to increase support for national human rights capacity building<sup>72</sup>.

The new strategy and the main focus of the Office of the High Commissioner for Human Rights have been developed in May 2005 by Louise Arbour, the new High Commissioner, in her report to the Secretary-General: "The OHCHR Plan of Action : Protection and Empowerment"<sup>73</sup>.

In that report Louise Arbour emphasizes: "The focus of OHCHR activities will be to work towards the implementation of rights at the country level. All of her Office's

<sup>70</sup> United Nations document, A/58/7 and Addenda.

<sup>71</sup> United Nations document, A/57/488.

<sup>72</sup> United Nations document, A/57/387.

<sup>73</sup> "Plan of Action submitted by the UN High Commissioner for Human Rights: Protection and Empowerment", UN document A/59/2005/Add.3, May 2005.

functions will be better used to support dialogue and engagement with countries. This will be a team effort, requiring collaboration among the different branches of the Office. A crucial part of this team effort will be expert geographic and country desks at headquarters. Currently, less than 40 staff is assigned on this basis, and *an emphasis on country engagement requires a considerable investment of new resources*. (...) Expanded in-country and regional presence will give OHCHR its greatest potential impact, building institutional credibility and trust, and creating stronger relationships with Government and civil society”.

Her report also indicates that identifying knowledge and capacity gaps needs close analysis of the situation in a country, and closing commitment gaps requires working with the Government and other actors at the national level. “Serious security gaps, especially in conflict situations, will often require deployment of human rights officers. Experience in both peace operations and human rights missions has shown the protective impact of a monitoring presence. Finally, a stronger presence in countries and regions will enhance the usefulness of the treaty bodies, as OHCHR can better encourage and assist greater engagement in the reporting process, and facilitate in-country follow-through on recommendations of the treaty bodies and special procedures. While OHCHR currently is present in some 24 countries (including 7 small regional and sub-regional offices), with its own office, most of these are not substantial teams. *OHCHR staff needs to be more present on the ground, and in a sustained manner*”.

The High Commissioner also intends to research and publish on an annual basis a thematic Global Human Rights Report. According to Louise Arbour, this will be an important policy and advocacy tool, through which her Office will be able to identify, analyse and build support for priority human rights issues, point to both positive and negative trends affecting human rights, and highlight successful policies. Moreover, the Global Report will be a vehicle to promote human rights, to spearhead new thinking and approaches and to bring to light diverse efforts to achieve human rights. It is expected that the Report will provide an authoritative source of information regarding human rights trends in selected thematic areas.

### 2.1. *Coordination*

The question of coordinating the activities of the extra-conventional mechanisms, first of all among themselves and subsequently with the treaty-bodies and the relevant UN Departments and programmes such as the Department of Peacekeeping Operations, the Department of Political Affairs, UNDP, or the Office of the Coordinator for Humanitarian Affairs, has been a vital task recognized already by the World Conference on Human Rights in 1993. In this regard it is worth noting that the Conference declared that the extraconventional mechanisms should be enabled to harmonize and rationalize their work by means of periodic meetings. It is the same World Conference that recommended to the General Assembly establishing a High Commissioner of Human Rights. The Conference took such action taking into consideration that UN human rights organs needed to improve their coordination, efficiency and effectiveness. In fact, two of the main responsibilities of the High

Commissioner are precisely to coordinate human rights promotion and protection activities throughout the United Nations system and rationalize, adapt, strengthen and streamline the United Nations human rights machinery.

Within this context it should be recalled that the extraconventional mechanisms are based on the UN Charter and that they are integrated by independent experts who do not receive any honoraries but carry out the UN mandates on a voluntary basis. They only use temporarily the UN premises during the time they are meeting in Geneva to write their reports or make the necessary contacts. Even if the extraconventional mechanisms can launch initiatives for a better coordination, it falls to the High Commissioner and to her Office the responsibility for the day to day coordinating activities of the special procedures and for convening annual meetings at Geneva of the extraconventional bodies as well as with the conventional system of treaty bodies and UN Departments and programmes, the *Ad hoc* International Tribunals on former Yugoslavia and Rwanda<sup>74</sup> and the International Criminal Court as necessary and by making the appropriate follow-up.

In this connection, since 1994 the Office of the High Commissioner organizes an annual meeting of special rapporteurs, representatives, experts and chairpersons of working groups. The question of lack of cooperation and support from Governments to the extraconventional mechanisms has been raised regularly at those meetings. Another question posed by the independent experts periodically has been the scarcity of resources allocated to mandate-holders. This last problem has been outspokenly emphasized in particular by the former Special Rapporteur on the Right to Education, Katarina Tomasevski, in several of her reports<sup>75</sup>.

More recently, the annual meeting of independent experts has tackled the question of the unprecedented level of criticism concerning several issues of the work of the extraconventional mechanisms which had been raised by Member States<sup>76</sup>. In the meeting the independent experts had had with the Chairperson and other representatives of the Expanded Bureau of the Commission it was pointed out to them the importance of "confirming their observations to their mandates and of ensuring that

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<sup>74</sup> Human rights monitors of the Office of the High Commissioner for Human Rights under the relevant mandates of the Special Rapporteurs and the Security Council Commissions of experts respectively on former Yugoslavia and Rwanda gathered first hand information on human rights violations committed. This information was transmitted to the *Ad hoc* Tribunals. It seems, however, that the tribunals had to carry out additional research in order to comply with the requisites of a criminal inquiry to be presented before a court.

<sup>75</sup> Already in her first report she pointed out to the miniscule support given to her by the Office of the High Commissioner which consisted of about 10 per cent of a full-time equivalent of one junior human rights officer and an annual budget which effectively allowed only one mission every second year. Report of the Special Rapporteur on the Right to Education, United Nations document, E/CN.4/2001/52, paragraph 2. And subsequently to the inadequate servicing by the OHCHR, Report of the Special Rapporteur on the Right to Education, United Nations document, E/CN.4/2002/60, paragraph 2. In her last two reports to the Commission she underlined that she had had to invest an immense amount of time and her own funds to carry out her mandate. Since the conditions had worsened in 2004 she had submitted a complaint to the OHCHR and therefore recommended to the Commission not to renew her mandate, Report of the Special Rapporteur on the Right to Education, United Nations documents, E/CN.4/2003/9, paragraph 1 and E/CN.4/2004/45.

<sup>76</sup> UN High Commissioner for Human Rights and follow-up to the World Conference on Human Rights: Effective Functioning of Human Rights Mechanisms, United Nations document, E/CN.4/2005/5.

the information contained in their respective reports was well-grounded in fact, not opinion"<sup>77</sup>. Another of the criticism raised relates to the different methods of work of the mandate holders. In this connection, the independent experts themselves have developed a Manual for mandate holders and the Office of the High Commissioner set up Guiding Principles on the relationship between the extraconventional mechanisms and OHCHR which have been requested to be updated. The independent experts, on their part, have once more reiterated their position that there should be no interferences of any kind or any clearance procedures at the UN regarding the sending of communications to Governments, the issuing of press releases on situation of concern and the holding of press briefings which were essential to their independence. In addition, they encouraged the Commission to be more vocal in its support for the extraconventional mechanisms and to be more active with respect to follow-up and in seeking the cooperation of, and the issuance of standing invitations by Member States. They also reiterated to the Expanded Bureau of the Commission their concern that the procedure for appointing new mandate-holders had become less transparent and more politicized recently<sup>78</sup>.

Within this overall context, one cannot underestimate the UN bureaucratic problems and to a certain extent the difficulties inside the Office of the High Commissioner itself as well as with the field presences to coordinate the activities of the extraconventional mechanisms that, as we have seen in previous paragraphs, have been scattered in several branches of the Office. Louise Arbour, the present High Commissioner, intends to use the centrality of the Human Rights Field Presences of her Office to enhance to the maximum extent the protection of human rights as well as the coordination with other UN Departments and programmes to ensure that international human rights standards are implemented at the country level following up the recommendations of the human rights treaty bodies as well as the extraconventional mechanisms of the Commission<sup>79</sup>.

In this regard, it may be recalled that the past history of the Human Rights Field Presences reflect a political split in the field of human rights introduced by General Assembly resolution 926 (X) of 14 December 1955 in which the Assembly established the UN Programme of Advisory Services in the field of Human Rights. Such programme, moved by the United States, aimed at abandoning the first initiatives that were taking place at the time for a monitoring human rights system. It concentrated uniquely on human rights promotional activities providing governments with advisory services and human rights capacity building. When thirty years later the negotiations started with national authorities for the establishment of human rights field presences in different countries the promotional aspect was much more attractive than the protection component which concentrates in monitoring human rights situations in order to assess whether there have been violations and breaches of the human rights instruments. This situation explains that in the terms of reference of a number of memoranda of understanding between the Office of the High

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<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

<sup>79</sup> Statement of the High Commissioner to the 2004 Heads of Field Presences Meeting Protecting Human Rights (22 November 2004).

Commissioner and concerned countries where the human rights field presences are established the promotional activities (carrot) are more favoured than the protection activities (stick). In a number of cases a balance of both has been struck, such as for the human rights field presences in Burundi, Cambodia, Democratic Republic of Congo. The recommendations of the special procedures which have visited the country should be an indispensable element to be taken into account in the daily work of the field presences.

The determination of Louise Arbour to direct the work of the Human Rights Field Presences to issues related with the "lack of compliance with respect to international human rights norms such as impunity for major human rights violations, including war crimes against humanity" as shown by the involvement of her Office in carrying two Commissions of Inquiry, one in Côte d'Ivoire and the other one, set up under Chapter VII resolution of the Security Council, on Darfur (Sudan) will have to overcome a number of practices and customs inherited from the past by human rights officials of her Office regarding the role and activities of Human Rights Field Presences. She will need to instil among many bureaucrats the values and the culture developed by the UN human rights extra-conventional protection mechanisms if she wants to succeed in creating a team spirit of collaboration among the different branches of her Office.

### 3. Concluding Observations

The UN system of human rights extraconventional instruments has been progressively set up in the course of the last thirty years as a last resort for victims of human rights abuses. The system has also been a response to palliate shortages, gaps and lack of effective procedures of the conventional system. With the creation of the thematic subsidiary bodies, the extraconventional instruments comprise at present most, though not all, of the civil, political, economic, social and cultural rights proclaimed in the Universal Declaration of Human Rights. The establishment of thematic mandates has seen a decrease in the number of geographic mandates. The main reason being the easier acceptance by States of thematic procedures dealing with human rights abuses globally. However, it should be emphasized that most thematic mandates have developed visits "*in situ*" to countries with grave problems of human rights violations for specific rights. A country report is, thus, published for each of these field missions under a large number of the thematic mandates on a given issue (torture, arbitrary detention, freedom of expression, disappearances, right to food, right to education, dumping of illicit toxics, migrants, indigenous people, etc...). Every year some 40 country reports are submitted to the Commission on Human Rights under the thematic mandates<sup>80</sup>. This approach has largely compensated the lack of more geographic mandates.

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<sup>80</sup> In 2005, the following reports on country visits by thematic mandates were submitted to the Commission: Algeria, Belarus, Bosnia-Herzegovina, Brazil (2), Canada, China, Colombia (2), Côte d'Ivoire (2), Ethiopia, Ecuador, Georgia, Guatemala (2), Honduras, Iran, Italy (2), Kazakhstan, Kenya, Mongolia, Mozambique, Nepal, Nicaragua, Nigeria, Paraguay, Peru, Romania, Serbia-Montenegro, Sudan (3), Turkey (2) and Occupied Palestine.



At present, the extraconventional instruments integrate the most universal monitoring system of human rights violations. Moreover, the system constitutes a strong inducement for States to ratify the UN conventional instruments of human rights. The extraconventional instrument system occupies a zone where the political and moral pressure of public opinion must act upon, much more than for the conventional instrument system which aims more at obtaining legal and juridical results. As all UN decisions except those adopted by the Security Council, the recommendations of the extraconventional subsidiary bodies, which are endorsed by the UN Commission on Human Rights, lack the enforcement element for their domestic implementation. As it has been described by a human rights expert, the extraconventional instruments system is something more than a "whimper" of the international community but less than a "roar" capable of threatening the States perpetrators<sup>81</sup>.

However, for the victims of human rights abuses the UN extraconventional instruments represent not only a hope but in many of the situations the unique monitoring mechanism capable of inquiring about the behavior of the national authorities of their respective countries. Contrary to the conventional instruments, the UN extraconventional mechanisms have had a very unstable basis. This situation stems from the international relations States develop and reach among themselves at a given point in time. Being established by resolutions of the Commission and not by an international treaty, the extraconventional instruments have been more exposed than the conventional ones to the dialectical relations which operate at the international level since the creation of the United Nations. On the one hand such relation comprises the governments which are generally very vigorous defenders of their national sovereignty. Governments are unlikely to be in favor of the observance by the international community of the promotion and respect of human rights and fundamental freedoms since they consider this as an interference in their domestic affairs. On the other hand, we find public opinion and the activists of civil society promoting the universalization of human rights and defenders of efficient UN monitoring mechanisms capable to watch the respect of human rights as well as the follow up of human rights situations all over the world.

Each of the extra-conventional instruments established by the Commission is the result to a great extent of the moral pressure exerted by public opinion on their respective governments and at the international level. This is done within a context of political negotiations which may vary according to a given international situation. The human rights priorities are dictated by the vision States may have at a specific moment of the place human rights occupy in international relations as well as to the possible exploitation some States may make for their own interests. The priorities accorded by the Commission on Human Rights to the extraconventional instruments have been determined by these concerns.

It must be recognized that up to the present time since the first extraconventional instruments were established the trend has always been on the increase. There have been, nonetheless, difficult periods during the "Cold War" or when reactionary U.S. Governments occupy the White House exerting strong pressure in order to

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<sup>81</sup> J. FARER, "The United Nations and Human Rights: More than a Whimper less than a Roar", *Human Rights Quarterly*, Vol. 9, 1987.

destroy or weaken the system. During such periods, even if the pressure has not succeeded in annihilating the extraconventional subsidiary bodies they have resulted in weakening them and in hampering their work by cutting financial and human resources. The difficulties found at present by the extraconventional mechanisms seem to stem not only from authoritarian regimes but also from European democratic states which up to recently were the strongest supporters of the special procedures system.

An academic research study<sup>82</sup> has identified the following six innovative indicators of UN special procedures bearing a positive impact to varying degrees in the international protection of human rights abuses: (a) the right for the UN Commission on Human Rights to monitor country situations through the geographic and thematic mandates; (b) the consolidation of the individual right to petition the UN; (c) the contribution to a better definition of a number of Public International Law norms; (d) the contribution for early warning and ascertaining extremely dangerous human rights situations; (e) the impact on country situations prior to *in situ* missions of the extraconventional subsidiary bodies enabling the mobilization of civil society, academic circles, the church and the media; (f) the impact on country situations through the *in situ* missions of the extraconventional subsidiary bodies, the elaboration of their recommendations and the follow up carried out by the national authorities.

The importance of the system of extraconventional instruments has now been duly recognized since they constitute a vital element in the application of international human rights standards. However, as pointed out by Amnesty International, the system has been undermined by the failure of many States to cooperate with mandate-holders and implement their recommendations as well as a chronic lack of adequate resources to carry out their activities effectively<sup>83</sup>. Moreover, another danger adds to the lack of resources: the new structure that the UN Commission on Human Rights, the political body which has created these mechanisms, is currently undergoing.

The UN Commission on Human Rights is the political organ which has set on foot the extra-conventional protection system of human rights. This protection system has enabled and empowered the Commission to monitor human rights abuses worldwide and has made the Commission the most authoritative UN organ dealing with human rights. But the Commission is suffering an unprecedented crisis of credibility. In his report "In Larger Freedom", the Secretary-General made a very harsh criticism stating that the Commission's capacity to perform its tasks had been increasingly undermined by its declining credibility and professionalism. He pointed out that, in particular, States had sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others. As a result, a credibility deficit had developed, which casts a shadow on the reputation of the United Nations system as a whole.

<sup>82</sup> Ingrid Nifosi, Ph.D. thesis on *The UN Special Procedures in the Field of Human Rights*, Scuola Superiore S. Anna, Pisa, Italy, 2003.

<sup>83</sup> "Meeting the Challenge: Transforming the Commission on Human Rights into a Human Rights Council", Amnesty International Index: IOR 40/008/2005.

In order to meet the expectations of men and women everywhere, the Secretary-General proposed the replacement of the Commission on Human Rights by an upgraded and smaller standing Human Rights Council<sup>84</sup>. This new Human Rights Council will be either a principal organ of the United Nations or a subsidiary body of the General Assembly<sup>85</sup>. In either case its members would be elected directly by the General Assembly by a two-thirds majority of members present and voting. The creation of the Council, the Secretary-General stated, would accord human rights a more authoritative position, corresponding to the primacy of human rights in the Charter of the United Nations. Member States should determine the composition of the Council and the term of office of its members. Those elected to the Council should undertake to abide by the highest human rights standards<sup>86</sup>. The new Human Rights Council should also preserve the independent role of the special procedures and continue the practice of the Commission regarding access for non-governmental organizations.

To these criteria, the High Commissioner for Human Rights added that *country scrutiny be exercised through a system of peer review (...) whereby all States submit to a review of law and practice concerning their human rights obligations*. In order to obtain results *a fair and transparent method be developed to compile information upon which to base the peer review*<sup>87</sup>.

It is to be hoped that the changes to be made to the Commission on Human Rights will not be window dressing and of a cosmetic character. Amnesty International has already warned that just changing the name and position of the UN human rights body will not be enough without implementation of "a whole range of other measures"<sup>88</sup>. It already appears that the changes do not go deep enough and will only constitute a minor improvement. What it would be really needed for the universal protection of individuals is an International Court of Human Rights based on the Universal Declaration of Human Rights and other pertinent international instruments such as the two Covenants, with a compulsory jurisdiction for all 191 Members of the United Nations. A court with the same powers and procedures of the already existing two regional courts: the European Court of Human Rights and the Inter-American Court of Human Rights. But, the international community seems to be still years light away from it.

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<sup>84</sup> Emphasis added by us.

<sup>85</sup> If the decision, as proposed by the Secretary-General, is to establish a Council at the same level as the Security Council and the Economic and Social Council which are principal organs of the UN an amendment of the UN Charter will be necessary. If the General Assembly creates the Council a simple resolution of that organ will suffice. This has been the consensus of Member States.

<sup>86</sup> "In Larger Freedom", Report of the Secretary-General, United Nations document A/59/2005.

<sup>87</sup> "Plan of Action submitted by the UN High Commissioner for Human Rights: Protection and Empowerment", UN document A/59/2005/Add.3, May 2005.

<sup>88</sup> In addition of a number of additional elements identified by Amnesty International as central to the creation of a Human Rights Council, it must preserve the following essential characteristics which have been crucial for the Commission's achievements: (a) the existing functions and responsibilities granted to the Commission under ECOSOC resolutions 1235 and 1503; (b) the system of Special Procedures but enhanced coherence and support; (c) the consultative status of NGOs based on Article 71 of the UN Charter and current practices of active NGO engagement with the Commission. AI Index: IOR 40/008/2005, "Meeting the Challenge: Transforming the Commission of Human Rights into a Human Rights Council".

The scope, mandate and composition of the new *upgraded and smaller standing Human Rights Council* at the time of finishing this article were being seriously considered by UN Member States. They all agreed that the present Commission on Human Rights had become “politicized and selective”. An upgraded and standing (permanent) new Human Rights Council did not present any difficulties and had been accepted. In the first draft they had also agreed that the new “Council shall be a standing subsidiary organ of the General Assembly to be based in Geneva, in replacement of the Commission on Human Rights and that the General Assembly shall review within 5 years whether the Council should be transformed into a principal organ of the United Nations”<sup>89</sup>. In fact, with the urgent action procedure the Commission on Human Rights has implicitly already the character of a standing body since it can meet each time an urgent situation calls for it. The more difficult issues were the questions of the *new mandate* and the *membership composition* of the new Council.

The United States and other First World countries were in favour of a smaller council as a way of getting rid of what they consider *undesirable members* such as Sudan, Zimbabwe, Pakistan, Cuba, Malaysia, Indonesia, Saudi Arabia and many others who in their opinion form the hard core group preventing the adoption of decisions. On the contrary, the hard core group and other Third World countries favoured a larger council which would prevent First World countries to impose their will. The proposal launched during the elaboration of the terms of the Commission on Human Rights in 1946 of having a Commission composed of “independent experts” instead of representatives of UN Member States still continued in the threshold of the twenty-first century to be too “daring”<sup>90</sup>. Among the more than 750 amendments introduced by the United States to the draft text there were a number of changes regarding the composition of the new Council which if adopted would be reduced to 30 members. These amendments envisaged that its members “should not include any State subject to measures imposed under Article 41 and 42 of the UN Charter or the subject of a UN Security Council Commission of Inquiry or similar UN Security Council investigation of human rights violations”<sup>91</sup>. Of course, such a measure would leave outside human rights violations committed by permanent members of the Security Council with the right of veto such as the United States violations in the War on Terror or Russian violence in Chechnya.

The consensus reached by Member States before the late amendments had been introduced by the United States was that the “Council shall comprise between

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<sup>89</sup> Revised draft outcome document of the High-level Plenary Meeting of the General Assembly of September 2005 submitted by the President of the General Assembly, United Nations document, A/59/HLP/CRP.1/Rev.2, August 2005.

<sup>90</sup> Ph. ALSTON, *The United Nations and Human Rights*, chapter 5, Oxford University Press, 1992.

<sup>91</sup> Two weeks before world leaders arrived in New York, the Bush administration threw the proceedings in turmoil with a call for drastic renegotiation of the draft agreement to be signed by Heads of State and Government. The United States introduced more than 750 amendments that would eliminate new pledges of foreign aid to impoverished nations, scrap provisions that call for action to halt climate change and urge nuclear powers to make greater progress in dismantling their nuclear arms. At the same time, the Bush administration was urging Members of the United Nations to take tougher action against terrorism, promote human rights and democracy. Source: *The Washington Post*, 25 August 2005.

30 to 50 members, each serving for a period of three years, to be elected directly by the General Assembly, by a two thirds majority. In establishing the membership of the Council, due regard shall be given to the principle of equitable geographical distribution and the contribution of member States to the promotion and protection of human rights. Those elected to the Council should undertake to abide by human rights standard in their respect, protection and promotion of human rights, and will be evaluated during their term of membership under the review mechanism, unless they have been recently evaluated before the start of their term in the Council<sup>92</sup> .

Of interest but difficult to realize in a political Organization such as the UN are the additional criteria raised by the High Commissioner for Human Rights to establish a *fair and transparent method* and a *system of peer review* which would enable the new Human Rights Council to *scrutinize the law and practice of all States concerning their human rights obligations*. Such has been the main aim of the human rights conventional system. However, the experience shows that after over fifty years of attempts the system is still incomplete and its many gaps have had to be filled in to a certain extent by the extraconventional mechanisms. Before the human rights conventional system came into existence and also without success, the Commission on Human Rights had encouraged Member States to report annually on the national implementation of the norms established by the Universal Declaration of Human Rights<sup>93</sup>. The consensus reached by Member States regarding this matter

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<sup>92</sup> Revised draft outcome document of the High-level Plenary Meeting of the General Assembly of September 2005 submitted by the President of the General Assembly, United Nations document, A/59/HLP/CRP.1/Rev.2, August 2005.

<sup>93</sup> The Secretary-General further elaborated on a proposed new key *peer review function* for the Council in his speech to the Commission on Human Rights on 7 April 2005 as follows: *It should have an explicitly defined function as a chamber of peer review. Its main task would be to evaluate the fulfillment by all states of all their human rights obligations. This would give concrete expression to the principle that human rights are universal and indivisible. Equal attention will have to be given to civil, political, economic, social and cultural rights, as well as the right to development. And it should be equipped to give technical assistance to States, and policy advice to states and UN bodies alike. Under such a system, every Member State could come up for review on a periodic basis. Any such rotation should not, however, impede the Council from dealing with massive and gross violations that might occur. Indeed, the Council will have to be able to bring urgent crises to the attention of the world community.* The peer review mechanism would complement not replace reporting procedures under human rights treaties. The latter arise from legal commitments and involve close scrutiny of law, regulations and practice, in regard to specific provisions of those treaties, by independent expert panels. They result in specific and authoritative recommendations for action. Peer review would be a process whereby states voluntarily enter into discussion regarding human rights issues in their respective countries. The basis would be the obligations and responsibilities to promote and protect these rights arising under the UN Charter, and as given expression in the Universal Declaration of Human Rights. Implementation of findings should be developed as a cooperative venture with assistance given to states in developing their capacities. Key to peer review is the notion of universal scrutiny, that is, that all Member States performance in regard to all human rights commitments should be subject to assessment by other states. The peer review would help avoid, to the extent possible, the politicization and selectivity that are hallmarks of the Commission's existing system. It should touch upon the entire spectrum of human rights namely, civil, political, economic, social, and cultural rights. The Human Rights Council will need to ensure that it develops a system of peer review that is fair, transparent and workable, whereby states are reviewed against the same criteria. A fair system will require agreement on the quality and quantity of information used as the reference point for the review. In this regard, the Office of the High Commissioner

had been that the Human Rights Council would “periodically review the fulfillment by all States of all their human rights obligations, in particular under the United Nations Charter and the Universal Declaration of Human Rights. This procedure will not duplicate the reporting procedures being carried out under the human rights treaties<sup>94</sup>”. Within this context the mandate holders of special procedures as well as many non-governmental organizations have already indicated that if the peer review is introduced in the Human Rights Council “the reports emanating from the special procedures system should be an integral part” of the process<sup>95</sup>. Also of interest is the fact that a Coordinating Committee of the extraconventional mechanisms has been recently established in order, among other things, to ensure that the concerns of the special procedures system are taken into consideration in the reform process leading to the Human Rights Council<sup>96</sup>. The mandate holders of extraconventional mechanisms have also proposed an additional agenda item on “Follow-up to fact finding missions by the special procedures” to the new Human Rights Council when it is established. In addition, they have indicated the responsibility of the Council to respond appropriately to the recommendations of the special procedures as well as underlined the role for the Council’s Bureau in ensuring follow-up to the decisions taken.

Be that as it may, one cannot help raising a number of questions, among which: (i) how the political selectivity of the members of the new Council is going to be avoided since it is the General Assembly who will select them with due regard to the principle of equitable geographical distribution; (ii) to what extent the new human rights organ by the fact of being upgraded will avoid the present double standards and political manoeuvres; (iii) what will be the functions, procedures and working methods of the new Human Rights Council since they have not yet been defined? (iv) will the new organ really preserve the independency of the special procedures and continue the practice established by the Commission regarding non-governmental organizations when one knows pertinently that governments in general have been particularly critical to the work carried out by both of them?. In spite of the fact that Member States have agreed that the Human Rights Council shall preserve the system of special procedures and that the arrangements made by ECOSOC for consultations with non-governmental organizations shall apply<sup>97</sup>, this last question

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could play a central role in compiling such information and ensuring a comprehensive and balanced approach to all human rights. The findings of the Council’s peer reviews would help the international community better provide technical assistance and policy advice. Furthermore, it would help keep elected members accountable to their human rights commitments. UN Human Rights Council, Explanatory Note provided by the Secretary-General, April 2005.

<sup>94</sup> Revised draft outcome document of the High-level Plenary Meeting of the General Assembly of September 2005 submitted by the President of the General Assembly, United Nations document, A/59/HLP/CRP.1/Rev.2, August 2005.

<sup>95</sup> Report of the twelfth meeting of special rapporteurs/representatives, independent experts and chairpersons of working groups of special procedures of the Commission on Human Rights and of the advisory service programme, United Nations document, E/CN.4/2006/4.

<sup>96</sup> *Ibid.*

<sup>97</sup> Revised draft outcome document of the High-level Plenary Meeting of the General Assembly of September 2005 submitted by the President of the General Assembly, United Nations document, A/59/HLP/CRP.1/Rev.2, August 2005.

is especially important since Member States will have all the room necessary in reorganizing the functions, procedures and working methods of the new Human Rights Council.

Non-governmental organizations have been mobilized since the announcement by the Secretary-General of the new Human Rights Council. They have detected potential warning signs of “regressive reform”. Human rights organizations initially welcomed this proposal, praising the Secretary-General for his dedication to human rights and reform. However, the same organizations have raised concerns about whether the new Council will retain active NGO participation and independent special rapporteurs as maintained by the Human Rights Commission. Some observers believe that by taking the UN human rights body out of ECOSOC, social and economic rights will suffer<sup>98</sup>. In a joint statement submitted by 22 NGOs measures are proposed to strengthen the system of special procedures including: (a) special procedures’ response to emerging situations; (b) regular reporting of activities and active engagement of civil society; (c) a right of access to all countries; (d) an expanded interactive dialogue; (e) greater cooperation by States; (f) an improved selection process for mandate holders; and (g) a substantive increase in UN regular budget for the extraconventional mechanisms<sup>99</sup>.

The 2005 World Summit of Heads of State and Government was held at the United Nations in New York, from 14 to 16 September, as a follow-up to the Millennium Summit and other major UN conferences and summits. At that World Summit global decisions were taken by the Heads of State and Government. However, the Summit fell short of adopting the necessary reforms to enable the UN to deal efficiently with the challenges of the 21<sup>st</sup> century. Instead it agreed on a weak document of international policy covering the following four areas: Development; Peace and collective security; Human rights and the rule of law; and Strengthening of the United Nations. Among the positive step forward of the Summit is the recognition that the international community has the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity<sup>100</sup>. However those matters will be most probably dealt directly by the Security Council and not

<sup>98</sup> GLOBAL POLICY FORUM, *Reform of the Human Rights Commission*, [www.globalpolicy.org](http://www.globalpolicy.org).

<sup>99</sup> On 12 and 13 October 2005 an open-ended Seminar was held in Geneva on Enhanced and strengthening the effectiveness of the special procedures of the Commission on Human Rights. It was attended by Governments, intergovernmental and non-governmental organizations as well as independent experts of the special procedures. The meeting afforded a unique opportunity to assess the backing and support by Governments of the special procedures with regard to the place they will occupy in the new Human Rights Council which has to be established. Latin American and Western European countries were very supportive. African countries were absent of the debate. Most of the criticisms emanated from Cuba, the Asian group as well as Eastern countries. The United States did not take part in the debate. These critical comments requested, among others: clearer criteria of admissibility of human rights allegations; a code of conduct for the experts; streamlining and rationalization of the mandates which means suppression of a number of mandates which some countries are against. A number of questions regarding the present nomination of the experts by the Chairperson of the Commission on Human Rights in consultation with the expanded Bureau and the establishment of an advisory panel by the High Commissioner to assist in the selection of independent experts were also raised.

<sup>100</sup> Another positive measure is that the Summit has resolved to double the regular budget resources of the Office of the High Commissioner for Human Rights over the next five years.

by the new Human Rights Council. Precisely, with regard to the establishment of such a Human Rights Council, the final document simply states a pledge to set up a new Council; the details must be worked out during the 60<sup>th</sup> Session of the General Assembly. The sentence stating that the Council should preserve the strengths of the Commission on Human Rights, including the system of special procedures has disappeared in the final text.

The President of the General Assembly has been requested "to conduct, open, transparent and inclusive negotiations to be completed as soon as possible during the 60<sup>th</sup> Session, with the aim of establishing the *modalities, functions, size, composition, membership, working methods and procedures for the Council*"<sup>101</sup>. The fate of the extra-conventional mechanisms is tied up to that of the new Human Rights Council which will be created to replace the UN Commission on Human Rights.

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The United Nations General Assembly adopted on 15 March 2006, three months after the completion of the present article, resolution 60/251 whereby it created the new Council on Human Rights<sup>102</sup>. The resolution was adopted by 170 votes in favour, 4 against (United States, Israel, Marshall Islands and Palau) and 3 abstentions (Belarus, Iran and Venezuela). The new Council will be integrated by 47 Member States based on geographical distribution: Africa 13; Asia 13; Eastern Europe 6; Latin America 8 Western Europe 7. They will be elected directly and individually by secret ballot by the majority of the members of the General Assembly for a period of three years and shall not be eligible for immediate re-election after two consecutive terms.

This resolution is the result of lengthy negotiations which were conducted under the leadership of the President of the General Assembly. A number of important loopholes and ambiguities remain in general and more specifically with regard to the special procedures (extra-conventional mechanisms). Within this context it is worth noting that the Council will have one year to "*review and, where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain a system of special procedures, expert advice and a complaint procedure*". The danger exists that during the next year, for the sake of rationalization, the scope and the number of mandates of special procedures might be reduced, disrupted or at the least slowed down and that the human rights violations which the special procedures expose may be silenced to a certain extent. The resolution is also vague regarding the methods of work of the Council which must yet be defined in order to "*allow for substantive interaction with special procedures and mechanisms*". It does neither indicate nor does it link, for example, the special procedures to the "*universal periodic review*" that the Council will carry out "*based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States*".

<sup>101</sup> 2005 World Summit Outcome, United Nations document A/60/L.1.

<sup>102</sup> The full text of the resolution is reproduced in the annex to this article.



On 27 March 2006 after sixty years of existence, the Commission on Human Rights decided to conclude its work in accordance with the decision of the General Assembly. The elections of the first members of the Council shall take place on 9 May 2006, and the first meeting of the Council has been convened on 19 June 2006.

#### ANNEX

### **General Assembly resolution 60/251. Human Rights Council**

*The General Assembly,*

*Reaffirming* the purposes and principles contained in the Charter of the United Nations, including developing friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and achieving international cooperation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights and fundamental freedoms for all,

*Reaffirming also* the Universal Declaration of Human Rights and the Vienna Declaration and Programme of Action, and recalling the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and other human rights instruments,

*Reaffirming further* that all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing, and that all human rights must be treated in a fair and equal manner, on the same footing and with the same emphasis,

*Reaffirming* that, while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, all States, regardless of their political, economic and cultural systems, have the duty to promote and protect all human rights and fundamental freedoms,

*Emphasizing* the responsibilities of all States, in conformity with the Charter, to respect human rights and fundamental freedoms for all, without distinction of any kind as to race, colour, sex, language or religion, political or other opinion, national or social origin, property, birth or other status,

*Acknowledging* that peace and security, development and human rights are the pillars of the United Nations system and the foundations for collective security and well-being, and recognizing that development, peace and security and human rights are interlinked and mutually reinforcing,

*Affirming* the need for all States to continue international efforts to enhance dialogue and broaden understanding among civilizations, cultures and religions, and emphasizing that States, regional organizations, non-governmental organizations, religious bodies and the media have an important role to play in promoting tolerance, respect for and freedom of religion and belief,

*Recognizing* the work undertaken by the Commission on Human Rights and the need to preserve and build on its achievements and to redress its shortcomings,

*Recognizing also* the importance of ensuring universality, objectivity and non-selectivity in the consideration of human rights issues, and the elimination of double standards and politicization,

*Recognizing further* that the promotion and protection of human rights should be based on the principles of cooperation and genuine dialogue and aimed at strengthening the capacity of Member States to comply with their human rights obligations for the benefit of all human beings,

*Acknowledging* that non-governmental organizations play an important role at the national, regional and international levels, in the promotion and protection of human rights,

*Reaffirming* the commitment to strengthen the United Nations human rights machinery, with the aim of ensuring effective enjoyment by all of all human rights, civil, political, economic, social and cultural rights, including the right to development, and to that end, the resolve to create a Human Rights Council,

1. *Decides* to establish the Human Rights Council, based in Geneva, in replacement of the Commission on Human Rights, as a subsidiary organ of the General Assembly; the Assembly shall review the status of the Council within five years;

2. *Decides* that the Council shall be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner;

3. *Decides also* that the Council should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon. It should also promote the effective coordination and the mainstreaming of human rights within the United Nations system;

4. *Decides further* that the work of the Council shall be guided by the principles of universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation, with a view to enhancing the promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development;

5. *Decides* that the Council shall, inter alia:

(a) Promote human rights education and learning as well as advisory services, technical assistance and capacity-building, to be provided in consultation with and with the consent of Member States concerned;

(b) Serve as a forum for dialogue on thematic issues on all human rights;

(c) Make recommendations to the General Assembly for the further development of international law in the field of human rights;

(d) Promote the full implementation of human rights obligations undertaken by States and follow-up to the goals and commitments related to the promotion and protection of human rights emanating from United Nations conferences and summits;

(e) Undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies; the Council shall develop the modalities and necessary time allocation for the universal periodic review mechanism within one year after the holding of its first session;

(f) Contribute, through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies;

(g) Assume the role and responsibilities of the Commission on Human Rights relating to the work of the Office of the United Nations High Commissioner for Human Rights, as decided by the General Assembly in its resolution 48/141 of 20 December 1993;

(h) Work in close cooperation in the field of human rights with Governments, regional organizations, national human rights institutions and civil society;

(i) Make recommendations with regard to the promotion and protection of human rights;

(j) Submit an annual report to the General Assembly;

6. *Decides also* that the Council shall assume, review and, where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain a system of special procedures, expert advice and a complaint procedure; the Council shall complete this review within one year after the holding of its first session;

7. *Decides further* that the Council shall consist of forty-seven Member States, which shall be elected directly and individually by secret ballot by the majority of the members of the General Assembly; the membership shall be based on equitable geographical distribution, and seats shall be distributed as follows among regional groups: Group of African States, thirteen; Group of Asian States, thirteen; Group of Eastern European States, six; Group of Latin American and Caribbean States, eight; and Group of Western European and other States, seven; the members of the Council shall serve for a period of three years and shall not be eligible for immediate re-election after two consecutive terms;

8. *Decides* that the membership in the Council shall be open to all States Members of the United Nations; when electing members of the Council, Member States shall take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto; the General Assembly, by a two-thirds majority of the members present and voting, may suspend the rights of membership in the Council of a member of the Council that commits gross and systematic violations of human rights;

9. *Decides also* that members elected to the Council shall uphold the highest standards in the promotion and protection of human rights, shall fully cooperate with the Council and be reviewed under the universal periodic review mechanism during their term of membership;

10. *Decides further* that the Council shall meet regularly throughout the year and schedule no fewer than three sessions per year, including a main session, for a total duration of no less than ten weeks, and shall be able to hold special sessions, when needed, at the request of a member of the Council with the support of one third of the membership of the Council;

11. *Decides* that the Council shall apply the rules of procedure established for committees of the General Assembly, as applicable, unless subsequently otherwise decided by the Assembly or the Council, and also decides that the participation of and consultation with observers, including States that are not members of the

Council, the specialized agencies, other intergovernmental organizations and national human rights institutions, as well as non-governmental organizations, shall be based on arrangements, including Economic and Social Council resolution 1996/31 of 25 July 1996 and practices observed by the Commission on Human Rights, while ensuring the most effective contribution of these entities;

12. *Decides also* that the methods of work of the Council shall be transparent, fair and impartial and shall enable genuine dialogue, be results oriented, allow for subsequent follow-up discussions to recommendations and their implementation and also allow for substantive interaction with special procedures and mechanisms;

13. *Recommends* that the Economic and Social Council request the Commission on Human Rights to conclude its work at its sixty-second session, and that it abolish the Commission on 16 June 2006;

14. *Decides* to elect the new members of the Council; the terms of membership shall be staggered, and such decision shall be taken for the first election by the drawing of lots, taking into consideration equitable geographical distribution;

15. *Decides also* that elections of the first members of the Council shall take place on 9 May 2006, and that the first meeting of the Council shall be convened on 19 June 2006;

16. *Decides further* that the Council shall review its work and functioning five years after its establishment and report to the General Assembly.

Part IV

The Council of Europe  
and Human Rights



# The European Convention of Human Rights

Juan Antonio Carrillo Salcedo

**Summary:** Introduction. 1. Rights and freedoms recognised. 2. Limitations and restrictions in the enjoyment of recognised human rights. 3. Derogations of obligations in participating States. 4. Limits of the scope of the European system for the protection of human rights: 3.1. Diversity among States Parties to the Convention and in its additional normative protocols; 3.2 Reservations and interpretative declarations. 5. The jurisdictional protection mechanism instituted in the European Convention on Human Rights. 6. The European Court of Human Rights: 6.1. Organisation. 6.2. Active legitimisation: inter-state complaints and individual applications. 6.3. Conditions of admissibility. 6.4 Proceedings. 7. Effects and execution of European Court of Human Rights' judgments. 8. The European Court of Human Rights' interpretation of the Convention: 8.1. The doctrine of the margin of appreciation of States as a manifestation of the tendency towards judicial self-control. 8.2. Manifestations of the favourable tendency towards the protection of rights and freedoms through an evolving, dynamic, and teleological interpretation of the European Convention on Human Rights. 9. Problems which the European Court of Human Rights is currently facing, and possible remedies: Protocol No. 14. 10. *De lege ferenda* proposals for perfecting the system. 11. Conclusions: the significance of the Convention in the framework of International Human Rights Law

## Introduction

Signed in Rome on 4<sup>th</sup> November 1950, and coming into force on 3<sup>rd</sup> September 1953, the Convention for the protection of human rights and fundamental freedoms (from here on, the European Convention of Human Rights) made concrete principles set out in Article 3 of the Statute of the Council of Europe, which states that every Member State

“must accept the principles of the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms”.

Re-launched on the occasions of two great speeches made by Winston Churchill in Zurich (on 19<sup>th</sup> September 1946) and London (on 14<sup>th</sup> May 1947), the International Committee of Movements for the European Unity (the European Movement) called a Congress of Europe, which took place in The Hague from 8<sup>th</sup> to 10<sup>th</sup> May 1948. In its Message to Europeans, approved at the final plenary session, the participants declared, among other things, the following:

“2. We desire a Charter of Human Rights guaranteeing liberty of thought, assembly and expression as well as the right to form a political opposition;

“3. We desire a Court of Justice with adequate sanctions for the implementation of this Charter”.

At the suggestion of the Political Committee, the Congress also approved a Resolution in which it showed itself convinced that a Court of Justice should be created, before which all citizens would be able to lodge a petition in the case of the violation of their rights. Similarly, the Cultural Commission, presided over by the Spaniard Don Salvador de Madariaga, proposed the creation of a Court with the authority to adopt binding decisions which legally obliged States to respect a Declaration of Human Rights.

Dealing with the technical problems brought about by these proposals was passed to the legal section of the European Movement, charged with submitting a project, whose leader was the great French jurist Pierre-Henri Teitgen. On 12<sup>th</sup> July 1949, the European Movement submitted to the Committee of Ministers of the Council of Europe a project on the European Convention of Human Rights, in which recognised rights were set out, and a control mechanism, with the authority to ensure the compliance with obligations for States as regards human rights, was also envisaged. After a complex process, the Committee of Ministers decided that the project, eventually adopted in August 1950, should be opened for signature at its session in Rome, where the Convention was signed on 4<sup>th</sup> November 1950.

Regarding States enthused with the same spirit, and in possession of a common heritage of ideals and political traditions for the respect of freedom and the rule of law, member States of the Council of Europe reaffirmed their adherence to

“the spiritual and moral values which are the common heritage of their peoples and the source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy” (third paragraph of the Preamble to the founding Treaty of the Council of Europe).

In this way, the signatory States to the European Convention of Human Rights decisively contributed to the consolidation of a revolutionary idea in international law which, begun with the proclamation of the intrinsic dignity of all human beings in the United Nations Charter, had been progressively confirming with the Convention on the Prevention and Punishment of the Crime of Genocide, the Universal Declaration of Human Rights, and the Geneva Conventions on International Humanitarian Law: the conviction that all sovereign States have the legal obligation to respect the human rights of those people who come under their jurisdiction. As well as making more precise the fundamental human rights principles set out in the Statute of the Council of Europe, the Convention transformed many of the principles proclaimed in the Universal Declaration of Human Rights into precise legal obligations.

During the first *travaux préparatoires* of the Convention, the existence of a link between the Declaration adopted by the General Assembly of the United Nations in 1948 and the European Convention project became very clear, to the point where the section dedicated to recognised rights did not define these rights, but made them



explicit through an explicit reference to the corresponding articles of the Universal Declaration, in the following terms: “in conformity with the Article... of the United Nations Declaration”. After these *travaux préparatoires*, however, it was considered more in keeping with the nature of an international treaty to autonomously define the rights recognised, and not do this through reference to articles in the Universal Declaration.

Nevertheless, when they came to the production of the Preamble to the Convention, and the decision that the Universal Declaration would form an integral part of it, the writers of the European Convention of Human Rights included three explicit references to the Declaration in the first, second, and fifth paragraphs of the Preamble, as follows:

“Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10 December 1948”;

“Considering that this Declaration aims at securing the universal and effective recognition of the rights therein declared”;

“Being resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration”.

The reference to the “collective enforcement of certain of the rights stated in the Universal Declaration” is important, as the establishment and putting into practice of a complex institutionalised guarantee mechanism with the aim of ensuring effective respect of obligations assumed by member States is, without any doubt, the most characteristic and distinctive feature of the European Convention of Human Rights; similarly significant are the words “to take the first steps”, as they make clear that the Convention was not conceived of as something definitive, but rather quite the opposite, as a first step and starting point for the progressive development of the international recognition and protection of human rights.

In effect, the Convention was completed with fourteen protocols adopted between 1952 (the first additional protocol) and 2004 (the fourteenth additional protocol, signed on 13<sup>th</sup> May 2004), which will come into force once it has been ratified by all States which are members of the Convention, currently all the member States of the Council of Europe. Of these protocols, eight are additional, and, as such, following their coming into force, bind only those States which are party to them. Of these, numbers one, four, six, seven, twelve, and thirteen are normative in character, in the sense that they widen the catalogue of rights recognised in the Convention; protocols nine and ten are not normative in character, as they refer to the guarantee mechanism instituted in 1950. Protocols three, five, eight, eleven, and fourteen refer to the organisation of the guarantee mechanism, and its authority. They are amendment protocols and therefore, unlike additional protocols, require the ratification of all member States of the Convention, which will be modified after their coming into force. Protocol number eleven, adopted in Strasbourg on 11<sup>th</sup> May 1994, and coming into force on 1<sup>st</sup> November 1998, radically modified the guarantee mechanism established in 1950, through the institution of a single body for jurisdictional control, the European Court of Human Rights, which

is permanent and of obligatory jurisdiction. This renders the ninth and tenth additional protocols worthless (only the first of these actually ever came into force); their aim was to modify the Convention, as regards which they had active legitimacy for making demands before the Court (protocol number nine), and with regards the majority required in the Committee of Ministers so that they could adopt a definitive and binding decision regarding whether or not there was a violation of the Convention in those cases where the case was not submitted to the Court, and through this brought to the attention of the Committee of Ministers (additional protocol number 10).

The Second Protocol conferred consultative jurisdiction to the Court so that, at the request of the Committee of Ministers of the Council of Europe, it could give advisory opinions on legal issues related to the interpretation of the Convention and its protocols. To date, the Committee of Ministers has not sought a consultative opinion from the European Court of Human Rights, which should not be seen as particularly strange given that it is not very probable that a political body with the characteristics of the Committee of Ministers should want to consult the Court regarding interpretation of the Convention.

The European Convention of Human Rights and its complementary protocols are restricted multilateral treaties, in the sense that only member States of the Council of Europe can be part to the Convention, and only these States can be party to the additional protocols. After the reforms introduced by the amendments of Protocol No. 11, the European Convention of Human Rights was made up of fifty-nine articles distributed under three titles. The first title (Articles 2 to 18) sets out the catalogue of rights guaranteed; the second title (Article 19 to 51) regulates the structure and functioning of the European Convention of Human Rights; and the third title (Articles 52 to 59) includes many different regulations.

## 1. Rights and freedoms recognised

The catalogue of rights guaranteed is very limited; the Convention recognises:

- the right to life (Article 2);
- the right to not be subjected to torture, or inhuman or degrading punishments or treatment (Article 3);
- the right to not be forced into slavery, servitude, or forced labour (Article 4);
- the right to liberty and security of person, and rights as a detainee (Article 5);
- the right to a fair trial and the presumption of innocence (Article 6);
- the right not to be convicted on account of any act or omission which, at the time it was committed, was not a criminal offence according to national or international law, and the right for criminal law not to have retrospective effects (Article 7);
- the right to respect for private and family life (Article 8);
- freedom of thought, conscience and religion (Article 9), of expression and information (Article 10), and of peaceful assembly, and of association, including the right to form and join trade unions (Article 11);

- the right to marry and found a family (Article 12);
- the right for everyone whose rights and freedoms as set forth in the Convention have been violated to an effective remedy before a national authority, including when the violation has been committed by persons acting in an official capacity (Article 13);
- finally, the right to the enjoyment of the rights and freedoms above mentioned without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status (Article 14).

The rights and freedoms recognised in the Convention make two important facts clear: firstly, that the rights and freedoms are set out through indeterminate legal categories, or categories which will become concrete when applied to actual cases; secondly, that the Convention fundamentally protects civil and political rights, although some of them (such as, for example, the right to freedom of syndication) have an indisputable social and economic dimension. This was due to the fact that there was a desire to proceed in stages, first protecting the fundamental rights without which the pluralist systems of democratic States and the rule of law cannot function, apart from the fact that in the Council of Europe, social rights are objects of recognition and protection in the European Social Charter (adopted in Turin on 18<sup>th</sup> October 1961, and which came into force in 1965).

The group of rights recognised in the European Convention of Human Rights is seen as a *minimum*, given that, in accordance with what is established in Article 53, none of its regulations should be interpreted in the sense of limiting or endangering human rights and fundamental freedoms which could be recognised under the law of Member States, or under any other human rights treaty to which they are also Parties.

The catalogue of human rights recognised in the European Convention of Human Rights has been extended through additional protocols numbers one, four, six, seven, twelve, and thirteen, which have added new rights and freedoms to those recognised in the Convention, with the aim of developing it, and achieving better consistency between the Convention and the International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations in 1966 and coming into force on 23<sup>rd</sup> March 1976, of which the Member States of the Council of Europe are also members.

The First Protocol, adopted in 1952 as an additional Protocol, added some rights which had not been included in the text adopted in 1950 to the list of rights in the Convention. These were: i) the right to peaceful enjoyment of possessions, through which nobody can be deprived of their property except in the public interest and subject to the conditions provided for by law and by the general principles of international law (Article 1); ii) the right to education, with the State respecting the rights of parents to ensure that such education is in conformity with their convictions (Article 2); and, finally, iii) the obligation of the State to periodically organise free elections (Article 3).

The Fourth additional protocol prohibits deprivation of liberty on the ground of inability to fulfil a contractual obligation (Article 1), and recognises the right of

everyone lawfully within the territory of a Member State to liberty of movement throughout the territory of the State, and to freely choose their residence (Article 2). Finally, Articles 3 and 4 of the Protocol N.º 4 preclude a State from expelling its own nationals or from refusing them admission to the State, and prohibit the collective expulsion of foreigners respectively. This last regulation brings about political and legal difficulties considering the current situation of migratory flows towards Europe, and explains the reluctance of some States to be bound by it. Thus, Spain, signed the Fourth Protocol on 23<sup>rd</sup> February 1978, but has not ratified it yet and, as such, is not a party to it. Nevertheless, and in accordance with what is set out in Article 18 of the Vienna Convention on the Law of Treaties of 23<sup>rd</sup> May 1969, it has the obligation to refrain from acts which would defeat the object and purpose of Protocol N.º 4.

The Sixth Protocol establishes the abolition of the death penalty, and sets out in Article 1 that nobody can be condemned to such penalty or executed. In this way, Protocol N.º 6 complements Article 2 of the Convention, as the right to life recognised in it leaves outside its sphere of influence the execution of a sentence pronounced by a court which, in the case of a crime for which death penalty is provided by law, imposes such a punishment. However, Article 2 of the Sixth Protocol allows Member States to impose the death penalty, in accordance with their legislation, for acts committed in time of war or of imminent threat of war.

The Seventh Protocol, adopted on 22<sup>nd</sup> November 1984, expands the catalogue of rights and freedoms recognised in the system of the European Convention of Human Rights, by prohibiting the arbitrary expulsion of foreigners, recognising new procedural guarantees (such as the right to appeal against a penal sentence, the right to obtain State compensation when a sentence is annulled or a pardon is given as a result of a miscarriage of justice, and the principle of *non bis in idem*), and proclaiming the principle of legal equality of spouses as regards civil rights and responsibilities.

Finally, two other additional Protocols, numbers twelve and thirteen, which have not yet come into force, complete the catalogue of rights recognised. The Council of Europe opened for signature the Twelfth Protocol on 4<sup>th</sup> November 2000 in Rome at the ceremonies commemorating fifty years since the signature of the European Convention of Human Rights, sets out in its first Article a general prohibition of discrimination, in stating that "the enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". This Protocol fine-tunes the right recognised in Article 14 of the European Convention of Human Rights, in which the right to not experience discrimination is not an autonomous right, as it only protects the right not to be discriminated against in the enjoyment of the rights recognised in the Convention.

The Thirteenth Protocol, regarding the abolition of the death penalty, was adopted in Vilnius on 5<sup>th</sup> May 2002. It complements the Sixth Protocol, leaving capital punishment abolished in all circumstances, and will come into force when it has been ratified, approved, and accepted by ten States which are party to the European Convention on Human Rights (It entered into force in July 2003).

## 2. Limitations and restrictions in the enjoyment of recognised Human Rights

Some of the rights recognised in the European Convention of Human Rights can be objects of limitations and restrictions. Such is the case for the rights recognised in Articles 8 to 11 of the Convention: the right to respect for private and family life, home, and correspondence; the right to manifest religion or belief; the right to freedom of assembly, and association, including the right to form and join trade unions. The second paragraphs of these articles foresee, in effect, that the exercise of these rights can be limited, although they will not be able to be the objects of restrictions other than those which, prescribed by law, are deemed necessary in a democratic society for the achievement of one or some of the following legitimate aims: national security, public safety, prevention of disorder or crime, protection of health or morals, or protection of the rights and freedoms of others.

Article 2 of the Fourth Protocol, for its part, admits that the right to freedom of movement recognised within it can be the object of restrictions foreseen in the law when they constitute measures necessary in a democratic society in the interest of national security or public safety, for the maintenance of public order, for the prevention of crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.

In the same way, the right to liberty of movement within the territory of a State and to freely choose residence may be subject, in particular areas, to restrictions which, prescribed by law, are justified by the public interest in a democratic society.

In addition, Article 18 of the Convention sets out in a general way that the restrictions which could be imposed on the rights and freedoms recognised cannot be applied for any purpose other than those for which they have been prescribed. There are, therefore, limitations on the exercise of the rights and freedoms recognised in the Convention, but they must be foreseen in the law, be in response to a legitimate final objective, and be necessary in a democratic society.

The notion of “necessary in a democratic society” is one of the indeterminate legal concepts which appear in the European Convention of Human Rights. The definition in a particular case of what is necessary in a democratic society is, obviously, difficult, as it deals with a legal concept of vague and abstract shape; nevertheless, as has been stated by Daniel I. García San José, the jurisprudence of the European Court of Human Rights has defined a criterion for the interpretation of this notion, having repeatedly signalled that interferences in the enjoyment of a right (i.e. its limitations and restrictions) must be proportional, as the Convention is characterised by its concern for balance between individual rights and general interests.

So, for example, in its judgment of 9<sup>th</sup> December 1994, recounted in *López Ostra v. Spain* (a case in which the applicant alleged a violation of her right to respect for her home, recognised in Article 8 of the Convention, due to smells, noises, and contaminating smoke released by a liquid and chemical waste management plant), the Court came to the conclusion that Article 8 of the Convention was applicable, and had been violated because the State in question

“did not succeed in striking a fair balance between the interest of the town’s economic well-being —that of having a waste-treatment plant— and the applicant’s effective enjoyment of her right to respect for her home and her private and family life” (paragraph 58 of the decision).

### 3. Derogations and obligations in participating States

Article 15 of the European Convention of Human Rights sets out that in time of war or any other public emergency threatening the life of the nation, Member States will be able to derogate from their obligations under the Convention. Such derogations, however, should only be adopted in strict accordance with the exigencies of the situation, and provided that they are not inconsistent with other obligations under international law. Any State exercising this right to derogation will keep the Secretary General of the Council of Europe fully informed of the measures taken, the reasons that inspired them, and of the date when they will cease to be in force and the provisions of the Convention will again apply.

Therefore, the option for derogation is not totally discretionary, nor is it exclusively entrusted to the unilateral and subjective appraisal of the Member State availing itself this right as, apart from the obligation to inform the Secretary General of the Council of Europe, the European Court of Human Rights has the authority to consider and decide whether, in a given case, the derogation was demanded by the situation at the material time, and whether it did not contradict other obligations under international law legally binding for the State in question.

So, in its judgment of 18th January 1978, recounted in the inter-State *Ireland v. United Kingdom of Great Britain and Northern Ireland*, the Court recognised that it falls to the State to determine whether there is a public emergency threatening the life of the nation; and, in the case of an affirmative answer, how far it is necessary to go in attempting to overcome the emergency; on this issue, section one of Article 15 leaves the State with a wide margin of appreciation. But the Court adds that States “do not enjoy an unlimited power in this respect (...). The domestic margin of appreciation is thus accompanied by a European supervision” (paragraph 207 of the judgment).

However, even when Article 15 is applicable, no derogation is permitted from Article 2, except in respect of deaths resulting from lawful acts of war, nor from Articles 3, 4 (1) and 7. Therefore, the right to life, freedom from torture or inhuman or degrading treatment, freedom from slavery and servitude, and the right to be protected against the retroactivity of criminal law do not admit any exception or derogation, and are guaranteed by imperative norms.

These are absolute rights, thus as regards the prohibition of torture, the European Court of Human Rights stated in its judgment of 28<sup>th</sup> July 1999 (*Selmouni v. France*, in which the Court considered that the physical and mental violence committed against the applicant's person caused severe pain and suffering and was particularly serious and cruel, and that such a conduct should be regarded as acts of torture for the purposes of Article 3 of the Convention) that Article 3 enshrines one of the most fundamental values of democratic societies, so

“Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 (2) even in the event of a public emergency threatening the life of the nation”

(paragraph 95 of the judgment of 28th July 1999, see the following judgments: *Ireland v. United Kingdom* of 18<sup>th</sup> January 1978; *Soering v. United Kingdom* of 7<sup>th</sup> July 1989; and *Chahal v. United Kingdom* of 15<sup>th</sup> November 1996).

Article 15 of the Convention proves the existence of a European public order regarding human rights, as, in establishing limits to the States' right to derogate the legal obligations they have assumed, the European Convention of Human Rights made concrete and positive the notion of *ius cogens* in international human rights law.

#### 4. Limits of the scope of the European system for the protection of Human Rights

The existence of this European public order does not, however, mean that the Convention's system constitutes a European human rights *ius commune*, as, in the legal framework made up by the European Convention of Human Rights and its additional normative Protocols, factors of fragmentation and relativism which cannot be ignored are at work, and limit its operation and effect.

The European system for the protection of human rights has, in effect, been created through treaties, i.e. through voluntary agreements between States, with the result that the role of the consent of sovereign States conditions the achievement of this group of legal obligations: firstly, because of the fact that although all Member States of the Council of Europe are bound by the European Convention of Human Rights, not all Member States are bound by the different normative Protocols which have extended the list of recognised rights and freedoms; secondly, because when signing the Convention or one of its normative Protocols, or when depositing its instruments of ratification, States can make reservations or interpretative declarations which exclude, or subjectively interpret, the legal obligations undertaken by Member States. All these assumptions constitute undeniable manifestations of relativism and fragmentation, which cannot be ignored, and which limit the scope of the European Convention of Human Rights' system, despite the constitutional and European public order dimensions of human rights which the Convention undoubtedly has.

##### 4.1. Diversity among States Parties to the Convention and to its Additional Normative Protocols

Not all States which are part of the Convention are legally bound by the different normative Protocols, with the result that the system as a whole does not operate in a homogenous way due to the fact that the States have not taken on the same legal obligations. Spain, for example, is a State which is party to the Convention, but not to the Fourth, Seventh, and Thirteenth Protocols, and has not even signed the Twelfth Protocol.

All this means that the Convention's system is not a homogenous legal whole which binds all the Member States of the Council of Europe equally, as the number of States participating in the various legal instruments is not the same as that of those in the system as a whole, a characteristic which, without doubt, represents a

factor of heterogeneity and fragmentation which limits the scope of the European *ius commune* of human rights.

A positive step of enormous importance has been made in the past few years, as all member States of the Council of Europe are now part of the European Convention of Human Rights, and all States wishing to be members are obliged to sign the Convention at their time of joining the Council of Europe, and to ratify it as soon as possible. The aim of the Convention, then, is to legally bind the group of States which are members of the Council of Europe, which can undoubtedly be seen to be a step towards progress if compared with the States' discretion at the beginning of the system as, at that time, the Member States of the Council of Europe were not legally bound to be part of the European Convention of Human Rights. A true European *ius commune* of human rights will not exist, however, until all Member States of the Council of Europe become, in turn, party to the Convention and to all the normative Protocols which have been developed through the progressive extension of the rights protected.

#### 4.2. *Reservations and interpretative declarations*

The heterogeneity which has just been referred to is equally evident in the possibility of all member States to make reservations and interpretative declarations regarding a particular section of the Convention due to the fact that any law in force within their territory is not in conformity with the aforementioned provision.

In effect, the European Convention on Human Rights, although within the procedural and substantive limits established in its Article 57 (in accordance with which, for example, reservations of a general character are not permitted), allows member States to make reservations which introduce factors of relativism, despite the fact that it is a Convention which, unlike the more "classic" treaties, exceeds the sphere of mere reciprocity between States and creates objective obligations which benefit from collective guarantees.

Reservations and interpretative declarations lodged by States Parties are, however, regarding their validity, subject to the control of the European Court of Human Rights, with the result that the decision as to whether or not they are valid, as well as their interpretation, escapes the individual, subjective, and unilateral appreciation of States which are members of the Convention. As regards this, the European Court of Human Rights resolutely affirmed in its decision of 29<sup>th</sup> April 1988, regarding the *Belilos vs. Switzerland* case, that the silence of the depositary and the Member States does not deprive the Convention institutions of the power to make their own assessment concerning the validity of a reservation. In its judgment, the Court declared invalid a Swiss reservation, as it considered it to be contrary to the Convention, clearly confirming that the jurisdictional control body set up by the European Convention of Human Rights has the competence to determine whether a reservation is valid or not.

If the Court decides that a reservation is invalid, this will not have legal effects, and the State which made the reservation will remain bound by the conventional law which it was attempting to avoid through the lodging of a reservation at the time of the ratification of the Convention, or of one of its Protocols.



In this way, the European Court of Human Rights has been able to limit the potentially devastating effects of State subjectivism. Nevertheless, the aforementioned factors of fragmentation and heterogeneity, and especially the possibility for States to lodge interpretative declarations and reservations —so difficult to justify when dealing with conventions protecting human rights— sometimes cause complex legal problems and, in any case, are surprising in a system which was conceived as a manifestation of a European public order for the protection of fundamental rights and freedoms. The worrying effect of reservations explains the fact that they are not admissible in Protocols N.º 6 and 7, which deal with the abolition of the death penalty; both, in effect, state that no reservation to any of their provisions will be accepted, thus anticipating what, in my opinion, would be desirable for the future as regards the European Convention of Human Rights and all its Protocols: the non-admission of reservations, through which all Member States of the Council of Europe could be a common normative whole.

## 5. The mechanism of jurisdictional protection instituted in the European Convention of Human Rights

When it was adopted in 1950, the most characteristic and significant feature of the European Convention of Human Rights consisted in the setting up of a complex institutionalised mechanism of jurisdictional guarantees, made up of two bodies: the European Commission of Human Rights, and the European Court of Human Rights.

In the project of the European Convention of Human Rights which the European Movement submitted to the Committee of Ministers of the Council of Europe, there was a proposal for the existence of two bodies: a Court and a Commission. The final aim of the proposal was to face up to the worries existing that the Court would be swamped under an avalanche of futile litigations and, as well, to the risk that it could be used with political purposes, hence the demand that petitioners should have to previously make known their complaints to the Commission, which would act as a filter.

The debates which took place in the heart of the Council of Europe, and led to the adoption of the Convention, confirmed that these fears were deeply felt, and from that point on, the negotiators chose a guarantee mechanism comprising three bodies: the European Commission of Human Rights, the European Court of Human Rights, and the Committee of Ministers of the Council of Europe.

The creation of a European Commission of Human Rights was not a controversial issue at the time of the writing of the Convention; however, there were many who were opposed to the creation of a Court, as they considered that such a body did not respond to a real need among the Member States of the Council of Europe. The final result was a compromise, based on a tripartite structure for the jurisdictional guarantee mechanism: the Commission, the Court and, as a result of the facultative nature of the jurisdiction of the latter, the Committee of Ministers of the Council of Europe.

The Commission could deal with the applications of a Member State against another State Party to the Convention, or receive complaints from individuals. In the

first case, its competence was obligatory; in the second, however, it was facultative or optional. The Commission was charged with deciding the admissibility of the applications, establishing the facts, contributing to possible friendly settlements, and if necessary, expressing its opinion as to whether there was a breach of the Convention, an opinion which the Commission would refer to the Committee of Ministers of the Council of Europe.

The Court, either of voluntary or of optional jurisdiction, was charged with the task of taking a definitive and binding decision regarding the affairs submitted by the Commission or by a Member State interested in the case, either due to its position as the plaintiff State or to its position as the respondent State before the Commission, or because of being the State whose national is the applicant.

In cases which could not be referred to the Court because the respondent State had not accepted its jurisdiction, as well as in other cases where the Commission or the Member State did not refer the case to the Court, the Committee of Ministers of the Council of Europe would have quasi-judicial capacity for the adoption of a definitive and binding resolution regarding whether or not there was a violation of the Convention which could be attributed to the State which had been accused before the Commission by another Member State of the Convention, or by an individual who found him or herself under its jurisdiction, if the State concerned had accepted the authority of the Commission to receive the applications of individuals.

The facultative character of the jurisdiction of the Court explains the anomalous presence of a political body, the Committee of Ministers of the Council of Europe, among those bodies which aimed at ensuring the compliance of the legal obligations taken on by States Parties to the Convention, with the authority to decide whether in a case previously examined by the Commission there was a violation of the Convention on the part of the accused State. In any case, the jurisdictional guarantee mechanism set up in 1950 operated on the basis of applications, and not *ex officio*, and it required the intervention of two bodies: the Commission and the Court, or the Commission and the Committee of Ministers if the case had not been referred to the European Court of Human Rights by those who had the legitimate power to do this (the Commission and the State or States involved in the case).

Despite its deficiencies (the facultative character of the authority of the Commission to receive the applications of individuals; the optional nature of the Court's jurisdiction; the possible intervention of an inter-governmental political body, regarding cases which were not referred to the Court; the lack of active legitimisation for the individual faced with the European Court of Human Rights), and the undeniable complexity of the guarantee mechanism set up in 1950, the European Convention of Human Rights introduced significant innovations in international law.

Firstly, it set up a collective guarantee system, through which a Member State could present an international complaint before a body of obligatory authority, the European Commission of Human Rights, against another Member State, although the victims of the alleged violation might not be nationals of the applicant State; this meant that the nationality requirement of the complaint was overcome.

Secondly, and despite the facultative character of the competence of the Commission for dealing with the applications of individuals, the mere admission of this possibility in 1950 constituted another rupture in traditional international law, as it

allowed that a person, a non-governmental organisation, or a group of individuals, could directly bring a complaint against a State, even if it was their own, before an independent and impartial international body, the European Commission of Human Rights. The significance of this important innovation in international law was, however, limited: on the one hand, because it did not institute a system of *actio popularis*, due to the fact that the individual applicant had to have been a victim of the alleged violation; on the other hand, because the competence of the Commission to receive applications from individuals was accepted by States in an optional capacity.

Thirdly, and finally, a Court was set up, charged with pronouncing definitive and binding judgments regarding affairs which were referred to it either by the Commission or by a Member State involved in the case, which was also a progressive step despite the voluntary nature of the jurisdiction of the Court, which could only deal with the cases in which the respondent State had declared that it recognised the jurisdiction of the Court as obligatory fully and without any special convention, and despite the lack of active legitimisation of individuals.

However, States safe-guarded some of their sovereign authority, and retained much of their unwillingness to be controlled by an independent and impartial guarantee mechanism: the first is evident in the facultative character of the competence of the Commission to receive the applications of individuals and the optional nature of the jurisdiction of the Court; the second is obvious both in the anomaly of the eventual intervention of a body of a political nature —the Committee of Ministers of the Council of Europe— in the functioning of a jurisdictional guarantee mechanism, and in the establishment of a system of double instance, in which respondent States had two opportunities to oppose an accusation: first before the Commission, and then before the Court or before the Committee of Ministers if the case was not taken to the Court.

This protection mechanism turned out to be difficult, slow, and unsatisfactory: difficult, firstly, because of the intervention of two bodies, the Commission and the Court, or the Commission and the Committee of Ministers if the case was not referred to the Court; slow, secondly, which brought about the paradoxical situation that, ostensibly, a right recognised in the Convention could not be protected: that of the administration of justice within a reasonable time-frame; finally, and most importantly, unsatisfactory for individuals who alleged that they had been victims of the violation of one of the recognised rights: above all because they only could have active legitimisation before the Commission, but not before the Court, which meant that the European system of protection did not fully respect one of the fundamental rights recognised within it: that of having access to an independent and impartial tribunal; also, because the lack of active legitimisation of individuals before the Court could facilitate that a case be decided on by a political body, the Committee of Ministers of the Council of Europe, and not by an impartial and independent judicial body.

In practice, however, the evolution of the system was very different to what had been foreseen in 1950: in effect, all the Member States ended up accepting both the competence of the Commission to receive the applications of individuals and the jurisdiction of the Court, which meant that the majority of cases was resolved by the Court and not by the Committee of Ministers. In this way, the Court ended up

becoming the mainstay of the guarantee mechanism, thereby confirming the distinctive characteristics of the human rights protection system set up in the European Convention on Human Rights: its jurisdictional nature.

The progressive increase in awareness of this distinctive characteristic, as well as the deficiencies in the guarantee mechanism set up in 1950, explains that both in the academic sphere as well as in the heart of the bodies of the Council of Europe, the need to significantly revise the guarantee system was frequently repeated, with a knowledge that partial and fragmentary solutions would not suffice.

The principal proposals for reform were as follows:

1. That the Commission and the Court become permanent bodies.
2. That the Commission become a first-instance court, and the Court be used for appeals.
3. To set up a single Court with the authority to decide regarding both the admissibility of the application, as well as the merits of the complaint

The third of these proposals was the one that was taken into consideration by the Parliamentary Assembly of the Council of Europe, and which was accepted in the Vienna Declaration of the Heads of State and Government of the Member States of the Council of Europe (9<sup>th</sup> October 1993). In this Declaration it was, in addition, stated that States which were candidates for membership of the Council of Europe had the obligation to sign and ratify the European Convention of Human Rights. From this moment on it was clear that the reform of the system was oriented towards a Convention to which all Member States of the Council of Europe would be party, and of which a permanent Court, with obligatory jurisdiction and decisive authority, would be the only jurisdictional guarantee body.

On 11<sup>th</sup> May 1994, a new protocol was adopted and opened for signature, Protocol N.º 11, which significantly modified the guarantee mechanism set up in 1950 on the setting up of a single control body, the European Court of Human Rights, a permanent court of obligatory jurisdiction, before which, under the same conditions as States, individuals have active legitimisation for filing complaints once the available domestic remedies have been exhausted, with the result that an independent and impartial judicial body will decide, through a binding sentence, whether or not there has been a violation of one of the rights set forth in the Convention or its normative Protocols.

When amendments of Protocol N.º 11 came into force, an important step towards the perfection of the European human rights protection system was made, due to the fact that, as Ángel Sánchez Legido has said, from this date a permanent Court with obligatory jurisdiction, before which individuals have active legitimisation to lodge complaints in the same conditions as States, is the sole body competent to decide whether or not there was a violation of recognised rights in a particular case.

## 6. The European Court of Human Rights

In examining the issues below, the normative reference will be that of Protocol N.º 11, which came into force on 1<sup>st</sup> November 1998.

### 6.1. Organisation

The Court, whose seat is in Strasbourg, is permanent, and is made up of a number of judges equal to that of the number of Contracting States, which, nowadays, are the Member States of the Council of Europe. The wide composition of the Court has the benefit of, in very sensitive political or social questions, avoiding the impression that the judgments of a Court, restrictive regarding its composition, could be seen as coming from a "foreign court", not acquainted with the historical and social background of the State concerned. In addition, the high number of judges allows the Sections of the Court to work in Chambers, which facilitates the consideration of the high number of cases which must be resolved.

The judges are elected by the Parliamentary Assembly of the Council of Europe, chosen from a list of three candidates submitted by each Member State. They should be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence. They have the duty to be independent and they are not representatives of the State in respect of which they have been chosen, and, during their terms of office, may not engage in any activity that is incompatible with the demands of independence, impartiality, and availability needed for a full-time office. Judges serve for six-year terms, and may be re-elected; the term expires when they reach the age of seventy, although they hold office until they are replaced, and continue to be in charge of the cases to which they were assigned.

For the examination of cases submitted to it, the Court acts in committees made up of three judges, in Chambers of seven judges, or in a Grand Chamber of seventeen judges. The Court's Chambers set up Committees for a fixed period of time. The judges of very Chamber are appointed on the basis of rotation in order to allow all judges to participate as full members. The Grand Chamber is composed of seventeen judges, who include the President, Vice-Presidents, the Presidents of the Chambers, and the judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber, no judge from the Chamber which rendered the judgment may sit in it, with the exception of the President of the Chamber and the judge who intervened in respect of the State concerned. The Grand Chamber is structured into two formations, whose composition is geographically balanced, and attempts to reflect the diverse legal systems of the Member States. Organisational issues are dealt with by the Court in plenary sessions in which all judges participate. The Court has the competence to organise itself and, as it does this, the Plenary Court is competent to elect a President, Vice-presidents, and the Registrar, and to adopt the rules of the Court. The judge elected in respect of the Member State concerned in a case submitted to the Court will be an *ex officio* member of the Chamber or of the Grand Chamber; in his or her absence, or when they are not in the condition to intervene, the same State will designate a person to act as judge on an *ad hoc* basis.

### 6.2. Active legitimisation: inter-state complaints and individual applications

The jurisdiction of the Court extends to all issues relating to the interpretation and application of the Convention and the protocols thereto which are submitted to it by those which have active legitimisation to do so.

In accordance with what is set out in Articles 33 and 34 of the Convention, the following can file applications:

- a) Any Member State which refers to the Court any alleged breach of the provisions of the Convention and the protocols thereto, and which, in its opinion, can be imputed to another State Party (Article 33 of the Convention);
- b) Any person, non-governmental organisation, or group of individuals claiming to be the victim of a violation of the Convention by one of the Member States (Article 34 of the Convention).

When dealing with inter-state complaints, any Member State, although it may not be that of the nationality of the victims of the alleged violations, can lodge a complaint before the Court, a fact which makes clear the note of collective guarantee which characterises the jurisdictional mechanism of the European system for the protection of human rights, in which the traditional requirements about the nationality of the complainant are overcome, as one of the elements needed for the putting into practice of the international responsibility of a State.

On the other hand, when dealing with the applications of individuals, the Convention has not instituted a type of *actio popularis* for their benefit, and therefore, they are not authorised to lodge an application *in abstracto*, that is the one filed for the sole reason that the individual applicant considers an internal law of the State to be contrary to the Convention. Hence the requirement that the individual (natural or legal person) must assert having been victim of a violation of one of the rights protected under the Convention or its Protocols.

On some occasions, however, the Court has been of the opinion that some people could be considered to be victims simply by the existence of a particular law, even if the applicants had not been able to prove that this law had been applied to them. Such was the case in *Klass and others v. Germany*, relating to a German law of 1968 which permitted, although only in certain conditions, a secret surveillance of correspondence, post, and telecommunications, without any obligation to inform the person concerned (judgment of 6<sup>th</sup> September 1978).

The term victim is, in principle, used to refer to the person directly affected by the act or omission considered to be the violation of a right. But the jurisprudence of the Court (as well as, before the coming into force of Protocol N.º 11, that of the European Commission of Human Rights) has widened the notion of victim to understand by it not only the direct victim of the alleged violation, but also any indirect victims, or those who can demonstrate the existence of a close link between themselves and the person who had one of his or her rights violated. The progressive flexibility of the notion of victim through jurisprudence has even led to the inclusion of the active legitimisation of an individual who could potentially be a victim of a violation, as occurred in the *Soering v. United Kingdom of Great Britain and Northern Ireland*, where the Court had to decide about an application filed by a young German man that if he were to be extradited from the respondent State to the United States of America, he would be tried and could be sentenced to the death penalty, and in that case he would have to spend a long time on death row. The applicant had not been extradited and, as a result, was no more than a potential victim of a possible violation of the obligation which, in an indirect manner, was imposed by Article three of the Convention on the United Kingdom.

In its judgment of 7<sup>th</sup> July 1989, the Court, in a decision written in conditional, admitted the possibility of being a potential victim, and declared the international responsibility of the respondent State if the applicant were extradited to the United States of America and if he were condemned to the death penalty there.

### 6.3. *Conditions of admissibility*

The admissibility phase is exceptionally important, as, for the Court to be able to begin a thorough examination of the alleged violations, the applicant has to fulfil rigorous requirements, and only those cases which do fulfil these requirements can be considered. The issue of admissibility is of fundamental importance for the functioning of the system of the European Convention of Human Rights, hence that in Article 35.4 of the Convention it is set out that, at any stage of proceedings, the Court can reject any application it considers to be inadmissible. It, therefore, constitutes a barrier that the majority of complaints do not manage to overcome.

As regards the applications of individuals, Article 35 of the Convention sets out that the application must be lodged within six months from the date of the final domestic decision; it cannot be anonymous; nor can it be essentially the same matter that, without dealing with any new facts, has already been examined by the Court or previously submitted to another procedure of international investigation or settlement.

On the other hand, the Court considers inadmissible any complaint from an individual that is deemed to be incompatible with the provisions of the Convention or the protocols thereto for any of the following reasons:

- a) it alleges the violation of a right which is not one of those protected under the Convention or its Protocols (incompatibility *ratione materiae*);
- b) it invokes a right recognised in a Protocol to which the State concerned is not party (incompatibility *ratione personae*);
- c) it refers to events which have happened outside the jurisdiction of the State concerned (incompatibility *ratione loci*); or
- d) it deals with events prior to the ratification of the Convention or one of its Protocols by the State concerned (incompatibility *ratione temporis*).

*Ratione loci* incompatibility applies when the application refers to events which have taken place outside the jurisdiction of the State concerned as, in accordance with what is set out in Article 1 of the Convention, Member States are obliged to guarantee the recognised rights to everyone who falls under their jurisdiction.

In the interpretation of the concept of jurisdiction, the Court has repeatedly stated in its jurisprudence that this notion is not restricted to the territory over which the State concerned exercises territorial sovereignty. So, in its decision of 10<sup>th</sup> May 2001, dealing with the inter-state case of *Cyprus v. Turkey*, the Court decided that the responsibility of a Member State can also come about as a consequence of an action which took place in an area that is not national territory, if the State in question exercises effective control over the area. Nevertheless, in the decision of 12<sup>th</sup> December 2001 (regarding the accusation of Vlastimir and Borka Bankovic and oth-

ers v. eighteen member States of the European Convention on Human Rights and members of the Atlantic Alliance regarding the alleged violation of Articles 2, 10, and 13 of the Convention as a result of the bombing carried out by NATO planes against Serbia Radio Television), the Court declared the application inadmissible for consideration because the applicants were not under the jurisdiction of the respondent States, in a criticised and restrictive vision completely opposed to previous decisions.

Similarly, abusive complaints are inadmissible, as are those which are manifestly ill-founded. The non-admission of an abusive application allows the Court to avoid being used for purely political purposes. This was a significant fear for the writers of the Convention in 1950, although in practice it has barely caused any problems, even though jurisdictional control bodies have preferred to reject "political" complaints on the basis of legal criteria, without declaring their inadmissibility to be due to political intentions.

The inadmissibility of applications which are manifestly ill-founded raises some difficult legal problems. In effect, the Court cannot make a decision regarding issues of admissibility without examining the problem on the merits, despite the fact that it is not a new instance of appeal against the alleged errors of fact or law made by national tribunals, as the function of the European Court of Human Rights consists in examining whether or not a violation of one of the rights recognised in the Convention or in its additional normative protocols has taken place.

It should be recognised, however, that it is not always easy to draw a line between the two functions, just as it is not easy to decide between declaring an accusation to be inadmissible due to its being "manifestly ill-founded" or opting, conversely, for choosing to begin the examination to determine whether or not there was a violation. In these cases, the difference between admissibility and examination on the merits is more theoretical than real, because inadmissibility due to a manifest lack of basis supposes that the Court has made a pronouncement regarding the alleged violation and, as such, on its basis. On the other hand, it is still strange that on occasions a long and contradictory process takes place only for, at its end, the Court to declare that an accusation is inadmissible due to its being "manifestly" ill-founded.

Finally, appeal to the Court cannot be made unless all existing domestic remedies in the internal legal order of the State concerned have been exhausted, just as this requirement is understood in the light of the generally recognised principles of international law. This requirement, whose aim is to provide States with the opportunity to prevent or amend the alleged violations against them before they are submitted to the European Court of Human Rights (as States do not have to account for their actions before an international body before having previously had the opportunity to correct the situation in the internal legal order), makes clear the subsidiary character of the European mechanism for the protection of human rights and fundamental freedoms.

In the system of the European Convention of Human Rights, the need for previous exhaustion of domestic remedies makes more sense than in general international law, as its Article 13 imposes on Member States the obligation to provide effective remedies within their jurisdiction as regards allegations relating to violations of the Convention. This provision is of fundamental importance, as it makes clear the duty



of States to ensure the fulfilment of the obligations derived from the Convention and its Protocols in the internal legal orders.

However, the obligation of previous exhaustion of internal remedies should not be understood in an absolute and mechanical way, but flexibly and without excessive formality, as the Court has repeatedly held in its jurisprudence that the government which maintains that the internal remedies have not been exhausted should prove that these exist both in theory and in practice. Only when this fact has been established, will it fall to the applicant to prove that such remedies did not exist or that, even if they did exist, the total passivity of the national authorities or the existence of generalised practices made these inefficient.

#### 6.4. *Proceedings*

When an application is made, a judge is designated as Judge Rapporteur and he or she commits, under the authority of the Court and with the help of the Registrar and the Registry, to prepare the proceedings, enter into contact with the parties and, if the application is declared admissible, carry out the necessary steps for the eventual achievement of a friendly settlement. Inter-state applications are submitted to a Chamber. However, the applications of individuals are examined by a Committee, which will have the Judge Rapporteur in charge as one of its members. The Committee is competent to unanimously declare the inadmissibility of an application, or to strike it out from the Court's list of cases and eliminate it from the day's proceedings where such a decision can be taken without further examination. The declaration of inadmissibility is definite, and there is no possibility of appeal.

If the Committee does not consider the application to be inadmissible, it will be forwarded to a Chamber, which will examine both its admissibility and the merits; in principle, the judgments of Chambers regarding admissibility will be adopted separately to the main question, and are definitive.

The examination regarding the merits of an application will be carried out by a Chamber of seven judges or, in exceptional circumstances, by the Grand Chamber.

In collaboration with the interested parties, the Court will pursue a contradictory examination of the case and, if it deems it necessary, to undertake an investigation for the establishment of facts, for the effective conduct of which the States concerned will have to furnish all necessary facilities. At the same time, the Court places itself at the disposal of the parties concerned, so as to reach a friendly settlement on the basis of the rights as defined in the Convention and the protocols thereto. The parties concerned can agree to a friendly settlement at any point in the proceedings; this settlement must be authorised by the Court and will bring proceedings to an end. The Court will strike the case out from the Court's list through a resolution which will be limited to a short explanation of the facts and the solution found.

Before rendering its judgment, and as long as none of the parties to the case objects, the court can, at any time, *motu proprio*, relinquish jurisdiction in favour of the Grand Chamber; this occurs when cases have significant and specific consequences. This relinquishment of jurisdiction to the Grand Chamber has come from a desire to accelerate the proceedings.

If the Chamber has rendered its judgment, the parties concerned will be able to request a referral of the case to the Grand Chamber for a new examination of the case regarding exceptional circumstances which bring up a serious issue of general importance, or serious questions affecting the interpretation or application of the Convention and the protocols thereto.

The request of the parties concerned will be examined by a panel, made up of five judges from the Grand Chamber, who will determine whether the request for the re-consideration of the case should be accepted or not.

When the aforementioned circumstances of general importance or serious questions affecting the interpretation or application of the Convention and its protocols occur, the aim of these new proceedings before the Grand Chamber is to permit a reconsideration of the more important aspects of the case, so as to guarantee the quality and coherence of the jurisprudence of the Court. It is, therefore, a system with two levels of jurisdiction, as two different forms within a single Court (a Chamber and a Grand Chamber) have the authority to decide which cases should be deferred to the Court.

Although in principle, and, it is to be hoped, habitually, a Chamber composed of seven judges will definitively resolve those applications declared to be admissible, the judgments of the chambers will, nevertheless, only be *res judicata*, and as such be final, either when a period of three months has passed since their pronouncement without any request from the parties concerned to refer the case to a wider section of the Court, the Grand Chamber, or having been requested by any of the parties, when a panel of five Grand Chamber judges considers that the case does not involve those exceptional circumstances which would justify the referral. If the case is referred to the Grand Chamber, then it is up to this body to give a final judgment.

This system, introduced by the Protocol N.º 11, has without doubt reinforced the jurisdictional character of the mechanism for the protection of rights and freedoms. But this was only possible thanks to a solution of compromise, consisting in maintaining the principle of re-examination as a structural element of the new mechanism, permitting cases of special importance to be considered at two instances, through two different forms of the Court, the Chambers and the Grand Chamber.

It is undeniable that this solution of compromise brings about problems, and it is the greatest of the technical imperfections of the new system, both because of its complexity and because of the fact that it expresses the wishes of States to be able to rely on a two level jurisdiction. But it was imposed with a compromise that in 1994, when Protocol No. 11 was adopted, made the reform of the protection mechanism set up in 1950 in the European Convention of Human Rights possible, and in principle maintained the principle of re-examination as a structural element of the system, allowing particularly important cases to be investigated twice, by two different formations of the Court.

Along these lines, the *Öcalan v. Turkey* case is significant because it makes evident how convenient it is that the Grand Chamber decides when serious questions affecting the interpretation and application of the Convention are at stake. Condemned to the death penalty, Öcalan lodged a complaint against Turkey before the European Court of Human Rights, an application which came to the attention of one of the Chambers of the first section of the Court; the Chamber decided to apply Ar-

title 39 of the Rules of Court, and asked the government of the State concerned to adopt all means necessary for the non-execution of the sentence, so as to be able to continue with the examination of the admissibility of the application. In September of 2001, a delegation from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) visited the place of detention of the applicant; a law of August 2002 abolished the death penalty in times of peace and, as a consequence, the Turkish penal Code was modified; the Turkish government alleged before the Court that the execution could no longer take place, as the punishment was commuted to life imprisonment in October of 2002. The Chamber dictated the sentence on 12<sup>th</sup> March 2003, and a few months later, in November 2003, Turkey ratified the Protocol N.º 6, which prohibits the death penalty in times of peace.

Even so, seeing the importance of the legal problems involved, it was deemed useful that the Court, in its Grand Chamber incarnation, should make a pronouncement regarding the interpretation of Article 3 of the Convention (prohibition of torture), in the light of what is set out in Article 2 (the right to not arbitrarily be deprived of life, and the pronouncement of a sentence to capital punishment dictated in a non-equitable process). Like the Chamber, the Grand Chamber found in its judgment on 12th May 2005, by thirteen votes to four, that the plaintiff had not been judged by an independent and impartial tribunal, and that he had had to suffer the threat of the death penalty for more than three years, which was deemed to be inhuman treatment.

## 7. Effects and execution of the European Court of Human Rights' Judgements

The Court decides, through a reasoned judgment, whether in the case that has been submitted to it, there was or was not a violation of the Convention which can be attributed to the State concerned. If the judgment does not, in whole or in part, express the unanimous opinion of all the magistrates, any of them is entitled to annex either a separate, concordant, or differing opinion to it.

The judgments of the Court are binding, because the States have undertaken to abide by the final judgment of the Court in any case to which they are parties (Article 46.1 of the Convention), and they have, above all, two effects: firstly, the judgment is *res judicata* as regards the State concerned, and secondly that of the interpretation of the case with *erga omnes* effects, as the Court does not only have authority to apply the Convention, but also to interpret it. The consequence of this last effect of the Court's sentences is general reach, affecting all Member States of the Convention; as such, national, including judicial, authorities should take into consideration the interpretation of the Convention by the Strasbourg Court in their jurisprudence, given that they are legally bound by this interpretation.

If an adequate reparation of the violation is not wholly or in part possible, Article 41 of the Convention establishes the competence of the Court to award a compensation, by setting out that the Court, if it finds that there has been a breach of the Convention, and if the internal law of the State concerned allows only a partial reparation of the consequences of the violation aforementioned, will afford, if necessary, just satisfaction for the injured party.

The judgments of the European Court of Human Rights are declarative but not enforceable by the Court. The declarative nature of the judgments of the European Court of Human Rights brings about a difficult problem, as the fact that the Court cannot enforce them does not imply that they lack effect in the legal order of the State declared responsible for a violation of the Convention or the protocols thereto. In other words, the fact that they cannot be directly executed does not imply that they lack any internal legal effect, and hence the need to establish adequate procedural channels which will allow an effective observance of the judgments of the European Court of Human Rights, as the Court lacks the competence to make pronouncements regarding the fulfilment and execution of its resolutions. The solution to this legal problem is not easy, due to the fact that, firstly, not all the judgments of the European Court declaring that there was a violation of one or some of the rights set forth in the Convention have the same nature and the same reach. If it is decided that there was a violation, the Court will declare the international responsibility of the offending State, but this can be due to many different reasons: sometimes, in effect, the Court declares that in a given case the internal judicial authorities violated the Convention; in other cases, the violation which gave rise to the international responsibility of the State was as a result of an act or omission of domestic administrative bodies; the judgment of the European Court can also be based on an appreciation that the internal norm applied by the national judge is in itself contrary to the Convention, meaning that the fulfilment of the judgment would require a legal reform.

The greatest legal difficulty in the execution of a Strasbourg Court's judgment occurs when, due to the *res iudicata* effects of firm and final judgments, the European Court of Human Rights finds that a violation of the Convention existed, which took place as a result of a final judgment previously pronounced by an internal tribunal. Can the decision of an international tribunal be used to call into question the *res iudicata* effect of a final sentence pronounced by the Judiciary of the offending State, which the European Court of Human Rights has declared responsible for a breach of its conventional obligations?

The effects and execution of the judgments of the European Court of Human Rights are not regulated in Spanish law despite the fact that, as a Member State of the Convention, Spain is under the obligation to set up in its legal order the appropriate legal channels for making the judgments of the European Court of Human Rights effectively executed, as it has undertaken to abide by the final judgment of the Court in any case where it is party (article 46.1 of the Convention). The need to regulate the problem of the execution of the sentences of the European Court of Human Rights in the Spanish legal order was expressly recognised by the Spanish Constitutional Court in its judgment of 16<sup>th</sup> December 1991, in which it urged public authorities to set up adequate procedural channels regarding the execution of the judgments of the European Court of Human Rights.

In Spanish doctrine, and in the light of the inadequacy of available legal mechanisms, a variety of *de lege ferenda* proposals have been formulated, with the aim of resolving the legal problems of the execution of the judgments of the European Court of Human Rights: one of these proposals is in favour of the adoption of an *ad hoc* law, such as the one enacted by Austria in 1963 and as the Spanish Consti-

tutional Court expressly suggested in its judgment of 16<sup>th</sup> December 1991; another, inspired by the techniques used in Norway and Luxembourg, proposes the introduction of new reasons for lodging the revision appeal in Spanish procedural laws; finally, a third proposes the introduction of a new condition of nullity.

Even taking into account the usefulness of the proposed legislative solutions, I believe the adoption of a new facultative protocol preferable in order to achieve a homogenous solution to a complex and difficult problem, which is not simply technical, but also of the greatest relevance to the effectiveness of the legal protection of rights and freedoms by the European Court of Human Rights. This is not a body for appealing, nor for annulment, nor for the revision of decisions made by domestic judicial authorities, nor does it have the authority to declare void a norm of internal law or a decision made by the administrative authorities of the State concerned and declared responsible for a violation of the Convention, but its competence extends solely to the interpretation and application of the Convention in a given case, with the aim of determining whether the State concerned has fulfilled its obligations or not and, as a result, whether the case entails the international responsibility of the offending State; however, the application and interpretation of a treaty for the protection of rights and freedoms falls to the Court, an expression of European *ius commune* rights which are effective and not illusory.

Finally, it should be noted that, given the close links existing between the European Convention of Human Rights and the Council of Europe, the Committee of Ministers of this latter international organisation has the authority to supervise the fulfilment of the Court's judgments, in accordance with what is set out in section two of Article 46 of the Convention. This authority for supervision comes from the obligatory nature of the Court's judgments, and makes clear a dimension of extraordinary legal significance: the presence of an institutionalised mechanism for ensuring that the law is respected.

## 8. The European Court of Human Rights' interpretation of the Convention

The European Convention of Human Rights is an international treaty and, as such, an agreement of wills between sovereign States. Nevertheless, the specific nature of the Convention as regards a treaty for the protection of fundamental rights and freedoms makes its application and interpretation by the European Court of Human Rights able to escape the traditional rules regarding the interpretation of treaties, which are codified in the Vienna Convention on the Law of Treaties of 23<sup>rd</sup> May 1969.

The specific nature of treaties for the protection of human rights was clearly made manifest by the International Court of Justice in its Advisory Opinion of 28<sup>th</sup> May 1951, concerning the validity of certain reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, when it stated that in this type of treaty,

“the contracting States do not have any interest of their own; they merely have, one and all, a common interest, namely, the accomplishment of those

high purposes which are the *raison d'être* of the Convention. Consequently, in a Convention of this type one cannot speak of [...] the maintenance of a perfect contractual balance between rights and duties", (CIJ, *Recueil 1951*, pp. 23-24).

This explains the fact that, although the European Court of Human Rights has expressly referred to the rules of interpretation set out in Articles 31 to 33 of the Vienna Convention on the Law of Treaties, it has, nevertheless, used criteria for interpretation that respond to the specific nature of the European Convention of Human Rights. So, in its judgment of 18<sup>th</sup> January 1978, regarding the inter-state case of *Ireland v. United Kingdom of Great Britain and Northern Ireland*, the Court held that, unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States, all of whom are members of the Council of Europe, because

"it creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a collective enforcement" (paragraph 239 of the judgment of 18th January 1978).

This interpretation of the nature and scope of the European Convention of Human Rights has been confirmed in the judgment of 23rd March 1995 (*Loizidou v. Turkey* case, preliminary exceptions), in which the Court reiterated the affirmations it had made in its judgment of 18<sup>th</sup> January 1978, and resolutely held that the Convention "as a treaty for the collective enforcement of human rights and fundamental freedoms", has a "special character"; "caractère singulier" (paragraphs 70 and 71 of the decision).

However, the Court does not forget its nature, and knows that it is not a European constitutional tribunal, but an international tribunal set up as a result of a treaty. And so, in its jurisprudence it is possible to distinguish two main directions or tendencies: on the one hand, one that favours the sovereignty of States, which is expressed in a position of self-control regarding the scope of its jurisdiction on the part of the Court; on the other hand, a more progressive tendency, towards judicial activism, favouring the protection of rights and freedoms, and therefore tending to restrict the competences of the Member States of the Convention. The first of these tendencies favours the discretionary power of States; the second, however, deals more with the protection of the individual and the rights which are afforded to him or her through the Convention and the protocols thereto and, as such, expands the scope of the legal obligations taken on by Member States, even beyond what is set out in the Convention or its protocols, therefore separating itself from the classic principle of international law, according to which the limitations of the sovereignty of State are not presumed.

### 8.1. *The doctrine of the margin of appreciation of States as a manifestation of the tendency towards judicial self-control*

Even though it is a treaty for the protection of individual rights and freedoms, it is undeniable that the European Convention of Human Rights recognises the need

to safeguard the general interests of the community, which are just as legitimate as the aforementioned in democratic States.

On this subject, the European Court of Human Rights has developed a series of concepts which aim to reconcile the interests of the individual with those of the community and which, so as to reach this conciliatory objective, make clear and confirm an essential characteristic of the Convention: its preoccupation with establishing a balance between individual rights and the general interests of the community. Among these concepts, one has achieved particular importance for the jurisprudence of the Strasbourg Court: the national margin of appreciation of States doctrine. From the decision of 7<sup>th</sup> December 1976, regarding the *Handyside v. United Kingdom* case (in which the problem of the seizure, in accordance with English law regarding obscene publications, of a schoolbook for sexual education, was brought up), the Court has, in effect, recognised that States have a margin of appreciation which is a consequence of the subsidiary character of the protection system instituted in the Convention.

In the same way, and in the context of the limitations of some of the rights recognised, and the possible interferences of the authorities into the protected rights, the European Court of Human Rights has admitted that, due to being more in touch with the national reality, States have a better knowledge of internal life and its peculiarities than would an international body. So, in its judgment of 21<sup>st</sup> February 1990 regarding the *Powell and Rayner v. United Kingdom* (in which the applicants alleged that noise generated by the air traffic of a large airport near to their residence constituted a violation of their right to respect for their private life and their home set forth in Article 8 of the Convention), the Court held that it is necessary to safeguard the balance which must exist between the legitimate interests of the individual and those which are of the community as a whole, and that in both contexts,

“the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention” (paragraph 41 of the judgment).

The discretionary power of States is variable, depending as it does on the circumstances, subjects, and context of each case. This explains the fact that, unlike the judgment which was referred to above (in which the Court found that no violation of the Convention was attributable to the offending State), in its judgment of 9<sup>th</sup> December 1994, recounted in the *López Ostra v. Spain* case (a case where the applicant alleged that her right to respect for her home had been violated due to fumes, pestilential smells and contamination coming from a plant for the treatment of liquid and solid waste), the Court considered that there was a violation of Article 8 of the Convention that was attributable to Spain, because the State concerned had not succeeded in

“striking a fair balance between the interest of the town’s economic well-being —that of having a waste-treatment plant— and the applicant’s effective enjoyment of her right to respect for her home and her private and family life” (paragraph 58 of the decision).

The margin of appreciation is most significantly noticeable in those issues where a European consensus does not exist: such is the case with those relating to national security (the *Leander v. Sweden* case, with a judgment adopted on 26<sup>th</sup> March 1987, relating to access to data placed on a secret police register for the evaluation of the aptitude of a candidate to an employment relating to national security and defence), or those cases relating to moral issues (the *Handyside* case, with its judgment of 7<sup>th</sup> December 1976, mentioned above; the *Müller and others v. Switzerland* case, with its judgment of 24<sup>th</sup> May 1998, relating to the sentencing of a painter for the exhibition of pictures which were judged to be obscene).

On the other hand, the State margin of appreciation does not exist, or is very reduced, regarding other subjects, such as those relating to the administration of justice, where it is easier to verify the existence of a Europe-wide consensus. So, in the *Sunday Times v. United Kingdom* case, relating to press law restrictions concerning publishing information about civil proceedings pending before British tribunals, the Court decided in its judgment of 16<sup>th</sup> April 1979 that the interference with the right to freedom of expression, with the aim of safeguarding legal independence, did not correspond to a pressing social need, and that it was neither proportionate nor necessary in a democratic society.

In my opinion, it is necessary to remember that, if exaggerated, the doctrine of the margin of appreciation can come to call into question the very essence of the European system for the protection of human rights and fundamental freedoms, its constitutional dimension as a European human rights public order. As Marc-André Eissen, former Registrar of the European Court of Human Rights, has very rightly said, the acceptance of the existence of a national margin of appreciation on the part of States constitutes a type of legal self-limitation on the part of the Court, derived from its recognition of the fact that the State concerned has a better knowledge of the internal, social, and legal life, closer to reality than Court; but it is one thing to bear in mind this fact, which makes manifest the subsidiary character of the European system for the protection of human rights, and a very different thing to dilute it into an excessive plurality of individual situations.

And so comes about the importance of the Court's being rigorous in the exercise of its authority to control the margin of appreciation belonging to States, and that an important part of the jurisprudence is stating that the limitations and restrictions of the exercise of the recognised rights cannot jeopardise the substance of the rights guaranteed.

The Court's favourable position towards the reinforcement of the international supervision of the compliance with the obligations derived from the Convention's system on the part the Member States is yet more visible in the tendency which I will discuss below, compared to that of the aforementioned legal self-control. If as regards the latter the Court shows itself to be prudent and, conscious of its limitations, respectful of the role which corresponds to States as regards the regulation of general interests, which can justify the limitation of some individual rights, in the legal tendency which I am going to discuss now, we shall show, by contrast, how the European Court of Human Rights has developed a series of legal concepts which tend to expand the international responsibility of States and, as a result, to the reinforcement of European protection for rights and freedoms.



8.2. *Manifestations of the favourable tendency towards the protection of rights and freedoms through an evolving, dynamic, and teleological interpretation of the European Convention of Human Rights*

In the interpretation of the nature and scope of the Convention, the Court has resolutely held that, as was mentioned above, unlike classic treaties, the Convention "comprises more than mere reciprocal engagements between contracting States" because, as well as a network of bilateral contractual agreements, it creates "objective obligations which, in the words of the Preamble, benefit from a collective enforcement", and as such has a "special character" (judgments of 23<sup>rd</sup> March 1995, *Loizidou v. Turkey*, preliminary exceptions, paragraphs 70 and 71, and 18<sup>th</sup> January 1978, *Ireland v. United Kingdom of Great Britain and Northern Ireland*, paragraph 239).

Along the same lines, in its judgment of 7th July 1989 relating to the *Soering vs. United Kingdom of Great Britain and Northern Ireland*, the Court held that any interpretation of rights guaranteed "has to be consistent with the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society", and affirmed that

"in interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms. Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective" (paragraph 87 of the decision).

This conception of the nature of the Convention, in which special emphasis is placed on its constitutional dimension as an international legal instrument which embodies a European public order of human rights and fundamental freedoms, justifies the fact that the Court has proceeded to an autonomous interpretation of the legal concepts set out in its provisions, as well as to an evolving interpretation of the Convention through which the scope of the international responsibility of the member States has been expanded.

In the analysis of this favourable tendency towards the protection of rights and freedoms through an evolving and dynamic interpretation of the Convention and the protocols thereto, I will examine diverse aspects of the jurisprudence of the European Court of Human Rights, in which a position opposed to the doctrine of the margin of appreciation of States is made manifest.

I will consider, above all, the principle of proportionality as an instrument through which the Court has reinforced European control of the discretionary power of Member States of the Convention; secondly, I will examine the notion of the positive obligations of Member States; thirdly, I will analyse the jurisprudential affirmation according to which the rights guaranteed must be analysed as effective rights and not as theoretical or illusory; finally, I will refer to how the jurisprudence of the European Court of Human Rights has included within the scope of the protection system even rights which are not expressly recognised in the Convention, therefore reaching the limit of its teleological interpretation.

## 8.2.1. THE PROPORTIONALITY PRINCIPLE

As a result of the consequences derived from this principle, the proportionality principle is a factor in the correction of the States' national margin of appreciation, and one of the richest general principles of law in the construction of a European *ius commune* of human rights. Although this may appear to bring about certain quantitative considerations, which might even be arithmetical, the principle is nevertheless built on the basis of qualitative considerations which the European Court of Human Rights has associated with the fundamental problem of striking a fair balance between general interests and individual rights. The legitimacy of those is, of course, indisputable, but the protection of individual rights and freedoms requires that the defence of general interests does not get confused with the so-called *raison d'état*.

None of the rules in the Convention or its additional protocols refer explicitly to the proportionality principle, but the Court has made it one of the key elements in the interpretation of the Convention, ever since the judgment of 23<sup>rd</sup> July 1968, relating to an affair regarding certain linguistic aspects of teaching in Belgium, seeing the need for a relationship of proportionality between the means employed and the objective aimed at, or, between the scope of the interference in a right guaranteed and the legitimate aim which, in principle, could justify the interference. Thereafter, the twin concepts of proportionality and a fair balance have been used in dozens of judgments adopted by the European Court of Human Rights, as factors for the control of the national margin for appreciation, and to determine whether there has been a violation of one of the rights guaranteed in the system of the Convention.

In effect, the proportionality principle has been a key element as regards the interpretation of the legal obligations taken on by member States; so, for example, the requirement of proportionality has been decisive in relation to the right not to be arbitrarily deprived of life, as was made clear in the judgment of 27<sup>th</sup> September 1995, *McCann and others v. United Kingdom of Great Britain and Northern Ireland*, regarding the interpretation of the terms "use of force which is absolutely necessary" as regards Article 2.2 of the Convention. The British, Spanish, and Gibraltar authorities knew that IRA terrorists were going to commit a terrorist attack in Gibraltar; in an act carried out by agents of a special regiment of the British Army, three IRA members were shot by the security forces. Although the Court found that these killings had not been premeditated, it nevertheless considered that the deaths of the three terrorists had not been the result of an absolutely necessary use of force for ensuring the defence of persons from unlawful violence, and decided, by ten votes to nine, that in this case there had been a breach of Article 2 of the Convention which was attributable to the United Kingdom of Great Britain and Northern Ireland.

Similarly, the proportionality requirement has been invoked by the European Court of Human Rights in the interpretation of limitations and restrictions in the context of Articles 8 to 11 of the Convention, and in paragraph 3 of Article 2 of Protocol N.º 4, to the extent that the principle of proportionality has been determinant not only for limiting the margin of appreciation for States in the determining of possible interferences in the enjoyment of the rights guaranteed in these articles, but also, and most importantly, as Daniel I. García San José has observed regarding the inter-

pretation of the indeterminate legal concept “necessary in a democratic society”, which appears in the second paragraphs of Articles 8 to 11 of the Convention as one of the requisites required so that the limitation or restriction of the enjoyment of a right can be in accordance with the Convention.

In the interpretation of the right to freedom of expression, for example, the proportionality principle has been a key element in the jurisprudence of the European Court of Human Rights: freedom of expression is not, of course, an absolute right, as its exercise, in the words of the second paragraph of Article 10 of the Convention, involves “duties and responsibilities”, and can be subject to “formalities, conditions, restrictions or penalties”. But due to being one of the essential foundations for a democratic society, all formalities, conditions, restrictions, or penalties imposed on the rights must be necessary in a democratic society and, therefore, proportionate to the legitimate aim pursued (judgments of 7<sup>th</sup> December 1976, *Handyside v. United Kingdom* case; of 26<sup>th</sup> April 1979, *Sunday Times v. United Kingdom* case; of 26<sup>th</sup> November 1991, *Observer, Guardian, and Sunday Times (2) v. United Kingdom* case; of 23<sup>rd</sup> September 1994, *Jersild v. Denmark* case; of 21<sup>st</sup> January 1999, *Janowski v. Poland* case; of 25<sup>th</sup> November 1999, *Nilsen and Johnsen v. Norway* case; and of 19<sup>th</sup> February 2000, *Fuentes Bobo v. Spain* case).

In the *Castells v. Spain* case, the applicant had, in a periodical publication, denounced the impunity of extreme right-wing groups which committed violent acts in the Basque Country, and had been punished for it without being able to prove either the truth of his statements or of his good faith, in the sense that in his statements he did little other than collect and express a generalised state of opinion. The Court ruled that in a democratic system the actions and omissions of the Government must be subject to the close scrutiny of the press and of public opinion, and not only of the legislative and judicial authorities, and therefore it considered that, although the interference was prescribed by the law and dealt with a legitimate aim, it was not necessary in a democratic society due to the fact that it was not proportional. As a result, it decided unanimously that there had been a violation of the right to freedom of expression guaranteed in Article 10 of the Convention (paragraphs 43 and 46 of the judgment of 23<sup>rd</sup> April 1992).

Some of the aforementioned decisions are, however, open for criticism, in my opinion, because of the fact that they give the impression that the Court had hardly used in them an excessive interpretation of the scope of the right to freedom of expression which, of course, is not an absolute right. Such is the case, for example, of the judgment of 23<sup>rd</sup>, *Jersild versus Denmark*, in which there was a case brought about by a fine for a journalist as a result of expressing racist and xenophobic opinions on television at peak time, and the Court made the right to freedom of expression prevail over the legal obligations which international law imposed on States regarding the prohibition of racial discrimination. From my point of view, the State concerned (Denmark) was obliged to punish and repress manifestations of racist ideas, not only because of conventional norms, but also because of imperative norms of general international law, which opens the Strasbourg Court's decision, obtained by a tiny minority, to criticism, through making the right to freedom of expression prevail over the legal obligation which international law imposes on States regarding the prohibition of racial discrimination.

Along the same lines as this decision which has just been analysed, that of 29<sup>th</sup> February 2000, related to the *Fuentes Bobo v. Spain* case, made the right to freedom of expression prevail in an affair in which the Court itself recognised that the applicant had expressed insults. The applicant alleged that his dismissal from Spanish State television company (TVE) for criticisms made against TVE's managers constituted a violation of his right to freedom of expression; faced with this claim, the Spanish government maintained that States enjoy a wide margin of appreciation for the evaluation of the scope of critical manifestations which could be deemed offensive, as freedom of expression cannot protect a claimed right to insult. However, the Court, even though it recognised that the reasons invoked by the Spanish government were worthwhile, considered that "the relation between the penalty and the legitimate aim pursued was not reasonably proportionate" and, consequently, that there had been a violation of Article 10 of the Convention.

#### 8.2.2. POSITIVE OBLIGATIONS OF PARTICIPATING STATES, AND THE SIGNIFICANCE OF ARTICLE 1 OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS

Article 1 is of exceptional importance for three reasons: firstly, for having helped the European Court of Human Rights to develop in its jurisprudence the reach of the jurisdiction of States; secondly, because it makes clear that the European Convention of Human Rights is not limited to the protection of Europeans, nationals of the Member States of the Council of Europe, but has a much wider scope, as everyone falling under the jurisdiction of a Member State, whatever their nationality might be, or even if they do not have one, are protected by the Convention in the enjoyment of the fundamental rights and freedoms guaranteed within it; thirdly, because it has helped the Court to be able to maintain in its jurisprudence, through a teleological and finalist view of the Convention, that Member States have positive obligations, and not only negative obligations to not interfere in the enjoyment of the rights guaranteed.

As of the judgment of 18<sup>th</sup> January 1978, *Ireland versus United Kingdom of Great Britain and Northern Ireland* case, the English text of Article 1 of the Convention has served as a basis for the Court in affirming that the Convention

"does not merely oblige the higher authorities of the Contracting States to respect for their own part the rights and freedoms it embodies; as is shown by Article 14 (art. 14) and the English text of Article 1 (art. 1) ('shall secure'), the Convention also has the consequence that, in order to secure the enjoyment of those rights and freedoms, those authorities must prevent or remedy any breach at subordinate levels" (paragraph 239 of the judgment).

From this judgment, Article 1 has been the legal foundation upon which the Court has developed a teleological and progressive interpretation of the Convention, which has allowed it to hold that this does not only impose negative obligations of States to not to do something, but also *positive obligations* to do something, with the aim of satisfying the duty of ensuring the effective enjoyment of the rights guaranteed to everyone coming under their jurisdiction. This interpretation of Article 1 of the Convention was confirmed by the Court in the judgment of 26<sup>th</sup> March

1985, *X and Y v. the Netherlands* case. In a case brought about by the impossibility in Dutch law of filing a lawsuit against the perpetrator of sexual violence where the victim was a minor of over sixteen years of age, mentally handicapped, by a person other than the victim, the Court affirmed that although Article 8 of the Convention has as its object the protection of the individual against arbitrary interference by the public authorities, this provision

“does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life (...). These obligations may involve the adoption of measures designed to secure respect for private life...” (paragraph 23 of the judgment).

Shortly after, in the judgment of 21st June 1988, *Plattform “Ärzte für das Leben” v. Austria* case, the Court confirmed this interpretation of the Convention in holding that a State cannot be content with not to interfere in a right, as in a democracy the right to counter-demonstrate (in this case, that of those supporting abortion), cannot extend to paralysing the right to demonstrate of those opposed to legalized abortion. And so, following an examination of the facts, the Court found that there had not been a violation of the Convention attributable to Austria, and stated that

“genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11 (art. 11). Like Article 8 (art. 8), Article 11 (art. 11) sometimes requires positive measures to be taken, even in the sphere of relations between individuals” (paragraph 32 of the judgment of 21st June 1988).

In effect, individuals can also commit abuses and violate fundamental rights and freedoms, hence the positive obligation of States—in short, guarantees of rights and freedoms—to adopt the measures necessary, both legislative and other, to really protect the rights of individuals, not only as regards public authorities, but also regarding possible interferences from other individuals.

The obligation to ensure the enjoyment of rights recognised in the Convention is one of the most important legal obligations of Member States, and, as such, the Court has not hesitated to underline its relevance, especially regarding the fulfilment of the obligations in Article 2 (the right to life), Article 3 (the prohibition of torture), and Article 5 (the right to liberty and security of person) of the Convention, which are imposed on Member States. Regarding the right to life, for example, this is the sense of the judgments of 28<sup>th</sup> March 2000, which are set out in the *Cemil Kiliç v. Turkey* and *Mahmut Kaya v. Turkey* cases. In the first of these, the Court recalled that the first sentence of Article 2.1 of the Convention enjoins the State not only to abstain from the intentional and unlawful taking of life, but to take appropriate steps to safeguard the lives of those who find themselves under its jurisdiction. Therefore, States party to the Convention have the positive obligation to take operational measures to protect an individual whose life is in danger because of the criminal acts of another, and, although in the case it had not been proved beyond

any reasonable doubt that any agent of the accused States, or person acting on behalf of State authorities, was involved in the killing of Kemal Kiliç, brother of the applicant, the Court concluded that the authorities had not taken reasonable measures for the prevention of the real and immediate risk to the life of the journalist Kemal Kiliç, accordingly, it found that there had been a violation of Article 2 of the Convention. The Court also stated, as it had already done in its judgment of 17<sup>th</sup> September 1995 (the *McCann and others v. United Kingdom of Great Britain and Northern Ireland* case), that the obligation to protect the right to life that is set out in Article 2 of the Convention, in relation to the general duty of the State in accordance with Article 1,

“requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force” (paragraphs 62 to 78 of the judgment of 28th March 2000).

It would seem undeniable, then, that through its jurisprudence, the Strasbourg Court has consolidated the notion of positive obligations of Member States, widening the scope of the rights protected by means of a finalist interpretation of the Convention and of its additional protocols. This has meant that rights not expressly mentioned in the wording of the said legal instruments would come into its sphere of control.

### 8.2.3. RIGHTS WHICH ARE EFFECTIVE AND NOT ILLUSORY

In the *Airey v. Ireland* case the problem of the effectiveness of the right of access to Court was brought up, in the light of the lack of the economic resources of a woman undergoing a separation process. The State concerned claimed that economic rights did not fall under the Convention: nevertheless, in its judgment of 9<sup>th</sup> October 1979, the Court held, in a passage that is one of the most significant achievements of the Strasbourg jurisprudence, that the Convention

“must be interpreted in the light of present-day conditions (...) and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals (...) Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers (...) that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention” (paragraph 26 of the judgment).

In this way, through a finalist interpretation of the obligations taken on by States, the European Court of Human Rights has contributed towards the overcoming of the classic distinction between civil and political rights, and economic, social, and cultural rights, between which, in the opinion of the Court, there is not an insurmountable obstacle. There is not a striking separation between the two spheres as, despite the lack of “justitiability” of social and economic rights, it is not possible to be unaware of the economic and social implications of the rights and freedoms recognised by the Convention, especially if the scope of these rights

and freedoms is interpreted in the light of the doctrine of Member States' positive obligations.

#### 8.2.4. INDIRECT PROTECTION OF RIGHTS NOT EXPRESSLY RECOGNISED IN THE CONVENTION

Thanks to the jurisprudence of the European Court of Human Rights, the scope of the Convention has expanded to include rights not expressly mentioned within it. So, for example, the rights of foreigners enjoy a certain amount of indirect protection in the light of an extensive interpretation of the scope of application of Article 3 of the Convention, through which the Court has repeatedly held that foreigners cannot be the objects of measures of expulsion or extradition when the person in question could be subject to inhuman treatment in the destination country.

As regards the expulsion of foreigners, the Court has affirmed that, although the right of a foreigner to enter or reside in a country is not recognised in the Convention, control of immigration should nevertheless be exercised in a way that is compatible with the demands of the Convention; as such, the expulsion of a person from the territory of the State in which his or her family lives could pose a problem as regards the application of Article 8 of the Convention.

With this in mind, the contributions of judgments where the Court has considered Article 8 to be applicable are important, as regards applications filed by non-Europeans who found themselves under the jurisdiction of Member States. This last element is of exceptional importance as regards the scope of the obligations taken on by Member States because it makes clear, as mentioned above, that the European Convention of Human Rights is not limited to protecting Europeans, nationals of the Member States of the Council of Europe, but it has a much wider scope, potentially universal, as every person under the jurisdiction of the Member State, whatever his or her nationality might be, and even if that person does not have one, is protected by the Convention as regards the enjoyment of the fundamental rights and freedoms which are recognised within it.

Non-Europeans who had been the objects of expulsion measures (judgments of 21st June 1988, in the *Berrehab v. the Netherlands* case; of 18<sup>th</sup> February 1991, in the *Moustaquim v. Belgium* case; of 26<sup>th</sup> March 1992, in the *Beldjoudi v. France* case; and of 11<sup>th</sup> July 200, in the *Jabari v. Turkey* case), or who had suffered restrictive measures on their right to respect for their family life (judgments of 28th May 1985, in the *Abdulaziz, Cabales y Balkandali v. United Kingdom* case), have been able to benefit from the protection of the European Convention of Human Rights thanks to the interpretation of it that was made by the Strasbourg Court. In the judgment of 21<sup>st</sup> June 1988, regarding a case where a foreigner had been expelled from Holland (despite the fact that he had legally lived in the country, where he had been married to a Dutch woman and maintained effective links with his daughter) and denied a residency permit, the Court ruled that, in this case,

“a proper balance was not achieved between the interests involved and that there was therefore a disproportion between the means employed and the legitimate aim pursued. That being so, the Court cannot consider the disputed measures as being necessary in a democratic society” (paragraph 29 of the judgment of 21st June 1988, in the *Berrehab v. the Netherlands* case).

The same reasons and an identical “expansion of the scope” of Article 3 of the Convention have been applied in allegations for extradition, as was made clear in the judgment of 7<sup>th</sup> July 1989 regarding the *Soering v. United Kingdom of Great Britain and Northern Ireland* case. In this judgment, the Court highlighted above all that the Convention should be read regarding its special character as a treaty for the collective guarantee of human rights, and that as it is an instrument for the protection of human beings its provisions should be understood as concrete and effective guarantees, meaning that any interpretation of the rights guaranteed should be in accordance with the general spirit of the Convention, aimed at protecting and promoting the ideals and values of a democratic society. On these foundations, the Court held that a State would be conducting itself in a manner incompatible with the underlying values of the Convention if it handed over a fugitive —however heinous and disgusting the crime of which that person is accused might be— to another State where there were substantial grounds for believing that he or she would be in danger of being subjected to torture or to inhuman or degrading treatment or punishment. Consequently, the Court considered that, although the right not to be extradited is not a right expressly guaranteed under the Convention, if the extradition of a fugitive put him or her at risk of being subjected torture or to inhuman or degrading treatment or punishment, such extradition would be manifestly against the spirit of the Convention, as

“extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court’s view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article” (paragraph 88 of the judgment).

On another note, the judgment of 9<sup>th</sup> December 1994, *López Ostra v. Spain* case (a case where the accuser alleged a violation of her right to respect for her home and her family life due to unpleasant smells, noises, and contaminated smoke coming from a plant for the treatment of liquid and solid waste), the Court declared that there had been a violation of Article 8 of the Convention that was attributable to Spain, because the State concerned

“did not succeed in striking a fair balance between the interest of the town’s economic well-being —that of having a waste-treatment plant— and the applicant’s effective enjoyment of her right to respect for her home and her private and family life” (paragraph 58 of the judgment).

In this way, as was mentioned above, the Court went beyond the position it had adopted in its judgment of 21<sup>st</sup> February 1990, in the *Powell and Rayner v. United Kingdom* case, and, rejecting the application of the States’ margin of appreciation doctrine, it expanded the scope of the European Convention of Human Rights by protecting a right to the environment, which is obviously not expressly mentioned in a treaty adopted in 1950, but which was given indirect protection through its link with the right to respect for home and family life, as a result of enlarging the scope of a right which is recognised in Article 8 of the Convention.



Along the same lines, in the *Guerra and others v. Italy* case (in which the applicants, neighbours of a factory which produced fertilisers and a chemical compound used in the manufacture of synthetic fibres, classified as high risk, and which, in the course of its production cycle, released large quantities of inflammable gas, alleged a violation of Article 8 of the Convention), the Court recalled its judgment of 18<sup>th</sup> February 1998 concerning the *López Ostra* case and asserted that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely. In this case, and until the cessation of the production of fertilisers, the applicants waited for essential information which would have permitted them to evaluate the risks they and their families might run if they continued to live in a place exposed to danger in the event of an accident at the factory; therefore, the Court decided that there had been a breach of the applicant' rights regarding their private and family life.

The applicants also claimed that information for the public constitutes one of the essential elements for the protection of the well-being and health of the population, because of the wording of Article 10 regarding freedom of information [especially "this right shall include freedom to (...) receive (...) information and ideas"] should be construed as conferring an actual right to receive information, in particular from the relevant authorities, on members of local populations who have been or could be affected by an industrial or other activity, which would be dangerous for the environment. In other words, Article 10 of the Convention would impose on member States not only a duty to make accessible to the public information regarding environmental matters (a requirement already present in Italian law), but also positive obligations to collect, process and disseminate such information which, by its very nature, could not otherwise come to the knowledge of the public. The Court did not accept this point of view and, conscious of its limitations, held that freedom of information could not be seen as an imposition on a State of positive obligations to collect and disseminate information of its own motion, meaning that, as a result, Article 10 was not applicable in this case.

Although, in my opinion, there is room for criticism regarding this decision, I recognise that it makes clear the inherent limitations of a finalist interpretation of the Convention; the Court, in effect, is not a legislator, and its active role in the progressive development of the rights guaranteed in the Convention and its normative protocols, through a teleological and finalist interpretation of them, cannot displace States from their role as "legislators". When Member States want to expand the catalogue of rights recognised, the way is cleared for this through the adoption of a new additional Protocol; the role of the production of the right corresponds to them and not to the Court, though the Court might have brought to fruition a task which in a way is creative through a teleological interpretation of the conventional norms for the protection of human rights.

In any case, it is undeniable that, through its jurisprudence, the European Court of Human Rights has consolidated the possibility of indirectly protecting rights not expressly recognised in the Convention, and that, by means of a finalist and dynamic interpretation of the Convention and its normative protocols, it has allowed rights not expressly guaranteed in the wording of the aforesaid legal instruments to come into its scope of application.

## 9. Problems which the European Court of Human Rights is currently facing and possible remedies: Protocol N.º 14

With the adoption and coming into force of Protocol N.º 11 a very important step was made towards the improvement of the European system for the protection of human rights, due to the fact that, as I have shown above, this was a huge advance regarding the system that had previously been in place since an international legal body, the European Court of Human Rights, is now the only one authorised to decide whether there has been a violation of the rights guaranteed under the European Convention of Human Rights or its normative protocols. But in the short amount of time lapsed since its coming into force on 11<sup>th</sup> November 1998, the facts have made clear that the Court is asphyxiated by the very numerous applications it must process, and from this comes the need to reflect on the causes of the situation and on possible solutions for the overcoming of the current overload which is seriously threatening the efficiency of the European legal system for the protection of human rights as well as its quality, and even its credibility.

### 9.1. *Causes: Problems brought about by changes undergone in the Council of Europe*

Following the fall of the Berlin wall and the later dismantling of the Russian Soviet empire, the Council of Europe became the European international organisation best placed to provide a solution to the demands for cooperation made by Central and Eastern European countries, as many of them saw the Council of Europe as a means for strengthening their transition processes to democracy, and considered Strasbourg as the “waiting room” for Brussels, or a necessary step for the reinforcement of their aspirations to later incorporation into the European Union. But it is clear that, compared with the situation which had existed for forty years (from 1949 to 1989), the Council of Europe became, after the events of 1989 and 1991, an international organisation that was less homogenous and more unstable: in 1989, the Council of Europe had 23 members and embraced 400 million people; currently, there are 46 Member States, and the Council works with 800 million people. In order to better understand the risk of loss of cohesion and homogeneity which I am referring to, it is sufficient to take into account the fact that in 1989 almost half of these countries and people hardly had any contact with the Council of Europe; this has changed so much in little less than a decade that, regarding its current composition, some have even begun to call it the “*Council of Eurasia*” rather than the Council of Europe. Throughout this swift process of change, it was necessary to carry out a political action, based on the values proclaimed in the Statute of the Council of Europe, with the aim of facing up to the long and difficult task of building Europe out of problems and diversity. Regarding this, and with the aim of providing an adequate solution to the risks mentioned above, the accession of States born out of the splitting of the Soviet bloc remained subordinate, as of 1990, to a political condition: the definitive and swift ratification of the European Convention of Human Rights.

This condition was not envisaged in the Statute of the Council of Europe, nor in the European Convention of Human Rights. Only members of the Council can be States party to the latter, but those were not under the obligation to remain legally bound by the Convention; nowadays, however, all Member States of the Council are part of the Convention, as this is a demand from the Committee of Ministers of the Council of Europe on inviting a State to join the organisation.

The significant change which took place was due to the consciousness that the expansion of the number of members implied a risk that profound cultural, social, and economic differences between the old and new members would bring about the debilitation of an organisation based on a heritage of common values, and hence the requirement that the post-Communist States would have to prove that they could be considered true democracies.

The commitment made by all States to ratify the Convention had, however, been made before the collapse of the Soviet bloc; it had become Council of Europe practice with the accessions of Portugal, Spain, and Finland. Spain, for example, signed the Convention on the same day that it joined the Council of Europe, 24<sup>th</sup> November 1977 (as a sign of where the process of transition to democracy was going, begun with the Law for Political Reform and the elections of 15<sup>th</sup> June 1977), and ratified it on 4<sup>th</sup> October 1979 (Official State Gazette 243, 10<sup>th</sup> October 1979).

This practice remained firmly formalised, and became a political and legal requirement in the Declaration of 9<sup>th</sup> October 1993, adopted in Vienna at the Summit of the Heads of State and Government of member States of the Council of Europe. The Vienna Declaration recalled that the end of the division of Europe offered a historic opportunity for the reaffirmation of European peace and stability, and that all member States of the Council of Europe were committed to pluralist and parliamentary democracy, the indivisibility and universality of human rights, rule of law, and a common cultural heritage enriched by their diversity.

The Heads of State and Government added that the Council of Europe was the European political institution that was capable of welcoming, on an equal footing and in permanent structures, the democracies of Europe that had been freed from Communist oppression. For this reason, the accession of those countries to the Council of Europe became a central element in the construction of a Europe founded on common values. As a result,

“such accession presupposes that the applicant country has brought its institutions and legal system into line with the basic principles of democracy, the rule of law and respect for human rights. The people’s representatives must have been chosen by means of free and fair elections based on universal suffrage. Guaranteed freedom of expression and notably of the media, protection of national minorities and observance of the principles of international law must remain, in our view, decisive criteria for assessing any application for membership. An undertaking to sign the European Convention of Human Rights and accept the Convention’s supervisory machinery in its entirety within a short period is also fundamental”.

All these achievements, nevertheless, are threatened as much by factors external to the Convention as by the inherent difficulties in running a system for the legal protection of human rights in the context of a situation that is now made up

of 800 million people and 46 member States of the Council of Europe, all of these States being part of the Convention.

The first undoubtedly affect the operation and effective working of the European system for the protection of human rights and freedoms. The significant increase in the number of member States of the Council of Europe, which has brought with it a growing level of heterogeneity, forces us to ask ourselves if these new member States (for example, the Russian Federation) are ready to take on the obligations required by the European Convention of Human Rights. Moreover, will they endure in the new context created by the enlargement “the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy?”

The political decision to open the doors of the Council of Europe to the States which arose from the collapse of the Russian Soviet Empire, on the condition that they signed and ratified the European Convention of Human Rights, is understandable. However, this bet could turn out to be perverse if the commitments undertaken by the new members are not fulfilled, or if they are but in an inadequate way. If this happens, the Council would have to choose either rigour, with its consequent political problems, or indulgence, with the negative repercussions that this would have for its credibility regarding the protection of human rights.

The passivity of the Committee of Ministers regarding the Russian Federation and its serious human rights violations in Chechnya, despite the critical resolutions adopted by the Parliamentary Assembly of the Council of Europe, confirms these fears, and calls into question the credibility of the Council of Europe as regards the protection of fundamental rights and freedoms.

And together with the external factors which I have just referred to, that is the context in which the European Convention of Human Rights operates, the difficulties inherent to the working of a Court charged with applying a very complex normative system (the Convention and its additional normative protocols) to such a high number of applications are such that they threaten to collapse it.

In effect, if the growing heterogeneity of the States bound by the Convention poses an undeniable risk, the intrinsic difficulties of a legal system for the protection of human rights, like the current one, are equally undeniable.

The facts which I have just referred to are of fundamental relevance to the understanding of the situation of asphyxiation that the European Court of Human Rights is currently facing. Its productivity is undeniable, but to what extent can it sustain itself? There is, therefore, the view that the eleventh additional Protocol has failed, and that what we need is a “reform of the reform”. I was in favour of the reform that the Protocol N.º 11 introduced into the guarantee mechanism set up in the European Convention on Human Rights because, in my opinion, its essential element was its primordial aim: perfecting the judicial character of the guarantee mechanism. However, I recognise that the negotiators involved might not have sufficiently taken into account how and with what intensity the European situation was changing, nor might they have taken into account the consequences that the improvement of the control system (a permanent tribunal with obligatory jurisdiction, before which all individuals could lodge applications) would bring with it, that is an obvious increase in the number of applications.

## 9.2. Possible solutions

The very high number of applications has, without doubt, a positive aspect regarding the confidence of citizens and lawyers in the European Court of Human Rights, and this has caused some to think that the Court is a victim of its own success.

Nonetheless, there is also a negative aspect, due to the fact that the Court is finding itself collapsed, and it is no longer just a question of increasing the number of lawyers in the registry—which cannot be increased *ad infinitum*—or of improving working practices. Therefore, in the medium and long term, measures with a greater reach had to be introduced, which were already suggested at the Inter-Ministerial Conference held in Rome at the beginning of 2000, on the occasion of the celebration of the fiftieth anniversary of the signing of the European Convention of Human Rights.

Some of these measures are as follows:

- 1) introducing into the European Court of Human Rights the working practices of the Supreme Court of the United States of America, which publishes a list of the affairs which it deems important enough for examination and decision, without motivating or reasoning the choice;
- 2) regionalising the system, that is setting up tribunals in the main European areas and regions—for example, Southern Europe, Northern Europe, Eastern Europe and others—maintaining a superior jurisdiction in Strasbourg;
- 3) transforming the European Court into a pre-judicial consultation body in the style of that which exists in the Court of Justice of the European Communities, in such a way that the national tribunal called to make a definitive decision in a case affected by the Convention could ask the European Court to give its opinion with the aim of finding a solution in accordance with the Court's view;
- 4) reducing the number of rights and freedoms recognised, excluding, for example, the requirement for a trial within a reasonable time as part of the right to a fair and public hearing;
- 5) doubling the number of judges—two per each State party to the Convention instead of one—and increasing the number of lawyers in the registry of the Court, so that the Court would have at its disposal a higher number of Chambers and committees and would therefore be able to increase its productivity;
- 6) creating, in the heart of the Court, an instance dedicated exclusively to the examination of the admissibility of applications, so that the Court would be freed of having to consider these questions, and would only have to deal with the applications which were declared admissible, approximately 16% of applications registered.

Amongst these proposals, it appears to me that the one suggesting that the European Court of Human Rights copy the working practices of the Supreme Court of the United States of America should be rejected. In fact, this method is already present in the Strasbourg Court, as in many cases the decisions regarding inadmis-

sibility pronounced unanimously by a committee of three judges are very concisely motivated, which means that a particular applicant could have the impression that the case has not been duly considered by the Court. However, it seems undeniable that, with this practice, there exists the risk of ignoring the fact that the Strasbourg Court is, above all, a human rights tribunal, or a tribunal before which all people finding themselves under the jurisdiction of a Member State can lodge an application against a State which they consider to be guilty of the violation of one of the rights guaranteed in the Convention or the protocols thereto.

If we disregard or do not value this essential element of the European system for the protection of human rights, we will be taking a significant and lamentable step backwards, and the Court will lose both the confidence of its citizens and its credibility and authority. This final point is very important as, due to its authority, the jurisprudence of the European Court is taken into consideration both by internal tribunals (for example, the jurisprudence of the Spanish Constitutional Court), and by other international judicial bodies (the Court of Justice of the European Communities, the Inter-American Court of Human Rights and, although it does not have judicial character in the strictest sense, the Human Rights Committee set up as a result of the International Covenant on Civil and Political Rights).

The regionalisation of the system, proposed by the former French Minister of Justice, should also be rejected because it would imply the risk of establishing different speeds and diverging jurisprudence regarding the protection of human rights, forgetting the specific nature of the Convention as an expression of a European public order of human rights.

The proposal to transform the European Court into a consultative body is similarly not to be supported, as it would mean a step back regarding one of the most important achievements of the European Convention of Human Rights: the appeal of the individual before an international judicial body. It would be, however, desirable to overcome the rigid nature of the current Protocol No. 2 (which authorises the Committee of Ministers of the Council of Europe to seek advisory opinions from the Court, and which has never been invoked), and to allow the Strasbourg Court, like the Luxembourg or the Inter-American Court of Human Rights do, to give advisory opinions, which could serve as a guide for States Parties to the Convention and the protocols thereto, and for the Committee of Ministers of the Council of Europe itself.

The proposal to "improve" the system through the reduction of the catalogue of rights guaranteed (excluding, for example, within the right to a fair trial, recognised in Article 6 of the Convention, the requirement of a reasonable time-frame for the proceedings) is, in my opinion, equally not worthy of support. Justice should not be either summary or excessively slow, and the reasonable time frame is an essential element of a fair trial. Like all the rights guaranteed in the European Convention of Human Rights, the right to fair trial must be effective and not illusory or theoretical; and, what effectiveness can an appeal have when, in the light of the complexity of the case and the behaviour of the interested parties and the judge, the length of the proceedings does not meet the requirement for a fair trial within a reasonable time?

The proposal to double the number of judges (two for each Member State, which nowadays would mean 92 instead of 46) would, without doubt, allow an

increase in “the productivity” of the Court, which could increase the number of admissibility committees and Chambers. But, apart from the cost, what would happen to the coherence of the jurisprudence? On the other hand, should “productivity”, meaning quantity, prevail over the quality of the decisions made by the Court? And, more generally, to what extent is it legitimate for the criterion of “productivity” to be so relevant in a tribunal dealing with the protection of human rights? Is it not, perhaps, more important that such a jurisdictional instance should exist, and that the people who consider themselves to have been victims of a violation of their rights and freedoms should be able to lodge an application before it, even though the proceedings of the appeal would be less speedy than what is desirable? Finally, the creation within the Court of an instance dedicated exclusively to the examination of the admissibility of applications would, without doubt, have the benefit of considerably reducing the Court’s workload, and would avoid this international legal mechanism not respecting, or not being able to respect (due to the excessive number of cases needing to be solved), the requirement of a reasonable time for a fair trial which the Convention imposes on internal tribunals. This solution, supported by Gérard Cohen-Jonathan—in my opinion one of the most relevant experts in the European system for the protection of human rights—and to which I showed my support in my book *El Convenio Europeo de Derechos Humanos*, proposed the creation of a system with two levels: a First Instance Court, a common law human rights tribunal, composed of a number of judges equal to that of the States Parties to the Convention, and a European Court of Human Rights, made up of fifteen judges, which would decide on the most important cases which brought about issues of principles. Would this be, then, a return to the double instance that existed before the Protocol N.º 11 (Commission and Court) came into force? Not exactly, because the old system used the Commission as a judge for admissibility, but regarding the merits of the case, it could only give an opinion regarding whether or not there had been a violation, whereas the new instance proposed would decide on both the admissibility and the merits.

The First Instance Court would be a tribunal—not a Commission—which would mean that, like the amendment Protocol No. 11, the aspiration contained in the Message to Europeans, adopted at The Hague Congress in 1948, would be fulfilled: “We desire a Court of Justice with adequate sanctions for the implementation of this Charter”.

This Court could also better take on the complex functions required of the Strasbourg judges, who are at the same time judges of admissibility, of instruction, mediators if there is a friendly settlement, and, finally, quasi-constitutional judges.

In the context of these proposals, on 13th May 2004 a new amendment Protocol for the control system set up in the European Convention on Human Rights was signed (Amendment Protocol N.º 14), which will come into force when it has been ratified by all Member States. At the time of writing, the summer of 2005, this protocol has been signed by 44 of the States Parties to the Convention (it has not been signed by Bulgaria and the Russian Federation), and ratified only by 12 (Armenia, Denmark, Slovakia, Slovenia, Georgia, Ireland, Iceland, the former Yugoslav Republic of Macedonia, Malta, Norway, Portugal, United Kingdom, and Romania). This Protocol aims to facilitate the functioning of the Court which, when it comes into force,

will be able to function with a single judge, a committee of three judges, Chambers, and Grand Chambers. The single judge will be able to declare inadmissible an individual application if such a decision does not require subsequent examination; the committee of three judges will be able to declare the inadmissibility of an application if such a decision is unanimous and, if it declares it to be admissible, will also be able to rule on the merits if the underlying question in the case is already the subject of well-established case-law of the Court.

However, the coming into force of the new amendment Protocol will take time, and hence my conviction that it is vital for lawyers and judges from Member States of the European Convention of Human Rights to definitively take in the subsidiary character of the European system for the protection of rights and freedoms, or that internal tribunals should function as the first and principal protectors of the rights guaranteed in the Convention.

In other words, in the same way that Spanish judges appear to have understood their function as community judges as regards the application of European Community law, it is desirable that they equally consider themselves to be judges for the application of the European Convention of Human Rights, with the direct applicability and range which this has in Spanish law in accordance with what is set out in Article 96 of the Constitution, and as a criterion for the interpretation of the rights and freedoms constitutionally recognised in accordance with what is set out in Article 10.2 of the Spanish Constitution.

I do not believe statements that say that the European Court of Human Rights is a victim of its success; in my opinion, the avalanche of applications is more an indication of failure: that of the internal legal systems regarding the adequate protection of rights and freedoms through legislators, tribunals, and lawyers. In reality, and due to the subsidiary nature of European protection of human rights, it is the internal legal orders of Member States which should prevent and remedy eventual violations of the rights recognised in the Convention; when this fails, the result will inevitably be an avalanche of applications before the Strasbourg Court.

Member States are obliged to set up effective internal appeals in their legal orders (Article 13 of the Convention), and, given the subsidiary nature of the European system for the protection of human rights, I believe it indispensable that national legislators should be more conscious of the obligation placed on them by Article 13 of the Convention, in the way that this has been interpreted by the Strasbourg Court: the concession of an effective remedy before a national instance to all people who consider themselves victims of a violation of the rights recognised in the Convention.

This last point is of fundamental importance, as it makes clear a procedural consequence of the duty for member States to ensure the fulfilment of conventionally assumed obligations in their internal law. The exceptional relevance of the demand for previous exhaustion of domestic remedies among the requirements for the admissibility of applications before the Court has as its basis the fact that internal authorities are best placed for the protection of fundamental rights and freedoms, meaning that the obligation for States to provide effective remedies in their legal orders regarding alleged violations of the Convention is seen as the counterpoint which balances the subsidiary character of the European mechanism for the protection of human rights.



The internal application of the Convention and its additional normative protocols is essential: firstly, because of its preventive effect, in avoiding non-fulfilment of conventional obligations on the part of the States; secondly, because the European mechanism for the protection of rights and freedoms is subsidiary in character, which means that the domestic judge is the first guarantor and first protector of the rights and freedoms recognised.

This, precisely, was one of the essential ideas that based the arguments of those of us in favour of the far-reaching reform that the eleventh amendment Protocol signified for the system set up in 1950: the coexistence of a sole body, of obligatory jurisdiction and permanent in nature, before which individuals who considered themselves victims of a violation of any of the rights recognised could have active legitimisation to lodge applications under the same conditions as States.

Without this vital collaboration between legal orders of Member States, the international guarantee mechanism would have problems functioning, whatever reforms might be introduced to it.

#### 10. *De lege ferenda* proposals for perfecting the system

In my opinion, the time has come for the European system for the protection of human rights to be reconsidered so as to make it more efficient. In that respect, I believe it will be useful to raise the following questions:

1) Firstly, the problem of reservations and interpretative declarations, with the aim of eliminating them and bringing to an end the relativism which, despite the limits which the control of the Court puts in place regarding the unilateral desires of States, they inevitably introduce in a system of European public order of human rights.

2) Secondly, the consideration of the utility of regulating, through the means of a new Protocol, the problem of the effects and execution of the judgments of the European Court of Human Rights in the internal legal orders of Member States. The Committee of Ministers of the Council of Europe is conscious of the importance of this issue, and on the 19<sup>th</sup> January 2000 adopted a recommendation on "the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights".

In my opinion, as I stated previously in my discussion of the effects and execution of the judgments of the Strasbourg Court and my signalling of the problems of national solutions, inevitably diverse and heterogeneous, I believe that it would be preferable to have a Protocol to regulate in a homogeneous way the effects of the sentences of the Strasbourg Court as regards the internal law of Member States.

3) Thirdly, I believe the time has come to pose the question of interim measures, which, currently, can only be recommended by the Court, in order to allow this body to decide what they shall be. With compulsory interim measures difficult situations will be able to be avoided, such as the one resulting from the judgment of 20th March 1991, *Cruz Varas and others vs. Sweden*. In this case (regarding the expulsion to Chile of a Chilean couple and their son, carried out with regard to the husband, despite the recommendation not to carry out the expulsion that had been

made by the European Commission on Human Rights), the Court considered that the indication of interim measures was only a recommendation that did not legally bind the State concerned; obviously, this situation is highly unsatisfactory in all cases which refer to Articles 2 and 3 of the Convention, that is those applications in which the right to life or the right to not be subjected to torture or inhuman or degrading treatment or punishment are at stake.

Due to the proposals I have just discussed, I believe that the deepening process of the realisation of a European human rights *ius commune* would continue, as the practice has progressively been consolidating the constitutional dimension of the European Convention of Human Rights which is, of course, a treaty concluded by States, but of a specific nature due to the fact that it is a treaty of collective guarantee of fundamental rights and freedoms.

### 11. **Conclusions: the significance of the Convention in the framework of International Human Rights Law**

The European system for the legal protection of human rights is not perfect, and it can and should be improved. But, within its limitations, we should not forget that it is the most advanced of existing systems for the international protection of rights and freedoms, both on a universal level and a regional level, due to the following:

- 1) An international jurisdictional body is the only authority with competence to decide whether there has been a violation of the rights guaranteed in the European Convention of Human Rights and the protocols thereto.
- 2) This jurisdictional instance, the European Court of Human Rights, has a permanent nature and obligatory jurisdiction, both if dealing with inter-state applications or those made by individuals.
- 3) In the same conditions as States, the individual has active legitimisation before the Court, which means that, once the domestic remedies existing in the legal order of the State concerned have been exhausted, he or she will be able to lodge an application before the European Court of Human Rights.

In my opinion, the most characteristic and essential element of the European system lies in the right of individual application, that is the possibility for any person claiming to be victim of a violation of one of the rights recognised in the Convention or one of its additional normative protocols, once all domestic remedies have been exhausted, to lodge an application before an international tribunal with obligatory jurisdiction, which will decide whether or not there was a violation, and will resolve the complaint through a legally binding judgement.

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# The European Social Charter

Jordi Bonet Pérez

**Summary:** 1. Introduction. 2. The legal policy aims pursued by the ESC. 2.1. The aim of the international protection of economic and social rights at European regional level. 2.2. The aim to contribute to the creation of a *European social space*. 3. The content and scope of the legal commitments undertaken by the States Parties. 3.1. The identification of the object of the protection given by the ESC. 3.2. The determination of the legal obligations for the States. 4. The ESC system of control. 4.1. The mechanism of periodical reporting. 4.2. The mechanism of collective complaints. 5. The process of revision of the ESC. 5.1. The general characteristics of the Revised ESC. 5.2. The update of the economic and social rights brought up by the Revised ESC. 6. Final considerations

## 1. Introduction

The European Social Charter (ESC), adopted on 18 October 1961, is, together with European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), one of the main contributions made by the Council of Europe to the development of a European system of human rights protection—according to the institutional aim to achieve “the maintenance and further realisation of human rights and fundamental freedoms” (Art. 1, b of the Statute of the Council of Europe)—.

However, the evaluation of the relevance of the ESC must go beyond its simple consideration as an international treaty that intends to oblige the States Parties—all of them Member States of the Council of Europe—to safeguard certain economic and social rights.

Firstly, because the ESC is not only considered a valid instrument to strengthen the respect of human rights in Europe, but also a tool for economic and social progress of European societies: the effectiveness of economic and social rights, as stated in the Preamble of the ESC, must contribute to “improve the standard of living and to promote the social well-being”. The analysis of the ESC makes possible, then, the debate on substantive issues: if we compare it with the ECHR, the discussion on the scope of equality and indivisibility of human rights can be revive; in the meantime, its perception as an element of harmonization that promotes a *European social space* contributes to the reflection about the current relevance of the idea of a *social Europe* in a world increasingly globalized—assessing both the scope and the level of fulfilment of the commitments assumed by the States Parties—.

Secondly, because the ESC represents a very significant advance in the international promotion and protection of economic and social rights; leaving aside the contribution of the International Labour Organization (ILO), we must bear in mind that the ESC was adopted and entered into force before the International Covenant

on Economic, Social and Cultural Rights (ICESCR). Therefore, even being an international treaty with a regional scope, its contribution as a international legal instrument of a general nature on economic and social rights is remarkable: it is a step forward in the progressive development of International Human Rights Law in this field; but its relevance is even greater if the ESC is located in the context of the interaction, interrelation and mutual influence among those international Organizations like the Council of Europe, the UN or the ILO that deal with economic and social rights.

These remarks —together with the appreciation of the ESC as a starting point for a dynamic and evolving legal regime with a European dimension— are latent in the conceptual substance that determines the analysis of the ESC; and all that will be present when successively examining the *aims of legal policy pursued by the ESC*, the *content and scope of the legal commitments undertake by the States Parties*, the *ESC system of control*, as well as a special reference to the *process of revision of the ESC*.

## 2. The legal policy aims pursued by the ESC

Chronologically, the ESC is the first international treaty whose specific aim is to protect a general catalogue of economic and social rights<sup>1</sup>. This singularity proves, in general terms, the different rhythm and consistency of the development of International Human Rights Law at the universal and the European regional level, and in special the relevance also given in the Council of Europe to the safeguard of economic and social rights. However, to gauge accurately the relevance, significance and specificity of the ESC within this sector of the international legal system other converging issues need to be examined, especially the legal policy aims pursued by the ESC.

Even when they may be considered both sides of the same coin, the ESC had, and still have nowadays<sup>2</sup>, a double legal policy aim: *to contribute at the European regional level to the international protection of economic and social rights*, and as an aim inseparable to the previous one, *to contribute to the creation of a European social space*.

### 2.1. *The aim of the international protection of economic and social rights at the European regional level*

As it can be inferred from the introduction to this research, this legal policy aim finds its legitimacy in the Statute of the Council of Europe itself: respect for human rights is included among the institutional aims expressly mentioned in its Article 1. The ESC is, therefore, a legal realisation in agreement with the values and principles of this European Organization of political cooperation. Consistently with the spirit and practice of the Council of Europe, the ESC has a double programmatic referent:

<sup>1</sup> WIEBRINGHAUS, H.: "La Charte sociale européenne: vingt ans après la conclusion du traité". *Annuaire Français de Droit International*, XXVIII, 1981, p. 934.

<sup>2</sup> A time where we should maybe wonder whether SUKUP's words about the dominant ideological discourse are right, words he uses to warn Europe to stop deceiving itself about the goodness of the neoliberal dogmatism and to avoid identifying labour flexibility with work insecurity and social cuts (SUKUP, V.: *Europa y la globalización. Tendencias, problemas y opiniones*. Editorial Corregidor, Buenos Aires, 1998, pp. 369-370).

the Universal Declaration of Human Rights (UDHR), of 10 December 1948, and the ECHR; at its root, the grounds of legal policy of the ESC are to develop at the European level a mechanism to guarantee the economic and social rights included in the UDHR complementary and autonomous to the one designed at the ECHR.

Accordingly, it must be noticed how the ESC is a “part of the same ambitious process of standard-setting in the post-war era which led to, and emanates from”<sup>3</sup>, the adoption of the UDHR; thus, the ESC projects and transfers to the field of the European cooperation on human rights the values and principles implied in the UDHR<sup>4</sup>, with the will to contribute to make its list of rights and freedoms partially effective. Thus, it is hardly surprising that during the preparatory work for the ESC it was born in mind the parallel experience of the United Nations at the preparation and negotiation of an international treaty that would specify into legal obligations regarding the economic, social and cultural rights the wording of the UDHR —a process that culminated with the adoption, the 16 December 1966, of the ICESCR<sup>5</sup>—.

On the other hand, it is generally accepted that the ESC is the *counterpart* of the ECHR and would be considered a complementary legal instrument of it: while the ECHR is basically founded on the will to acknowledge and the realization at the European area of the civil and political rights included in the UDHR, the ESC should do the same regarding the economic and social rights.

The complementarity between the ECHR and the ESC must be clarified, as it can't be established a *symmetric parallelism* between both international instruments<sup>6</sup>:

- The ESC is the result of a conscious and excluding political will by those who drafted the ECHR. They decided to include in the ECHR only those rights and fundamental freedoms “defined and accepted after long usage, by the democratic regimes”<sup>7</sup>; in accordance with this, they assumed that the civil and political rights were essentially the ones that, on the one hand, represented a common denominator consolidated and accepted by all the Member States according to their constitutional traditions and, on the other hand, a requirement for the functioning of the democratic system.

<sup>3</sup> EVJU, S.: “The European Social Charter”, in: BLANPAIN, R. (ed.): *The Council of Europe and The Social Challenges of the xxist Century*, Kluwer Law International, London, 2001, p. 20.

<sup>4</sup> Paradoxically, the Preamble of the ESC doesn't make any reference to the UDHR —the only texts mentioned in the Preamble of the ESC are the ECHR and its Additional Protocol—; on the contrary, the Preamble of the ECHR links the origin of the European system of human rights to the UDHR values and principles: it was adopted “to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration”.

<sup>5</sup> We must remind that in the early 50s —according to Resolution 543 (VI) of the General Assembly, 5 February 1952—, the draft of a single international treaty split in two projects finally adopted in 1966 as the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR.

<sup>6</sup> The ECHR and the ESC are “the regional counterparts” of the ICCPR and the ICESCR, but “there the parallel [of the ESC] with the European Convention on Human Rights ends” (GOMIEN, D.: HARRIS, D.; ZWAAK, L.: *Law and practice of the European Convention on Human Rights and the European Social Charter*. Council of Europe, Strasbourg, 1996, p. 378).

<sup>7</sup> CONSULTATIVE ASSEMBLY OF THE COUNCIL OF EUROPE: “Report of the Committee on Legal and Administrative Questions on the establishment of a collective guarantee of essential freedoms and fundamental rights”, *Document 3* (COUNCIL OF EUROPE: *Collected edition of the “travaux préparatoires” of the European Convention on Human Rights*. Vol. I, Nijhoff, The Hague, 1975, p. 18).

In short, as TEITGEN stated, the Council of Europe had to *begin at the beginning*<sup>8</sup>:

“5. Certainly, ‘professional’ freedoms and ‘social’ rights, which have in themselves a fundamental value, must also, in the future, be defined and protected; but everyone will understand that is necessary to begin at the beginning and to guarantee political democracy in the European Union, and the to co-ordinate our economies, before understanding the generalisation of social democracy”.

It isn’t surprising, given these criteria, that the final political decision to adopt an international treaty like the ESC came after the entry into force of the ECHR, in 1953.

- The complementarity between both legal instruments, in any case, is based on the principle of legal autonomy: even though they were done within the same International Organization, the ESC and the ECHR are two international treaties that give rise to legal regimes that are autonomous between them —which have been independently completed and revised—; that’s why an *asymmetric differentiation* can be predicated between them, what affects not only the rights and freedoms respectively protected, but also the scope of the legal obligations assumed by the States Parties and the system of international guarantee established to monitor their behaviour. The autonomy and asymmetry of both legal regimes can be exemplified through the existing differences regarding the monitoring of the fulfilment of the legal obligations accepted by the State Parties: both legal regimes have their own systems of international control, specific and exclusive, so the European Court of Human Rights doesn’t have a jurisdiction *ratione materiae* to apply or interpret the ESC —nor the other way round in the case of the European Committee of Social Rights<sup>9</sup>—; this redounds to the presence, as far as the ECHR is concerned, of a jurisdictional mechanism that individuals can access, unlike the ESC —in spite of its progressive evolution—.

<sup>8</sup> *Ibidem*.

Together with the above mentioned priorities, there are three essential factors that had influence on it: the lesser importance of the constitutional tradition of the legal recognition of economic and social rights; the conceptual difficulties to define and delimit its legal content and the differences existing among the economic and social structures of the Member States (LEZERTUA, M.: “Orígenes, funcionamiento, efectos y cuadro de ratificaciones por los Estados Miembros”, in: LEZERTUA, M. and VIDA SORIA, J. (eds.): *La Carta Social Europea en la perspectiva de la Europa del año 2000. Acta del Coloquio conmemorativo del XXV aniversario de la Carta Social Europea (Granada, 26 octubre 1987)*. Ministerio de Trabajo y Seguridad Social, Madrid, 1989, p. 293).

<sup>9</sup> Even though the analysis of the possible interaction *ratione materiae* between the ESC and the ECHR is postponed, it is true that the jurisprudence of the European Court of Human Rights maintain an interpretative criterion —the so-called *indirect protection*— in favour of the guarantee of rights and freedoms not expressly recognised in the ECHR as soon as they are connected to the effective respect for the rights and freedoms provided in it (CARRILLO SALCEDO, J. A.: *El Convenio Europeo de Derechos Humanos*. Tecnos, Madrid, 2003, pp. 105-108); by applying the state law on economic rights as a whole, what EWING states especially regarding the right to work, the interpretation of the ECHR “could in principle affect labour law incidentally, and not always on peripheral issues” (EWING, K. D.: “The Human Rights Act and Labour Law”. *Industrial Law Journal*, 27, 1998, 4, p. 278).



## 2.2. *The aim to contribute to the creation of a European social space*

From the idea of *social State* developed during the 19th Century, we shift to a 20th Century characterized by the progressive legal acknowledgement of economic and social rights, both at the national and international levels<sup>10</sup>, as a manifestation of the will to go more deeply into it. The ESC is shaped, in these terms, as a legal instrument of an international nature that contributes to a project of solidarity and social justice that pursues the construction of a common social policy<sup>11</sup>: the idea of a *social Europe* or a *European social space* is promoted. This idea can be implied both from the aims of the Council of Europe themselves —Article 1 a) of its Statute points out that the aim of the Council of Europe consists in achieving “a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress”— and from the preparatory work for the ECHR —because, as it has already been said, the option to admit in the beginning only civil and political rights didn’t mean a renunciation to do the same regarding those rights, the economic and social ones, that could help to the generalisation of *social democracy* among the Member States—.

As far as the ESC has the aim to guarantee a European common denominator as regards economic and social rights, it plays a relevant task in the legal construction of an adequate social space for States with heterogeneous constitutional traditions and economic and social models: the identification of a common but flexible legal ground capable of contributing to a minimum harmonization<sup>12</sup> —because only at a level of minimum standards the creation of a shared legal space coherent and uniform on this subject seems viable—; the ESC provides with “a common core of fundamental principles”<sup>13</sup>, both regarding the determination of common principles of social policy and regarding certain legal obligations in relation with economic and social rights.

However, though it was designed as a legal instrument of minimum standards —a characteristic of the International human rights law as a whole<sup>14</sup>—, the pre-

<sup>10</sup> Particularly after World War I, there are some noteworthy Constitutions in this regard, like the republican ones of Mexico (1917) and Germany (1919), or the monarchist ones of the Serb-Croat-Slovene Kingdom (1921) or Romania (1923) —PECES-BARBA, G.: “Los derechos económicos, sociales y culturales: apuntes para su formación histórica”, in: MARIÑO MENÉNDEZ, F. (dir.): *Política social internacional y europea*. Universidad Carlos III/Ministerio de Trabajo y Asuntos Sociales, Madrid, 1996, p. 47—; the creation of the ILO in 1919 also opens in that historic moment an international channel for progress in the field of social justice.

<sup>11</sup> DIAZ BARRADO, C.: “La Carta Social Europea: un instrumento válido para el desarrollo de los derechos sociales en Europa”, in: MARIÑO MENÉNDEZ, F. (dir.): *op. cit.*, p. 233).

<sup>12</sup> If the concept of *legal harmonisation* could express the will to achieve “the regulatory requirements of governmental policies of different jurisdictions” to be identical “or at least more similar” (LEEbron, D. W.: “Lying down with Procrustes: an analysis of harmonization claims”, in: BHAGWATI, J. & HUDEC, R. E.: *Fair trade and harmonization. Prerequisites for free trade?*. Vol. 1: Economic Analysis, MIT Press, Cambridge (MA), 1997, p. 43), then the ESC would be assessed as a short-ranged but positive legal project of harmonisation.

<sup>13</sup> SCIARRA, S.: “From Strasbourg to Amsterdam: Prospects for the Convergence of European Social Rights Policy”. *European University Institute Working Papers*, Law 98/9, 1998, p. 12.

<sup>14</sup> This attribute is clearly expressed in the article 32 of the ESC: “[t]he provisions of this Charter shall not prejudice the provisions of domestic law or of any bilateral or multilateral treaties, conventions or agreements which are already in force, or may come into force, under which more favourable treatment would be accorded to the persons protected”.

paratory work for the ESC weren't *peaceful* regarding the substantive options that were considered. Thus, the difficulties accumulated after a long process of gestation—opened after a Memorandum of Understanding of the Secretary-General of the Council of Europe, of 16 April 1953—, very complex—the preparatory work had place in three consecutive steps<sup>15</sup> where the divergent sensibilities in presence come out—, as well as full of doubts and oscillations about the conception of the core of the project—what explains the existing differences in the successive drafts that were proposed<sup>16</sup>—, are indicative of the existence within the Council of Europe very conflicting positions about fundamental aspects of the design of the project<sup>17</sup>.

It is anyhow meaningful that problems were focused on the legal nature and scope of the commitments that should be accepted by future States Parties: extreme options fluctuated from the adoption of an international treaty generating legal duties or the elaboration of a merely declarative instrument that included some general principles<sup>18</sup>—; the organization of the monitoring system to be implemented also happened to be controversial—rejecting proposals like the creation of a monitoring body with tripartite representation or the possibility for the Committee on Economic Affairs of the then so-called Consultative Assembly of the Council of Europe to refer to the then existing European Commission of Human Rights any question regarding the compliance of legal duties articulated in the ESC<sup>19</sup>. As it was to be expected, the final result is compromise legal text that, for the same reason, shows a complex and ambiguous wording, with a very generic and sometimes vague language, that gives big leeway for the interpretation of the legal commitments accepted.

The so described legal policy aims project on the legal configuration of the ESC two guiding principles that inspire and determine the logic and methodology of action stemmed from the international legal regime: *dynamism* and *flexibility*.

— The description of the ESC as a dynamic legal instrument is perfectly inferred from its own Preamble: it invokes both the aims of the Council of Eu-

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<sup>15</sup> Successively: the *parliamentary phase* (1953-1956), the *governmental phase* (1956-58), and, finally, the Tripartite Conference (1-12 December 1958); about them, for instance: LAMARCHE, L.: *Perspectives occidentales du Droit international des droits économiques de la personne*. Bruylant, Bruxelles, 1995, pp. 87-97; LECLERC, A.: "El papel de los gobiernos en la elaboración de la Carta Social Europea", in: LEZERTUA, M. and VIDA SORIA, J. (eds.): *op. cit.*, pp. 182-188.

<sup>16</sup> For instance, in the framework of the the so-called Consultative Assembly, three draft versions were elaborated.

<sup>17</sup> Without forgetting that, together with the divergent opinions on the conception of the project, there was no reasonable ground to consider that the substantive problems, existing at the time the inclusion of economic and social rights in the ECHR was suggested, had vanished (see Note 8). The preparatory work for the ESC is an illustrative example of the basic questions that a negotiation for the recognition of a list of economic and social rights involves; perhaps it would be necessary to discern if ALSTON is really right when he says that, in general terms, the States "are reluctant participants in the cause of economic and social rights": they use to express their "ideological resistance" and "a negative attitude in front of the need to establish standards and benchmarks, and auditing and accountability mechanisms" (ALSTON, Ph.: "Making Economic and Social Rights Count: a Strategy for the Future". *Political Quarterly*, 188, 1997, p. 190).

<sup>18</sup> In this way, the proposal included in the first draft submitted by the Governmental Social Committee can be highlighted (LAMARCHE, L.: *op. cit.*, p. 95).

<sup>19</sup> Proposal included in the third version of the draft prepared within the the so-called Consultative Assembly.

rope—to facilitate the economic and social progress of States and to secure the maintenance and further realisation of human rights and fundamental freedoms—, which are *per se* proposals for future action in the field of economic development and protection of human rights, and the idea already mentioned that the ESC is a contribution to improve the standard of living of European peoples.

The dynamism that impregnates the ESC can be decomposed at least in three levels:

- i) *Systemic*: the ESC is an international treaty that shapes an *evolutionary legal regime*, that is adaptable to the needs emerging in a dynamic European society through the legal techniques allowed by the Law of Treaties; in practice, the original legal regime in the ESC has been touched up, both material—extension of the protected economic and social rights— and institutional—improvement of the ESC monitoring system—, that have been combined with a global process of review.
- ii) *Legal commitments made by the States Parties*: the flexibility given to States Parties to achieve the level of legal commitment they are willing to assume—within the fixed conventional limits—, is complemented with the implicit aim to finally set a uniform higher legal standard on economic and social rights accepted by States Parties. Article 20, 3 ESC<sup>20</sup>, which provides for the possibility for States to enlarge the legal scope of the accepted obligations, is a demonstration of this *gradualism*.
- iii) *Legal content of the economic and social rights recognized*: from the wording of the numbered paragraphs of the ESC it is predicated that an important number of the undertakings are of a progressive nature, so they imply a continued and sustained action by the State in favour of the highest effectiveness of the economic and social rights recognized<sup>21</sup>.

— Flexibility is another characteristic of the ESC: together with the authorisation to formulate reservations not incompatible with the object and purpose of the ESC<sup>22</sup>, the States Parties, limited by the legal exigencies of

<sup>20</sup> “Any Contracting Party may, at a later date [after the deposit of its instrument of ratification or approval], declare by notification to the Secretary General that it considers itself bound by any articles or any numbered paragraphs of Part II of the Charter which it has not already accepted under the terms of paragraph 1 of this article. Such undertakings subsequently given shall be deemed to be an integral part of the ratification or approval, and shall have the same effect as from the thirtieth day after the date of the notification”.

A similar provision can be found in the Additional Protocol of the ESC, adopted on 5 May 1988—Article 5, 3—, and in the Revised ESC—Article A, 3—.

<sup>21</sup> For instance, in Article 1,1 ESC a reference is made to the undertaking of the States “to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment”, while the Article 1, 3 ESC undertakes them “to provide or promote appropriate vocational guidance, training and rehabilitation”; Article 12, 3 has a special significance because it expressly provides that the States has “to endeavour to raise progressively the system of social security to a higher level”.

<sup>22</sup> In practice, very few States have formulated reservations to the ESC—Source: COUNCIL OF EUROPE; *Treaty Office*, available on: <http://conventions.coe.int/Treaty/EN/v3MenuTraites.asp>—. The writers of the ESC certainly intended to exclude their use by laying down the mechanism of flex-

the ESC, can chose *à la carte* those statutory provisions they accept. This legal technique seems to be an obstacle to the legal homogenisation and harmonisation that the creation of a common legal space entails, as each State Party creates its own legal regime with a specific level of legal commitment; however, although this weakens and minimizes *a priori* the scope of the harmonizing project, the existing legal and socio-economic disparities among the States seemed to make its utilization unavoidable.

It isn't easy to assess whether, then and now—as any analysis of the ESC can't forget it is a living and evolving legal instrument—the ESC has achieved in an efficient manner both aims, whether the legal standard for economic and social rights is satisfactorily fulfilled and whether it corresponds to the European social reality, in what level of compliance is located the degree of social convergence reached, or whether the legal commitments under the ESC and subsequent treaties related to it are still a valid starting point for developing the idea of a European social space.

Anyhow, we have to bear in mind that, firstly, the European social space isn't legally constructed only through the ESC—as its normative development also depends on the Community's social policy developed in accordance with the Treaty establishing the European Community and on the ILO's international standards<sup>23</sup>—. Secondly, that in the framework of the European Community the ESC constitutes a legal text of reference—although not the only one—to identify the fundamental social rights from which the aims of the Community's social policy must be developed<sup>24</sup>. Thirdly, there persist at the beginning of the 21<sup>st</sup> Century deep differences among the European States both regarding their levels of development and their constitutional and legal models on this issue<sup>25</sup>—what can question the opportu-

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ibility of the Article 20 of the ESC (DIAZ BARRADO, C.: *op. cit.*, p. 250); however, according to the Law of Treaties, the lack of reference in the provisions of the ESC to the total or partial authorization or prohibition of reservations means that they can be formulated as long as they aren't incompatible with the object and purpose of the treaty. (INTERNATIONAL COURT OF JUSTICE: *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, CIJ Reports, 1951*, pp. 11-20).

<sup>23</sup> So, according to Vogel-Polsky, in the construction of that idea of a social Europe converges a *space of International law* (VOGEL-POLSKY, E.: "La Europa social del año 2000: la Carta Social y el sistema comunitario", in: LEZERTUA, M. and VIDA SORIA, J. (eds.): *op. cit.*, p. 71); that is to say that the ESC isn't the only international legal instrument devoted to that process.

<sup>24</sup> Article 136, 1 of the European Community Treaty states: "The Community and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion".

The 25 States Members of the European Union are Parties to the ESC or the Revised ESC.

<sup>25</sup> Regarding the legal configuration of fundamental social rights, three constitutional models can be identified: the liberal model, the Southern Europe model and the moderate model (BUTT, M.E.; KÜBERT, J. & SCHULTZ, Ch. A.: "European Parliament: Fundamental Social Rights in Europe", in BLANPAIN, R. (ed.): *op. cit.*, p. 333); in view of the progressive incorporation of Central and Eastern European States to the European Union, some academics have warned that the deepening into the measures of social harmonization according to the potentialities of the European Community Treaty

nity to deepen in the aims of the ESC—. And, fourthly, in this sense can operate ideological —with an ideology almost standing as a *pensée unique*— and economic tendencies that undoubtedly mark the current stage of globalization, which seem to require socio-labour issues to be tackled from the single standpoint of labour market, and States to reduce the public expenditure to its minimum —against their social policies<sup>26</sup>—.

### 3. The content and scope of the legal commitments undertaken by the States Parties

As far as the formal structure of its content is concerned, the ESC is divided into five parts, where successively: the principles of social policy to be followed by future States Parties are enumerated (Part I); the list of economic and social rights which are internationally protected is specified (Part II); the scope of the legal obligations established under the ESC (Part III); the ESC monitoring system is established (Part IV)<sup>27</sup>; and provisions regarding the application of the ESC, as well as the usual final provisions in any international treaty on its legal regime of entry into force and validity, are stipulated (Part V). The ESC has as well an Annex —being an integral part of it, as inferred from Article 38— that happens to be especially important, as we will see below, as far as it sets parameters for the interpretation of the content of the ESC and delimits its personal jurisdiction. The same formal structure is followed by the Additional Protocol of the ESC, adopted on 5 May 1988 (Additional Protocol)—that enlarged the list of economic and social rights recognized—, and, in a way, also by the Revised ESC, adopted on 3 May 1996<sup>28</sup>.

It can be stated that the formal structure of the ESC makes possible to visualize in general terms the elements to be considered in order to delimit the legal content and scope of the commitments accepted by the States Parties; from this structures, two big questions can be inferred: first, the *identification of the object of the protection given by the ESC*, and second, the *determination of the legal obligations for the States*.

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would be negative for these States, as it would seriously affect to their comparative advantage (BELKE, A. & HEBLER, M.: "Social Policy and Eastern Enlargement of the European Union: Labour Market Impacts for the Accession Countries". *Journal for Institutional Innovation, Development and Transition*, 5, 2001, pp. 48-61).

<sup>26</sup> The translation made by FIGUEROA is very meaningful, stating that for the neoliberal economic doctrine "labour market = potato market" (FIGUEROA, A.: "Labour market theories and labour standards", in: SENGERBERGER, W. & CAMPBELL, D. (editors): *International Labour Standards and Economic Interdependence*. International Institute for Labour Studies, Geneva, 1994, p. 57; the legal requirements of the ESC undoubtedly turn this international treaty into an uncomfortable legal instrument (FRANCO FOSCHI, M.: "La Carta Social y el espacio social europeo", in: LEZETUA, M. and VIDA SORIA, J. (eds.): *op. cit.*, p. 61).

<sup>27</sup> According to the object of the current section, the content of Part IV will be analysed in the section of this research devoted to the system of control laid down in the ESC.

<sup>28</sup> Although the last one divides the two typologies of issues included in Part V ESC into its Part V and Part VI respectively; the analysis of the legal content and scope of the undertakings in the Revised ESC are left for Section V of this research.

### 3.1. *The identification of the object of the protection given by the ESC*

The presence in Parts I and II of the ESC —as well as in the Additional Protocol and the Revised ESC— of a distinction between some *social policy principles* and a *list of economic and social rights* makes evident that two levels of legal exigency for States Parties regarding the object of protection are provided.

—In Part I there are established —“as the aim of their policy, to be pursued by all appropriate means, both national and international in character, the attainment of conditions in which the following rights and principles may be effectively realised” (introductory paragraph of Part I)— a number of *social policy principles* addressed to guarantee that the States Parties integrate the recognition of economic and social rights included in the ESC into their decision-making, regardless the legal commitments they can assume concerning the list of economic and social rights included in Part II. The aim of Part I would thus have a double meaning: as the expression of the will in presence during the preparatory work for the ESC to give birth to a legal text that combined a double nature, declarative and compulsory; and also as a manifestation of the need to involve the States Parties in the achievement of a deeper effectiveness of all economic and social rights included in the ESC —hence the correspondence between the social policy principles generically formulated in Part I and each of the economic and social rights whose content is expressly specified in the Part II<sup>29</sup>—.

Another question is which legal requirements can be derived from Part I for States Parties. Considering that Part I constitutes some sort of *declaration of intentions* or, maybe, a *policy commitment* “similar to that in the Universal Declaration of Human Rights”<sup>30</sup>, the programmatic nature that can result from its comparison with the UDHR doesn’t exclude some legal consequences for States Parties, inferred from the wording of the ESC and its legal nature as an international treaty:

- In agreement with the legal requirement provided by the Law of Treaties that every international treaty in force must be performed by parties in good faith, the States Parties to the ESC assume an undertaking which would be inferred from Article 20, 1 of the ESC: Part I must be considered “as a declaration of the aims which it will pursue by appropriate means, as stated in the introductory paragraph of that part”; when reading both paragraphs in connection, it can be concluded the existence of a very generic legal obligation to maintain a national policy inspired, in good faith, by those principles as a whole with the purpose to make them effective —what should exclude a national policy which will conducted in the opposite or reverse direction<sup>31</sup>—.

<sup>29</sup> For instance, if in Part I the general principle that all workers have the right to just conditions of work can be identified —Principle 2—, in article 2 ESC the legal exigencies of the right to just conditions of work are correlatively developed in five numbered paragraphs.

<sup>30</sup> GOMIEN, D.; HARRIS, D.; ZWAAK, L.: *op. cit.*, p. 379; in its Preamble, the UDHR proclaims itself “a common standard of achievement for all peoples and all nations”.

<sup>31</sup> This doesn’t mean that a State cannot maintain a non-active policy if social evolution permits itself to progress in the adequate assumption of aims described in Part I; consequently, a State “may choose not to intervene directly if, according to its legal and institutional system, this is the best way of attaining the “conditions in which the [...] rights” in question “may be effectively realised”, without need to express any reservations whatsoever end” (COUNCIL OF EUROPE: *Explanatory Report to the Additional Protocol to the European Social Charter (ETS No. 128)*. Council of Europe, *Treaty Office*, available on: <http://conventions.coe.int/Treaty/en/Reports/Html/128.htm>, par. 16).

• Part I results, as well, in the legal commitment of no subsequent retraction regarding any measure that has involved a progress towards the achievement of the principles in it, unless those measures adjust to the requirements provided in the ESC itself<sup>32</sup>.

The legal consequences of Part I are certainly very limited, as they seem to be restricted to demand the States Parties to keep in a continuous and gradual way a social policy in agreement with the social policy principles listed as a whole. In spite of that, they can serve as an instrument of political cohesion that can contribute to some extent to help the aim of a deeper uniformity in the social field not to blur, thanks to the flexibility provided by its Article 20: firstly, because to keep the political commitment of the States is particularly relevant when it comes to those economic and social rights about which the State Party won't undertake any legal obligation—since it doesn't free them from showing a positive political action—; and, secondly, because these social policy principles can be useful as an interpretative element when examining the alleged violation of a certain right<sup>33</sup>.

—Part II includes a list of economic and social rights susceptible to turn into international legal obligations the programmatic provisions in the UDHR, particularly in its Articles 22 to 25<sup>34</sup>. Without disregarding its flexibility, that allows to chose to a large extent the scope of its undertakings, it is evident that Part II has as its aim that States Parties “consider themselves bound by the [legal] obligations laid down” —introductory paragraph to Part II of the ESC—. It is a dynamic list that has not only evolved through the interpretation made by the bodies involved in the ESC system of control, but also through the will to expand the list itself —Additional Protocol and Revised ESC—, and to undertake the revision of the economic and social rights previously included in the ESC or in the Additional Protocol —Revised ESC—.

As far as the *classification* of economic and social rights is concerned, a minimalist option of the division into fundamental categories has been preferred, in view of “the broad range of social and economic rights with which the Charters are concerned”<sup>35</sup>: rights regarding work and employment and rights regarding social protection.

• As far as the *rights regarding work and employment* are concerned, the following subcategories can be established:

- i) the right to work (Articles 1 and 9 ESC)<sup>36</sup>;
- ii) the protection in the employment—including the protection of the employment relationship—and in the working environment (Articles 2, 3, and 4 ESC,

<sup>32</sup> According to Article 31, 1 ESC, “the rights and principles set forth in Part I when effectively realised, (...), shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals”. This paragraph is clearly inspired by the restrictive clauses included in some dispositions of the ECHR—for instance, see the respective paragraphs 2 of Articles 8, 9, 10 and 11 ECHR—.

<sup>33</sup> DIAZ BARRADO, C.: *op. cit.*, p. 251, or LAMARCHE, L.: *op. cit.*, p. 112.

<sup>34</sup> The right to property, to the extent it can be considered an *economic right*, was included in Article 1 of the Additional Protocol of the ECHR, adopted on 20 march 1952 —Article 17 UDHR—; through its Article 2 the right to education —Article 26 UDHR— is likewise recognised.

<sup>35</sup> EVJU, S; *op. cit.*, p. 19.

<sup>36</sup> Articles 1-19 are common to the ESC and the Revised ESC.

Article 1 of the Additional Protocol<sup>37</sup>, and Articles 24-27 and 29 of the Revised ESC);

- iii) the right to a vocational training (Article 10 ESC);
- iv) the right to organise and to bargain collectively, including the special protection to workers' representatives (Articles 5 and 6 ESC, Articles 2 and 3 of the Additional Protocol, and Articles 28 and 29 of the Revised ESC);
- v) the right to a special protection for certain categories of workers belonging to vulnerable groups (Articles 7, 8, 15, 18 and 19 ESC).

• As for the *rights regarding social protection*, the following subcategories can be established:

- i) rights concerning the social protection of the population as a whole (Articles 11-14 ESC and Articles 30-31 of the Revised ESC);
- ii) rights concerning the special social protection of certain categories of persons belonging to vulnerable groups (Articles 15-19 ESC and Article 4 of the Additional Protocol).

There is no doubt about the deep interrelation of the ESC with other international legal whose object is the progressive development of economic and social rights at the universal level instruments: the influence of the previous normative activity of the ILO is noticeable in the wording of the ESC —both regarding the content of the list of economic and social rights included and the conventional structure of the ESC<sup>38</sup>—.

The preparatory work in parallel for the ICESCR is also a referent to the normative process that would peak with the adoption of the ESC<sup>39</sup>. After the analysis of two legal instruments with similar characteristics like the ESC and the ICESCR —international treaties of a general nature on economic and social rights— it can be concluded that, in general, the ESC further specifies the legal content of the economic and social rights recognized: for instance, the wording of Article 7 (a) ICESCR —which refers to the fair remuneration as a part of the right of everyone to the

<sup>37</sup> Articles 1-4 of the Additional Protocol have their correspondence in articles 20-23 of the Revised ESC.

<sup>38</sup> Irrespective of the interaction among ILO Conventions and Recommendations and the ESC as far as the economic and social rights protected are concerned, the binding scheme adopted by Article 20 ESC can previously be found —with a high level of coincidence— in the Social Security (Minimum Standards) Convention (1952) —n.º 102— or in the Plantations Convention (1958) —n.º 110—, both adopted by the ILO; although the Council of Europe and the ILO have regularly maintained a fluent level of institutional co-operation —according to an agreement which came into force on 23 November 1951—, both International Organisations established more intensive links during the preparatory work for the ESC —for instance, the aforementioned Tripartite Conference, which finally resulted in a relevant meeting to determine the key issues in the final draft, was organised under the auspices of the ILO (according to the Article 3 of the Mutual Agreement)—.

The ESC is sometimes more ambitious than ILO Conventions expressly are; for instance, Article 6, 4 ESC expressly affirms the undertaking of the States to recognise the right to strike as a form of collective action —but such recognition has not been made in ILO Conventions n.º 87 and 98: it has been later inferred by ILO monitoring bodies—.

<sup>39</sup> For instance, the first draft of the ESC submitted to the the so-called Consultative Assembly, in April 1955, was basically inspired in the UN's previous works.



enjoyment of just and favourable conditions of work— compared with Article 4 ESC—right to a fair remuneration—, or the differences between both formulations of the right to social security—Article 9 ICESCR and Article 12 ESC<sup>40</sup>—.

Even though, the wording of the ESC has been criticized for the vagueness and imprecision of most of its provisions, what redounds on the lack of a complete specification of the protected rights; it has been even stressed both the non-inclusion of some economic and social rights in the list of the ESC<sup>41</sup> and the obsolescence of some of its provisions<sup>42</sup>. The legal questions raised by the list introduced by the ESC aren't very different to those that, in general, are raised by any international treaty whose object are economic and social rights.

In this respect, it can be added that the typical dynamism of the ESC has been a tool that has helped to polish a part of the failings noticed—although, naturally not in such a way to achieve their total elimination—. Firstly, the functioning of the international monitoring system has generated a *jurisprudence*<sup>43</sup> that has allowed an evolutionary interpretation of the provisions of the ESC and thus it has contributed to specify the legal content of the ESC and to adapt it to the European social reality. And secondly, both the Additional Protocol and the Revised ESC have been adopted as international legal instruments whose aim is to take “account of developments in labour law and social policies since the Charter was draw up in 1961”<sup>44</sup>: thus, for instance, if the undertaking “to provide for a minimum of two weeks annual holiday with pay” —Article 2, 3 ESC— could be considered outdated, in the Revised ESC such a legal commitment increase the number of weeks of holiday with pay to four. In any case, States also can, with their faculty of choice *à la carte* of the undertaken commitments, to leave aside some ambiguous, imprecise and even obsolete provisions<sup>45</sup>.

<sup>40</sup> On the other hand, in Article 12, 2 ESC an express reference is made to ILO Convention n.º 102.

<sup>41</sup> A brief remark on these criticisms in LAMARCHE, L.: *op. cit.*, pp. 112-113.

<sup>42</sup> BETTEN, L.: “Prospects for a Social Policy of the European Community and its Impact on the Functioning of the European Social Charter”, in: BETTEN, L./HARRIS, D./JASPERS, T. (dir): *The Future of the European Social Policy*. Kluwer Law and Taxation, Deventer, 1989, p. 101.

<sup>43</sup> Despite the non-judicial nature of the competences of the bodies involved in the supervision—not even when they examine collective complaints—, this term is probably used in an inappropriate way in order to refer to the practice resulting from the implementation of the competence of control provided in the ESC, as it happens with the UN bodies (WIEBRINGHAUS, H.: *op. cit.*, p. 939).

<sup>44</sup> COUNCIL OF EUROPE: *Explanatory Report to the European Social Charter (revised) (ETS No. 163)*. Council of Europe, Treaty Office, available on: <http://conventions.coe.int/Treaty/en/Reports/Html/163.htm>, par. 8; notwithstanding, the State Party to the ESC can remain not bound neither by the Additional Protocol nor the Revised ESC (about legal consequences of the entry into force in a State of the Revised ESC, see Part V).

<sup>45</sup> It also exists the possibility to denounce presumably obsolete provisions—Article 37, 2 ESC—: Spain has denounced the sub-paragraph 4 (b) of the Article 8 of the ESC—which expressly binds the States “to prohibit the employment of women workers in underground mining”— with effect as from 5 June 1991 (the ESC entered into force in Spain on 5 June 1980). The Spanish Constitutional Court later declared that the non employment of women in underground mining was not in conformity with the general prohibition of discrimination of Article 14 of the Spanish Constitution; doing so, the Spanish Constitution was interpreted according to the *Council Directive 76/207/EEC, of 9 February 1976, on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions,*

### 3.2. *The determination of the legal obligations for the States*

It has already been remarked the particularity of the flexibility mechanism laid down in Article 20 ESC authorizes the States to choose —nevertheless, in agreement with a minimum rules previously established by the ESC itself— which provisions in it will they freely accept, hence its relevance for the determination of the legal obligations of States Parties to the ESC.

A flexibility mechanism as the one laid down in the ESC can't be said to be exceptional, not even original for being exclusively used by the ESC: firstly, because the introduction of flexibility mechanisms is a usual practice in international multilateral treaties —included the international human rights treaties—, and secondly, because a legal technique with such a flexibility similar to the one reflected in Article 20 ESC —the partial acceptance of the legal obligations included in the international treaty— can be found in some ILO Conventions<sup>46</sup>. In any case, the need for flexibility is stressed when the guaranteed list includes economic and social rights —due to the resulting requirements of State positive action and their budgetary implications— if the international treaty is intended to be widely ratified and the standards it sets worthwhile<sup>47</sup>.

This procedure of *choice à la carte* works as follows:

- Every State undertakes to accept at least five out of seven articles which can be considered the *hard core* of the ESC<sup>48</sup> —Article 20, 1 (b) of the ESC—.
- Additionally, every State undertakes to consider itself bound “by such a number of articles or numbered paragraphs of Part II” of the ESC, “provided that the total number of articles or numbered paragraphs by which it is bound is not less than 10 articles or 45 numbered paragraphs [provisions accepted by means of the mechanism in letter (b) included]” —Article 20, 1 (c) ESC—. The Additional Protocol undertakes to the States to bind themselves by at least one of the four substantive articles included in it<sup>49</sup>.
- The selection shall be notified to the Secretary General of the Council of Europe at the time when the instrument of ratification or approval of the State is deposited —Article 20, 2 ESC—; it can be presumed that if the State

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and Article 11, 3 of the *UN Convention on the Elimination of All Forms of Discrimination against Women*, of 18 December 1979 —the main argument given by the court was that the scientific and technological progress would determine the revision of protective legislation (STC 229/1992, of 14 December, Legal Fundament 3)—, in despite of the opposite requirements of the ILO *Underground Work (Women) Convention* (1935) —n.º 45—, also into force in Spain.

<sup>46</sup> See Note 38.

For instance, Article 2 of the ILO Convention n.º 102 provides that each State in which this Convention is in force shall comply with at least three of the nine substantive Parts of the Convention —every part develops, respectively, a different type of social insurance cover—, included one of the five selected parts expressly indicated by Article 2.

<sup>47</sup> GOMIEN, D.; HARRIS, D.; ZWAAK, L.: *op. cit.*, p. 379.

<sup>48</sup> These articles are: 1 (right to work); 5 (right to organise), 6 (right to bargain collectively), 12 (right to social security), 13 (right to social and medical assistance), 16 (right of the family to social, legal and economic protection) and 19 (right of migrant workers and their families to protection and assistance); the Revised ESC extends the list of *hard core* articles and of the minimum number of articles that must be accepted too (see Part V).

<sup>49</sup> About the Revised ESC, see Part V.

doesn't make any express indication about its selection, it is accepting the Part II as a whole. Furthermore, a State may, at a later date, declare that it accepts other articles or paragraphs that it has not initially accepted —Article 20, 3 of the ESC<sup>50</sup>—.

Furthermore the level of flexibility made available to States Parties increases both because of the authorisation to make reservations or to denounce the ESC as a whole —Article 37, 1 ESC<sup>51</sup>—, and because of the complementary faculty of any State to denounce any article or paragraph of Part II of the ESC accepted by it, although with a limitation: that “the number of articles or paragraphs by which this Contracting Party is bound shall never be less than 10 in the former case and 45 in the latter and that this number of articles or paragraphs shall continue to include the articles selected by the Contracting Party among those to which special reference is made in Article 20, paragraph 1, sub-paragraph b” —Article 37, 2 of the ESC<sup>52</sup>—.

The application of the legal technique of the partial acceptance of legal obligations in the ESC arouses, due to its specificity, some legal questions that must be commented.

First, Article 20 ESC lays down the priority of some economic and social rights that would be in theory the *hard core* of the ESC. Maybe the relevance of this differentiation must not be maximized for the purposes of the establishment of a strict hierarchical order: these articles “were chosen not because they necessarily protect the seven most important rights, but in order to achieve a balance between the different groups of rights”<sup>53</sup>; in practice, it is a *hard core* that can be relativized, as far as it is susceptible to be not accepted as a whole and as it has turned out to be variable since the Revised ESC includes as a part of it some rights that weren't initially recognized as such<sup>54</sup>; and finally, probably only the Revised ESC reflects in its hard core all those economic and social rights that are fundamental according to the ILO<sup>55</sup>.

Second, the practice by States Parties must be analysed in order to assess the fragmentation of the general legal regime and the depth of state *particularisms* that

<sup>50</sup> See Article 5, 3 of the Additional Protocol and A, 3 of the Revised ESC.

<sup>51</sup> “Any Contracting Party may denounce this Charter only at the end of a period of five years from the date on which the Charter entered into force for it, or at the end of any successive period of two years, and, in each case, after giving six months notice to the Secretary General of the Council of Europe who shall inform the other Parties and the Director General of the International Labour Office accordingly. Such denunciation shall not affect the validity of the Charter in respect of the other Contracting Parties provided that at all times there are not less than five such Contracting Parties”.

See also Article 11, 1 of the Additional Protocol and the Article M, 1 of the Revised ESC.

<sup>52</sup> See also Article 11, 2 of the Additional Protocol and Article M, 2 of the Revised ESC.

<sup>53</sup> GOMIEN, D.; HARRIS, D.; ZWAAK, L.: *op. cit.*, p. 380.

<sup>54</sup> Article N of the Revised ESC includes the right of children and young persons to protection —Article 7— and the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex —Article 20—; both articles have their own correspondence with Article 7 of the ESC and Article 1 of the Additional Protocol.

<sup>55</sup> In its Declaration on Fundamental Principles and Rights at Work (1998), the ILO has identified as fundamental rights at work: the freedom of association and the effective recognition of the right to collective bargain; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and, the elimination of discrimination in respect of employment and occupation.

dilute the will to harmonize. If we consider that 38 out of 46 Member States of the Council of Europe are Parties to the ESC —17 States; of whom 8 to the Additional Protocol (this 8 States have not accept the Revised ESC)—, or to the Revised ESC —21 States—, the following statement can be made<sup>56</sup>: first, while the States Parties to the ESC haven't accepted about 25% of its numbered paragraphs —the Member States to the Additional Protocol haven't done so regarding about 10%— the States Parties to the Revised ESC haven't accepted a bit more than 16% of the numbered paragraphs; second, that, in spite of the wide State's discretion, it is noticeable how some articles in the ESC and the Revised ESC tend to concentrate a greater number of non-acceptances<sup>57</sup> —but without being a generalized tendency extendable to the great majority of States—; and third, that the position of States is very heterogeneous, because together with those States Parties that accept all the provisions regarding those which they must choose, some other States restrict to the utmost their legal undertakings<sup>58</sup>. Therefore, it is a fragmentation that can't be qualified as intensive, due to the systematically generalized use of Article 20 ESC, nor results in the rejection by more than a half of the States of any significant part of the ESC or the Revised ESC —perhaps, with the exception of Articles 30 and 31, 1 and 3 Revised ESC—.

And third, and leaving aside that it authorizes too the formulation of reservations, there must be underlined the differences between the flexibility mechanism provided by the ICESCR and by the ESC: the flexibility scheme of Article 2, 1 of the ICESCR<sup>59</sup> is a good example of a general clause of flexibility; so the States Parties undertake themselves to achieve the full realization of *all* the rights recognized in a progressive way, according to their available resources. This general clause of flexibility offers "a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights"<sup>60</sup>. Certainly, this flexibility is not unlimited but the method that has been used to restrain the freedom of the State is different from the one in the ESC: first, every State undertakes to progressively adopt real and effective measures —it has the "obligation to move as expeditiously and effectively as possible towards that goal"<sup>61</sup>—; and second, as the Economic, Social and Cultural Committee has pointed out, "a minimum core obligation to ensure the satisfaction of, at the

<sup>56</sup> See annexed Tables.

<sup>57</sup> The respective Articles 18 and 19 of the ESC and the Revised ESC —rights of migrants— or Articles 30 and 31 of the Revised ESC —the right to protection against poverty and social exclusion and the right to housing, respectively— are very good examples of that.

<sup>58</sup> For instance, Latvia has not accepted the 64 % of the numbered paragraphs of the ESC, while Azerbaijan has not accepted the 52% of the numbered paragraphs of the Revised ESC.

<sup>59</sup> "Each State Party to the present Covenant undertakes to take steps, individually or through international assistance and co-operation specially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures". Article 2,1 ICESCR is the consequence of a compromise solution between partisans and detractors of a draft in which it would be included legal binding commitments about economic, social and cultural rights (CRAVEN, M.C.R; *The International Covenant of Economic, Social and Cultural Rights. A perspective on its development*. Clarendon Press, Oxford, 1995, p. 150)

<sup>60</sup> ECONOMIC, SOCIAL AND CULTURAL RIGHTS COMMITTEE (ESCR): *General Comment 3. The nature of State Parties obligations (Article 2, 1)*, of 1990 (UNITED NATIONS: *Document E/1991/23*, par. 9).

<sup>61</sup> *Ibidem*, par 10.

very least, minimum essential levels of each of the rights is incumbent upon every State party"<sup>62</sup>.

From the standpoint of the determination of legal obligations for the States Parties, it is interesting too to shape the general characteristics of the legal obligations included in Part II ESC, the Additional Protocol and the Revised ESC. It must be admitted that, on the one hand, the provisions in those three international treaties, as in the ICESCR, include both obligations of result<sup>63</sup> and obligations requiring a particular course of conduct<sup>64</sup>—even being indistinctly a part of the legal content of the same article—. On the other hand, we must see whether the progressive nature typical to these three international treaties makes it possible to glimpse the inclusion of *norms of self-executing nature*—those norms that seem to be capable of immediate application by judicial and other national bodies<sup>65</sup>—. If that is quite easy to accept with regard to the ICESCR<sup>66</sup>, it is much more complicated regarding the ESC due to the wording of its provisions: for instance, according to Article 4, the States Parties "undertake" themselves "to recognise the right of men and women workers to equal pay for work of equal value"<sup>67</sup>—paragraph 3—. The practice of States proves however that "the final decision as to whether a Charter [ESCR] provision can be relied upon by an individual in a national court must be one for the national court concerned" according to the state laws<sup>68</sup>, and therefore that the direct application of some provisions of the ESC has effectively been accepted<sup>69</sup>.

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<sup>62</sup> *Ibidem*.

<sup>63</sup> These are those obligations which require "to achieve, by means of its own choice, a specified result" —Article 21 of the *Draft articles on State responsibility for internationally wrongful acts*, provisionally adopted by the Commission on first reading (1996)—.

<sup>64</sup> These are those obligations which require "to adopt a particular course of conduct when the conduct of that State is not in conformity with that required of it by that obligation" —Article 20 of the *Draft articles on State responsibility for internationally wrongful acts*, provisionally adopted by the Commission on first reading (1996)—.

<sup>65</sup> CESCR; *General Comment 3. The nature of State Parties' obligations (Article 2, 1)*, of 1990 (UNITED NATIONS: *Document E/1991/23*, par. 5).

<sup>66</sup> The ESCR has listed those provisions of the ICESCR which contain such a kind of norms: Articles 3, 7 (a) (i), 8, 10 (3), 13 (2) (a), (3) and (4) and 15 (3), adding that "any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain" (*ibidem*).

<sup>67</sup> Comparing this Article of the ESC to the general configuration of the obligations of States in Article 1 ECHR —"[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention"—, it is clear that a difference between the *legal undertaking to recognize* a right and the *legal undertaking to secure* a right which has been previously recognised.

<sup>68</sup> GOMIEN, D.; HARRIS, D.; ZWAAK, L.: *op. cit.*, p. 429; in a similar way, WIEBRINGHAUS, H.: *op. cit.*, p. 945.

<sup>69</sup> The aforementioned academics usually give examples from The Netherlands or Germany courts. In Spain, there are early examples of this trend, too: by 1987 it's already possible to find a decision of the *Tribunal Central de Trabajo* in which the ESC—curiously, this decision is referred to the Article 8, 4 (b) which undertake the States "to prohibit the employment of women workers in underground mining" (see Note 45)—is considered a legal text in force and containing an executive mandate (STCT of 20 February 1987, Recurso de Suplicación. *Jurisprudencia Aranzadi*, 1987/3705); another example, in 1990, was the decision of the Spanish Supreme Court which had to decide whether Article 2 of the ESCR has been violated—as a part of Spanish legal order— (STS of 13 December 1990, Recurso de casación por infracción de ley. *Jurisprudencia Aranzadi*, 1990/9785). Of course, these are not isolated jurisdictional decisions.

Finally, we must notice the presence both in Part V of the ESC and of the Revised ESC —and according to its Article 8, to a large extent those provided in Part V of the ESC are applicable *mutatis mutandi* to the Additional Protocol— of some conditions of applicability that must serve as principles for action for the States in the fulfilment of their legal obligations.

With regard to these ones it is relevant to point out that:

- There is no provision in the ESC relating to the prohibition of discrimination, as it happens for instance in Article 14 ECHR or Article 2, 2 ICESCR —with-out disregarding that some of its provisions are specifically referred to this condition of application: Articles 4, 3; 12, 4; and 13, 4 ESC, and Article 1 of the Additional Protocol—. Instead, Article E of the Revised ESC does state it clearly. Being a general legal principle that delimits the application of International Human Rights Law, it seems logical to interpret the Part II in agreement with the Preamble of the ESC —that does mention that legal principle— in a way that allow “to achieve the same result [the prohibition of all kind of discrimination] where the wording of the provisions concerned is not clearly to the contrary”<sup>70</sup>.
- Article 30 ESC and Article F of the Revised ESC introduce a *clause of derogation* —similar to the one in Article 15 ECHR— that authorize States to “take measures derogating from its obligations” —respecting the principles of proportionality and temporality and being such measures not inconsistent with the rest of international obligations of the State— “in time of war or other public emergency threatening the life of the nation”.
- The possibility to apply a progressive policy of negative nature, that is to take measures that entail a backward movement in the advancements achieved in the fulfilment of the assumed obligations, seems to be subject to some requirements apparently very restrictive<sup>71</sup> and, in any case, susceptible to be object of international monitoring.
- As for the *personal field of application* of the ESC, there are some issues to comment on:
  - The starting point must be that most of the provisions of the ESC aren’t addressed to *every person*<sup>72</sup> but provide instead the need to guarantee rights and to adopt the subsequent measures in regard with particularized groups. Therefore, the general principle is that each conventional provision is applicable to every person reached by the protection it guarantees.

<sup>70</sup> GOMIEN, D.; HARRIS, D.; ZWAAK, L.: *op. cit.*, p. 412.

<sup>71</sup> Such measures will only be adopted if they are “prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals” —Article 31 ESC; in similar terms, Article G of the Revised ESC (Article 4 ICESCR isn’t very different to them).

<sup>72</sup> There are provisions addressed to those persons that hold the condition of workers, or persons identified on other grounds, like their age or their gender, or other personal or social grounds; for instance, such reference can be found in Articles 1, 9, 10, 11, 13 and 14 ESC (DÍAZ BARRADO, C.: *op. cit.*, p. 241); to some extent, this can be extensive to provisions such as Article 31, 1 of the Revised ESC.

- Notwithstanding, Article 33, 1 ESC —and, in similar terms, Article 7 of the Additional Protocol and Article I of the Revised ESC— softens this undertaking, assuming that the implementation of certain conventional provisions corresponds to “matters normally left to agreements between employers or employers’ organisations and worker’s organisations”<sup>73</sup>. This can certainly entail that, due to the game of collective bargaining, not everyone targeted by the international legal norm has effectively guaranteed through a collective agreement the standard that would correspond to them according to the conventional provision concerned. In view of this problem, the accomplishment of these provisions is softened, considering the State Party is effectively complying if the legal provisions “are applied through such agreements or other means to the great majority of the workers concerned”. The notion of *great majority* in this context seems to have interpreted in the sense the application of the measures is extended at least to 80% of the collective concerned<sup>74</sup>.
- From the standpoint of the personal field of application we can turn to the Appendix of the ESC, where the applicability of Articles 1 to 17 ESC is restricted to the nationals of the State and to the “nationals of other Contracting States Parties lawfully resident or working regularly” —who will be interpreted according to its Articles 18 and 19<sup>75</sup>—. This extension implies the uniform application of the whole provisions accepted by the State Party, within the pre-established limits, without needing to take into consideration the principle of reciprocity —that is to say, the ESC must be applied regardless its acceptance by the State of nationality—.

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<sup>73</sup> The provisions which have been identified as *normally left*, according to Article 33, 1, are: paragraphs 1 to 5 of article 2 —right to just conditions of work—, paragraphs 4, 6 and 7 of Article 7 —right of children and young persons to protection— and paragraphs 1 to 4 of Article 10 —right to vocational training—; according to Article 7,2 of the Additional Protocol: Articles 2 and 3 —respectively the right to information and consultation and the right to take part in the determination and improvement of the working conditions and working environment—; the Revised ESC only adds or excludes a few number of paragraphs —paragraphs 7 of Article 2 and 5 of Article 10 are included, while paragraph 4 of Article 10 is excluded—.

<sup>74</sup> WIEBRINGHAUS observes that the interpretation given by the then so-called Committee of Independent Experts was upheld on the preparatory work for the ESC (WIEBRINGHAUS, H.: *op. cit.*, p. 943); such a percentage must be taken, anyway, as general guide, as the “common sense suggests that it should not be rigidly followed” (GOMIEN, D.; HARRIS, D.; ZWAAK, L.: *op. cit.*, p. 414).

<sup>75</sup> Article 33, 2 ESC introduces a correcting factor for those States Parties that regulate such issues through their domestic law —they are *normally subject of legislation*— instead of collective agreements. Thus, the applicability of the criterion of the *great majority* is extended; Article 7 of the Additional Protocol and article I of the Revised ESC predicate the applicability of this criterion independently to the method used by the State in the implementation —what includes, for instance, the State Party that combines the use of laws or regulations and collective agreements—.

Respectively, the right to engage in a gainful occupation in the territory of the other State and the right to migrant workers and their families to protection and assistance; without disregarding that similar advantages can be extended to other groups and the special provision applicable to refugees. A similar provision is included in the Appendix of the Revised ESC.

#### 4. The ESC System Of Control

As it happens in many international treaties whose object is the international protection of human rights, the guarantee of the enjoyment of the economic and social rights undertaken by the States Parties to the ESC is internationally linked to the subjection of States Parties to some sort of system of control to monitor the action of state authorities and to assess the effectiveness of those legal and administrative measures addressed to execute their undertakings.

Regarding the system to control the compliance with the ESC by the States Parties, we must echo, in principle, the provisions of its Part IV —Articles 21 to 29—, in which it is established as the only instrument integrated in the system of control a *non-contentious monitoring mechanism*, based on the obligation to *submit periodical reports*<sup>76</sup>.

However, the initial provisions of the ESC have tended to be subjected to an evolutionary restatement that, since the formalization in 1990 of the decision to *revitalise* the ESC<sup>77</sup>, was embodied in a real will of review during the last decade of the 20th Century. As the Parliamentary Assembly of the Council of Europe pointed out in 1991<sup>78</sup>, the monitoring system required a restatement addressed to the strengthening of the means of action.

By that time the functioning of the mechanism of supervision through periodical reports laid down in the ESC had accumulated some criticisms that VANDAMME summarizes in four aspects of a mainly technical and political nature<sup>79</sup>: the relative slowness of the procedure —faced with the prevision of intervention of a plurality of bodies—; the non sufficient precision in the delimitation of the competences of the then so-called Committee of Independent Experts and the Subcommittee of the Governmental Social Committee of the Council of Europe; the resulting imperfections observed in the functioning of both bodies; and, finally, the scarce will of the Committee of Ministers to exercise its competence to formulate recommendations to States parties, since from the first moment “[i]ts reluctance to make individual recommendations has been the subject of discussion since the adoption of the [European Social] Charter”<sup>80</sup>.

Some other substantial criticisms have tend to make evident that, unlike the mechanism provided for instance in the ILO Constitution, the representation of the social actors —employers and workers— places them as mere observers. On the other hand, any sanctioning will regarding the States seems to be absent<sup>81</sup>; in a dif-

<sup>76</sup> This mechanism of supervision has as its referent, despite their marked differences, the system of supervision provided in the ILO Constitution —Articles 19, 22 and 23— (VALTICOS, N. & VON POTOSBKY, G., *International Labour Law*. Second edition revised, Kluwer Law and Taxations Pub., Deventer/Boston, 1995, p. 312).

<sup>77</sup> Decision that will be mentioned later in Section V.

<sup>78</sup> PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE: *Recommendation 1168 (1991), Future of the Social Charter of the Council of Europe*, 24 September 1991, par. 10.

<sup>79</sup> VANDAMME, F.: “Revision of the European Social Charter”. *International Labour Review*, 133, 1994, 5/6, pp. 639-641.

<sup>80</sup> *Ibid*, pp. 639-640; in agreement with Article 29 ESC.

<sup>81</sup> GREVISSE, S.: “Le renouveau de la Charte sociale européenne”. *Droit Social*, 2000, 9/10, p. 885.



ferent sense, what has been put forward underlines, in general, the insufficient transparency of the mechanism of supervision<sup>82</sup>.

We can't either forget the context where those considerations of revision are projected: the entrance in the Council of Europe and the possible incorporation as Parties to the ESC of Central and Eastern European States, after the decline and collapse of the soviet block.

On this basis two additional international treaties to the ESC were adopted during the 90s with the aim to transform the system of control.

First, the Protocol adopted the 21 October 1991 (from now on, the *1991 Protocol*), to amend the system of control laid down in the ESC —specifically, its Articles 23 a 29—, which hasn't entered into force yet because the twenty-one States that were Parties to the ESC by the time the Protocol was adopted hasn't expressed yet their consent to be bound by it<sup>83</sup>. Although most of its provisions have been in practice implemented through the decisions of the Committee of Ministers of the Council of Europe and are fully operative<sup>84</sup>, even when these are inconsistent with the original text of the ESC —this happens for instance regarding the composition of the originally so-called Committee of Independent Experts, which according to the wording of Article 25 ESC shall consist of seven members, while according to the wording given to it by the 1991 Protocol it shall consist at least of nine members—.

And second, the *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints*, of 9 November 1995 (from now on, the *1995 Protocol*), to lay down a mechanism of basically a quasi-contentious nature, complementary to the reporting mechanism —so a qualitatively renewing element would seem to be added to the ESC system of control—. This Protocol does have entered into force —since the 1 July 1998—.

The system of control laid down in the ESC, as it is currently shaped, formally attributes competences within the system of control to three bodies:

- The *European Committee of Social Rights* (from now on, the *ECSR*) —a denomination given to the originally so-called Committee of Independent Experts<sup>85</sup>— consists of twelve members<sup>86</sup>, elected by the Parliamentary Assembly of the Council of Europe from a list of experts of the highest integrity and of recognised competence in international social questions, nationals of any Member State of the Council of Europe —as it was decided by the Commit-

<sup>82</sup> PETTITI, Ch. ; "La Charte sociale européenne révisée". *Revue Trimestrielle des Droits de l'Homme*. 8, 1997, 29, p. 7.

<sup>83</sup> Spain gave its consent on the 24 January 2000 (Source: *Treaty Office*, available on: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=128&CM=1&DF=11/10/2005&CL=ENG>).

<sup>84</sup> An idea already suggested in the Final Resolution of the Ministerial Conference of Turin, 21 and 22 October de 1991 (GOMIEN, D.; HARRIS, D. & ZWAAK, L.: *op. cit.*, p. 415).

<sup>85</sup> Since control cycle XV-1 (March-June 2000).

<sup>86</sup> As resulting after the amendment of Article 25, 1 ESC introduced by the 1991 Protocol and applied since 1995, although the Protocol isn't in force; even when the number of members must be at least of nine, the Committee of Ministers of the Council of Europe is granted the capacity to determine the number of members it must consist of —Article 3 of the 1991 Protocol—.

tee of Ministers—, for a renewable period of six years<sup>87</sup>. Their competences are essentially legal: on the one hand, they must examine the reports submitted by the States Parties in accordance with the ESC —Article 24—, even when the new wording of Article 24 suggested by the 1991 Protocol clarifies that this involves to assess the compliance of national laws, regulations and practices with the content of the obligations arising from the Charter for the Contracting Parties concerned; and, on the other hand, the decision on the admissibility and the drawing up of a report on the complaints submitted in accordance with the 1995 Protocol —in which it will conclude whether or not the Contracting Party concerned has ensured the satisfactory application of the provision of the Charter referred to in the complaint —Article 8—<sup>88</sup>.

- The *Governmental Committee* —the denomination of the old Subcommittee of the Governmental Social Committee of the Council of Europe according to the nomenclature of the 1991 Protocol—, consists in a representative of each State Party to the ESC. Its competence seems now to be focused<sup>89</sup> —after the adaptations made according to the wording proposed by Article 4 of the 1991 Protocol— in the preparation of the decisions of the Committee of Ministers, providing it with information and making proposals within its attributions. It must be emphasized how the possibility is provided to invite two international organizations of employers and two international organizations of workers —at the most— to integrate in the working of the Governmental Committee, although they will participate in consultative terms and as observers<sup>90</sup>.
- The *Committee of Ministers*, consisting in the Ministers of Foreign Affairs of the Member States of the Council of Europe —nowadays 46 States—, is the deciding body of the Organization, that passes a general resolution after every control cycle corresponding to the mechanism of submission of periodical reports, that can be complemented with individual recommendations addressed to the States Parties according to the content of the periodical reports submitted by the States Parties and their previous examination by the ECSR<sup>91</sup>, or, in the framework of the mechanism of collective complaints, with recommendations declaring the violation of the ESC —otherwise, it will pass a resolution ending the procedure—.

<sup>87</sup> The new wording of Article 25, 1 ESC, as provided in the 1991 Protocol, states that they can be reappointed only once.

<sup>88</sup> Article 30 of the ECSR Rules of Procedure, of 9 September 1999, specifies that it is a decision on the merits of the complaint.

<sup>89</sup> This issue, as we will see, hasn't been peaceful due to the original wording of Article 27 ESC.

<sup>90</sup> In the Governmental Committee there currently participate: the Union of Industrial and Employers' Confederations of Europe (UNICE), the International Organisation of Employers (IOE) and the European Trade Union Confederation (ETUC); it is also possible to consult Non-Governmental Organisations particularly qualified on the subjects regarding the ESC.

<sup>91</sup> The *Parliamentary Assembly of the Council of Europe*, the plenary and deliberative body of the Organisation, consisting in representatives of the Parliaments of the States Members of the Council of Europe, can consider the realisation of debates during its sessions on the basis of the reports by the ECSR and the Governmental Committee; it is thus applied *de facto* the wording of Article 29 ESC, according to the 1991 Protocol, that excludes its consultative competence, prior to the decision of the Committee of Ministers, in the framework of the reporting mechanism.

The mechanisms of supervision related to the ESC system are the *mechanism of periodical reporting* and the *mechanism of collective complaints*.

#### 4.1. *The mechanism of periodical reporting*

Provided as a mechanism of supervision compulsory for the States Parties, it involves the periodical submission of a report on the application of the provisions in Part II of the ESC accepted by the State Party —Article 21 ESC—, as well as the periodical submission of reports “relating to the provisions of Part II of the Charter which they [the States Parties] did not accept at the time of their ratification or approval or in a subsequent notification” —Article 22 ESC—. While as for the accepted provisions the ESC establishes a two-years interval, in regard with the non-accepted provisions it is established a variable periodicity —“at appropriate intervals”—, when requested by the Committee of Ministers, that can also periodically determine time in respect of which provisions this will be required.

According its current practice, the reporting mechanism works on the following basis:

- Regarding the submission of reports on the *accepted provisions*: every year the States Parties have the obligation to submit reports “concerning the application of such provisions of Part II of the ESC as they have accepted” —Article 21 of the ESC<sup>92</sup>—, indicating how the accepted provisions have been implemented in their law and practice. The odd years are reserved for reporting about certain provisions of Part II of the ESC that are considered the ESC *hard core* or *fundamental obligations* —that is to say, those provisions expressly mentioned in Article 20, b) ESC, adding, when appropriate, those listed in Article A, 1 b) of the ESC Revised—; while for the rest of provisions in Part II accepted by the State, the report about half of them will be submitted in the even years<sup>93</sup>.
- Regarding the submission of reports on the *non-accepted provisions*, we must take into account the practice of the Committee of Ministers, whose requests have been usually focused on those provisions non-accepted by the majority of the States Parties.

The reports must be sent to the national organizations affiliated to the international organisations that participate in the work of the Governmental Committee, to make, if they want to, their own remarks —that according to Article 23, 2 ESC will be sent to the States Parties, although the 1991 Protocol authorizes to sent them directly to the Secretary General of the Council of Europe (Article 1)<sup>94</sup>—. Article 1

<sup>92</sup> The States Parties of the 1998 Protocol —Article 6— and of the Revised ESC —Article C— accept that the implementation of their respective provisions accepted shall be submitted to the same supervision as the European Social Charter.

<sup>93</sup> So, every four years the cycle report about all provisions accepted by the State Parties is completely closed.

<sup>94</sup> Maybe this formula can be useful to promote the submission of observations because, despite a increasing tendency to correct the previous practice, in general terms it is an under-utilised resource (GOMIEN, D.; HARRIS, D. & ZWAAK, L.: *op. cit.*, p. 416).

of the 1991 Protocol also provides that those reports will be forwarded to Non-Governmental Organisations in consultative status with the Council of Europe and particularly qualified on the subjects regulated by the ESC, in order to allow them to make also their remarks.

The reports submitted—and, when appropriate, the existing remarks—will be examined by the ECSR. On the procedure before this body the following comments can be made: first, a representative appointed by the ILO is allowed to participate in consultative terms in the deliberations of the ECSR—according the Rule 13, 1 of the ECSR Rules of Procedure (from now on, the ERP)<sup>95</sup>—; second, and for the purposes of the rationalization of the work, the ERP provide the appointment of *Rapporteurs* for each normative provision in the ESC, 1988 Protocol and Revised ESC—Rule 19—, as well as of Sub-committees to prepare the decisions of the plenary—Rule 20—; third, that, according to Article 24, 3 ESC—as amended by the 1991 Protocol—, and the way this one is applied, the ECSR can specifically address to a State to ask for complementary information or clarification, and even call and hold meetings in principle public with the State, where the international organisations that participate in the work of the Governmental Committee will be allowed to attend<sup>96</sup>; and, four, the conclusions of the ECSR will be made public.

The conclusions of the ECSR, as well as to the Parliamentary Assembly of the Council of Europe, are sent to the Governmental Committee. This one, according to the original wording of Article 27 ESC, should examine the reports of the States Parties, the hypothetical comments formulated, and the conclusions of the ECSR—then the Committee of Independent Experts—, to formulate as well “its conclusions and append the report of the Committee of Experts”.

Without dealing with the issue in depth, the ESC seems certainly to lead to a confusing duplicity of attributions between both Committees—the ESCR and the Governmental Committee—. However, the different nature of each one—the first one, a technical and legal body, and the second one, an intergovernmental and political body— was really reflected on their own practice: the Governmental Committee had been offering a more restrictive perception of the obligations undertaken by the States Parties<sup>97</sup>.

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<sup>95</sup> Participation that the ERP extends not only to the plenary meetings but also to the sub-committees internally created according the Rule 20 ERP; it is also provided to send to the International Labour Bureau the working documents to facilitate its participation—Rule 13,1 ERP—.

It's necessary to take in account that 1999 ERP (adopted on 9 September 1999) are partially still in force: the Rules of 2004 ERP (adopted on 29 march 2004) have replaced the Rules of 1999 ERP, except in respect of collective complaints currently under examination which remain regulated by the Rules of 1999 ERP.

<sup>96</sup> The affiliated national organisations and Non-Governmental Organisations, to which copies of the report of the State Party have been transmitted, will be informed—the first ones, in agreement with Rule 21, 2 RPC, through the international organisations to which they are affiliated—; on the other hand, the national organisations of employers and trade unions “may also be invited” to participate in these meetings—Rule 21, 3—.

As it can be seen, the RPC themselves assume the applicability of certain provisions of the 1991 Protocol.

<sup>97</sup> GOMIEN, D.; HARRIS, D. & ZWAAK, L.: *op. cit.*, p. 422; in a similar way: JIMÉNEZ GARCÍA, F.: “El sistema europeo de protección de los derechos humanos: El Consejo de Europa y la Carta Social”, in: FERNÁNDEZ DE CASADEVANTE ROMANI (coord.): *Derecho Internacional de los Derechos Humanos*. Editorial Dilex, Madrid, 2000, p. 175.

In view of this evident mismatch, it was decided, since 1993, to apply the reform provided in the 1991 Protocol, considering the Governmental Committee a body that would prepare the work of the Committee of Ministers: on the basis of the conclusions of the ECSR, it selects the situations that should be object of a specific recommendation—according to grounds of social and economic policy—, and suggests proposals to undertake studies on social issues. Even being true that this reform offers coherence and credibility to the reporting mechanism<sup>98</sup>, it can be noticed how the competences of the Governmental Committee still allows it in practice to filter—and, when appropriate, not to send—the suggestions of the technical-legal body.

On the basis of the report of the Governmental Committee, the Committee of Ministers adopts a resolution about the whole control cycle made and, when appropriate, specific recommendations addressed to the States—not binding—. The difficulty to get a majority of two thirds of the States Members of the Committee of Ministers, together with a maybe initial lack of political will, contributed to prevent any specific recommendation to be formulated during the first twenty years of functioning of the mechanism<sup>99</sup>. But as a result maybe of the conviction of the Committee of Ministers about the need to collaborate in the revitalization of the reporting mechanism as well as the application, since 1993, of the reform drafted in Article 5 of the 1991 Protocol—only States Parties have the right to vote on the decisions that affect/refer to the reports—the truth is that the practice of the Committee has noticeably changed.

As general considerations about this mechanism of supervision, we must appreciate, among others, its relative efficiency, if we bear in mind that the lack of positive response of the State to the recommendations of the Committee of Ministers doesn't have an effect beyond the dynamics itself of the later supervision and verification of that fact, as the adopted decisions aren't legally binding for the affected State<sup>100</sup>. On the other hand, it is true that we can positively assess, as a conceptual referent of a uniform comprehension of the European social space, the practice of the ECSR—about which there really exists a consensus on its quality and its identification as a sort of *jurisprudence about the ESC*—.

#### 4.2. *The mechanism of collective complaints*

The contribution of the 1995 Protocol to the revitalization of the ESC system of control depends on the establishment of a quasi-contentious mechanism similar to the one provided in Article 24 of the ILO Constitution<sup>101</sup>: the ILO *complaints procedure*. In this one, any “industrial association of employers or of workers” is entitled to allege “that any of the [ILO] Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party”

<sup>98</sup> GOMIEN, D.; HARRIS, D. & ZWAAK, L.: *op. cit.*, pp. 423-424.

<sup>99</sup> *Ibid.*, p. 426.

<sup>100</sup> HARRIS, D.: “Lessons from reporting system of the European Social Charter”, in: ALSTON, Ph. & CRAWFORD, J. (ed.): *The Future of UN Human Rights Treaty Monitoring*. Cambridge University Press, Cambridge, 2001, p. 360.

<sup>101</sup> COUNCIL OF EUROPE: *Explanatory Report to the Additional Protocol to the European Social Charter providing for a system of collective complaints (ETS N.º 158)*. Council of Europe, Treaty Office, available on: <http://conventions.coe.int/Treaty/en/Reports/Html/158.htm>, par. 1.

—Article 24 of the ILO Constitution—. Again, it has been discarded to option of a jurisdictional and contentious mechanism<sup>102</sup>.

From the standpoint of the procedure, this one begins through a complaint lodged in writing submitted by any of the organisations actively legitimated according to Article 3 of the 1995 Protocol. The complaint shall be addressed to the Secretary General who, after acknowledging receipt of it, notifies it to the State Party concerned<sup>103</sup> and transmits it to the ECSR, which is the body that from the legal standpoint has the competence to examine the collective complaints submitted.

First, the ESCR must decide on the admissibility of the complaint; before the final decision, the President of the ESCR may ask the defending State and the or the complainant organisation, if considered appropriate<sup>104</sup>, for written information and observations about admissibility.

If the complaint is admitted —the decision of non-admissibility involves the end of the procedure—, there begins a procedure of a contradictory nature and mainly written:

- the Committee's decision on admissibility of the complaint is notified to the Parties to the ESC or the Revised ESC; upon previous requirement, it is also transmitted to the Status Parties to the 1995 Protocol and to the international organisations invited to be represented at the Governmental Committee a copy of the complaint and of the comments to the Parties —Rule 27, 5 of the RPC—;
- a time-limit is given to the defending State and to the complainant organisation to respectively submit their comment on the core of the matter and answer to those comments. The Parties to the complaint can also submit all supplementary relevant written explanations or information —Article 7, 1 to 3 of the 1995 Protocol and Rule 28 of the RPC—, after inviting the States Parties to the 1995 Protocol<sup>105</sup> as well as the international organisations represented at the Governmental Committee<sup>106</sup> to make their comments;

<sup>102</sup> This has justified and still justifies that the ESC system of control can't be compared to the system of control laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms, also adopted within the Council of Europe the 4 November 1950, that has a judicial procedure that allows the States Parties and the individuals to submit their complaints before the European Court of Human Rights (VERDIER, J. M.: "Les droits économiques et sociaux: relance au Conseil de l'Europe?". *Droit Social*, 1992, 4, p. 415).

<sup>103</sup> Complaints can only be submitted against the States Parties to the 1995 Protocol: specifically, by the 12 October 2005, only 13 States out of the States Parties to the ESC or to the Revised ESC are Parties to the 1995 Protocol —Spain isn't among them— (Source: COUNCIL OF EUROPE: *Treaty Office*, available on: <http://conventions.coe.int/Treaty/Commun/ChercheSansSTE.asp?CM=2&CL=ENG>)—.

<sup>104</sup> Rule 26.

Previously, the Rapporteur appointed for the complaint submits a draft decision about its admissibility —Rule 24, 3—.

<sup>105</sup> As well as those States non-Parties to it that being Parties to the Revised ESC had done the declaration laid down in its Article D, 2 of the Revised ESC —Rule 28, 3 of the RPC—; that is to say, if, not being previously Party to the 1995 Protocol, it is accepted to extend the mechanism of supervision provided in it to the legal obligations undertaken through the Revised ESC.

<sup>106</sup> As long as complaint has been submitted by national organisations of employers or of workers, or by a national or international Non-Governmental Organisation —Article 7, 2 of the 1995 Protocol and Rule 28, 4 of the RPC—.

- on the basis of a decision of the ECSR —Article 7, 4 of the 1995 Protocol and Rule 29 of the RPC—, at the request of one of the Parties or on the Committee's initiative, a contradictory hearing can be carried out, where not only the parties to the complaint will participate but also all the intervenients that are authorized to submit written comments;
- finally, the ECSR —taking into consideration the proposal of the Rapporteur— shall draw up a report that will include its conclusions about the compatibility of the action of the State regarding the provision referred to in the complaint;
- the report will be transmitted to the Committee of Ministers, and to the Parliamentary Assembly of the Council of Europe —Article 8, 2 1 of the 1995 Protocol), as well as to the organisation that lodged the complaint and to the Contracting Parties to the Charter —or to the Revised ESC—, included the defending State, although it will be made public at the same time as the resolution of the Committee of Ministers, or no later than four months after it has been transmitted to this one —Article 8 of the 1995 Protocol—; and finally,
- the Committee of Ministers shall adopt a resolution by a majority of those voting, declaring whether or not the Contracting Party concerned has ensured the satisfactory application of the provision of the Charter referred to in the complaint. If it is found the Charter has not been applied in a satisfactory manner, the Committee of Ministers shall adopt, by a majority of two-thirds of those voting, a recommendation addressed to the Contracting Party concerned —Article 9 of the 1995 Protocol—, which must provide information on the measures it has taken to give effect to the Committee of Ministers' recommendation, in the next report concerning accepted provisions which the State will submit to the ECSR —Article 10 of the 1995 Protocol—.

This procedure, however, has some singularities that mainly influence the admissibility of the complaints and affects to the *entitled subjects* and to their *object*.

a) As far as the *entitled subjects* are concerned, the 1995 Protocol recognizes in its Articles 1 and 2 the right of the following organisations to submit complaints alleging unsatisfactory application of the Charter: international organisations invited to participate in the work of the Governmental Committee; other international Non-Governmental Organisations which have consultative status with the Council of Europe and have been put on a list established for this purpose by the Governmental Committee<sup>107</sup>; representative national organisations of employers and trade unions; and those national Non-Governmental Organisations with particular competence in the matters governed by the Charter whose right to lodge complaints has been formally recognised by the State Party.

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<sup>107</sup> COUNCIL OF EUROPE: *List of International Non-Governmental Organisations entitled to submit Collective Complaints (as from 1 January 2005)* —Source: COUNCIL OF EUROPE: *Human Rights. European Social Charter*, available on: [http://www.coe.int/T/E/Human\\_Rights/Esc/4\\_Collective\\_complaints/Organisations\\_entitled/default.asp# TopOfPage](http://www.coe.int/T/E/Human_Rights/Esc/4_Collective_complaints/Organisations_entitled/default.asp# TopOfPage)—.

What can be first noticed, as it is already obvious, is that the individual isn't entitled to submit complaints<sup>108</sup>; but immediately we must realise about two controversial aspects that the approach in the 1995 Protocol raises<sup>109</sup>:

- on the one hand, the *representativity* of the national organisations of employers and trade unions, a requirement in relation with which the ECSR chooses, first, to delimitate through an *autonomous notion* —that is, it doesn't assume *ipso iure* that this representativity must be necessary identical to the one in the laws of the State<sup>110</sup>—, and second, to determine that the exam of this issue must be done *in concreto* regarding each complaint and each complainant<sup>111</sup>;
- and, on the other hand, the *particular qualification* that Non-Governmental Organisations, international or national, must have, as a result of the requirement in Article 3 of the 1995 Protocol, which is essentially observed by the ECSR from the formal standpoint of the object and mandate of the entity, rather than their concrete activities<sup>112</sup>.

On the other hand, and as far as the defendants concern, we must bear in mind that, first, they must be States Parties to the 1995 Protocol, or, being Parties to the Revised ESC and not to the 1995 Protocol, they must have accepted the extension of the system of complaints to control the compliance of their undertakings regarding the Revised ESC, but taking into consideration that *ratione materiae* it can only be claimed against that State by virtue of the provisions of the ESC, the 1988 Protocol and, when appropriate, the Revised ESC previous and expressly accepted by that State —Article 4 of the 1995 Protocol—.

b) Connected to this, as far as the *object* of the complaints is concerned, Article 4 of the 1995 Protocol warns that they must relate to a provision of the Charter ac-

<sup>108</sup> Unlike the draft Optional Protocol to the International Covenant of Economic, Social and Cultural Rights that lays down a quasi-contentious mechanism (UNITED NATIONS: *Document E/CN.4/1997/105*, par. 19; about the arguments in favour and against, see: ARAMBULO, K.: *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights. Theoretical and Procedural Aspects*. Intersentia/Hart, Antwerp/Groningen/Oxford, 1999).

<sup>109</sup> Until the 7 July 2005, thirty-two complaints have been processed ([http://www.coe.int/T/E/Human\\_Rights/Esc/4\\_Collective\\_complaints/List\\_of\\_collective\\_complaints/List\\_%20of\\_complaints.asp#TopOfPage](http://www.coe.int/T/E/Human_Rights/Esc/4_Collective_complaints/List_of_collective_complaints/List_%20of_complaints.asp#TopOfPage)); about the decisions of the Committee, see: COUNCIL OF EUROPE: *European Social Charter Database*, available on: <http://hudoc.esc.coe.int/esc/search/default.asp>.

<sup>110</sup> After the decisions adopted in *Complaints 6/1999, Syndicat national des professions du tourisme c. France* and *10/2000 Tehy et STTK c. Finlande* (AKANDJI-KOMBE, J.-F.: "La procédure de réclamation collective dans la Charte sociale européenne. Chronique des décisions du Comité européen des droits sociaux". *Revue Trimestrielle des Droits de l'Homme*, 12, 2001, 48, pp. 1040-1041; by the same author, "La application de la Charte social européenne: la mise en oeuvre de la procédure de réclamations collectives". *Droit Social*, 2000, 9/10, pp. 888-896); this allows to qualify as representative a national organisations that wouldn't be such according to the domestic laws (*ibid*, p. 1040).

<sup>111</sup> We must bear in mind, however, that the explanatory report of the 1995 Protocol offers two meaningful criteria to weigh up: the number of affiliated members and the effective role they can play in the negotiation as at the national level (COUNCIL OF EUROPE: *Explanatory Report... Collective Complaints*, *op. cit.*, par. 23).

<sup>112</sup> AKANDJI-KOMBE, J.-F.: "La procédure...", *op. cit.*, p. 1042; on the basis of the decision in *Complaints No. 1/1998 International Commission of Jurists v. Portugal* and *No. 8/2000 Quaker Council for European Affairs v. Greece*.



cepted by the Contracting Party concerned but *indicating in what respect the latter has not ensured the satisfactory application of this provision*; a requirement that the ECSR has interpreted in a liberal way, without needing to strictly precise that relation for the purpose of admissibility—what would already be a substantive issue<sup>113</sup>—.

It also must be taken into consideration, on the one hand, the possibility to reject a complaint whose object has been submitted to another international or national body, or examined in the framework of the reporting mechanism of the ESC—this possibility is interpreted by the ECSR in a restrictive way and admitting that it must be solved taking into consideration the specific facts<sup>114</sup>—; and, on the other hand, that the object of the complaint is determined by the quality of the parties, especially when a Non-Governmental Organisation is involved<sup>115</sup>.

What has just been said lets us give a global assess of the quasi-contentious mechanism of collective complaints.

The mechanism of collective complaints is certainly a noticeable advancement in the strengthening of the ESC system of control, as it allows representative organisations in the social field to denounce before a quasi-contentious mechanism the failings of the state social policies when executing the obligations undertaken in agreement with the provisions of the ESC, the 1988 Protocol and the revised ESC, and therefore to get involved through their complaints in the control of the activity of the States Parties to the 1995 Protocol.

However, it must be cautiously considered, not only for the escarce binding legal force of the recommendations of the Committee of Ministers, but also because to some extent—as SUDRE properly outlines—, procedural innovation doesn't necessarily imply instrumental renovation: this mechanism of complaints—unlike the one provided at the ILO—is presided by the logics of the reporting mechanism, as the object of the complaints is rather of a general nature—the measures of social policy regarding one or several provisions of the ESC—and it doesn't admit due to its formulation the individualization from the standpoint of the entitled subject—typical of those cases where a collective right of complaint exists, that is, of the logics of the claim of rights<sup>116</sup>.

## 5. The process of revision of the ESC

The evolution of the European societies and of the labour markets since the adoption of the ESC—considering also the incipient approach of the consolidation of a process of globalisation since the end of the Cold War—, as well as the gradual

<sup>113</sup> *Ibid*, p.1043; on the basis of *Complaints No. 4/1999 European Federation of Employees in Public Services v. Italy* and *No. 5/1999 European Federation of Employees in Public Services v. Portugal*.

<sup>114</sup> According to the standpoint the Explanatory Report to the 1995 Protocol (COUNCIL OF EUROPE: *Explanatory Report...Collective Complaints...*, *op. cit.*, par. 31), and the practice of the ECSR (*Complaint No. 1/1998 International Commission of Jurists v. Portugal*); see: AKANDJI-KOMBE, J.-F.: "L'application...", *op. cit.*, pp. 892-893.

<sup>115</sup> As SUDRE states, the claimants needn't to have a direct interest that allows them to be qualified as *victims* (SUDRE, F.: "Le Protocole additionnel à la Charte sociales européenne prévoyant un système de réclamations collectives". *Revue Générale de Droit International Public*, 100, 1996, 3, p. 726).

<sup>116</sup> *Ibid*, pp. 726-727.

incorporation of States of Central and Eastern Europe, are factors that can explain the reasons for the opening of a process of revision of the ESC in the early 90s<sup>117</sup>.

Within these coordinates we must appreciate the proposals and decisions adopted at the Ministerial Conference on Human Rights, held in Rome —5 November 1990—, among them the decision to invite the Committee of Ministers to adopt the measures needed to start a deep reflection about the meaning, the content and the functioning of the ESC<sup>118</sup>. These proposals resulted in an *ad hoc* committee —the ESC Committee— that was convened that year, consisting in representatives of the States Members and observers —for instance, the ILO, the UNICE or the ETUC—, that was asked to make proposals to improve the effectiveness of the ESC —included the revision of certain normative provisions and the introduction of new economic and social rights—, and, particularly, of its system of control<sup>119</sup>; that *ad hoc* committee worked from 1991 to 1994, and drafted a revised ESC.

After sending it to the then so-called Committee of Independent Experts of the ESC and to the Parliamentary Assembly of the Council of Europe, in consultative terms, the Committee of Ministers adopted the 3 May 1996 the Revised ESC —which entered into force the 1 July 1999<sup>120</sup>; thus, together with the 1991 and 1995 Protocols —without forgetting the 1988 Protocol—, it is legally formalized the intent to update what VANDAMME calls “the expression of a common heritage of rights and principles intended to underpin social policies”<sup>121</sup>.

The analysis of the Revised ESC will be focused on its *general characteristics* and the legal scope of the *suggested updating of the economic and social rights*.

### 5.1. *The general characteristics of the Revised ESC*

The Revised ESC has the legal nature of an international treaty. Its aim is, according to its Preamble, to progressively take the place of the ESC, taking into account the fundamental social changes which have occurred since the text was adopted in 1961.

To some extent, both elements —the technical-legal and the teleological— meet in a necessary way in order to articulate the specific measures that characterize the international legal text. Thus, it is evident, first, that, although the Revised ESC entails the amendment of provisions of the ESC and the 1988 Protocol, as well as the introduction of new economic and social rights that weren't previously provided, its adoption doesn't correspond to the technique of *supplementary international treaties*: it isn't neither a protocol amending the ESC nor an additional protocol to it<sup>122</sup>;

<sup>117</sup> Thus, the Revised ESC takes into consideration the evolution in Labour law and in the conception of social policies since 1961 (COUNCIL OF EUROPE: *Explanatory Report. European Social Charter (revised)*, *op. cit.*, para 8).

<sup>118</sup> CONSEIL DE L'EUROPE; *Droits de l'homme- Feuille d'information* 27, 1991, p. 99.

<sup>119</sup> On the table there were as well the proposals of the Parliamentary Assembly of the Council of Europe, for instance, those included in the already mentioned Recommendation 1168 (1991), of 24 September 1991.

<sup>120</sup> As it has been already mentioned, the Revised ESC has 21 States Parties —among them, 12 States Members of the European Union, although not Spain— (see Table 3).

<sup>121</sup> VANDAMME, F.: *op. cit.*, p. 635.

<sup>122</sup> AUST, A.: *Modern Treaty Law and Practice*. Cambridge University Press, Cambridge, 2000, p. 221.

instead, as it results from its articles, it is an international treaty autonomous but complementary to the ESC: its Article K allows any State Member of the Council of Europe to ratify, accept or approve it as ways to give their consent, irrespective of whether they were States Parties to the ESC<sup>123</sup>, without prejudice of a special consideration being made of the situation of the States Parties to the ESC and those also to the 1988 Protocol.

The essential principles on this subject, according to the provisions in Article B) of the Revised ESC, are the following ones:

- non-duplicity of the international legal obligations: for the State that becomes a Party to the Revised ESC the corresponding provisions of the ESC and, where appropriate, of its Additional Protocol of 1988 cease to apply to the Party concerned from the date of entry into force of those obligations for the Party concerned, in the event of that Party being bound by the first of those instruments or by both instruments —Article B, 2 of the Revised ESC—;
- from what has been said, it can be inferred they have dispensed with formal mechanisms to articulate this abrogation<sup>124</sup>; and,
- the maintenance of international legal standards previously accepted: no State Party to the ESC or to the ESC and the 1988 Protocol can accept, when giving its consent to become a Party to the Revised ESC, a lesser number of provisions than those accepted as a Party to the ESC and the 1988 Protocol, as it must consider itself bound by at least the provisions of the Revised ESC corresponding to the provisions of the ESC and, where appropriate, of the 1988 Protocol, to which it was bound —Article B, 1 of the Revised ESC—.

The Revised ESC, within these parameters, follows an identical posing to the ESC regarding the flexibility granted to the States as far as the acceptance of legal obligations is concerned, according to its Article A: Part I of the Revised ESC is also a declaration of social policy aims; regarding the rights provided in Part II, at least six out of the nine articles listed must be accepted<sup>125</sup>; and, finally, a supplementary number of articles or numbered paragraphs of Part II must be accepted —not less than sixteen articles or sixty-three numbered paragraphs—.

Together with this, it must be taken into account that from the angle of its legal content, the Revised ESC has the basic aim to update the ESC legal system, and it does it: on the one hand, by revising the content of the provisions included in the

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<sup>123</sup> Neither Bulgaria, nor Slovenia, Estonia, Lithuania, Moldova, or Romania, which are Parties to the Revised ESC became Parties to the ESC.

<sup>124</sup> The need isn't provided to denounce the ESC or the Additional Protocol (COUNCIL OF EUROPE: *Explanatory Report... European Social Charter (revised)*, *op. cit.*, par. 10).

<sup>125</sup> Article 1 (right to work); Article 5 (right to organise), Article 6 (right to collective bargaining); Article 7 (right of children and young persons to protection); Article 12 (right to social security); Article 13 (right to social and medical assistance); Article 16 (right of the family to social, legal and economic protection); Article 19 (right of migrant workers and their families to protection and assistance); and Article 20 (right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex).

ESC and the 1988 Protocol, and on the other hand, by adding new economic and social rights.

Hence the correspondence inside Part II of the rights provided in Articles 1 to 19 of the Revised ESC with the ones provided in similar articles of the ESC, in spite of the modifications of content introduced, and the correspondence of Articles 20 to 23 of the Revised ESC with Articles 1 to 4 of the 1988 Protocol. Articles 24 to 31 are those that come to introduce new economic and social rights<sup>126</sup>.

As PETTITI<sup>127</sup> points out, it must be stressed that the system of control isn't modified: the ESC reporting mechanism is extensible and applicable to the ESC—actually, specific cycles of control have been set for the Revised ESC (Article C of the ESC)—, as the mechanism of collective complaints is also applicable to the Revised ESC for those States that are also Parties to the 1995 Protocol—according to Article D, 1 of the Revised ESC—; although, on the other hand, those States that give their consent to be or already are Parties to the Revised ESC, but not to the 1995 Protocol, are authorized to accept the application of the mechanism of complaints through a declaration made by the time of giving consent or afterwards. It could be maybe thought that the Revised ESC could have been useful to rationalize the whole system of control and, above all, to incorporate all the modifications introduced on the basis of the 1991 Protocol. However, due to the reticence of some States Parties to the ESC, it was chosen to keep a *neutral attitude*<sup>128</sup> towards the 1991 Protocol, without prejudice that the current situation isn't satisfactory from the standpoint of the legal security and the transparency of the system of control.

## 5.2. *The update of the economic and social rights brought up by the Revised ESC*

It is difficult to make a whole assessment of the update of the economic and social rights undertaken by the ESC. VANDAMME<sup>129</sup> points out as big issues in it: the working conditions, the protection of children and young persons, the protection of vulnerable groups, employment relations, social security, and non-discrimination.

What is important to stress is that the contributions made largely have as their referent, on the one hand, the ILO Conventions and Recommendations, and, on the other hand, the European Union Law—especially, the secondary legislation—; so “the revitalization process as a whole could not have been completed so rapidly without the recent standard-setting activity of the International Labour Organization and the European Union”<sup>130</sup>.

The new economic and social rights included are: i) The right to protection in cases of termination of employment (Article 24)—on the basis of two principles: the right of all workers not to have their employment terminated without valid reasons and the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief—; ii) the right of workers

<sup>126</sup> As in Part I in relation with the declaration of social policy aims.

<sup>127</sup> PETTITI, Ch.: *op. cit.*, p. 6.

<sup>128</sup> COUNCIL OF EUROPE: *Explanatory Report...European Social Charter (revised)*, *op. cit.*, par. 131.

<sup>129</sup> VANDAMME, F.: *op. cit.*, pp. 644-650.

<sup>130</sup> *Ibid.*, p. 654.

to the protection of their claims in the event of the insolvency of their employer (Article 25); iii) the right to dignity at work (Article 26) —sexual harassment and, to a certain extent, hostile or offensive practices against the worker are expressly mentioned—; iv) the right of workers with family responsibilities to equal opportunities and equal treatment (Article 27); v) the right of workers' representatives to protection in the undertaking and facilities to be accorded to them (Article 28)—; vi) the right to information and consultation in collective redundancy procedures (Article 29); vii) the right to protection against poverty and social exclusion (Article 30); and viii) the right to housing (Article 31) —including the access to housing of an *adequate standard*—.

It must be stressed the relevance given to non-discrimination on the basis of sex<sup>131</sup>, and in general the prohibition of discrimination, in the Revised ESC: not only because the former Article 1 of the 1988 Protocol (right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex), reconverted to Article 20 of the Revised ESC, has been included as a part of the *hard core* of the rights in the ESC —Article A, 1, b)—, but also because a general clause of non-discrimination has been included in the Article E of Part V of the Revised ESC —similar to Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms—.

From the point of view of the update of the provisions already laid down in the ESC and the 1988 Protocol, we must start out from the fact that Articles 1 to 4 of the 1988 Protocol have been included without remarkable changes, as the only thing that has been done is to move paragraphs 2, 3 and 4 of Article 1 (right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex), and the common paragraphs 2 of Articles 2 (right to information and consultation) and 3 (right to take part in the determination and improvement of the working conditions and working environment) to the Annex of the Revised ESC, without affecting in principle the legal obligations that States can undertake<sup>132</sup>.

As far as the ESC is concerned, it must be first said that the wording of Articles 1 (right to work), 4 (right to a fair remuneration), 5 (right to organise), 6 (right to bargain collectively), 9 (right to vocational guidance), 13 (right to social and medical assistance), 14 (right to benefit from social welfare services), and 18 (right to engage in a gainful occupation in the territory of other Contracting Parties), hasn't been modified and they have been entirely transcribed in the Revised ESC.

Changes have been focused on the following articles, affecting even their title in some cases: i) Article 2 (right to just conditions of work); ii) Article 3 (right to safe and healthy working conditions); iii) Article 7 (right of children and young persons to protection); iv) Article 8 (right of employed women to protection of maternity); v) Article 10 (right to vocational training); vi) Article 11 (right to protection of health); vii) Article 12 (right to social security); viii) Article 15 (right of persons with disabilities to independence, social integration and participation in the life of the community); ix) Article 16 (right of the family to social, legal and economic protection); x) Article 17 (right of children and young persons to social, legal and

<sup>131</sup> PETTITI, Ch. ; *op. cit.*, p. 14.

<sup>132</sup> COUNCIL OF EUROPE: *Explanatory Report...European Social Charter (revised)*, *op. cit.*, par. 81.

economic protection); and xi) Article 19 (right of migrant workers and their families to protection and assistance).

In view of what has been stated above about the Revised ESC, we must acknowledge the praiseworthy effort that has implied the search to update an international legal text as the ESC to the evolution of the social policy as well as to the regulation of work and employment relations in a socio-cultural area as the European one, where social issues are a referent for the construction of a stable democracy; in this sense, the Revised ESC undoubtedly constitutes an advancement for the protection of economic and social rights<sup>133</sup>.

However, that doesn't prevent some obstacles from showing up, which can obscure in the future the effectiveness of the Revised ESC and the effort it represents<sup>134</sup>:

- First, the relative indifference of the States and the European societies, not only towards the international legal obligations of the Revised ESC as such, but even towards some of the objective situations that intend to eradicate. The truth is that, for the moment, data on the formal acceptance of the Revised ESC aren't quite promising: after six years in force 10 out of the 27 States Parties to the ESC, and 21 out of the 46 States Members of the Council of Europe, are Parties to the Revised ESC. It is needed a greater involvement of the organisations of employers and workers, national and international, as well as of the Non-Governmental Organisations, in the field of social awareness.
- Second, the multiplicity of international legal instruments, universal and regional, whose object is the protection of the economic and social rights, and the formulation of social policies; thus, it can stressed the relevance of the coexistence and interrelation between the Revised ESC and the legal norms of the European Community<sup>135</sup> —a priori not always ensured—.
- And third, the evidence of the crisis, more or less stressed, that the European social model goes through —to a certain extent represented by the Revised ESC—, in front of the demands of a process of globalization that, far from being negative *per se* for the development of the aspirate social State, is ruled and led from neoliberal ideological paradigms that intend to eliminate the main advances achieved in the social field.

All these obstacles, above all the second and the third ones, must be especially contextualized in the understanding of the relevance acquired by the Revised ESC for the evolution of the social guidelines of the European Community<sup>136</sup> —with a special significance in the framework of the process of integration drawn by the European Union—, and also in front of the perspective of the legal and economical consequences of the enlargement of the European Union<sup>137</sup>.

<sup>133</sup> PETTITI, Ch.: *op. cit.*, p. 15.

<sup>134</sup> GRÉVISSE, S.: *op. cit.*, p. 887.

<sup>135</sup> As GRÉVISSE points out, it seems as if the authors of the Charter of Fundamental Social Rights, of 9 December 1989, had ignored, conscious or unconsciously, the existence of the ESC (*ibid*).

<sup>136</sup> RENUCCI, J.-F.: *Droit européenne des droits de l'homme*. LGDJ, Paris, 1999, p. 311.

<sup>137</sup> See Notes 24 and 25.

On this basis, we must start from the reciprocal relevance acquired by the ESC system and the European legal system: on the one hand, the Article 136 EC Treaty in force—as amended by the Treaty of Amsterdam, of 2 October 1997—states that in order to develop the social policy aims described, there must be taken into consideration “fundamental social rights such as those set out in the European Social Charter”<sup>138</sup>; and, on the other hand, the acknowledgement in the provisions of the Revised ESC of the influence of certain European Community acts—particularly of some Directives<sup>139</sup>—.

The final question to raise is whether this interrelation leads to a harmonic development of the evolution of the European social policy with the demands posed by the Revised ESC—not only influenced, as it has been already said, by the European Community normative action but also by the legal labour standards adopted by the ILO at the universal level—.

On this subject, we have to bear in mind: first, that, although it mustn't be underestimated, the reference to the ESC in the EC Treaty reveals however an indirect legal impact on the determination of the Community's social policy<sup>140</sup>; and second, the ascertainment of the slowness and fragmentation of progress in the construction of the Community's social policy, in view of the difficulties to harmonize different national traditions and the discussion on the compatibility between an ambitious social policy and market economy in the depths of an acceleration of globalization<sup>141</sup>.

Therefore, we must wonder whether the subordination of the Community's social policy to the economic and monetary aims will allow the social policy to develop in an integral way and whether this will make possible a normative action that will lead to the full effectiveness of the economic and social rights provided in the Revised ESC<sup>142</sup>.

## 6. Final considerations

1. The ESC is a contribution to the construction of a European social space and to the creation of a European legal standard in the field of economic and social rights whose results, even if they can be judged as insufficient or unsatisfactory when considered the limited ambitions of the harmonizing project, the flexibility offered to States Parties in the determination of their undertakings or the lack of a system of

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<sup>138</sup> Even when this reference is made to the text adopted in 1961—it isn't mentioned neither the 1988 Protocol nor the Revised ESC, which had already been adopted but hadn't entered into force yet by the time the Treaty of Amsterdam was celebrated—; without prejudice of this, nothing prevents to understand that reference in an extensive sense.

<sup>139</sup> CONSEIL DE L'EUROPE: *Explanatory Report... European Social Chart (revised)*, *op. cit.*, par. 26, 41, 49, 91 and 109.

<sup>140</sup> SCIARRA, S.: *op. cit.*, p. 38-39.

<sup>141</sup> DUBOIS, L. and BLUMANN, C.: *Droit matériel de l'Union européenne*. 2nd. edition, Montchrestrien, Paris, 2001, p. 106.

<sup>142</sup> BLANPAIN, R.: *European Labour Law*. Seventh revised edition, Kluwer Law International, The Hague/London/Boston, 2001, p. 24.

international supervision sufficiently strengthen, can also be more positively evaluated if we reflect in realistic terms and realize that due to its dynamism it is a living instrument that can help to legally support a social model that faces some difficulties of great significance.



2. The ESC is, therefore, a international legal instrument that reflects the contradictions and difficulties that conditioned its adoption and that still remain. It is hard to know whether the combination of dynamism and flexibility —made clear in the preference for a mechanism of choice *à la carte* of the legal obligations— are enough to guarantee that in the future there will deepen in the consolidation of the social Europe. It is easier to appreciate in its legal content the caution of its drafters: for instance, in the reciprocal interaction between principles of social policy and economic and social rights —Parts I and II—.

3. The ESC system of control, based on a reporting mechanism and a quasi-contentious mechanism, is useful to know the deficiencies of the social policies of the States Parties from the angle of the legal obligations that each of them has accepted. Therefore, in that sense, we must admit, in spite of its possible defects, its contribution to the creation of a common European social space —emphasizing, from the legal point of view, the contribution of the ECSR—. However, the opportunity has been probably lost to favour, thanks to the mechanism of collective complaints, a significant advancement regarding the justiciability of economic and social rights —even when the starting point were the impossibility for individuals to lodge complaints—, in view of the apparent restrictivity of the potential object of the complaints.

4. The Revised ESC is the result of an effort needed in order to revise the material content of that European social space, so its adoption and entering into force can only be positively regarded. Even then, it is obvious that the effectiveness of the Revised ESC, which promotes the social involvement of State policies, can be challenged in the framework of national policies that react in accordance with deregulating tendencies in the field of employment and restrictive tendencies in the social field —according to the not-so-unavoidable demands of the adaptation to the raising world economic integration—, as well as the limitations pointed out by the social policy undertaken in the framework of the European integration.



Table 1  
**Acceptance of provisions of the European Social Charter (1961)**  
**(Status as of: 22/08/2005)**

Acceptance  Non Acceptance 

| Provisions of the European Social Charter | AUSTRIA | CROATIA | CZECHREPUBLIC | DENMARK (a) 1 | GERMANY | GREECE | HUNGARY (b) | ICELAND | LATVIA | LUXEMBOURG | NETHERLANDS 2 | POLAND | SLOVAKIA | SPAIN | FYRMACEDONIA | TURKEY | UNITED KINGDOM 3 |
|---|---------|---------|---------------|---------------|---------|--------|-------------|---------|--------|------------|---------------|--------|----------|-------|--------------|--------|------------------|
| Art. 1,1                                  |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 1,2                                  |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 1,3                                  |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 1,4                                  |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 2,1                                  |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 2,2                                  |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 2,3                                  |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 2,4                                  |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 2,5                                  |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 3,1                                  |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 3,2                                  |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 3,3                                  |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 4,1                                  |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 4,2                                  |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 4,3                                  |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 4,4                                  |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 4,5                                  |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 5                                    |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 6,1                                  |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 6,2                                  |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 6,3                                  |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 6,4                                  |         |         |               |               |         |        |             |         |        |            | (c)           |        |          |       |              |        |                  |
| Art. 7,1                                  |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 7,2                                  |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 7,3                                  |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 7,4                                  |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 7,5                                  |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |

| Provisions of the European Social Charter | AUSTRIA | CROATIA | CZECHREPUBLIC | DENMARK (a) 1 | GERMANY | GREECE | HUNGARY (b) | ICELAND | LATVIA | LUXEMBOURG | NETHERLANDS 2 | POLAND | SLOVAKIA | SPAIN | FYRMACEDONIA | TURKEY | UNITED KINGDOM 3 |
|---|---------|---------|---------------|---------------|---------|--------|-------------|---------|--------|------------|---------------|--------|----------|-------|--------------|--------|------------------|
| Art. 7,6                                  |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 7,7                                  |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 7,8                                  |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 7,9                                  |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 7,10                                 |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 8,1                                  |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 8,2                                  |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 8,3                                  |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 8,4                                  |         |         |               |               |         |        |             |         |        |            |               |        |          | (e)   |              |        |                  |
| Art. 9                                    |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 10,1                                 |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 10,2                                 |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 10,3                                 |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 10,4                                 |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 11,1                                 |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 11,2                                 |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 11,3                                 |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 12,1                                 |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 12,2                                 |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 12,3                                 |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 12,4                                 |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 13,1                                 |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 13,2                                 |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 13,3                                 |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 13,4                                 |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 14,1                                 |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 14,2                                 |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 15,1                                 |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 15,2                                 |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 16                                   |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 17                                   |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |

| Provisions of the European Social Charter | AUSTRIA | CROATIA | CZECHREPUBLIC | DENMARK (a) 1 | GERMANY | GREECE | HUNGARY (b) | ICELAND | LATVIA | LUXEMBOURG | NETHERLANDS 2 | POLAND | SLOVAKIA | SPAIN | FYRMACEDONIA | TURKEY | UNITED KINGDOM 3 |
|---|---------|---------|---------------|---------------|---------|--------|-------------|---------|--------|------------|---------------|--------|----------|-------|--------------|--------|------------------|
| Art. 18,1                                 |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 18,2                                 |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 18,3                                 |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 18,4                                 |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 19,1                                 |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 19,2                                 |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 19,3                                 |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 19,4                                 |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 19,5                                 |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 19,6                                 |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 19,7                                 |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 19,8                                 |         |         |               |               |         |        |             |         |        |            | (d)           |        |          |       |              |        |                  |
| Art. 19,9                                 |         |         |               |               |         |        |             |         |        |            |               |        |          |       |              |        |                  |
| Art. 19,10                                |         |         |               |               |         |        |             |         |        |            | (d)           |        |          |       |              |        |                  |

*Substantive questions:*

- (a) Denmark has declared to be bound by Art. 4 (3) on 1979 (the ESC entered into force in Denmark in 1965).
- (b) Hungary has declared to be bound by Arts. 7 (1), 10, 12 (1) and 15 in 2004 (the ESC entered into force in Hungary in 1999).
- (c) Except for civil servants.
- (d) The Netherlands has declared to be bound by Art. 19 (8) and (9) on 1983, "as from the date of entry into force —for the Kingdom (the Kingdom in Europe)— of the European Convention on the Legal Status of Migrant Workers, which was concluded at Strasbourg on 24 November 1977" (the ESC entered into force in The Netherlands in 1980).
- (e) Spain has denounced acceptance of sub-paragraph *b* of Art. 8 (4) as from 5 June 1991.
- (f) The United Kingdom has denounced acceptance of Art. 8 (4)(a) as from 26 February 1988, and Arts. 7(8) and 8(4)(b) as from 26 February 1990.

*Territorial questions:*

- 1. The metropolitan territory of Denmark to which the provisions of the Charter shall apply is declared to be the territory of the Kingdom of Denmark with the exception of the Faroe Islands and Greenland.
- 2. As regards the Netherlands Antilles and Aruba, the Kingdom of Netherlands has accepted Articles 1, 5, 6 (except for civil servants) and 16.
- 3. The United Kingdom has extended the application of the ESC to the Isle of Man.

Table 2

**Acceptance of provisions of the Additional Protocol (1988)<sup>143</sup>**  
**(Status as of: 22/08/2005)**

Acceptance       Non Acceptance

| Provisions of the European Social Charter | BELGIUM | CROATIA | CZECH REPUBLIC | DENMARK 1 | FINLAND | GREECE | HUNGARY | ITALY | NETHERLANDS 2 | NORWAY 3 | SLOVAKIA | SPAIN | SWEDEN |
|---|---------|---------|----------------|-----------|---------|--------|---------|-------|---------------|----------|----------|-------|--------|
| Art. 1                                    |         |         |                |           |         |        |         |       |               |          |          |       |        |
| Art. 2                                    |         |         |                |           |         |        |         |       |               |          |          |       |        |
| Art. 3                                    |         |         |                |           |         |        |         |       |               |          |          |       |        |
| Art. 4                                    |         |         |                |           |         |        |         | (a)   |               |          |          |       |        |

*Substantive questions:*

(a) At the time of deposit of the instrument of ratification, Italy declared "that the provisions of Article 4, paragraph 2, letter a, are to be understood as having a programmatic character".

*Territorial questions:*

1. Denmark declared that the Additional Protocol doesn't apply to the Faroe Islands and Greenland.
2. As regards the Netherlands Antilles and Aruba, the Kingdom of Netherlands has only accepted Article 1 of the Additional Protocol.
3. Norway has declared that the Additional Protocol shall not apply to Svalbard, Jan Mayen and the Norwegian Antarctic Dependencies.

<sup>143</sup> Five Parties to the Additional Protocol —Belgium, Finland, Italy, Norway and Sweden— have subsequently consented to be bound by the Revised ESC; in accordance with Art. B (2) of the Revised ESC, the "[a]cceptance of the obligations of any provision of this Charter [Revised ESC] shall, from the date of entry into force of those obligations for the Party concerned, result in the corresponding provision of the European Social Charter and, where appropriate, of its Additional Protocol of 1988 ceasing to apply to the Party concerned". Therefore, concerning the five States above mentioned, see Table 3 (Arts. 20 to 23).

Table 3

**Acceptance of provisions of the Revised European Social Charter (1996)  
(Status as of: 22/08/2005)**

Acceptance  Non Acceptance 

| Provisions of the ESCR | ALBANIA | ANDORRA | ARMENIA | AZERBAIJAN 1 | BELGIUM | BULGARIA | CYPRUS | ESTONIA | FINLAND | FRANCE | GEORGIA | IRELAND | ITALY | LITHUANIA | MALTA | MOLDOVA | NORWAY 2 | PORTUGAL | ROMANIA | SLOVENIA | SWEDEN |  |
|------------------------|---------|---------|---------|--------------|---------|----------|--------|---------|---------|--------|---------|---------|-------|-----------|-------|---------|----------|----------|---------|----------|--------|--|
| Art. 1,1               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 1,2               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 1,3               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 1,4               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 2,1               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 2,2               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 2,3               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 2,4               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 2,5               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 2,6               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 2,7               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 3,1               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 3,2               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 3,3               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 3,4               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 4,1               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 4,2               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 4,3               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 4,4               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 4,5               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 5                 |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 6,1               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 6,2               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 6,3               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 6,4               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |

(f)

(g)

| Provisions of the ESCR | ALBANIA | ANDORRA | ARMENIA | AZERBAIJAN 1 | BELGIUM | BULGARIA | CYPRUS | ESTONIA | FINLAND | FRANCE | GEORGIA | IRELAND | ITALY | LITHUANIA | MALTA | MOLDOVA | NORWAY 2 | PORTUGAL | ROMANIA | SLOVENIA | SWEDEN |  |
|------------------------|---------|---------|---------|--------------|---------|----------|--------|---------|---------|--------|---------|---------|-------|-----------|-------|---------|----------|----------|---------|----------|--------|--|
| Art. 7,1               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 7,2               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 7,3               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 7,4               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 7,5               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 7,6               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 7,7               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 7,8               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 7,9               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 7,10              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 8,1               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 8,2               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 8,3               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 8,4               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 8,5               |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 9                 |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 10,1              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 10,2              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 10,3              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 10,4              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 10,5              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 11,1              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 11,2              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 11,3              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 12,1              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 12,2              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 12,3              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 12,4              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 13,1              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |

| Provisions of the ESCR | ALBANIA | ANDORRA | ARMENIA | AZERBAIJAN 1 | BELGIUM | BULGARIA | CYPRUS | ESTONIA | FINLAND | FRANCE | GEORGIA | IRELAND | ITALY | LITHUANIA | MALTA | MOLDOVA | NORWAY 2 | PORTUGAL | ROMANIA | SLOVENIA | SWEDEN |  |
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| Art. 13,2              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 13,3              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 13,4              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 14,1              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 14,2              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 15,1              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 15,2              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 15,3              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 16                |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 17, 1             |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 17,2              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 18,1              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 18,2              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 18,3              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 18,4              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 19,1              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 19,2              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 19,3              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 19,4              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 19,5              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 19,6              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 19,7              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 19,8              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 19,9              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 19,10             |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 19,11             |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 19,12             |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 20                |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |
| Art. 21                |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |

| Provisions of the ESCR | ALBANIA | ANDORRA | ARMENIA | AZERBAIJAN 1 | BELGIUM | BULGARIA | CYPRUS | ESTONIA | FINLAND | FRANCE | GEORGIA | IRELAND | ITALY | LITHUANIA | MALTA | MOLDOVA | NORWAY 2 | PORTUGAL | ROMANIA | SLOVENIA | SWEDEN |  |  |
|------------------------|---------|---------|---------|--------------|---------|----------|--------|---------|---------|--------|---------|---------|-------|-----------|-------|---------|----------|----------|---------|----------|--------|--|--|
| Art. 22                |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |  |
| Art. 23                |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |  |
| Art. 24                |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |  |
| Art. 25                |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |  |
| Art. 26,1              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |  |
| Art. 26,2              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |  |
| Art. 27,1              |         |         |         |              |         |          |        |         |         |        |         |         | (a)   |           |       |         | (d)      |          |         |          |        |  |  |
| Art. 27,2              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |  |
| Art. 27,3              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |  |
| Art. 28                |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         | (e)      |          |         |          |        |  |  |
| Art. 29                |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |  |
| Art. 30                |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |  |
| Art. 31,1              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |  |
| Art. 31,2              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |  |
| Art. 31,3              |         |         |         |              |         |          |        |         |         |        |         |         |       |           |       |         |          |          |         |          |        |  |  |

*Substantive questions:*

- (a) Ireland is not bounded by sub-paragraph c) of Art. 27 (1).
- (b) Malta has not accepted sub-paragraphs b) and c) of Art. 10 (5).
- (c) Malta has not accepted sub-paragraph b) of Art. 12 (4).
- (d) Norway is only bounded by sub-paragraph c) of Art. 27(1).
- (e) Norway has declared to be bound by Art. 28 in 2005 (Revised ESC has entered into force in Norway in 2001).
- (f) Portugal has declared “that it will not apply Article 2, paragraph 6 to contracts with a duration not exceeding one month or to those with an ordinary working week not exceeding eight hours, and to those of a particular or occasional nature”.
- (g) Portugal has also declared “that the obligation under Article 6 does not prejudice, with respect to paragraph 4, the prohibition of lockouts, as specified in paragraph 4 of Article 57 of the Constitution”.

*Territorial questions:*

1. The Republic of Azerbaijan declared on 2 September 2004 “that it will be unable to guarantee compliance with the provisions of the Charter in its territories occupied by the Republic of Armenia until these territories are liberated from that occupation”.
2. The Revised ESC shall apply to all the territory of the Kingdom of Norway with the exception of Svalbard (Spitzbergen) and Jan Mayen; on the other hand, the Revised ESC shall not apply to the Norwegian dependencies either.



# The European Convention for the Prevention of Torture

Yolanda Román

**Summary:** 1. Introduction. 2. The European Convention for the Prevention of Torture: its genesis and major characteristics: 2.1. Prevention, Co-operation and Confidentiality: a new approach to protection against torture. 2.2. The CPT: its composition and functions. 3. Degree of Protection and Scope of the Convention: the independence of evaluation criteria: 3.1. The European Court of Human Rights' interpretation of the Prohibition of Torture and Inhuman or Degrading Punishment or Treatment. 3.2. The CPT's Evaluation Criteria.

## 1. Introduction

While it is hard to imagine such a direct and brutal negation of human dignity, over the course of history torture and corporal punishment have been common practice in most civilizations<sup>1</sup>.

In Europe, torture was accepted and practiced for centuries as a legal method for obtaining confessions and establishing proof in criminal proceedings as well as a punishment for those sentenced. Its use became generalised in the Middle Ages and up until the 18th century when humanist ideas expanded throughout the continent thanks to a favourable economic and cultural context, and to illustrious thinkers of the time such as Montesquieu, Voltaire and, particularly Beccaria<sup>2</sup> who staked a claim for the humanisation of Justice, for a profound reform of criminal legislation and for the prohibition of torture.

At the end of the 19th century, torture was abolished in the vast majority of European States, and this was celebrated as a triumph of reason over barbarianism, arbitrariness and cruelty.

Unfortunately, despite its disappearance from legislation, the practice of torture has endured both as an unlawful phenomenon, and as a chronic illness and constant threat to our modern societies<sup>3</sup>. Moreover, the methods used to coerce,

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<sup>1</sup> It was known in ancient Greece (*basanos*) and during the Roman Empire (*quaestio*), and its use became generalised in the Middle Ages. For a quick historical approximation, we recommend MORGAN, R. and EVANS, M., *Preventing Torture: a study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, Clarendon Press, Oxford 1998, (chapter I), and TOMÁS Y VALIENTE, F., *La tortura en España*, Ariel, Barcelona, 1994.

<sup>2</sup> His powerful book *Dei delitti et delle pene*, published for the first time in Livorno in 1764, came as a veritable doctrinal event.

<sup>3</sup> CASSESE, A., *Inhuman States: Imprisonment, Detention and Torture in Europe Today*, Polity Press, Cambridge, 1996. This is also confirmed by Amnesty International's annual reports, as well as those of the United Nations Special Rapporteur.

intimidate or punish criminals, prisoners or suspects<sup>4</sup> have become increasingly sophisticated over time, in such a way that, at times, their results are impossible to ascertain immediately or at a glance. Here reference is obviously made to psychological torture, but also to a great variety of disorientating and destabilising techniques affecting the physical and mental integrity of persons without leaving any evident traces. Constant changes in diet, brusque changes in temperature, lack of lighting, prolonged isolation, sound-proofing or excess noise are only a few examples.

For these reasons, in the framework of the process of internationalisation of Human Rights during the 20th century, the need to reiterate and update the principle that no one may be subjected to treatment that goes against their physical or mental integrity became evident, whether this meant torture in its classical form or any other type of cruel, inhuman or degrading treatment contrary to the respect of human dignity.

Article 5 of the Universal Declaration of Human Rights solemnly proclaims

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.

Other subsequent texts in International Law contain similar provisions. Amongst others, the International Covenant of Civil and Political Rights (Art. 7), the American Convention of Human Rights (Art. 5.2), the African Charter on Human and People's Rights (Art. 5) and, of course, the European Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 3)<sup>5</sup> include the same prohibition in practically identical terms to those in Art. 5 of the 1948 Declaration<sup>6</sup>.

Currently, the prohibition of torture is considered to be an imperative part of Customary International Law, that is, binding for all States in the International Community<sup>7</sup>. Moreover, this is one of the few absolute prohibitions in International Hu-

<sup>4</sup> Strictly speaking, the notions of torture or inhuman or degrading treatment, as they have been conceptually delineated by international law and jurisprudence, that is, they involve the participation of States or State agents, such as law enforcement or prison officials, acting in the name of a public authority or with its consent. Suffering inflicted by individuals or domestic violence, although equally execrable, is encompassed under a different problem both in International Law and national legislations.

<sup>5</sup> The International Covenant of Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966. The Interamerican Convention of Human Rights, adopted in the framework of the OAS on 22 November 1969. The African Charter of Human and Peoples' Rights, adopted in the framework of the OAU on 27 June 1981. The European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in the Council of Europe on 4 November 1950.

<sup>6</sup> Also the Arab Charter for Human Rights (Art. 13), adopted on 15 September 1994, or the Convention on the Rights of the Child (Art. 37), dated 20 November 1989. In addition, several international texts aimed at protecting certain social groups (the mentally or physically impaired, etc.) or prohibiting certain human rights violations (genocide, racial discrimination, etc.).

<sup>7</sup> GONZÁLEZ GONZÁLEZ, R., *El control internacional de la prohibición de la tortura y otros tratos o penas inhumanos o degradantes*, Universidad de Granada, 1998, p.48. Also see PASTOR RIDRUEJO, J.A., “La Convención Europea de los Derechos del Hombre y el ‘ius cogens’ internacional”, in *Estudios de Derecho Internacional. Homenaje al profesor Maja de la Muela*, Tecnos, 1979, p. 581-590, and MERON, T., *Human Rights and Humanitarian Norms as Customary International Law*, Clarendon Press, 1989, p. 94.

man Rights Law and, to enforce it, specific protection mechanisms, both universal and regional in nature,<sup>8</sup> have been created on an international level.

Thus, in the framework of the United Nations, in 1984 the Convention Against Torture and other Cruel Inhuman or Degrading Treatment was adopted. This Convention sets out a series of measures that States must respect in order to ensure the prohibition of torture. The Convention provides for a monitoring body, the Committee Against Torture, in charge of supervising member States' respect for their obligations under the Convention. It examines periodic reports that they present, takes decisions on notifications made by private parties and, in exceptional cases, may determine whether there are systematic violations of the prohibition of torture in a given country<sup>9</sup>.

Also prominent in the context of the United Nations is the existence of the Human Rights Commission's Special Rapporteur on the issue of torture. The creation of these two mechanisms bears witness to the efforts made to bolster protection against torture in the universal realm. Nevertheless, their scope is limited, amongst other reasons, because they are *ex post facto* mechanisms<sup>10</sup>.

It can be affirmed that it is in the Council of Europe where the most advanced, innovative and effective system of protection against torture has been established. In addition to the legal protection insured by the European Human Rights Convention, in which Article 3 refers to the prohibition of torture and inhuman and degrading punishment or treatment, in 1987 the European Convention for the Prevention of Torture (CEPT) was adopted.

This Convention provides for a committee of experts, the European Committee for the Prevention of Torture (CPT)<sup>11</sup>, to which notable powers are given, and it instates an unprecedented system of visits. The creation and functioning of this original protection mechanism based on prevention (as opposed to the *a posteriori* reparation that characterises contentious systems) and cooperation and constructive dialogue with governments has represented an indisputable, though not very well recognized, step forward in the international protection of human rights.

Ostensibly simple in its conception and approach, the European Convention for the Prevention of Torture nevertheless has its complexities. The Convention is a legal text in International Law that therefore imposes legal obligations on its signatory States, but its effective enforcement and the work of the Committee in practice are translated into a subtle *diplomatic* exercise, governed by the principles of cooperation and confidentiality.

Furthermore, the Convention omits any attempt to define or conceptualise the terms torture, inhuman treatment or degrading treatment, thereby leaving the CPT wide manoeuvring room for flexibility and comprehensiveness in this area. The out-

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<sup>8</sup> For an in-depth study on international protection against torture, GONZÁLEZ GONZÁLEZ, R., *El control internacional de la prohibición de la tortura... op.cit.*

<sup>9</sup> Adopted by the General Assembly of the United Nations in its Res. 39/46 dated 10 December 1984.

<sup>10</sup> See, for instance, INGELSE, C., "The Committee Against Torture: One Step Forward, One Step Back", *Netherlands Quarterly of Human Rights*, vol. 18/3, 2000.

<sup>11</sup> Hereinafter Convention refers to the European Convention for the Prevention of Torture and Committee to the European Committee for the Prevention of Torture.

come is a set of *standards* or criteria developed by the CPT after more than a decade of activity. Without being truly legal precepts, they are considered to be important *norms* for reference in the field.

The success of the Convention and its Committee's activity are undoubtedly based on these two aspects.

In order to gain a good understanding of this innovative mechanism, it is first necessary to analyse the text of the Convention, which will be done under heading (1), in order to reveal its principles and major characteristics as well as the composition, functions and the powers of the CPT. Another analysis, albeit partial, of the *standards* used by the Committee (2), is also necessary in order to properly value the breadth of the protection afforded and, ultimately, the true effectiveness of this original Council of Europe mechanism.

At the same time, the shortcomings and malfunctioning of the system will be brought out and certain future prospects for the protection against torture and inhuman and degrading treatment will also be indicated. As much as progress is made in the respect of human rights, one must not forget that no conquest is definitive, and current protection mechanisms must therefore be evaluated and improved on an ongoing basis.

## 2. The European Convention for the Prevention of Torture: its genesis and major characteristics

Article 3 of the European Convention of Human Rights (ECHR) is the only article that was bolstered through the adoption on 26 June 1987 of a complementary protection mechanism: the European Convention for the Prevention of Torture.

Entering into force on 1 February 1989, this Convention brought about international, non-judicial, preventive monitoring of places of detention and internment subject to the jurisdiction of the States that are parties. Based on a virtually unconditional system of visits, the European Convention for the Prevention of Torture opens up a "true right to interference on an European level"<sup>12</sup>.

The text of the Convention is brief and simple, and is comprised of a preamble, 23 articles and an annex specifying the privileges and immunities of the Committee members. The Convention has been fleshed out by an Explanatory Report<sup>13</sup> and two additional protocols, the first of which opens up the Convention to other non-Council of Europe member countries, and the second of which introduces technical modifications in order to ensure a certain degree of continuity in the Committee's composition.<sup>14</sup>

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<sup>12</sup> FOURTEAU, H., *L'application de l'article 3 de la CEDH dans le Droit interne des Etats membres. L'impact des garanties européennes contre la torture et les traitements inhumains et dégradants*, L.G.D.J., 1996.

<sup>13</sup> This text that complements the convention is very useful, offering an interpretation article by article: CPT/Inf/C (89) 1.

<sup>14</sup> All of these texts, as well as the reports that have been published so far, are available on the Committee's web site: [www.cpt.coe.int](http://www.cpt.coe.int)

The European Convention for the Prevention of Torture is rooted in the firm will of a single man, Jean-Jacques Gautier, founder of the Swiss Committee Against Torture. In 1976, inspired by the International Committee of the Red Cross' activity, he proposed the creation of a Convention which would establish a universal system of visits to places of detention and internment, with a broad field of application and without the restrictions he knew that the Red Cross had<sup>15</sup>.

Initially, Jean-Jacques Gautier's proposal took on the form of an optional protocol to what at the time was still the draft United Nations Convention Against Torture. The text, presented by Costa Rica at the United Nations Human Rights Commission in 1980, was never made concrete nor could it prosper<sup>16</sup>.

It was to be in the Council of Europe where Gautier's proposal was to find an echo. After several initiatives in this sense, in 1983 the Council of Europe's Consultative Assembly adopted a recommendation on the protection against torture of persons deprived of liberty. This recommendation invited the Council of Ministers to approve a specific convention in this regard. After four years of intense debate among governments, the European Convention for the Prevention of Torture was approved.

The ECPT met with exceptional acclaim and, in 1989, fifteen States had ratified it. Currently, 44 Council of Europe member States have adhered to the Convention<sup>17</sup>, which is considered to be a considerable success, particularly considering the demanding conditions imposed upon the signatory States in a politically delicate area.

### 2.1. *Prevention, Cooperation and Confidentiality: a new approach to the protection against torture*

Article 1 of the Convention establishes generally that

"There shall be established a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (...). The Committee shall, by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment".

Over the last few years, the efforts of the Council of Europe in its work to protect human rights prioritised prevention. Thus, the ECPT's first and clear objective is

<sup>15</sup> Indeed, the monitoring carried out for more than a century by the International Committee of the Red Cross, in charge of watching over the compliance of the Geneva Conventions in cases of international conflict or severe internal crises, is also independent, non-contentious inspection and monitoring. However, its capacity to act is extremely limited and the control it exercises is considerably less ambitious and developed than that of the CPT.

<sup>16</sup> Since 1992, a working group of the United Nations Commission on Human Rights has worked on a draft Optional Protocol of the Convention Against Torture in order to create a subcommittee modelled after the European Committee for the Prevention of Torture. After having been approved by the Human Rights Commission and the Economic and Social Council, the protocol was adopted by the United Nations General Assembly on 18 December 2002, with votes against it from the United States, Nigeria, the Marshall Islands and Palao.

<sup>17</sup> The last State to adhere to the Convention was Bosnia i Herzegovina, on 12 July de 2002.

to prevent torture and ill-treatment prohibited by Article 3 of the European Convention of Human Rights in the places that this type of abuses traditionally occur the most<sup>18</sup>, those where persons are deprived of their liberty and are therefore most vulnerable to suffering severe attacks against their dignity<sup>19</sup>.

The CPT's task consists of fighting against the causes of torture and inhuman and degrading treatment, in identifying the conditions and situations that are scarcely compatible with the respect for human dignity or those that may in some way favour any practice contrary to Article 3 of the European Convention of Human Rights<sup>20</sup>.

The mechanism created by the Council of Europe does not purport to discover effective violations of the prohibition of torture, nor does it perform the task of denouncing or condemning States. Contrarily, it aims to prevent these violations from occurring or being repeated in the future, and attempts to establish the causes of these violations as well as the situations that favour them. It also proposes specific reforms that it considers necessary and cooperates with the State in question.

In other words, the fundamental objective of the Convention and the work of its Committee is prevention, and its strategic priority is constructive cooperation with States.

In effect, the States party engage to allow the Committee, whenever it deems necessary, to enter without any restrictions anywhere in the State's territory under its jurisdiction where there may be persons deprived of their liberty by decision of a public authority (Article 3). The CPT is entitled to interview, without witnesses, as many persons deprived of their liberty as it deems necessary, as well as any other person who may provide useful information for fulfilling its objectives.

In addition, the States accept the obligation to cooperate with the Committee, furnishing it with any necessary, useful information regarding the places where there are persons deprived of their liberty. Specifically, the States must ensure that the Committee is facilitated certain possibilities allowing it to perform its duties, such as the access to its territory and the right to travel freely within it, without any type of restrictions (Article 8)<sup>21</sup>.

This is how the principle of cooperation, which, together with confidentiality, is one of the two pillars on which the system rests, is manifested.

The counterpart of cooperation is confidentiality (Article 11). Confidentiality is a *conditio sine qua non* in the cooperation and trust between member States and the Committee. For this reason, the Committee's procedure is confidential and the information obtained is therefore only communicated to those State authorities interested

<sup>18</sup> NOWAK, M., "On the Prevention of Torture", in DUNER BERTIL (Ed.), *An End to Torture: Strategies for its Eradication*, Zed Books, 1998, p. 248.

<sup>19</sup> On the principle of human dignity, we recommend B. MAURER's very interesting study, *Le principe de la dignité humaine et la Convention européenne des droits de l'homme*, La Documentation Française, Paris, 1999.

<sup>20</sup> 1st. General Report, paragraph 45, CPT/Inf (91) 3.

<sup>21</sup> For instance, visa requirements for Committee members or any other person belonging to the delegation in charge of making a visit, are considered to be restrictive measures that thwart the entry of the Committee into a State's territory. See CPT/Inf (93) 10, *Questions relatives à l'interprétation de la Convention Européenne pour la Prévention de la Torture...*, providing an account of the legal debate hinging around this issue.

and to no one else, not even to other Council of Europe bodies in charge of protecting human rights. It is easy to understand that this was an indispensable condition made by the States in order to accept the demanding obligations imposed by the ECPT.

It is also easy to guess that this is one of the most highly criticized aspects of the CPT's work, since there was acquiescence in taking on confidentiality and a lack of transparency or secrecy. We however feel that a great deal of the CPT's success still rests on the principle of confidentiality. The only disadvantage we find with this confidentiality in the Committee's work is that it has become a great unknown to the public at large and the media, which rarely mirror the CPT's achievements or difficulties.

In any event, the principle of confidentiality is not absolute and cannot be understood separately from the principle of cooperation. The Convention actually provides for a significant exception to the principle of confidentiality which takes on the form of a sanction. When a State resists cooperating with the Committee or refuses to take the necessary measures suggested in the Committee's recommendations, the rule of confidentiality may be waived and the CPT may decide, by a two thirds majority of its members, to make a public statement against that State. This is the public statement sanction provided for in Article 10.2 of the Convention<sup>22</sup>:

"If the Party fails to co-operate or refuses to improve the situation in the light of the Committee's recommendations, the Committee may decide, after the Party has had an opportunity to make known its views, by a majority of two-thirds of its members to make a public statement on the matter. "

In addition, the States may give their consent for the publication of reports with the Committee's recommendations as well as their own reports with the corresponding responses and reactions (Article 11.2). This is what normally occurs in actual practice, and enables us to appraise the effectiveness of the Committee's work and the States' will to cooperate<sup>23</sup>.

In short, while confidentiality is the general rule and may therefore be invoked at any time, publicity may be used as a sanction against a State that refuses to cooperate or as a sort of prize for a "diligent" State thereby affording it the opportunity to make its good behaviour or will to strengthen the protection of persons deprived of their liberty against torture and ill treatment known.

Confidentiality and publicity are thus combined to create a subtle balance ensuring the proper functioning of the system.

## 2.2. *The CPT: its composition and functions*

The CPT is made up of independent, impartial experts who are chosen by the absolute majority of the Council of Europe's Committee of Ministers out of a list of candidates put forward by the national delegates of the Consultative Assembly

<sup>22</sup> This measure has been taken twice against Turkey, in 1992 and 1996. Documents CPT/Inf (93) 1 and CPT/Inf (96) 34.

<sup>23</sup> To date, the CPT has made 142 visits, 95 of which were periodical, and has published 98 Reports. The time elapsed between a Committee visit and the publication of the corresponding Report is generally two years.

(Article 5). The Committee has one member per each State party to the Convention. However, members are individual and do not represent the States that put them forward.

Undoubtedly, the large number of Committee members currently poses serious problems in functioning and budgeting that limit the Convention's effectiveness and possibilities. We feel that the chapter on the composition of the CPT insofar as the number of members is concerned, although inspired on Article 20 of the European Convention of Human Rights<sup>24</sup>, is less than ideal and we would go so far as to suggest a revision of this item in the near future.

Article 4 stipulates that Committee members must be

“(...) chosen from among persons of high moral character, known for their competence in the field of human rights or having professional experience in the areas covered by this Convention”.

The need for the Committee to have a multidisciplinary composition in terms of the qualifications of its members, and to be plural in terms of its members' political tendencies in order to ensure the demanded impartiality and independence has often been stressed. CPT members therefore come from different fields including, for instance, medicine, Sociology, Law, Penitentiary Administration or Psychology.

The Convention's Explanatory Report specifies that CPT members “do not have to be lawyers”<sup>25</sup> and it is considered desirable for them to include members with pertinent experience in penitentiary administration and medicine in order to facilitate the Committee's making specific recommendations.

The professionalism of Committee members is of great importance given the inherent difficulty in the work it performs<sup>26</sup>.

CPT members are chosen for four years and may be re-elected only once<sup>27</sup>. The Committee normally meets in camera and its decisions are taken by a majority of members present, with the exception of what is set out in Article 10.2, as previously mentioned, regarding public statements. The Committee establishes its Rules of Procedure and has a permanent secretariat in Strasbourg (Article 6).

The CPT freely organises its visit regime on which the entire system rests. In addition to periodic or ordinary visits, the Committee may carry out any other visit it deems the circumstances require (Article 7). In its Rules of Procedure<sup>28</sup>, the CPT envisages and makes a distinction between three types of visits: periodic visits, *ad hoc* visits and follow-up visits.

The periodic visits are those that are organised in all of the party States with a certain degree of regularity. Envisaged in a general manner by the Convention, these

<sup>24</sup> This article establishes that the Commission shall consist of a number of members equal to that of the High Contracting Parties.

<sup>25</sup> Explanatory report, paragraph. 36.

<sup>26</sup> See LEUPRECHT, P. and LABARHTE, J-F.: “La mise en oeuvre de la Convention européenne pour la prévention de la torture et des peines et traitements inhumains ou dégradants”, *Revue Universelle des Droits de l'Homme*, vol.2, 1990.

<sup>27</sup> With the entry into force of the additional protocol num. 2, Committee members may be re-elected twice.

<sup>28</sup> CPT/Inf/C (89) 3 rev.1 (1997).



are the basic visits through which prevention work is carried out<sup>29</sup>. The *ad hoc* visits are made after allegations of serious, credible abuses in a given country and context. Lastly, the follow-up visits enable the Committee to check on how a specific situation is evolving and how and or whether its recommendations are being practiced and effective.

Regarding the *ad hoc* visits, the Explanatory Report specifies that the Committee has discretionary power vested in it to assess the need to make a visit of this kind. Here, because the Committee does not investigate the requests of individuals, it is free to consider any type of information it may be sent by a private individual or group (for instance a non-governmental organisation) and by virtue of that information decide whether a specific or *ad hoc* visit is required.

As a general rule, the delegation of the Committee in charge of making a visit to a country is, as provided for in Article 7, comprised of at least two Committee members. Exceptionally, the Committee may be represented by a single member, for instance during an urgent, *ad hoc* visit. The Convention also establishes that in its visit and inspection tasks, a Committee delegation may be assisted by an undetermined number of experts and interpreters of its choice. In this sense, Article 14 adds that the names of the persons assisting the Committee shall be identified in the notification preceding the visit and that, exceptionally, a State may oppose the participation of an expert in the Committee visit, for instance when it considers that the person does not meet the required conditions of impartiality and independence. This exception is specified and clarified in the Explanatory Report (paragraphs 83, 84, and 85)<sup>30</sup>.

Along these same lines, the Committee Rules of Procedure impose that the Committee member of the nationality of the country being visited not belong to the delegation in charge of the visit. We see this as a proper type of guarantee for impartiality<sup>31</sup>.

As previously mentioned, the CPT visit is necessarily preceded by notification to the pertinent authorities of the State being visited. This requirement is set out in Article 8, which provides that the Committee must notify the government concerned of its intention to carry out a visit in its territory. Once notification has been provided, the Committee may, at any time, carry out the corresponding visits by virtue of the provisions in the Convention (Again, this is the visit to places where persons deprived of their liberty by decision of a public authority may be found).

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<sup>29</sup> MORGAN, R. and EVANS, M., *Protecting prisoners. The Standards of the European Committee for the Prevention of Torture in Context*, Oxford University Press, 1999, p.15. These authors lament that the increasing number of States party to the Convention makes the original aspiration of the Committee to make periodical visits to all countries every two years impossible. Currently, the normal cycle is every four years.

<sup>30</sup> In the Explanatory Report, it is clarified that this right must be exercised on an exceptional basis so that each State can only refuse the presence of an expert, or any other professional assisting the Committee, if the person has manifestly shown a negative attitude towards the State by making a certain type of public statement or political comment, or when in the past s/he has not respected the rule of confidentiality. However, as far as we know, this type of situation does not normally arise.

<sup>31</sup> Rules of Procedure, Art. 37, paragraph. 2 (added by the Committee in 1990).

Attention must be drawn to two aspects regarding this prior notification. First, notification does not require the member State's consent for the visit to take place. In this sense, notification is a formal requirement. Second, the Convention does not specify any deadline for the presentation of the notification. That is to say, prior notification is necessary for the entry of the Committee in the territory of the member State, but it may come days or even hours before the visit begins.

In practice, however, and according to the spirit of cooperation in the Convention, at the end of each year, the Committee announces a list of countries it aims to visit over the following year, and the specific notification, as a general rule, comes two weeks before the scheduled date of the visit.

Once the notification has been made, the Committee can begin its visit to a State party. As we have indicated, the CPT may visit, without any restrictions, any place under the jurisdiction of that State where persons deprived of their liberty by the decision of a public authority may be found (or if there are grounds to suspect they may be found there).

It is now appropriate to specifically explain what, for these purposes, is understood as deprivation of liberty, and also the breadth of the Committee's inspection capacity.

Paragraph 24 of the Explanatory Report determines the concept of deprivation of liberty

"to be understood within the meaning of Article 5 of the European Convention on Human Rights as elucidated by the case law of the European Court and Commission of Human Rights",

although this does not prevent the Committee from making a distinction between "lawful" and "unlawful" deprivation of liberty<sup>32</sup>.

In addition to penitentiaries, the Committee may visit any police station or establishment, any administrative detention centre for asylum seekers or any other category of foreigners, psychiatric hospitals or centres for minors. In short, they may visit any place where there may be persons detained or admitted by decision of a public authority, be it judicial or administrative, and be it a definitive or temporary measure. Detentions exercised by military authorities also apply.

Private establishments, for instance psychiatric hospitals, may be visited by the Committee as long as there are persons interned there by decision of a public authority and not voluntarily or by their own decision.

In any of these places, the CPT can circulate freely and also interview, without witnesses, the persons it deems useful and necessary. They may be persons deprived of their liberty or officials in charge of custody, family members, lawyers, doctors or nurses that have been or are in contact with those deprived of their liberty or who

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<sup>32</sup> This indication has not always been observed by the CPT, which considered that it was within its mandate to inspect transit areas in airports where foreigners who are denied entry into a country are found since it considers they are deprived of their liberty. Since there is no jurisprudence on this issue, a controversy was generated until the European Court of Human Rights ruled on such a case with upholding the CPT's position. 25 June 1996 judgement, *Amuur vs. France*. See MURDOCH, J., "CPT Standards and the Council of Europe", in MORGAN, R. and EVANS, M., *Protecting prisoners...* *op.cit.*, p. 112.

have pertinent information for the Committee at their disposal. Naturally, no private party is obliged to have contact with the Committee or accept being interviewed.

It should also be pointed out that it is common practice for the CPT to meet at the beginning of a country visit with the pertinent authorities, and with representatives of the major non-governmental organisations in the country working in the areas of interest to the Committee.

Two are issues tie in to this. The primary issue is the exception provided for in Article 9 of the States' obligation to allow Committee visits in its territory at any time after receiving formal notification. The other issue also affecting the Committee's capacity on its visits is the competence of the European Committee for the Prevention of Torture and that of the International Committee of the Red Cross. We will now discuss both of these issues.

A general question will arise among readers at this point: can a State party in any case prevent a Committee visit in its territory? The Convention establishes that, under exceptional circumstances, the competent authorities of a State party may present to the Committee objections to its visit at a given time, either applying to the entire territory or to a specific place that the Committee intends to visit (Article 9). The reasons a State may invoke postponing a Committee visit or restrict the Committee's right to access certain places are limited and exceptional in nature and must be interpreted restrictively. Both Article 9 itself and the Explanatory Report stipulate:

- National defence and public safety, including the urgent need to avoid a serious crime,
- Serious disorder (for instance mutiny)<sup>33</sup> in a prison or any other place where there are persons deprived of their liberty,
- The health condition of a given person whom the Committee intends to visit when it is considered that the visit may jeopardize him or her and, lastly,
- When in the framework of an investigation relating to a serious crime there is an urgent interrogation that may be thwarted by the Committee's presence.

The second portion of the Article adds that once these objections have been presented, the Committee and the State party shall immediately consult with each other in order to clarify the situation and reach an agreement on the provisions that allow the Committee to perform its functions as soon as possible. These provisions may include the possibility of a person that the Committee wishes to see and interview being transferred to another place. Until the visit actually takes place, the State has the obligation to provide the Committee with information on any person concerned.

In this sense, we can appreciate that the principle of cooperation governs relations between the Committee and the States, even under exceptional situations, and this is certainly positive.

Nevertheless, we feel that the wording in Article 9 is generally far from ideal. On one hand, some of the situations stipulated that may give rise to the CPT's right to

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<sup>33</sup> The example is ours. Neither the Convention nor the Explanatory Report specify the type of "serious disorders" they refer to.

visit are situations in which the risk that ill treatment may occur is the greatest. Specifically, reference to an urgent interrogation that the Committee's presence could thwart or "prejudice"<sup>34</sup> would lead one to understand that at certain times and for certain offences, anything is allowed.

While we are sure that this was not the intention of the authors of the Convention, we feel attention must be drawn to this point particularly given the current context in which the international fight against terrorism and the intensified debate on *security* threaten to justify, in certain cases and for certain groups, the denial of certain inherent rights that cannot be waived<sup>35</sup>.

Another limitation on the CPT's visiting possibilities falls under Article 17 of the Convention, which sets out a demarcation of competences between the CPT and the International Committee of the Red Cross. The Committee shall not visit places where, in application of the 1949 Geneva Conventions and their Additional Protocols of 1977, the International Committee of the Red Cross makes effective and regular visits. This is to say that, in cases of armed conflict, the Geneva Conventions take precedence.

This, however, does not mean that the ECPT only applies in times of peace. Contrarily, the CPT can visit, in times of conflict, those places that the International Committee of the Red Cross does not visit "effectively" and "regularly". There is no conflict of competences considered, however, in those visits made by the International Committee of the Red Cross in times of peace by virtue of bilateral agreements. Here, it is incumbent on the CPT to decide, at its discretion, whether or not to visit the same places.

Once a visit to a given country, which usually lasts an average of ten days, concludes, the CPT must draw up a report including a list of observations made during the visit and the specific recommendations necessary in order to reinforce the protection of persons deprived of their liberty. As we already know, this report is confidential and may only be conveyed to the corresponding authorities in the State concerned. In turn, the member state concerned is invited, in a period of six months, to provide a preliminary response and later a report on the measures taken or reforms undertaken according to the CPT's recommendations. Thus, a truly interesting constructive dialogue is established between the Committee and the country authorities<sup>36</sup>.

The impact of the Committee's visits and reports is not easy to evaluate since specific results, while satisfactory in the long term, are neither immediate nor spec-

<sup>34</sup> Explanatory Report, paragraph. 71

<sup>35</sup> What we have in mind here is not only the treatment that suspects of international terrorism may receive, but also how the climate and current trends may affect groups such as asylum seekers or immigrants. See, for instance, Amnesty International, "Security, Refugee Protection and the Human Rights Agenda after the 11 September: Amnesty International concerns regarding EU policies", November 2001. The European Court of Human Rights has already referred in a general way to these risks in its 27 August 1992 judgement, *Tomasí vs. France*.

<sup>36</sup> In practice, this dialogue is limited due, amongst other reasons, to lack of resources on the part of the Committee's secretariat. Even so, the reading of the CPT's reports and governments' responses lead us to make a positive appraisal although it would seem desirable to us for the dialogue to be more regular and ongoing. For a much more critical version, see MORGAN, R. and EVANS, M., *Protecting prisoners... op.cit.*, pp. 17 and ff.

tacular, and even less are they media stories<sup>37</sup>. We will therefore attempt to illustrate the effectiveness of the system with a necessarily brief specific example:

Between 26 October and 2 November 1999, the CPT carried out a visit to Greece. As indicated in the corresponding report, it was an *ad hoc* visit required by the circumstances by virtue of Article 7 of the ECPT, and motivated by the alarming reports received by the Committee regarding the condition of the detention of foreigners in the Greek police establishments.

In the section of the CPT's report devoted to detention conditions, the Committee affirmed that while it did not find any indication of torture or deliberate physical ill-treatment, it was obliged to stress that in several of the police establishments visited it could observe "a large number of foreign nationals were subjected for prolonged periods of time to a combination of negative factors —overcrowding, appalling material conditions and levels of hygiene, lack of outdoor exercise, absence of any activities— which could easily be described as inhuman and degrading treatment"<sup>38</sup>. As a result, the CPT made a series of recommendations to the Greek government in order to correct the situation.

The Greek Ministry of Public Order, in its response to the CPT Report, provided an orderly and systematic account of certain reforms that had been carried out and measures that had been adopted in following with the CPT's observations regarding the police establishments visited. It affirms, for instance, that in a certain police station sometimes used for the detention of foreigners waiting to be expelled, "mattresses and blankets have been obtained for the needs of the detainees" and that in general, "the overall detention conditions have been improved", as well as the hygienic conditions. Specifically, a hot water and shower system were installed, periodic disinfection of the establishment was being done, and a meal service at scheduled times was established<sup>39</sup>. In other cases, photographs accompanied the list of improvements made. Certain projects approved for the future building of adequate specific facilities for temporary detainment of foreigners and asylum seekers were also mentioned.

This limited but also revealing example provides an idea of the dialogue that is established between the Committee and the national authorities after a visit, of the effectiveness of this type of prevention system, and of the specific results that can be obtained in the short and medium term in order to bolster the protection of persons deprived of their liberty against torture and inhuman and degrading treatment.

It also gives us an idea of the CPT's recommendations or requirements to governments and how they are based on a broad, flexible interpretation of the concepts of torture and inhuman or degrading treatment, which will be our next subject.

As a conclusion of this first chapter, we can assert that in addition to being a guide and reference for national authorities, the CPT's reports and recommendations may currently be considered a sort of ethical obligation to which the party States cannot turn their backs, a sort of unpostponable commitment requiring short, medium and long term results.

<sup>37</sup> ANSTETT, M., " La Convention Européenne pour la Prévention de la Torture: succès et incertitudes », *Revue Pénitentiaire et de Droit Pénal*, num. 3, 1997.

<sup>38</sup> Greece visit report, CPT/Inf (2001) 18, paragraph. 16.

<sup>39</sup> Greek Government Response (Ministry of Public Order), CPT/Inf (2001) 19, section V.

### 3. Degree of Protection and Scope of the European Convention for the Prevention of Torture: the independence of evaluation criteria

As was previously indicated, the text of the Convention does not contain any substantive provision on the issue of torture or "other treatment", and even less so a definition of these notions. The Convention omits any conceptualisation of the terms of torture and inhuman or degrading treatment, and this gives it flexibility and ample manouevring room in this field. This is a fundamental aspect of the work of the CPT, since the independence of its criteria for evaluating and assessing the treatment received by persons deprived of their liberty determines the degree of protection that the Committee may require of the Parties and, ultimately, the scope of the European Convention for the Prevention of Torture.

Let us remember that the objective of the CPT is to try and bolster the protection of persons deprived of their liberty, ensuring that both general and specific detention or internment conditions do not potentially or in actual fact constitute an attack against their physical and mental integrity. Demonstrating with conclusive proof or legal specifications that there was effectively a violation of the prohibition of torture or that there is a practice of systematic ill-treatment in a given country is not one of the Committee's specific tasks.

The Committee does not make judgements, given that it is not a body of a legal nature. It rather makes recommendations in order to maximise its reinforcement of the protection of persons deprived of their liberty, avoiding any interference or conflict of the competence of other Council of Europe bodies, particularly the European Court of Human Rights.

The CPT's obligation consists of identifying the causes of the violence and the abuses committed against persons detained or deprived of their liberty, evaluating the indicators and risk situations, and proposing to the government in question a series of specific measures in order to ensure that, in the future, conduct contrary to the respect of human dignity does not occur again. In doing so, the CPT makes an extensive interpretation of the international standards in the field, thereby arriving at a set of *standards* that, while not actual legislation, are considered to be important rules of reference<sup>40</sup>.

In this sense, the CPT provides a broader, more profound and human approach to the situation of persons deprived of their liberty than, say, the European Court of Human Rights<sup>41</sup>, which is obliged and restricted by formalities and legal procedures inherent to legal instruments (formalities that uphold, let us not forget, the basic requirements of justice, such as legal certainty and equality before the law).

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<sup>40</sup> On several occasions, the bodies of Strasbourg, the Commission and the European Court of Human Rights have taken the CPT's considerations into account in order to establish the facts and evaluate the consequences of a given case: 30 July 1998 judgement on *Aerts vs. Belgium*, and 27 September 1997 judgement on *Aydin vs. Turkey*, for instance. We understand that these references will be more frequent in the future and that it is therefore important to define and specifically delineate the competences of the two bodies and the legal value of their respective decisions.

<sup>41</sup> The Committee explicitly expressed its goal of offering "a greater degree of protection than that offered by the Commission and the European Court of Human Rights", 1st General Report, *loc. cit.*, paragraph 51.

But does this mean that the CPT does not take into account international law or the jurisprudence of the European Court on Human Rights? What basic grounds does the CPT use in its considerations regarding its country visits? That is to say, what does the CPT understand to be torture or cruel and inhuman or degrading treatment? These questions all point towards the issue of the independence of the CPT's criteria, which we will try to elucidate in the following chapter in order to then analyse certain criteria used by the Committee on its visits.

The independence of the CPT's criteria mean that it is not bound by the jurisprudence of the European Court of Human Rights regarding the prohibition of torture and inhuman or degrading treatment, or by the interpretations that other bodies make regarding this prohibition. The Explanatory Report vaguely alludes to this issue<sup>42</sup>, signalling that the European Court of Human Rights jurisprudence on Article 3 of the ECDH serves as a point of reference and a guide for the Committee in its work, as does other international law<sup>43</sup>, although their decisions or jurisprudence do not directly bind the CPT.

The Committee is not and cannot be removed from the jurisprudence of the Strasbourg bodies and, despite the full independence of both, they must obviously have an impact on each other<sup>44</sup>.

We therefore feel it is pertinent to briefly analyse the European Court of Human Rights' interpretation of Article 3 of the ECDH. The literature on this matter abounds<sup>45</sup>. Here we will limit ourselves to the most characteristic traits of the Court's jurisprudence on these issues since this will enable us to better evaluate the meaning and importance of the CPT's protection criteria.

### 3.1. *The Interpretation of the Prohibition of Torture and Degrading or Inhuman Treatment or Punishment by the European Court of Human Rights*

The various international instruments that include the prohibition of torture and inhuman or degrading treatment do not provide definitions that are satisfactory or universally accepted. Jurisprudence in this area has been and continues to be crucial

<sup>42</sup> Paragraphs. 23, 26 and 27.

<sup>43</sup> In addition to the instruments mentioned in the introduction, *vid. supra.* notes 5 and 6, reference must be made to the 1975 Declaration on the Protection of all Persons Against Torture and Other Cruel, Inhuman or Degrading Treatment, the 1984 Convention Against Torture and other Cruel, Inhuman or Degrading Punishment, the 1985 Interamerican Convention to Prevent and Sanction Torture, and the draft Arab Convention for the Prevention of Torture and Inhuman and Degrading Punishment, approved in 1989. All of these instruments contain a definition of torture. The European Penitentiary Rules adopted by the Council of Europe in 1987 also deserve special attention. See MURDOCH, J., "CPT Standards and the Council of Europe", in MORGAN, R. and EVANS, M., *Protecting prisoners... op. cit.*, p. 106.

<sup>44</sup> PEUKERT, W., "The European Convention for the Prevention of Torture and the European Convention on Human Rights", in MORGAN, R. y EVANS, M., *Protecting prisoners... op. cit.*, p. 87.

<sup>45</sup> Among other doctrinal contributions see Sudre F., "La notion de peines et traitements inhumains et dégradants dans la jurisprudence de la Commission et la Cour Européenne des droits de l'homme", *R.G.D.I.P.*, num 4, 1984, pp. 825-289, and CASSESE, A., "Prohibition of Torture and Inhuman and Degrading Treatment or Punishment", in *The European System for the Protection of Human Rights*, Martinus Nijhoff, 1993, pp. 229 and ff.

for determining the content and scope of this legislation<sup>46</sup>. Of particular relevance is the jurisprudence of the control organs of the European Convention of Human Rights, "artifices of the most elaborate conceptual delineation of prohibited treatment and its respective fields of application"<sup>47</sup>.

We can highlight three aspects of Strasbourg jurisprudence regarding Article 3 of the ECHR: the absolute nature of the prohibition of torture and inhuman and degrading treatment, the minimum in terms of severity and the maximum in terms of suffering, and relative appreciation. These criteria for determining and circumscribing the field of application of Article 3 have given rise to flexible, dynamic and protective jurisprudence, although not always congruent<sup>48</sup>.

To paraphrase a well-know author, we ask whether Article 3 is an absolutely relative or relatively absolute provision?<sup>49</sup>. We can affirm that Article 3 of the ECHR sets out an absolute prohibition of torture and inhuman or degrading treatment or punishment, and that this prohibition expresses "one of the fundamental values of the democratic societies that make up the Council of Europe"<sup>50</sup>.

In Sudre's words, "the prohibition of torture is one of the few uncontestable imperative rules in international human rights law that enunciates absolute rights"<sup>51</sup>. This means that the prohibition of torture included in the ECHR contemplates no exception and that the right to physical and mental integrity that it ensures cannot be subject to any limitations, suspensions or waivers, not even under exceptional circumstances.

The European Court of Human Rights was categorical in this issue, affirming that Article 3, unlike other ECHR legislation, "makes no provision for exceptions and, under Article 15 para. 2, there can be no derogation therefrom even in the event of a public emergency threatening the life of the nation"<sup>52</sup>. Neither specific local situations nor the severity of certain crimes and the difficulty in combating them can make the prohibition of torture and inhuman or degrading punishment or treatment relative.

The absolute nature of this prohibition, however, does not prevent the Court from taking in consideration the circumstances of a specific case when applying Article 3. The specific circumstances characterising a case are considered and assessed in order to set the *threshold of severity* used to establish whether or not there has been a violation of the legislation, and this has enabled the Committee to develop a dynamic, evolving interpretation of Article 3<sup>53</sup>.

<sup>46</sup> In addition to the jurisprudence developed by the Strasbourg bodies is that drawn up by the United Nations Commission on Human Rights, regarding Articles 7 and 10 of the International Covenant of Civil and Political Rights, and the Committee Against Torture, especially as regards Article 3 of the Convention Against Torture.

<sup>47</sup> GONZÁLEZ GONZÁLEZ, R., *El control internacional de la prohibición de la tortura... op. cit.*, p. 35.

<sup>48</sup> MORGAN, R. and EVANS, M., *Protecting prisoners... op. cit.*, p. 98.

<sup>49</sup> CALLEWAERT, J., "L'article 3 de la Convention Européenne : une norme relativement absolue ou absolument relative?", in *Liber Amicorum Marc André Eissen*, Bruylant, L.G.D.J., 1995, p.13.

<sup>50</sup> This is affirmed by the European Court of Human Rights in its 7 July 1989 judgement in the *Soering vs. United Kingdom case*.

<sup>51</sup> SUDRE, F., "Article 3", in Pettiti and others (dirs.), *La Convention européenne des droits de l'homme: commentaire article par article*, Economica, 1995.

<sup>52</sup> 18 January 1978, *Ireland vs. United Kingdom*.

<sup>53</sup> CALLEWAERT, J., *Is there a margin of appreciation in the application of articles 2, 3 and 4 of the Convention?*, *Human Rights Law Journal*, vol. 19, num.1, 1998, p. 6.



The European Court of Human Rights has established the principle by which in order to be judged in the light of Article 3 of the ECDH, the acts that have been made known to the Court must be of *minimum level of severity*, and that the appreciation of that threshold is necessarily relative.

In order to establish the minimum severity for Article 3 to be applied, the Court makes an *in concreto* appreciation on a case by case basis, considering the ensemble of circumstances and elements that characterise each case.

The principle of relative appreciation has been defined by the European Court of Human Rights in the famous *Ireland vs. United Kingdom case*<sup>54</sup>. In its judgement, the Court explains that the appreciation of minimum severity “depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.”. This formula has been used repeatedly by both the Commission and the European Court of Human Rights.

This means that the “gate of entry” to Article 3 is set by the Court according to the specific circumstances in each case as well as by the social and political context into which it has framed. This has propitiated evolution in the application of Article 3 of the ECHR according to what is considered at each moment in history to be a *sufficiently severe* attempt against the person’s physical, mental or moral integrity<sup>55</sup>.

A study of the Strasbourg bodies’ jurisprudence seems to confirm in principle that there is a tendency to lower this threshold for severity and to broaden the field of application of Article 3. This is what is seemingly gleaned from cases such as *Tomasi vs. Francia*, *LHAN vs. Turkey*, and *Ribitsch vs. Austria*<sup>56</sup>, among others.

Relative appreciation is also a determining factor for establishing the threshold for the *intensity of suffering*, the other criterion used by the Court in order to distinguish between the concepts under Article 3 and to qualify what is called into question as torture, inhuman treatment or degrading treatment.

In effect, the Court distinguishes between three categories in Article 3, different degrees of violation of the prohibition in the legislation, that is to say the different types of violation of the right to one’s physical and mental integrity. The degree of intensity of the suffering caused is what determines whether there will have been torture, inhuman treatment or degrading treatment.

Plainly stated, first the Court determines whether the facts or actions are severe enough to be judged under Article 3. Once the surpassing of this threshold has

<sup>54</sup> *Ireland vs. United Kingdom judgement, loc. cit.*

<sup>55</sup> This is the so-called “sociological parameter” of evaluation, whose legitimacy is debatable. The dangers involved in using this criterion are in a certain way offset by the ongoing and absolute assertion of the legislation emanating from the Strasbourg bodies. In any event, it seems that the evolution of the jurisprudence points towards a marginalisation of this technique for interpretation. See note *infra*.

<sup>56</sup> Judgements of 27 August 1992, *Tomasi vs. Francia*, 4 December 1995, *Ribitsch vs. Austria*, 27 June 2000, *LHAN vs. Turkey*. However, while certain steps forward have been seen in the Human Rights Court’s jurisdiction, there have also unfortunately been limitations on the effective application of these theoretical steps forward, such as certain requirements in providing proof. One can therefore speak of a manifest imbalance between potential protection provided for in Article 3 and real protection. See CHAUVIN, E., “L’interprétation de l’article 3 de la CEDH: réelle avancée ou restriction déguisée?”, *Revue Universelle des Droits de l’Homme*, 1997.

been established, the facts or actions are established as being degrading treatment, inhuman treatment or torture, and this is basically based on the intensity of the pain caused or suffered.

In this sense, the criteria for minimum severity and intensity of suffering overlap or may even be considered the same since the legal category of degrading treatment, in which the degree of suffering is less, is still enough for Article 3 to be applied, and therefore opens up a way to accede to the protection this article affords.

The following level on the scale of severity is inhuman treatment, which involves more intense suffering than degrading treatment, yet without reaching the maximum level considered torture. Here, as the European Court of Human Rights has indicated, all torture is at the same time inhuman and degrading treatment.

Obviously, as previously stated, the appreciation of these limits is relative and varies according to the ensemble of information in each case. The case judgements stemming from the application of these criteria abound and have been intensely criticised by some and defended by others, although this is not the place to expound upon this issue in a detailed analysis.

We will suffice it to say that, in general, torture is an aggravated form of inhuman treatment that causes “very severe and cruel” suffering, and that the Court has reserved this term for exceptional cases, perhaps to prevent its trivialisation. It has favoured the use of the concepts inhuman or degrading treatment whose interpretation is less restrictive and allows for a more useful and flexible application of Article 3<sup>57</sup>.

In any event, what we would like to stress is that the European Court of Human Rights has developed an interpretation of the prohibition of torture and inhuman or degrading treatment or punishment that is both dynamic and strict. It sets ceilings and floors for the scope of application based on the criteria of minimum severity and intensity of suffering.

However, as we have mentioned, the CPT’s interpretation of the prohibition of torture and “other treatment” is broader and simpler. For instance, the CPT does not take the minimum threshold of severity and suffering characterising the Strasbourg Court’s jurisprudences into account. The Committee tends to assure the fullest possible protection against any type of abuse, attack or situation, as moderate as it may appear by the standards of interpretation established by the Strasbourg Court<sup>58</sup>.

In this sense, it can be affirmed that the CPT has created its own set of standards regarding the protection of persons deprived of their liberty against torture and inhuman or degrading treatment (this is what some call the doctrine or even the *jurisprudence* of the Committee). This translates into a series of demands made

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<sup>57</sup> In the controversial *Ireland vs. United Kingdom judgement*, *loc.cit.*, the devastating techniques of sensory disorientation applied by the English police to alleged IRA terrorists were qualified as inhuman and degrading treatment although they had been considered to be torture by the Commission and indeed contained all of the elements in the traditional definition of torture. Contrarily, on a certain occasion, the Court was able to use the category of torture making a certain effect in order provide a reminder as to the absolute nature of Article 3 of the ECHR and draw public attention to the severity of certain brutal practices. We see the 28 July 1999 judgement in the *Selmouni vs. France* as a clear example of this.

<sup>58</sup> MURDOCH, J., “CPT Standards and the Council of Europe” ..., *loc. cit.*, p. 119.

upon States that, in terms of protection, are broader in scope than those of the Strasbourg Court<sup>59</sup>.

### 3.2. *The CPT's evaluation criteria*

The examination of the various documents drawn up by the CPT allows us to identify a series of constant, and to varying degrees consistent, criteria used to evaluate the situation of persons deprived of their liberty in the various countries it visits and in order to demand reforms and other pertinent measures to governments.

The CPT's work and its methodology are reflected basically in two different types of documents. First, in the Reports on the various countries, corresponding to the visits carried out. Secondly, the Committee annually publishes general reports that summarize, evaluate and comment on its activities. It is true that there is no single publication by the Committee or the Council of Europe fully listing and clarifying the criteria consolidated over the last decade by the CPT, and this would be desirable<sup>60</sup>.

With no such publication, one must resort to other previously mentioned documents in order to establish what these criteria consist of. We do not aim to be exhaustive in doing so here, but rather to offer the reader a general idea that may serve as an introduction to such a vast and complex issue.

The first issue assessed by the CPT in its Reports reflecting visits to the member States is the risk of suffering torture observed in the various places visited. In this regard, it must be specified that the Committee established a clear distinction between torture and ill-treatment on one hand and inhuman or degrading treatment on the other. This distinction is not based on the intensity of suffering as in the European Court of Human Right's jurisprudence, nor is it based on the lesser or greater degree of severity of the facts being assessed. The CPT uses both terms to refer to aspects of the protection of persons deprived of their liberty.

With the terms torture and ill-treatment, the Committee refers to deliberate forms of physical or psychological violence aimed at obtaining a confession or certain information, or to intimidate or humiliate. Specifically, the CPT warns of the existence or risk of torture or ill-treatment in a country when it finds proof or indications of the use of specialised techniques or instruments (for instance the *falaka*, that is, the prolonged suspension of the victim, or the use of electric shock equipment). In short, torture involves premeditated and intentional physical or psychological violence (threats, isolation), normally used by the police, although also used by civil servants in prisons.

Also, the qualification inhuman and degrading is reserved for certain material detention conditions considered either in their ensemble or singly. As referred to above, the CPT considers that certain material detention conditions, when com-

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<sup>59</sup> Here we do not purport to insinuate that the judicial mechanism is not effective. Contrarily, we consider both mechanisms to be necessarily and mutually complementary. See KELLY, M., "Complementarity of Mechanisms within the Council of Europe. Perspectives from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment", *Human Rights Law Journal*, vol. 21, num. 8, 2000, p. 301.

<sup>60</sup> MORGAN, R. and EVANS, M., *Protecting prisoners... op.cit.*, p. 22.

bined, to give rise to deplorable situations that deserve to be qualified as inhuman and degrading treatment<sup>61</sup>.

There are also certain detention conditions which, even when considered alone, have been qualified as inhuman and degrading treatment by the Committee. Overpopulation in jails or crowding in places of detention, when reaching unacceptable levels, serve as examples. The Committee has also qualified as degrading treatment certain practices triggered by the lack of facilities or resources, such as “slopping out”, not only for those detained or the prisoners suffering from these conditions, but also for the other prisoners and the persons in charge of supervising them<sup>62</sup>.

These clarifications regarding the terminology used give an idea of the aspects that the Committee devotes its attention to on its visits to the different places where there are persons deprived of their liberty.

More specifically, the CPT has included as series of “substantive” sections in its General Reports where it refers to issues on which it basically focuses during its visits, or on issues it considers particularly important. These specific observations are put into chapters separate from the CPT’s general reports. They include a great portion of the Committee’s most consolidated doctrine regarding issues such as police custody, incarceration, the training of law enforcement officials, health services in prisons, and foreign citizens detained under foreign legislation<sup>63</sup>. The following protection criteria used by the CPT in various areas of its mandate can be gleaned from these chapters.

In the context of police custody, the CPT stresses the importance of three rights that must be guaranteed for the detainees and which constitute fundamental guarantees for prevention against torture and ill-treatment. These three rights are: the right of the detainee to notify the third person of his/her choice of the information involved in his/her detention; the right to a lawyer; and the right to a medical examination. The CPT requires/recommends that these rights always be observed from the outset of the deprivation of liberty (arrest, detention, etc.) and specifies their content.

In addition, the CPT considers that there must be clear rules or guidelines that regulate police interrogations and it recommends that they be electronically recorded as a highly useful safeguard against ill-treatment. Other basic guarantees against torture relate to police custody and independent mechanisms for examining complaints against treatment filed during this period.

Insofar as the material conditions during police custody are concerned (and these may degenerate into inhuman or degrading treatment as we have seen previously), the CPT establishes a series of detailed demands insofar as the space, light-

<sup>61</sup> *Vid. supra.* note 40.

<sup>62</sup> Practice established in certain countries whereby the detainees or prisoners must urinate and defecate without any privacy in cubes provided in their cells. See MORGAN, R. and EVANS, M., *Protecting prisoners...* *op.cit.*, pp. 38-39.

<sup>63</sup> The CPT has published a document compiling all of the “substantive” sections drafted to date, with which the Committee hopes “to be able to offer a clear indication to the national authorities of its point of view regarding the way in which persons deprived of their liberty should be treated, and more generally, to promote debate on these issues”: *The CPT Standards. Substantive Sections of the CPT’s General Reports*, CPT/Inf/E (2002) 1.

ing and ventilation of cells<sup>64</sup>, as well as their facilities. More specifically, the CPT establishes that “persons in custody should be allowed to comply with the needs of nature when necessary in clean and decent conditions”, and they should be offered proper facilities for their personal hygiene. The diet is also considered important by the CPT, which actually specified that at least one of the daily meals should be “full” (in other words, more substantial than a sandwich)<sup>65</sup>.

Regarding incarceration, the CPT has reiterated that all of the aspects of depriving of liberty in prisons are important for its mandate and not only those that might seem the most severe, such as allegations or indications of physical ill-treatment. In the Committee’s words, “ill-treatment can take numerous forms, many of which may not be deliberate but rather the result of organisational failings or inadequate resources”. The quality of life in a penitentiary establishment is assessed according to many different parameters. Particularly significant are the activities available for prisoners and relations between penitentiary personnel and the prisoners, as well as relations between the prisoners themselves.

The occupation rate of prisons is particularly significant, since overpopulation decreases the overall quality of the establishment and affects services and activities alike, thereby causing a great deterioration among the prisoners, and nearly always degenerating into inhuman or degrading treatment.

Other aspects of prison life that have been subject to reiterated comments from the Committee are outdoor exercise, contact with the outdoors and standards of hygiene<sup>66</sup>.

Insofar as foreigners nationals detained under aliens legislation, the CPT has developed a series of specific criteria on the treatment that this category of persons deprived of their liberty should receive. It refers to them under the general term “immigration detainees”. This is a complex and highly sensitive issue. The CPT stresses the need to ensure conditions for proper treatment of these persons, whether they be in transit areas and “international zones” of airports or in police stations or prisons<sup>67</sup>. Proper conditions mean at least a means to sleep, access to proper toilet facilities, food and health care.

In any event, when the deprivation of liberty is prolonged, “centres specifically designed for that purpose, offering material conditions and a regime appropriate to their legal situation and staffed by suitably-qualified personnel” must be provided<sup>68</sup>.

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<sup>64</sup> Regarding the size of cells and other types of accommodation, guidelines have been issued setting “desirable amounts” of space. For police cells in which a single person must remain for more than a few hours, the guidelines indicate 7 square metres, two metres or more between the walls and 2.5 metres between the walls and the ceiling.

<sup>65</sup> 2nd General Report, paragraphs 36-46, CPT/Inf (92) 3. These criteria were reiterated with a general nature in the 6th General Report and revised in the 12th General Report.

<sup>66</sup> 2nd General Report, paragraph 44-57, CPT/Inf (92) 3. The significance of overpopulation in prisons was again underscored in the 7th General Report. The protection criteria for prisons were broadly revised again in the 11th General Report.

<sup>67</sup> In principle, by definition, prisons are considered inappropriate for detaining persons who have not been sentenced or are not suspects of any crime. However, they are accepted in certain exceptional circumstances.

<sup>68</sup> The CPT expressly welcomes the fact that this is being observed increasingly in Party States.

The safeguards required for other categories of detainees, that is, access to a lawyer and a medical examination, together with the right to inform a person of one's choice of one's situation are also required for detained immigrants are. Furthermore, "they should be expressly informed, without delay and in a language they understand, of all their rights and of the procedure applicable to them".

In order to assess the risk of ill-treatment after expulsion, an issue on which the Commission and the European Court of Human Rights have taken a position on several occasions, the CPT, in accordance with its preventive function, is inclined to focus its attention on the question of whether the decision-making process as a whole offers suitable guarantees against persons being sent to countries where they run a risk of torture or ill-treatment.

Also regarding expulsion procedures, the CPT pays special attention to any coercive measures used, reminding that "the force used should be no more than is reasonably necessary", that "to gag a person is a highly dangerous measure" and that administering medication to persons pending deportation may only be done by medical decision according to medical ethics<sup>69</sup>.

This is no more than a small sampling of the protection standards imposed by the CPT through its visits to Party States and through its corresponding reports, following the system and principles described in the first chapter. Many other aspects of protecting persons deprived of their liberty are monitored by the Committee and could also be highlighted. For instance, CPT doctrine on *incomunicado* detention, health care services in prisons, or involuntary internment in psychiatric establishments could be noted<sup>70</sup>.

In any event, in order to properly evaluate the content and scope of the previously mentioned criteria, one would need to analyse how they are mentioned in the different visit reports in order to relate them both on a case by case basis with what the CPT comes across in the various States, and with each one of the responses from the governments in question.

This is not an accessory assertion. Quite the contrary, one of the greatest challenges faced by the CPT is the application of criteria that have already been consolidated for Western European countries in Eastern European countries recently adhering to the Convention, where the economic and political situation is completely different and where in the short and even medium term, it is impossible to observe many of the previously mentioned CPT protection criteria.

It would be premature to make an evaluation in this regard, but we do consider that the Committee should not lower its protection standards in these countries, but rather set an order of priorities for each case and lower its requirements insofar as the deadlines for reaching these objectives. In addition, the CPT should continue to carry out ongoing monitoring and evaluation. It could even consider establishing a monitoring subcommittee in charge of overseeing the actual application of CPT recommendations and assisting reform processes in countries less advanced in human rights protection.

<sup>69</sup> 7th General Report, CPT/Inf (97) 10, paragraphs 24-36.

<sup>70</sup> 3rd General Report, CPT/Inf (93) 12, and 8th General Report, CPT/Inf (98) 12, respectively.

In the future, once it comes into force, the universal mechanism for the prevention of torture established within the United Nations system will have to tackle this same problem.

In conclusion, we feel that the European Convention for the Prevention of Torture is an important human rights protection mechanism of an innovative nature within the regional human rights system that has been consecrated in the Council of Europe. We consider that in this field the preventive approach is absolutely necessary in order to ensure effective protection, particularly because of its twofold approach of identifying causes on one hand and, on the other, drawing up specific recommendations in order to improve and reform both practices and conditions during deprivation of liberty. As reflected in this article, a great deal of this mechanism's effectiveness lies in the possibility of making an extensive interpretation of the notion of torture, inhuman treatment and degrading treatment, as well as in the principles of cooperation and confidentiality on which it is based. Undoubtedly, these same principles and the Committee's flexibility in interpretation will be key to successfully facing the challenges that lie ahead. We also believe that the European Convention for the Prevention of Torture could and should serve as inspiration for the creation of other similar protection measures aimed at preventing other human rights violations both within the framework of the universal system and of the various regional systems.





Part V

The Organization of  
American States  
and Human Rights



# The Inter-American system of protection of Human Rights: the developing Case-Law of the Inter-American Court of Human Rights (1982-2005)<sup>1</sup>

Antônio Augusto Cançado Trindade

**Summary:** 1. Introduction. 2. Case-law in the exercise of the advisory jurisdiction. 2.1. The Developing Case-Law in the Exercise of the Advisory Function. 2.2. The Legal Basis of the Court's Advisory Jurisdiction. 2.3. The right to information on consular assistance. 2.4. The juridical condition and the rights of the child. 2.5. The juridical condition and the rights of undocumented migrants. 3. Case-law in the exercise of the contentious jurisdiction. 3.1. Substantive Aspects. 3.2. Procedural aspects. 3.3. Complementarity between the International Responsibility of the State and of the Individual: The Issue of Crime of State Reconsidered. 4. Case-Law pertaining to provisional measures of protection. 5. Concluding Observations.

## 1. Introduction

Established in 1979, once the 1969 American Convention on Human Rights entered into force (on 18 July 1978), the Inter-American Court of Human Rights has nowadays attained its maturity, having just completed a quarter of a century of continuing operation. This is a proper occasion to review its developing case-law, which nowadays comprises 54 Provisional Measures of Protection, 18 Advisory Opinions and 110 Judgments (on Preliminary Objections, Jurisdiction, Merits and Reparations), with a total of 52 contentious cases resolved so far.

There takes place today a regular and ever increasing exercise of the advisory as well as the contentious functions conferred upon it by the American Convention. The Court, entrusted with the interpretation and application of the Convention, has constructed a case-law which is nowadays the juridical patrimony of the countries and peoples of the American continent. It is my intention, in the present study, to single out some of the most significant aspects to date of the developing case-law of the Inter-American Court that have a direct bearing on the international standards of protection of the human person ensuing therefrom.

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<sup>1</sup> The present study served as basis for one of the 27 chapters of the General Course on Public International Law delivered by the Author at the Hague Academy of International Law from 25 July to 12 August 2005; cf., forthcoming, A.A. CANÇADO TRINDADE, "General Course on Public International Law - International Law for Humankind: Towards a New *Jus Gentium*", in *Recueil des Cours de l'Académie de Droit International de La Haye* (2005) (in print).

May it preliminarily be recalled that the conventional basis for the exercise of the Court's advisory jurisdiction is distinct from that for the exercise of its contentious jurisdiction. The basis for the exercise of the latter is particularly wide (under Article 64), given that all OAS member States (whether Parties to the American Convention or not) and all main organs mentioned in chapter X of the OAS Charter can request advisory opinions from the Court on distinct issues (e.g., interpretation of the American Convention or of other treaties relating to the protection of human rights in the American States, determination of the compatibility of any of the domestic laws of the American States with the American Convention or other human rights treaties). For the exercise of the Court's contentious jurisdiction, in turn, a declaration of acceptance is required from States Parties to the Convention (under Article 62).

In addition, the Court is also entitled, by the American Convention itself (under Article 63(2)), to order Provisional Measures of Protection; in recent years, it has in fact been developing a remarkable practice on such Provisional or Interim Measures of Protection, disclosing the preventive dimension of its work of safeguard of the rights protected under the Convention. It would thus be convenient, bearing these preliminary remarks in mind, to cover the development of the case-law of the Inter-American Court under the distinct headings pertaining to the functions ascribed to it by the American Convention (contentious and advisory functions, and provisional protective measures, respectively).

## 2. Case-Law in the Exercise of the Advisory Jurisdiction

### 2.1. *The Developing Case-Law in the Exercise of the Advisory Function*

In the exercise of its advisory jurisdiction (Article 64 of the American Convention), the Inter-American Court of Human Rights has delivered eighteen Advisory Opinions so far (end of 2004). In the first Advisory Opinion (1982), the Court stressed the specificity of the instruments of international protection of human rights and the wide scope of its advisory faculty. In its fourth Opinion (1984), it reiterated the extensive interpretation of its own advisory faculty<sup>2</sup>. In its second Advisory Opinion (1982), the Court again emphasized the special character of the international protection of human rights and dismissed the possibility of an alleged interest on the part of reserving

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<sup>2</sup> It added that, if one could request advisory opinions only on laws in force, such excessively restrictive interpretation (of Article 64(2) of the Convention) would "unduly limit" its advisory function. —In its sixth Opinion (1986), the Court clarified that the word "laws" in Article 30 of the Convention, to be examined in accordance not only with the principle of legality but also with that of legitimacy, means a juridical norm of a general character, turned to the "general welfare", emanated from the legislative organs constitutionally foreseen and democratically elected, and elaborated according to the procedure for law-making established by the Constitutions of States Parties. —Subsequently, in its thirteenth Advisory Opinion (1993), the Court held that the Inter-American Commission is competent (under Articles 41-42 of the Convention) to determine whether a norm of domestic law of a State Party violates or not the obligations incumbent upon this latter under the American Convention, but is not competent to determine whether that norm contradicts or not the domestic law itself of that State.

States in postponing the entry into force of the Convention. And in its third Opinion (1983), the Court underlined the unique character of its wide advisory function<sup>3</sup> and explained the limitations imposed by the Convention to the death penalty: according to the Court, the “limitative tendency” of the application of death penalty requires that its scope is definitively limited, so as to keep on reducing until its “final suppression” (par. 57).

In its fifth Advisory Opinion (1985), the Court, in pronouncing on freedom of expression (compulsory membership in an association of journalism), singled out the “dual aspect” of that freedom (Article 13 of the Convention): it required, at first, that “no one be arbitrarily limited or impeded” to express his own thoughts, and, secondly, that everyone be assured the right “to receive any information whatsoever and to have access to the thoughts expressed by others” (par. 30). Hence the close relationship between the right to freedom of expression and the right to receive information and ideas (right to information); the two dimensions ought to be “guaranteed simultaneously” (par. 33)<sup>4</sup>.

The Court warned in that respect that freedom of expression could in fact also be affected “without the direct intervention of the State”, when, e.g., the communication and circulation of ideas are bound to be impeded by the existence of monopolies or oligopolies in the ownership of communications media. It further warned that a society which is not well informed is not truly free: freedom of expression constitutes “the primary and basic element of the public order of a democratic society”, and “a cornerstone upon which the very existence of a democratic society rests” (pars. 69-70). It added that “there must be a plurality of means of communication, the barring of all monopolies thereof, in whatever form, and guarantees for the protection of the freedom and independence of journalists” (pars. 56 and 33). And it concluded that compulsory licensing of journalists is incompatible with Article 13 of the Convention for denying any person access to the “full use of the news media as a means of expressing opinions or imparting information” (par. 85).

Shortly later, in its seventh Advisory Opinion (1986), the Court acknowledged the close relationship between freedom of expression and the right of reply or correction for inaccurate or offensive statements disseminated to the public in general (pars. 23 and 25). It held that Article 14(1) of the American Convention recognizes an “internationally enforceable” right of reply or correction; when this latter is not enforceable under domestic law, the State at issue is under the obligation (under Article 2) to adopt the legislative or other measures that may be necessary to give effect to that right (pars. 33 and 35). The Court further sustained that the fact that an Article refers itself to the law is not sufficient to lose direct applicability, and observed that Article 14(1) of the Convention is directly applicable *per se*.

<sup>3</sup> In fact, only on one occasion so far (twelfth Advisory Opinion, 1991), the Court decided not to answer the request, as in its view it could deviate the contentious jurisdiction and negatively affect the human rights of those who have formulated complaints before the Inter-American Commission.

<sup>4</sup> The Court also pondered that the question whether a limitation on freedom of expression is “necessary to ensure” one of the objectives listed in Article 13(2)(a) and (b) of the American Convention must be judged “by reference to the legitimate needs of democratic societies and institutions” (par. 42).

In its eighth Advisory Opinion (1987), the Court held that the remedies of *amparo* and *habeas corpus* could not be suspended in accordance with Article 27(2) of the Convention, as they constituted “indispensable judicial guarantees” to the protection of rights and freedoms which likewise could not be suspended according to the same provision. The Court, moreover, warned that the constitutional and legal provisions of the States Parties which authorize, explicitly or implicitly, the suspension of the remedies of *amparo* or *habeas corpus* in situations of emergency, are to be regarded as incompatible with the international obligations which the Convention imposes upon those States<sup>5</sup>—given that the writs of *habeas corpus* and *amparo* are among those judicial remedies which are essential for the protection of non-derogable rights and for the preservation of legality in a democratic society—.

Directly related to that Opinion is the following—the ninth— Advisory Opinion of the Court (1987), in which it pondered that the fact that the remedies were provided for by domestic law or were formally accessible was not sufficient: they should also be effective and adequate. In its view, Article 8 of the Convention does not contain a judicial remedy itself, but rather recognizes that due process is applicable essentially to all judicial guarantees referred to in the Convention<sup>6</sup>. It added that “essential” judicial guarantees, not subject to derogation (Article 27(2)), include, besides *habeas corpus* and *amparo*, any other effective remedy before judges or competent tribunals (Article 25(1)), designed to guarantee respect of the rights whose suspension is not permitted by the Convention.

Moreover, “essential” judicial guarantees, not subject to suspension, include judicial procedures inherent to representative democracy as a form of government (Article 29(c)), designed to guarantee the full exercise of non-derogable rights, whose suppression or restriction entails the lack of protection of such rights. Those judicial guarantees—the Court concluded in its ninth Opinion—, should be exercised within the framework and the principles of the due process of law (laid down in Article 8); and the measures taken by a government in a situation of emergency ought to count on judicial guarantees and be subject to a control of legality, so as to preserve the rule of law. In this way, in its eighth and ninth Advisory Opinions the Court developed its reasoning from a realistic approach, taking into account the reality of the American continent, and insisting on the intangibility and prevalence of the judicial guarantees<sup>7</sup>.

In the tenth Advisory Opinion (1989), the Court held that it was authorized by Article 64(1) of the American Convention to render advisory opinions on the interpretation of the 1948 American Declaration, in the framework and within the limits of its competence in relation to the OAS Charter and the American Convention and other treaties concerning the protection of human rights in the American States<sup>8</sup>. In

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<sup>5</sup> In the understanding of the Court, the question of the suspension of guarantees cannot be detached from the “effective exercise of representative democracy” (which Article 3 of the OAS Charter refers to).

<sup>6</sup> Even under the regime of suspension regulated by its Article 27.

<sup>7</sup> Meanwhile, the doctrinal debate proceeds as to the desirable enlargement *de lege ferenda* of the nucleus of non-derogable rights, and the equally desirable precise regulation and control of states of emergency.

<sup>8</sup> This was so because, according to the Court, the American Declaration contains and defines the human rights which the OAS Charter refers to, in such a way that one cannot interpret and apply

the fourteenth Opinion (1994), the Court sustained that the adoption as well as the application of a domestic law contrary to the obligations under the Convention are a violation of this latter, entailing the international responsibility of the State at issue; if an act pursuant to the application of such a law is an international crime, it generates the international responsibility not only of the State but also of the officials or agents who executed that act<sup>9</sup>.

In the eleventh Advisory Opinion (1990), the Court examined the question of the circumstances surrounding the requisite of the exhaustion of local remedies (under Article 46 of the American Convention); this requisite was to be approached in a clearly more flexible way (than in other contexts), in the light of the specificity of the international protection of human rights, with the presumptions operating in favour of the alleged victims. The requisite of exhaustion, in this way, according to the Court, does not apply if, by reason of indigence or generalized fear of lawyers to represent him or her legally, a complainant before the Commission is rendered unable to exhaust or utilize local remedies necessary to protect a right guaranteed by the Convention.

## 2.2. *The Legal Basis of the Court's Advisory Jurisdiction*

In its fifteenth Advisory Opinion (1997), concerning the interpretation of Article 51 of the American Convention, the Court held that the Inter-American Commission is not entitled to modify the opinions, conclusions and recommendations sent to the State at issue, except in exceptional circumstances<sup>10</sup>, and that under no circumstances can a third report be rendered by the Commission (as the American Convention contemplates only the reports under its Articles 50 and 51, respectively). Most significant was the Court's delivery of this Opinion<sup>11</sup> despite the fact that the requesting State, Chile, had later withdrew its request: the Court rightly found that this in no way affected its jurisdiction over the matter of which it had already been seized, and which had already been notified to all OAS member States and all organs mentioned in Chapter X of the OAS Charter.

This fifteenth Advisory Opinion thus touched the very foundations of the Court's advisory jurisdiction. Despite the oscillations in the position of the requesting State, the Court decided to retain jurisdiction over the matter it had been seized of, and delivered the Opinion. The Court's advisory jurisdiction —exercised to the benefit of all actors of the inter-American system of protection as a whole— was thus greatly enhanced by this memorable fifteenth Advisory Opinion.

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the OAS Charter in the field of human rights without integrating its pertinent norms with the corresponding provisions of the Declaration, as results from the practice followed by the OAS organs.

<sup>9</sup> It remains to determine, as a step to be taken in the future, the individual responsibility (besides that of the State) in cases of violation of non-derogable rights (e.g., right to life, right not to be subjected to torture or slavery, right not to be incriminated by means of retroactive application of penalties).

<sup>10</sup> Pointed out in paragraphs 54-59 of the Opinion.

<sup>11</sup> Cf. also, in that Advisory Opinion, the Concurring Opinion of Judge A.A. Cançado Trindade, and the Dissenting Opinion of Judge M. Pacheco Gómez.

### 2.3. *The Right to Information on Consular Assistance*

In its recent sixteenth Advisory Opinion (1999), a most important one, the Court held that Article 36 of the 1963 Vienna Convention on Consular Relations recognizes to the foreigner under detention individual rights —among which the right to information on consular assistance—, to which correspond duties incumbent upon the receiving State (irrespective of its federal or unitary structure) (pars. 84 and 140). The Court pointed out that the evolutive interpretation and application of the *corpus juris* of the International Law of Human Rights, have had “a positive impact on International Law in affirming and developing the aptitude of this latter to regulate the relations between States and human beings under their respective jurisdictions”; the Court thus adopted the “proper approach” in considering the matter submitted to it in the framework of “the evolution of the fundamental rights of the human person in contemporary International Law” (pars. 114-115).

The Court expressed the view that, for the due process of law to be preserved, “a defendant must be able to exercise his rights and defend his interests effectively and in full procedural equality with other defendants” (par. 117). In order to attain its objectives, “the judicial process ought to recognize and correct the factors of real inequality” of those taken to justice (par. 119); thus, the notification, to persons deprived of their liberty abroad, of their right to communicate with their consul, contributes to safeguard their defence and the respect for their procedural rights (pars. 121-122). Thus, the individual right to information under Article 36(1)(b) of the Vienna Convention on Consular Relations renders effective the right to the due process of law (par. 124). The non-observance or obstruction of the exercise of this right affects the judicial guarantees (par. 129). The Court in this way linked the right at issue to the evolving guarantees of due process of law, and added that its non-observance in cases of imposition and execution of death penalty amounts to an arbitrary deprivation of the right to life itself (in the terms of Article 4 of the American Convention on Human Rights and Article 6 of the International Covenant on Civil and Political Rights), with all the juridical consequences inherent to a violation of the kind, that is, those pertaining to the international responsibility of the State and to the duty of reparation (par. 137)<sup>12</sup>.

This sixteenth Advisory Opinion of the Court, truly pioneering, has served as inspiration for the emerging international case-law, *in statu nascendi*, on the matter<sup>13</sup>,

<sup>12</sup> And cf. Concurring Opinions of Judges A.A. Cançado Trindade and S. García Ramírez, and Partially Dissenting Opinion of Judge O. Jackman.

<sup>13</sup> As promptly acknowledged by expert writing, for example, in referring to the more recent ICJ's decision (of 27.06.2001) in the *LaGrand* case, rendered “à la lumière notamment de l'avis de la Cour Interaméricaine des Droits de l'Homme du 1er octobre 1999”; G. COHEN-JONATHAN, “Cour Européenne des Droits de l'Homme et droit international général (2000)”, 46 *Annuaire français de Droit international* (2000) p. 642. It has also been pointed out, as to the Inter-American Court's 16th Advisory Opinion, “le soin mis par la Cour à démontrer que son approche est conforme au droit international”. Moreover, “pour la juridiction régionale il n'est donc pas question de reconnaître à la Cour de la Haye une prééminence fondée sur la nécessité de maintenir l'unité du droit au sein du système international. Autonomie, la juridiction est également unique. (...) La Cour Interaméricaine des Droits de l'Homme rejette fermement toute idée d'autolimitation de sa compétence en faveur de la Cour mondiale fondamentalement parce que cette dernière ne serait pas en mesure de remplir la fonction qui est la sienne”. Ph. WECKEL,



and is having a sensible impact on the practice of the States<sup>14</sup> of the region on the issue. It was the Advisory Opinion which has achieved the greatest mobilization in the advisory proceedings (with eight intervening States, besides several non-governmental organizations and individuals) in the whole history of the Court to date<sup>15</sup>.

#### 2.4. *The Juridical Condition and the Rights of the Child*

On 28 August 2002, the Inter-American Court delivered the seventeenth Advisory Opinion of its history, on the *Juridical Condition and Human Rights of the Child*. In that seventeenth Advisory Opinion, of particular importance, the Court dwelt upon the duties which both the family and the State have *vis-à-vis* the child, in the light of the rights of this latter provided for in the American Convention on Human Rights and the United Nations Convention on the Rights of the Child. The Court clarified the juridical personality is ineluctably recognized by Law to every human being (whether a child or an adolescent), irrespectively of his existential condition or the extent of his legal capacity to exercise his rights for himself (capacity of exercise).

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M.S.E. HELALI and M. SASTRE, "Chronique de jurisprudence internationale", 104 *Revue Générale de Droit international public* (2000) pp. 794 and 791. It has further been pointed out that the Inter-American Court's Advisory Opinion of 1999 contrasts with "la position restrictive prise par la Cour de La Haye" in its decision of 2001 in the *LaGrand* case: "La juridiction régionale avait exprimé son opinion dans l'exercice de sa compétence consultative. Or, statuant sur un différend entre États, la juridiction universelle ne disposait pas de la même liberté, parce qu'elle devait faire prévaloir les restrictions imposées à sa juridiction para le défendeur". Ph. WECKEL, "Chronique de jurisprudence internationale", 105 *Revue Générale de Droit international public* (2001) pp. 764-765. And, furthermore: "La Cour Interaméricaine avait examiné dans quelle mesure la violation du droit d'être informé de l'assistance consulaire pouvait être considérée comme une violation de la règle fondamentale du procès équitable et si, par voie de conséquence, une telle irrégularité de procédure dans le cas d'une condamnation à mort constituait aussi une atteinte illicite à la vie humaine protégée par l'article 6 du Pacte relatif aux droits civils et politiques. (...) La CIJ ne s'est pas prononcée sur ces questions qui ont trait à l'application de deux principes du droit international (la règle du procès équitable et le droit à la vie)". *Ibid.*, p. 770. Cf. also, in further acknowledgement of the pioneering contribution of the 16th Advisory Opinion of the Inter-American Court: M. MENNECKE, "Towards the Humanization of the Vienna Convention of Consular Rights - The *LaGrand* Case before the International Court of Justice", 44 *German Yearbook of International Law/Jahrbuch für internationales Recht* (2001) pp. 430-432, 453-455, 459-460 and 467-468; M. MENNECKE and C.J. TAMS, "The *LaGrand* Case", 51 *International and Comparative Law Quarterly* (2002) pp. 454-455.

<sup>14</sup> An examination of which goes beyond the purposes of the present paper.

<sup>15</sup> In the public hearings (on this 16th Advisory Opinion) before the Court, apart from the eight intervening States, several individuals took the floor, namely: seven individuals representatives of four national and international non-governmental organizations (active in the field of human rights), two individuals of a non-governmental organization working for the abolition of the death penalty, two representatives of a (national) entity of lawyers, four University Professors in their individual capacity, and three individuals in representation of a person condemned to death. Earlier on, in the proceedings pertaining to the fourth (1984) and the fifth (1985) Advisory Opinions, some individuals presented their viewpoints in the respective public hearings before the Court, in representation of institutions (public as well as of the press, respectively); the proceedings pertaining to the 13th Advisory Opinion counted on the participation of four representatives of three non-governmental organizations; in the proceedings concerning the 14th Advisory Opinion, two members of non-governmental organizations intervened; and those relating to the 15th Advisory Opinion counted on the participation of the representatives of two non-governmental organizations.

The Court warned that the child is subject (*titulaire*) of rights rather than simply object of protection. In fact, the recognition and the consolidation of the position of the human being as a full subject of the International Law of Human Rights constitutes, in our days, an unequivocal and eloquent manifestation of the advances of the current process of *humanization* of International Law itself (the new *jus gentium* of our times)<sup>16</sup>.

## 2.5. *The Juridical Condition and the Rights of Undocumented Migrants*

On 17 September 2003, the Inter-American Court delivered the eighteenth Advisory Opinion of its history, on the *Juridical Condition and Rights of Undocumented Migrants*. It originated from a request by Mexico, of 10 May 2002, to the Inter-American Court on the juridical condition and rights of undocumented migrants. In the course of the corresponding advisory proceedings, which counted on the greatest public participation in the whole history of the Court, the Court celebrated two public hearings, the first in its headquarters in San José of Costa Rica, in February 2003, and the second outside its headquarters (for the first time in its history), in Santiago of Chile, in June 2003<sup>17</sup>.

On 17 September 2003 the Inter-American Court of Human Rights delivered its 18th Advisory Opinion (requested by Mexico), on the *Juridical Condition and Rights of Undocumented Migrants*, wherein it held that States ought to respect, and ensure respect for, human rights in the light of the general and basic principle of equality and non-discrimination, and that any discriminatory treatment with regard to the protection and exercise of human rights generates the international responsibility of the States. In the view of the Court, the fundamental principle of equality and non-discrimination has entered into the domain of *jus cogens*.

The Court added that States cannot discriminate or tolerate discriminatory situations to the detriment of migrants, and ought to guarantee the due process of law to any person, irrespective of her migratory status. This latter cannot be a justification for depriving a person of the enjoyment and exercise of her human rights, including labour rights. Undocumented migrant workers have the same labour rights as the other workers of the State of employment, and this latter ought to ensure respect for those rights in practice. States cannot subordinate or condition the observance of the principle of equality before the law and non-discrimination to the aims of their migratory or other policies.

In addition, four Individual Opinions were presented by Judges A.A. Cançado Trindade, S. García Ramírez, H. Salgado Pesantes and A. Abreu Burelli, respectively; all of them, significantly, were Concurring Opinions. In his extensive Concurring

<sup>16</sup> Cf., on this point, A.A. CANÇADO TRINDADE, *Tratado de Direito Internacional dos Direitos Humanos*, vol. III, Porto Alegre/Brazil, S.A. Fabris Ed., 2003, pp. 447-497.

<sup>17</sup> The advisory procedure counted on the participation of twelve accredited States (among which five States intervening in the hearings), the Inter-American Commission on Human Rights, one agency of the United Nations (the U.N. High Commission for Refugees - UNHCR), and nine entities of the civil society and academic circles of several countries of the region, besides the Central American Council of Human Rights Ombudsmen [Attorneys-General].

Opinion, the President of the Court, Judge A.A. Cançado Trindade, dwelt upon nine points, namely: a) the *civitas maxima gentium* and the universality of the human-kind; b) the disparities of the contemporary world and the vulnerability of the migrants; c) the reaction of the universal juridical conscience; d) the construction of the individual subjective right of asylum; e) the position and the role of the general principles of Law; f) the fundamental principles as *substratum* of the legal order itself; g) the principle of equality and non-discrimination in the International Law of Human Rights; h) the emergence, the content and the scope of the *jus cogens*; and i) the emergence and the scope of the obligations *erga omnes* of protection (their horizontal and vertical dimensions).

The 18th Advisory Opinion of the Inter-American Court, on the *Juridical Condition and Rights of Undocumented Migrants*, has already had, for all its implications, a considerable impact in the American continent, and its influence is bound to irradiate elsewhere as well, given the importance of the matter. It propounds the same dynamic or evolutive interpretation of International Human Rights Law heralded by the Inter-American Court, four years ago, in its pioneering 16th Advisory Opinion, on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (1999)<sup>18</sup>, which has ever since been a source of inspiration for the international case-law *in statu nascendi* on the matter.

In 2003, the Inter-American Court has thus reiterated and expanded on in its forward-looking outlook, in its 18th Advisory Opinion, on the *Juridical Condition and Rights of Undocumented Migrants*, constructed upon the evolving concepts of *jus cogens* and of obligations *erga omnes* of protection. As it can be seen, the Court's Advisory Opinions have helped to shed light on some central issues, of the utmost importance, concerning both the determination of the wide scope of the protected rights under the American Convention, and the operation of the inter-American system of human rights protection.

### 3. Case-Law in the exercise of the contentious jurisdiction

The development of the case-law of the Inter-American Court in the exercise of its jurisdiction in contentious matters can be conveniently considered, for an assessment of the international standards of protection of the human person that it upholds, in relation to its most significant substantive, as well as procedural, aspects. As to the former, attention will be focused on its case-law as to protected rights under the American Convention, and the reparations for the consequences of their violations; and in respect of the latter, attention will be turned to the key questions of the access to justice at international level, the basis of international jurisdiction, and the State's recognition of responsibility under the American Convention.

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<sup>18</sup> In that 16th and pioneering Advisory Opinion, of major importance, the Inter-American Court clarified that, in its interpretation of the norms of the American Convention, it should extend protection in new situations (such as that concerning the observance of the right to information on consular assistance) on the basis of preexisting rights.

### 3.1. Substantive Aspects

#### 3.1.1. THE WIDE SCOPE OF THE FUNDAMENTAL RIGHT TO LIFE

The first contentious cases in which the Inter-American Court established, *inter alia*, a violation of the right to life, were those concerning disappearances in Honduras, cases *Velásquez Rodríguez* (1988) and *Godínez Cruz* (1989). The contribution of the two Judgments of the Court on the merits in those cases consisted in having elaborated on the triple duty of the States Parties to prevent, investigate and punish the human rights violations, and to provide reparation for the consequences of the breaches, as well as in having linked the substantive provisions on the violated rights with the general duty, under Article 1(1) of the Convention, *to respect and to ensure respect* for the exercise of the rights set forth in the American Convention. Such link came to be systematically invoked, ever since, in other cases, by both the Inter-American Court and Commission on Human Rights.

In the *Aloeboetoe versus Suriname* case (1993), in which the respondent State had recognized its international responsibility (in 1991), the Court proceeded to the determination of the amount of reparations to be paid to the relatives of the murdered victims or their heirs; furthermore, it ordered the establishment of two trust funds and the creation of a foundation, as well as the reopening of a school located in Gujaba and the functioning of the medical dispensary already in place. The contribution of that Judgment consisted in having determined the reparations for human rights violations in the social context where the conventional norms of protection apply, taking sensibly in due account the cultural practices (such as polygamy) in the community of the maroons (*saramacas*) in Suriname, to which the seven murdered victims belonged.

Violations of the right to life were also found by the Court in the cases *Neira Alegría versus Peru* (1995), *Caballero Delgado and Santana versus Colombia* (1995), and *Durand and Ugarte versus Peru* (2000). Such violations of the right to life were established also in the case *Paniagua Morales and Others versus Guatemala* (1998), where the Court, furthermore, expressed its concern with the prevailing situation of impunity surrounding the acts of the *cas d'espèce*. The Court characterized impunity as "the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention, in view of the fact that the State has the obligation to use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human rights violations, and total defencelessness of victims and their relatives" (par. 173)<sup>19</sup>. It should not pass unnoticed that, in the *Blake versus Guatemala* case (reparations, 22.01.1999), the first resolutive point of the Court's Judgment consisted in having ordered the respondent State to investigate the facts and to identify and punish those responsible, and to adopt the measures of domestic law to assure compliance with that obligation.

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<sup>19</sup> In another case, that of *Garrido and Baigorria versus Argentina* (reparations, 1998), in which the respondent State accepted responsibility for the facts, the Court devoted a whole section (n. IX) of the Judgment to the State's duty to take action at domestic level, to render the conventional obligations of effective protection.

In its historical Judgment in the case, concerning Peru, of the massacre of *Barrios Altos* (Judgment of 14.03.2001), the Court warned that provisions of amnesty, of prescription and of factors excluding responsibility, intended to impede the investigation and punishment of those responsible for grave violations of human rights (such as torture, summary, extra-legal or arbitrary executions, and forced disappearances) are inadmissible; they violate non-derogable rights recognized by the International Law of Human Rights (par. 41). Laws of self-amnesty —the Court proceeded—, impede knowing the truth and obstruct the access to justice (and the obtaining of reparation), leading to the perpetuation of impunity and rendering the victims defenceless, being thus manifestly incompatible with the letter and spirit of the American Convention (par. 43). As a consequence of such manifest incompatibility —the Court concluded significantly—, those laws have no legal effects and can no longer continue to represent an obstacle to the investigation of the facts and the punishment of those responsible for the human rights violations (par. 44)<sup>20</sup>.

In the paradigmatic case of the so-called “*Street Children*” case (*Villagrán Morales and Others versus Guatemala*, merits, Judgment of 19.11.1999), the Court, in establishing a violation of the right to life under Article 4 of the American Convention, to the detriment of the five murdered adolescents, significantly pondered that “owing to the fundamental nature of the right to life, restrictive approaches to it are inadmissible. In essence, the fundamental right to life includes not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence” (par. 144). In a Joint Concurring Opinion in that case, it was pointed out that “the duty of the State to take positive measures *is stressed* precisely in relation to the protection of life of vulnerable and defenceless persons, in situation of risk, such as the children in the streets” (par. 4); “the needs of protection of the weaker —such as the children in the streets—, require definitively an interpretation of the right to life so as to comprise the minimum conditions of life with dignity” (par. 7)<sup>21</sup>.

In two other Judgments of the Court, both delivered in the year 2002, in the cases *Bámaca Velásquez versus Guatemala* and *Las Palmeras versus Colombia*, in the application of the relevant provisions of the American Convention on Human Rights, the Tribunal’s considerations had a direct bearing upon the observance of International Humanitarian Law. In its Judgment on reparations (of 22 February 2002) in the *Bámaca Velásquez versus Guatemala* case (concerning the detention, torture and forced disappearance of the Guatemalan revolutionary leader Efraín Bámaca Velásquez, commander of the Guatemalan National Revolutionary Unit - URNG), the Court ordered pecuniary (for material and immaterial damages) as well as non-pecuniary reparations. Among these latter, the Court ordered the following: a) the

<sup>20</sup> Cf. also the Concurring Opinions of Judges A.A. Cançado Trindade and S. García Ramírez. Subsequently, in its Judgment of 02.09.2001, in the same *Barrios Altos* case (interpretation of sentence), the Court added that, given the nature of the violation constituted by the Peruvian self-amnesty laws, the decision it reached in the Judgment on the merits in the *cas d’espèce* (*supra*) had “general effects” (resolutive point n. 2). For the prompt repercussion of the case in Peru, cf. A.A. CANÇADO TRINDADE, “[Interview:] Presidente de Corte Interamericana Reafirma que Amnistía a Violadores de DD.HH. es Ilegal”, in *Liberación*, Lima/Peru, 13.09.2001, p. 8.

<sup>21</sup> Joint Concurring Opinion of Judges A.A. Cançado Trindade and A. Abreu Burelli.

identification of the mortal remains of the victim, their exhumation in the presence of his widow and relatives, and the rendering of his mortal remains to his widow and relatives (first resolutive point); b) the investigation of the facts and the identification and punishment of those responsible for the human rights violations at issue; c) the harmonization of the Guatemalan domestic legal order with the relevant international norms on human rights and humanitarian law<sup>22</sup>.

In another decision on reparations (of 26 November 2002), in the case of *Las Palm-eras* concerning Colombia (and pertaining to the summary and extrajudicial executions of seven persons), the Court determined that the respondent State should conclude effectively the penal process for the facts relating to the death of the victims which engaged its responsibility for violations of the American Convention. It further decided that the State should identify those materially and intellectually responsible for those violations, as well as those who eventually covered up the killings, and punish them. Moreover, the Court ordered indemnizations to the relatives of the victims for violation of the right to judicial guarantees and protection under the American Convention.

Still as to the exercise of its compulsory jurisdiction, in its Judgment of 27 February 2002 in the case of *Trujillo Oroza versus Bolivia* (reparations), the Inter-American Court ordered, besides indemnizations for breaches of the rights to life, to personal freedom and integrity, and to judicial guarantees and protection, distinct measures of non-pecuniary reparation, comprising the following ones: the identification of the mortal remains of the victim and their surrendering to the relatives of the victim; the tipification of the delict of forced disappearance of persons in the domestic legal order of the respondent State; the investigation, identification and punishment of those responsible for the wrongful acts in breach of provisions of the American Convention on Human Rights; and the designation, with the name of the victim, of an educational centre in the city of Santa Cruz; among others.

In its decision of 29 August 2002 on reparations in the case of the *Caracazo* concerning Venezuela (pertaining to victims of the public disturbances which occurred in the city of Caracas in February-March 1989)<sup>23</sup>, the Court ordered the respondent State to undertake an effective investigation of the facts; it further ordered, besides the indemnizations, also the identification of the mortal remains of most of the victims, their exhumation and their rendering to the relatives of the victims. Moreover, the Court ordered the State to take all measures necessary to avoid the repetition of the facts, and to form and train all members of its armed and security forces on the principles and norms of human rights protection and on the limits which those officers ought to be subjected to, even in states of emergency.

On 7 June 2003 the Inter-American Court issued its Judgment (on Preliminary Objections, Merits and Reparations) on the case of *Juan Humberto Sánchez versus*

<sup>22</sup> In a Separate Opinion in that Judgment of the Court, Judge A.A. Cançado Trindade dwelt upon four specific aspects pertaining to the aforementioned first resolutive point of the Court's decision, namely: a) the time, the living law, and the dead; b) the projection of human suffering in time; c) the passing of time, and the repercussion of the solidarity between the living and the dead in the Law; and d) the precariousness of the human condition and the universal human rights (pars. 1-26).

<sup>23</sup> In its earlier decision, on the merits, of 11.11.1999, the Court, besides establishing the violations of the American Convention, also took note of the State's acceptance of responsibility (*allanamiento*) as a "positive" step in the prevalence of the principles which inspire the Convention.

*Honduras*. The Court found that the respondent State violated the rights to life (Article 4 of the American Convention) and to personal freedom (Article 7(1) to (6) of the Convention) in combination with the right to an effective domestic remedy (Article 25 of the Convention), to the detriment of the victim, Mr. Juan Humberto Sánchez; it also breached, in the decision of the Court, the right to personal freedom (set forth in Article 7 of the American Convention) and the right to the integrity of the person (Article 5 of the Convention), to the detriment of the relatives of the victim. The Court also established violations of the rights to judicial guarantees and judicial protection (Articles 8 and 25 of the Convention), to the detriment of the victim as well as his relatives. These violations were linked to non-compliance by the State of the general obligation set forth in Article 1(1) of the American Convention (duty to respect and to ensure respect for the guaranteed rights).

The Court further ordered, in the same case concerning Honduras, besides the corresponding indemnizations to the relatives of the victims, the continuation of the investigations by the State so as to identify the mortal remains of the victim and those responsible for the violations; it further ordered the State to implement a register of detained persons so as to control the legality of detentions. This was the first time in its history that the Court issued a Sentence in an external session, held not in its headquarters in San José of Costa Rica, but rather in Santiago of Chile, on the occasion of the realization in that capital of a member State of the Organization of American States (OAS) of a General Assembly of the OAS.

The next Judgment of the Court (of 18 September 2003), in the case *Bulacio versus Argentina*, concerned the detention of a young man, Walter David Bulacio, together with other youth, detained by the Argentine Federal Police, and found dead days later, after allegedly having been tortured. In its Judgment the Inter-American Court admitted the recognition of international responsibility effected by the State, in the terms of which the State violated the rights protected by Articles 4, 5, 7 and 19 of the American Convention, to the detriment of the victim, as well as the rights protected by Articles 8 and 25 of the Convention, to his detriment and of his relatives, all in combination with Articles 1(1) and 2 of the Convention.

Besides the corresponding indemnizations, the Court ordered the continuation of the investigation of the case, and the adoption of legislative and other measures to secure the non-repetition of the facts. In his Separate Opinion, Judge Cançado Trindade stressed the devastating effects which impunity had had over the relatives, leading to a tragic family disruption, and the importance of the realization of justice (also as a form of satisfaction to the relatives of the victim, given the irreparability of the damage caused)<sup>24</sup>.

### 3.1.2. THE RIGHT TO PERSONAL INTEGRITY

In its Judgment on the merits in the case *Cantoral Benavides versus Peru* (2000), the Court, in establishing a violation of Article 5 of the American Convention, pondered that certain acts which, in the past, were qualified as "inhuman and degrad-

<sup>24</sup> Judges García Ramírez and Gil Lavedra also appended Separate Opinions.

ing treatment”, could, later on, with the passing of time, come to be considered as torture, given that the growing demands for protection “must be accompanied by a more vigorous response in dealing with infractions of the basic values of democratic societies” (par. 99). Moreover, both in the *Cantoral Benavides* case (pars. 104 and 106) and in the case *Bámaca Velásquez versus Guatemala* (merits, 2000, par. 158), besides the tortures inflicted on the direct victims (Mr. Cantoral Benavides and Mr. Bámaca Velásquez, respectively), the prohibition also of cruel, inhuman or degrading treatment retained relevance (under Article 5(2) of the American Convention) due to the sufferings undergone by their close relatives (indirect victims).

That absolute prohibition thus had its scope *ratione materiae* enlarged. In cases of forced disappearance of persons —added the Court in the *Bámaca Velásquez* case, the victims are both the disappeared person and his close relatives—. On other Judgments on the merits, as in the case *Blake versus Guatemala* (1998, and also reparations, 1999), and in the case *Villagrán Morales and Others versus Guatemala* (the so-called “Street Children” case, 1999), the Court established the juridical foundations of the *enlargement of the notion of victim*, comprising also the close relatives of the direct victims. This understanding nowadays forms part of its *jurisprudence constante*. The observance of the right to a humane treatment (Article 5) becomes crucial when the individuals at issue are under detention, as illustrated by the Court’s decisions in the *Loayza Tamayo* and the *Suárez Rosero* cases (cf. *infra*).

Fairly recently, in its Judgment on the merits and reparations (of 21 June 2002) in the cases of *Hilaire, Constantine and Benjamin and Others versus Trinidad and Tobago*, the Court held that the provisions of Article 4 of the American Convention ought to be interpreted to the effect of definitively limiting the application and ambit of the death penalty, in such a way as to keep reducing it until its final suppression. The Court found that, in so far as the effect of the *Offences against the Person Act* (of 1925) of Trinidad and Tobago (providing for the application of “mandatory” death penalty for the delict of intentional murder) was to subject a person accused of intentional homicide to a judicial process wherein the particular circumstances of the accused, as well as of the delict, were not considered, it violated the prohibition of arbitrary deprivation of life set forth in the American Convention (Article 4).

All the victims —the Court proceeded in the *Hilaire, Constantine and Benjamin and Others* case—, having been condemned to death, were entitled to request amnesty, pardon or the commutation of the penalty; the conditions of detention of the victims in the *cas d’espèce* —the Court added—, constituted a cruel, inhuman or degrading treatment in breach of the American Convention (Article 5). The Court further established violations of the right to be judged within a reasonable time and the right to an effective domestic remedy<sup>25</sup>.

As to reparations, the Court decided, in the same *Hilaire, Constantine and Benjamin and Others* case, that the respondent State should abstain from applying the 1925 *Offences against the Person Act*, and should, within a reasonable time, modify it so as to adjust it to the relevant international norms of human rights protection. The Court furthermore ordered the respondent State to revise the cases

<sup>25</sup> Under Articles 7(5) and 8(1), and Articles 8 and 25, of the American Convention, respectively.



of the 32 victims, reinitiating penal proceedings —with the due guarantees— corresponding to the delicts imputed to the 32 victims, and in any case abstaining from executing them, whichever the results of the new judgments might come to be. And the Court also determined that the respondent State should modify the conditions of its prison system so as to adjust them to the applicable international norms of human rights protection<sup>26</sup>.

In its Judgment of 27 November 2003 in the case *Maritza Urrutia versus Guatemala*, the Court found the respondent State in breach of Articles 7 (right to personal freedom) and 5 (right to personal integrity), as well as 8 and 25 (rights to judicial guarantees and protection), in combination with Article 1(1) of the American Convention<sup>27</sup>, to the detriment of the victim. The Court ordered the investigation of the facts and pecuniary and non-pecuniary reparations to the victim<sup>28</sup>.

### 3.1.3. THE RIGHT TO A FAIR TRIAL

The Inter-American Court was first faced with an alleged breach of the right to a fair trial in the *Maqueda versus Argentina* case (1995) (Argentina); as the parties reached a friendly settlement, and the detainee was granted conditional liberty, the Court, upon request, allowed the discontinuance of the case<sup>29</sup>. Subsequently, the Court had the occasion to dwell upon the right to a fair trial under the American Convention in its Judgments on the merits in the cases of *Loayza Tamayo versus Peru* and *Suárez Rosero versus Ecuador*. In the *Loayza Tamayo* case (1997), the Court declared that the Peruvian decrees-laws which typified the delicts of terrorism and “*traición a la patria*” were incompatible with Article 8(4) of the Convention, in that they were in breach of the principle of *non bis in idem* set forth therein. This was the first time that the Court held, in a contentious case, that provisions of domestic law were incompatible with the American Convention<sup>30</sup>.

Some days after the Judgment, the respondent State complied with the Court’s order to release the prisoner (Mrs. María Elena Loayza Tamayo) and, moreover, an-

<sup>26</sup> In a lengthy Concurring Opinion in the case, Judge A.A. Cançado Trindade concentrated mainly on two aspects of the relationship between law and death, namely, the *jus talionis* and the arbitrary deprivation of life, and the premeditation (by the State) of the deprivation of life (cf. pars. 1-43, for his firm argument in support of the definitive abolition of all corporal punishments, of which the death penalty is but an unwarranted and unsustainable historical remnant or residuum).

<sup>27</sup> The Court further found breaches of the obligations set forth in Articles 1 and 6 of the Inter-American Convention to Prevent and Punish Torture.

<sup>28</sup> Two Judges appended Concurring Opinions to the Judgment (Judges Cançado Trindade and García Ramírez), one Judge a Separate Opinion (Judge de Roux Rengifo), and one Judge a Partially Dissenting Opinion (Judge Martínez Gálvez).

<sup>29</sup> Although it reserved the faculty to reopen and continue hearing the case, if there occurred a change in the circumstances which led to its settlement.

<sup>30</sup> For antecedents, in the Court’s case-law, in support of the need to determine the incompatibility of domestic laws *per se* with the American Convention, and urging the Court to proceed to such determination within the context of concrete cases, cf. the Dissenting Opinions of Judge Cançado Trindade in the following cases: *El Amparo*, concerning Venezuela, Judgement (on reparations) of 14.09.1996, and Resolution (on interpretation of judgement) of 16.04.1997; *Caballero Delgado and Santana versus Colombia*, Judgement (on reparations) of 29.01.1997; and *Genie Lacayo versus Nicaragua*, Resolution (on request for revision of judgment) of 13.09.1997.

nounced its decision to put an end to the so-called tribunals of “faceless judges” (“*jueces sin rostro*”) in Peru<sup>31</sup>. Subsequently, in its Judgment in the case *Castillo Petruzzi and Others versus Peru* (1999), the Court *inter alia* found that the proceedings conducted against the four persons at issue were invalid, as they were incompatible with the American Convention, and, furthermore, ordered that the four imprisoned persons be guaranteed a new trial, in which the guarantees of the due process of law are ensured.

In its Judgment in the *Suárez Rosero* case (1997), the Court found the respondent State in breach *inter alia* of the judicial guarantees enshrined in Article 8(1) and (2) of the Convention. Moreover, it declared that Article 114 *bis* of the Ecuadorean Penal Code, which deprived all persons in detention under the Anti-Drug Law of certain judicial guarantees (as to the length of detention), violated *per se* Article 2 of the American Convention, *irrespective of whether that norm of the Penal Code had been applied in the present case*. This was the first time that the Court established a violation of Article 2 of the Convention by the existence *per se* of a provision of domestic law<sup>32</sup>.

The Court’s Judgment in the *Suárez Rosero* case significantly devoted a whole section (n. XIV) to the establishment of the violation of Article 2 of the Convention (the general duty to harmonize national legislation with the norms of the American Convention). Shortly afterwards (on 24.12.1997), the Supreme Court of Ecuador decided to struck down the provision at issue of the Ecuadorean Anti-Drug Law, declaring it unconstitutional<sup>33</sup>. This was the first time that a provision of national law (of exception) was promptly modified as a result of a decision of the Inter-American Court.

### 3.1.4. THE RIGHT TO AN EFFECTIVE DOMESTIC REMEDY

In its Judgment in the *Castillo Paéz versus Peru* case (1997), the Court, in contrast with its earlier approach<sup>34</sup> to the right to an effective remedy under the Con-

<sup>31</sup> This decision was announced by the Peruvian government in October 1997, shortly after the release of the prisoner on October 16th, communicated to the Court on October 20th.

<sup>32</sup> As Ecuador, in its view, by the existence of Article 114 *bis* of its Penal Code, had not taken the adequate measures of domestic law in order to render effective the right contemplated in Article 7(5) of the Convention.

<sup>33</sup> Tribunal Constitucional/Secretaría General, cases ns. 174-92, 106-94 and 61-95 (joined), *Resolución n. 119-1-97*, Quito, December 1997, pp. 1-5 (internal circulation), esp. p. 5, for reference to the Judgment of the Inter-American Court of 12.11.1997 in the *Suárez Rosero* case.

<sup>34</sup> In earlier cases, such as the decisions on the merits in the cases *Caballero Delgado and Santana versus Colombia* (1995) and *Genie Lacayo versus Nicaragua* (1997), the Court had summarily disposed of the matter, on the basis of the test of the *availability*, rather than of the *adequacy* and *effectiveness*, of domestic remedies. In this way, no violation was established in those earlier cases of the State’s duty to provide effective local remedies under Article 25 of the Convention. This view, however, did not pass unchallenged. A Dissenting Opinion was expressed to the effect that Article 25 embodied a fundamental judicial guarantee far more important than one might *prima facie* assume, as the right to an effective remedy before competent national tribunals constituted a basic pillar not only of the Convention but of the rule of law itself in a democratic society, and its correct application had the sense of improving the administration of justice at national level. The dissent further recalled the Latin American origin of that judicial guarantee: from its insertion originally in the American Declaration of the Rights and Duties of Man (of April 1948), it was transplanted to the Universal Declaration of Human Rights (of December 1948), and from there to the European and American Conventions on Human Rights (Articles 13 and 25, respectively), as well as to the U.N. Covenant on Civil and Political Rights (Article 2(3)).

vention, for the first time elaborated on that right, set forth under Article 25 of the Convention. In its own words, the provision of Article 25, “on the right to an effective remedy before the competent national judges or tribunals, constitutes one of the basic pillars, not only of the American Convention, but of the rule of law (*État de Droit, Estado de Derecho*) itself in a democratic society in the sense of the Convention” (par. 82)<sup>35</sup>.

The Court added, in the *Castillo Páez* case, that “Article 25 is intimately linked with the general obligation of Article 1(1) of the American Convention, in conferring functions of protection upon the domestic law of States Parties. The remedy of *habeas corpus* has the purpose of not only guaranteeing personal freedom and integrity, but also preventing the disappearance or indetermination of the place of detention and, ultimately, securing the right to life” itself (par. 83)<sup>36</sup>. Ever since, this has been the position of the Court: in subsequent Judgments<sup>37</sup>, the Court reiterated its significant *obiter dictum*—now *jurisprudence constante*—to the effect that Article 25 constitutes one of the basic pillars not only of the American Convention but of the rule of law itself in a democratic society in the sense of the Convention, and is intimately linked to the general obligation of Article 1(1) of the Convention in attributing functions of protection to the domestic law of States Parties.

### 3.1.5. FREEDOM OF EXPRESSION

In the Court’s case-law to date, the leading case on freedom of expression is the Court’s Judgment of 05.02.2001 on the prohibition in Chile (based on a constitutional provision) of the exhibition of the movie “*The Last Temptation of Christ*”. The Court, recalling the individual and social dimensions of the freedom of expression, pointed out that “the expression and dissemination of thought and information are indivisible”, so that a restriction on the possibilities of dissemination represents

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In fact, the insertion of that guarantee into the 1948 American Declaration took place at a moment when, in parallel, the Commission on Human Rights of the United Nations was still preparing the Draft Universal Declaration (from May 1947 until June 1948), as recalled, in a fragment of memory, by the *rapporteur* of the Commission (René Cassin); in turn, the insertion of the provision on the right to an effective remedy before national jurisdictions in the Universal Declaration (Article 8), inspired in the corresponding provision of the American Declaration (Article XVIII), took place in the subsequent debates (of 1948) of the III Committee of the General Assembly of the United Nations (cf. R. CASSIN, “Quelques souvenirs sur la Déclaration Universelle de 1948”, 15 *Revue de droit contemporain* (1968) n. 1, p. 10; and cf. also A. VERDOODT, *Naissance et signification de la Déclaration Universelle des Droits de l’Homme*, Louvain/Paris, Éd. Nauwelaerts, [1963], pp. 116-119). Inter-American Court of Human Rights, case *Genie Lacayo versus Nicaragua* (revision of sentence, 1997), Dissenting Opinion of Judge A.A. Cançado Trindade (pars. 18-21); and cf. case *Caballero Delgado and Santana versus Colombia* (reparations, 1997), Dissenting Opinion of Judge A.A. Cançado Trindade (pars. 2-3).

<sup>35</sup> For the antecedent of this significant *obiter dictum* of the Court, cf. the Dissenting Opinion (paragraph 18) of Judge Cançado Trindade in the *Genie Lacayo versus Nicaragua* case, Resolution (on appeal for revision of judgement) of 13.09.1997.

<sup>36</sup> On the interrelationship between Articles 25 and 1(1) of the American Convention, cf., again, the antecedent of the Dissenting Opinion (paragraphs 20-21) of Judge Cançado Trindade in the *Genie Lacayo versus Nicaragua* case, Resolution (on appeal for revision of judgement) of 13.09.1997.

<sup>37</sup> E.g., its Judgments on the merits in the cases *Suárez Rosero versus Ecuador* (1997) and of *Paniagua Morales and Others versus Guatemala* (1998), *Blake versus Guatemala* (1998), among others.

directly a limitation to the right to freedom of expression (pars. 64-65), respect for which is essential to the extension of ideas and information among persons (par. 66). The individual and social dimensions of that right—the Court added—, “have equal importance” and ought to be simultaneously guaranteed; “freedom of expression, as a cornerstone of a democratic society, is an essential condition for this latter to be sufficiently informed” (pars. 67-68). In finding a violation of Article 13 of the Convention, the Court upheld the objective international responsibility of the State, for any act or omission on the part of any of its powers or organs, irrespective of its hierarchy (pars. 72-73)<sup>38</sup>. The Court *inter alia* determined that the respondent State should, within a reasonable time, modify its domestic law, so as to put an end to prior censorship and allow the exhibition of the movie “*The Last Temptation of Christ*” (resolatory point n. 4).

### 3.1.6. THE RIGHT TO PROPERTY

In its Judgment on the merits in an unprecedented case, that of the *Community Mayagna Awas Tingni versus Nicaragua* (merits, 2001), the Court’s decision protected a whole indigenous community (as the complaining party), and its right to communal property of its lands (under Article 21 of the Convention). The public hearings of the case before the Court were particularly illuminating with regard to the customary law of the indigenous *Mayagna Awas Tingni* community. In the light of Article 21 of the Convention, the Court determined that the delimitation, demarcation and the issuing of the title to the lands of the indigenous *Mayagna Awas Tingni* community should be undertaken in conformity with its customary law, its uses and habits.

In reaching this significant decision, the Court took into account the fact that “among the indigenous persons there exists a communitarian tradition about a communal form of the collective property of the land, in the sense that the ownership of this latter is not centred in an individual but rather in the group and his community. (...) To the indigenous communities the relationship with the land is not merely a question of possession and production but rather a material and spiritual element that they ought to enjoy fully, so as to preserve their cultural legacy and transmit it to future generations” (par. 141), pondered the Court.

Subsequently, in its Judgment of 28 February 2003 (on the merits and reparations) in the case of *Five Pensioners versus Peru*, the Inter-American Court declared by unanimity that the respondent State had violated the right to property set forth in Article 21 of the American Convention on Human Rights, as a result of modifications introduced in the regime of pensions. The Court further established violations of Article 25 (right to judicial protection) of the American Convention, in combination with Articles 1(1) and 2 of the Convention.

The Court held that its Judgment constituted *per se* a form of reparation to the victims, and decided, moreover, that the State should undertake the corresponding

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<sup>38</sup> In the *cas d’espèce*, the origin of the breach was found in Article 19(12) of the national Constitution, which established the prior censorship of cinematographic production. On the Court’s upholding of the objective international responsibility of the State, cf. also the Concurring Opinion of Judge A.A. Cançado Trindade (pars. 1-40).

investigations and apply the pertinent sanctions to those responsible for non-compliance with the judicial sentences of the Peruvian tribunals (not executed by public administration), in the development of the actions of guarantee interposed by the victims; it further ordered the payment of indemnizations to the four victims and to the widow of the fifth one, and the payment of the costs of the process<sup>39</sup>.

### 3.1.7. REPARATIONS: THE CONCEPT OF "PROJECT OF LIFE"

Article 63(1) of the American Convention opens a wide horizon in respect of reparations for violations of the rights protected by it, in referring to indemnizations added to other forms of reparations. The Inter-American Court, accordingly, in its *jurisprudence constante*, has ordered distinct kinds of reparations, stressing the respondent States' obligations to take positive measures (*obligaciones de hacer*) also in that regard. In several recent cases the Court has drawn attention to the importance of non-pecuniary reparations, and has paid due attention to the rehabilitation of the surviving victims and their relatives.

One aspect of its rich case-law in this regard which deserves to be singled out, is the Court's jurisprudential construction of the concept of "project of life" (*proyecto de vida*). In its Judgment in the case of *Loayza Tamayo versus Peru* (reparations, 1998), the Court for the first time pronounced on the concept of project of life, linked to satisfaction, among other measures of reparation (pars. 83-192). The Court pondered that the complaint of damage to the project of life "is definitely not the same as the immediate and direct harm to a victim's assets", but it rather seeks to fulfill "the full self-actualisation of the person concerned" (par. 147). The Court found that the circumstances in which the detention of the victim had taken place caused a damage to her project of life (pars. 147-154).

To the Court, the project of life "is akin to the concept of personal fulfillment, which in turn is based on the options that an individual may have for leading his life and achieving the goal that he sets for himself. Strictly speaking, those options are the manifestation and guarantee of freedom. An individual can hardly be described as truly free if he does not have options to pursue in life and to carry that life to its natural conclusion. Those options, in themselves, have an important existential value. Hence, their elimination or curtailment objectively abridges freedom and constitutes the loss of a valuable asset, a loss that this Court cannot disregard" (par. 148)<sup>40</sup>.

<sup>39</sup> Judge Cançado Trindade delivered its Concurring Opinion, in support of the *legitimitio ad causam* of the petitioners; further Opinions were delivered by Judges García Ramírez (also Concurring) and de Roux Rengifo (Separate Opinion).

<sup>40</sup> In a Joint Concurring Opinion in the *Loayza Tamayo* case (reparations, 1998), it was pondered that "the project of life encompasses fully the ideal of the American Declaration [of Human Rights] of 1948 of proclaiming the spiritual development as the supreme end and the highest expression of human existence. The damage to the project of life threatens, ultimately, the very *meaning* which each human person attributes to her existence. When this occurs, a damage is caused to what is most intimate in the human being: this is a damage endowed with an autonomy of its own, which affects the spiritual meaning of life". Joint Concurring Opinion of Judges A.A. Cançado Trindade and A. Abreu Burelli, par. 16, and cf. also par. 10.

The Court retook its consideration of the concept of project of life in its Judgment on the merits in the "*Street Children*" case (*Villagrán Morales and Others versus Guatemala*, 1999). More recently, in the case of *Cantoral Benavides versus Peru* (reparations, 2001), the Court *inter alia* decided (resolatory point n. 6) that the State ought to grant the complainant —a victim of torture— the means to undertake and conclude his (interrupted) studies of university or superior level in a centre of recognized academic quality. This determination by the Court of the damage to the project of life of the complainant as well as of the need to provide reparation for it, constitutes a form of *satisfaction*, conducive to the *rehabilitation* of the victim<sup>41</sup>.

### 3.2. Procedural Aspects

#### 3.2.1. ACCESS TO JUSTICE AT INTERNATIONAL LEVEL

The central question of the individual's access to justice at international level has been the object of attention on the part of the case-law of the Inter-American Court, with regard both to the right of individual petition under the American Convention as well as the conditions of admissibility of individual complaints. In its Judgment in the case *Castillo Petruzzi and Others versus Peru* (preliminary objections, 1998), the Court upheld the integrity of the right of individual petition (challenged by the respondent State) under the American Convention (Article 44) in the circumstances of the case. It drew attention to the importance of that right, observing that the broad faculty "to make a complaint is a characteristic feature of the system for the international protection of human rights" (par. 77). In a Concurring Opinion, it was pondered that "without the right of individual petition, and the consequent access to justice at international level, the rights enshrined into the American Convention would be reduced to a little more than dead letter"; thus, the right of individual petition —rendering the protected rights effective— constituted "a fundamental clause (*cláusula pétrea*)" upon which was erected "the juridical mechanism of emancipation of the human being *vis-à-vis* his own State for the protection of his rights in the ambit of the International Law of Human Rights"<sup>42</sup>.

The other aspect of the question of the access of the individual to justice at international level, dealt with in the case-law of the Court, pertains to the conditions of admissibility of individual complaints. In its earlier case-law<sup>43</sup>, the Court used to admit the reopening and reexamination by the Court of an objection of pure admissibility, favouring the respondent party, which should have been definitively resolved by the Inter-American Commission. Just as the Commission's decisions of inadmissibility were final, so should its decisions of admissibility be: either all decisions —of

<sup>41</sup> The emphasis given by the Court, in the *cas d'espèce*, to the *formation* of the victim, to his *education*, places this form of reparation in an adequate perspective, from the angle of the integrality of the personality of the victim, bearing in mind his self-accomplishment as a human being and the reconstruction of his project of life. Separate Opinion of Judge A.A. Cançado Trindade, pars. 8 and 10.

<sup>42</sup> Concurring Opinion of Judge A.A. Cançado Trindade, pars. 35-36.

<sup>43</sup> As from its decisions on preliminary objections in the cases *Velásquez Rodríguez and Godínez Cruz versus Honduras* (1987).

admissibility or otherwise— were allowed to be reopened before the Court, or they were all to be kept exclusive to the Commission. To allow for a reopening or review by the Court of a decision on admissibility by the Commission<sup>44</sup> created an unbalance between the parties, favouring the respondent States.

In the case *Gangaram Panday versus Suriname* (preliminary objections, 1991) the Court came to admit that, if an objection of non-exhaustion of local remedies is not raised *in limine litis*, it is tacitly waived. But it was necessary to go further than that, since, if the respondent State waived the objection of non-exhaustion of local remedies by not raising it *in limine litis*, in the prior procedure before the Commission, it would be inconceivable that it could freely withdraw that waiver in the subsequent procedure before the Court (*estoppel/forclusion*) by raising the objection again. This is precisely what happened in the *Loayza Tamayo* and *Castillo Páez* cases (preliminary objections, 1996), concerning Peru, where the Court, reorienting its case-law, took the important step of rightly determining that, if the respondent State failed to invoke the preliminary objection of non-exhaustion of local remedies in the proceedings on admissibility before the Commission, it was precluded from invoking it subsequently before the Court (*estoppel*)<sup>45</sup>. In this way, the Court redressed the earlier unbalance to the detriment of the complainants, fostering the procedural position of the individuals in the proceedings under the American Convention.

### 3.2.2. THE BASIS OF INTERNATIONAL JURISDICTION

Shortly after the Court's Judgment in the *Castillo Petruzzi and Others versus Peru* (*cit. supra*), the respondent State (under the Presidency of Mr. Alberto Fujimori) announced the "withdrawal" of its instrument of acceptance of the Court's compulsory jurisdiction, with "immediate effects". In its two Judgments on competence of 24 September 1999, in the cases of the *Constitutional Tribunal* and of *Ivcher Bronstein versus Peru*, the Inter-American Court, in asserting its competence to adjudicate on those cases, declared *inadmissible* the intended "withdrawal" by the respondent State of its contentious jurisdiction with "immediate effects". The Court warned that its competence could not be conditioned by acts distinct from those of its own. It added that, in recognizing its contentious jurisdiction, a State accepts the prerogative of the Court to decide on any question affecting its competence, being unable, later on, to attempt to withdraw suddenly from it, as that would undermine the whole international mechanism of protection.

The Court pondered that there exist unilateral acts of the States which are completed by themselves, in an autonomous way (such as the recognition of State or government, diplomatic protest, promise, renunciation), and unilateral acts performed in the ambit of the law of treaties, governed and conditioned by this latter (such as ratification, reservations, acceptance of the clause of contentious jurisdiction of an international tribunal). The American Convention cannot be at the mercy of limitations no provided for by it, imposed suddenly by a State Party for reasons of domestic order. The American Convention does not foresee the uni-

<sup>44</sup> As the Court upheld in the aforementioned *Honduran* cases.

<sup>45</sup> Cf., on this point, in both cases, the Separate Opinions of Judge A.A. Cançado Trindade.

lateral withdrawal of a clause, and even less of a clause of the importance of the one which provides for the acceptance of the contentious jurisdiction of the Court. The sole possibility which the American Convention foresees is that of the denunciation (of the Convention as a whole), with the observance of a 12-month lapse of time, and without comprising facts prior to the denunciation. This is the same lapse of time set forth in the Vienna Convention on the Law of Treaties of 1969. This is an imperative of juridical security, which ought to be rigorously observed in the interest of all States Parties.

The Court proceeded, thus, with its examination of the pending contentious cases against the Peruvian State—and it could not have been otherwise: this is a duty incumbent upon it, under the American Convention, as an autonomous judicial organ of international protection of human rights. The respondent State had undertaken an international engagement from which it could not, all of a sudden, withdraw in its own terms. The purported unilateral “withdrawal” with “immediate effects” of the respondent State had no juridical foundation—neither in the American Convention, nor in the law of treaties, nor in general international law. The intended “withdrawal”, besides being unfounded, would have brought about the ruin, to the detriment of all States Parties to the American Convention, of the inter-American system of protection as a whole, constructed with so much effort along the last decades. The Court then decided, in conclusion, that the intended “withdrawal” of the respondent State was “inadmissible”.

With its important decision in those cases the Court safeguarded the integrity of the American Convention, which, as the other human rights treaties, bases its application on the *collective guarantee* in the operation of the international mechanism of protection. The Court’s aforementioned Judgments, in the cases of the *Constitutional Tribunal* and of *Ivcher Bronstein versus Peru*, contributed ultimately to enhance the foundation of its jurisdiction in contentious matters<sup>46</sup>. With the subsequent change in government in the country, the Peruvian State rendered “without effects” the earlier purported “withdrawal” from the Court’s competence, and “normalized” its relations with this latter (on 9 February 2001)<sup>47</sup>, complying with its Judgments<sup>48</sup>.

<sup>46</sup> In that regard, also deserving of special mention are the Judgments of the Court in the *Blake versus Guatemala* case (preliminary objections, 1996; merits, 1998; and reparations, 1999): its decision on the legal issue raised therein, in relation to the alleged limitation *ratione temporis* of the Court’s competence, touched the very basis of its jurisdiction in contentious matters.

<sup>47</sup> On that date, the Minister of Justice of Peru visited the headquarters of the Court in San José of Costa Rica, and handled to the Court’s President two notes, whereby the Peruvian State expressly recognized its international responsibility for the violation of the rights of the three dismissed Judges of the Constitutional Tribunal, as well as of Mr. Baruch Ivcher Bronstein (with regard to the Court’s Judgments, on the merits, of 31.01.2001, and 06.02.2001, respectively), and informed of the measures the Peruvian State was taking in order to reestablish the rights of those persons. Inter-American Court of Human Rights, *Press Release CDH-CP2/01*, of 09.02.2001, pp. 1-2.

<sup>48</sup> For a historical account of this episode, cf. A.A. CANÇADO TRINDADE, “El Perú y la Corte Interamericana de Derechos Humanos - Una Evaluación Histórica (Part I)”, in: 138 *Ideele - Revista del Instituto de Defensa Legal - Lima/Peru* (June 2001) pp. 108-113; A.A. CANÇADO TRINDADE, “El Perú y la Corte Interamericana de Derechos Humanos (Part II)”, in: 139 *Ideele - Revista del Instituto de Defensa Legal - Lima/Peru* (July 2001) pp. 85-88.



The basis of the Court's contentious jurisdiction in contentious matters came also to the fore in the cases of *Hilaire, Benjamin, and Constantine versus Trinidad and Tobago* (preliminary objections, 2001). The respondent State had interposed a preliminary objection, of a kind not expressly foreseen in Article 62 of the American Convention, which, in the Court's assessment, "would lead to a situation in which the Court would have as first parameter of reference the Constitution of the State and only subsidiarily the American Convention, situation which would bring about a fragmentation of the international legal order of protection of human rights and would render illusory the object and purpose of the American Convention" (par. 93).

This was clearly unacceptable; as the Court, furthermore, observed, "the instrument of acceptance on the part of Trinidad and Tobago, of the contentious jurisdiction of the Tribunal, does not fit into the hypotheses foreseen in Article 62(2) of the Convention. It has a general scope, which ends up by subordinating totally the application of the American Convention to the domestic law of Trinidad and Tobago pursuant to what its national tribunals decide. All this implies that this instrument of acceptance is manifestly incompatible with the object and purpose of the Convention" (par. 88). On the basis of this conclusion as to the *rationale* of Article 62(2) of the American Convention (*numerus clausus*), the Court retained jurisdiction to adjudicate on the *Hilaire, Benjamin, and Constantine* cases, and safeguarded the integrity of its own jurisdictional basis in particular, and of the mechanism of protection under the American Convention as a whole<sup>49</sup>.

In the same line of thinking, more recently, the Court issued a Judgment on Jurisdiction, on 28 November 2003, in the case of *Baena Ricardo and Others versus Panama*, in which the Court asserted its competence to supervise the execution of its own judgments. In unanimously rejecting the challenge of the respondent State, the Court affirmed that, in its exercise of that competence, it is entitled to request the responsible States the presentation of reports on the measures taken to give application to the reparations it has ordered, to evaluate such reports, and to issue instructions and resolutions on compliance (or otherwise) with its judgments. Moreover, the Court discarded as unfounded the challenge of its competence to supervise compliance with its decisions, and decided by unanimity to continue to supervise the integral compliance by the respondent State with its earlier Judgment (of 2 February 2001) in the case of *Baena Ricardo and Others versus Panama*.

### 3.2.3. THE STATE'S RECOGNITION OF INTERNATIONAL RESPONSIBILITY

Last but not least, as a positive development in the Court's experience to date, there have been cases in which the respondent States have recognized before the Court their international responsibility under the American Convention. Such recognition (*allanamiento*) has had the effect of putting an end to controversies as to the facts of the respective cases, and has enabled the Court to move on more expeditiously to the reparations stage. The first time it happened was in the case of *Aloë-boetoe and Others versus Suriname* (1991-1993). Subsequently, it also happened in

<sup>49</sup> Cf. also Separate Opinion of Judge A.A. Cançado Trindade, pars. 1-39.

the cases of *El Amparo* concerning Venezuela (1994-1995), *Garrido and Baigorria versus Argentina* (1996), *El Caracazo* concerning Venezuela (1999), *Trujillo Oroza versus Bolivia* (1999-2000), and *Barrios Altos* concerning Peru (2001); it took place in the case of *Benavides Cevallos versus Ecuador* (1998) as well, where a significant friendly settlement was reached before the Court, satisfactory to all concerned.

### 3.3. *Complementarity between the International Responsibility of the State and of the Individual: The Issue of Crime of State Reconsidered*

On 25 November 2003, the Inter-American Court delivered a historical Judgment in the case of *Myrna Mack Chang versus Guatemala*. The Court's decision was much awaited in the Central American region, where the case had gained much visibility, given the extrajudicial execution of anthropologist Myrna Mack Chang (in Guatemala City, on 11.09.1990). In its Judgment, the Court admitted the State's acceptance of international responsibility, and found the respondent State in breach of Article 4(1) of the American Convention (right to life) in combination with Article 1(1), to the detriment of the victim, and in violation of Articles 8 and 25 of the Convention (rights to judicial guarantees and judicial protection) and Article 5(1) (right to personal integrity), in combination with Article 1(1), to the detriment of the victim and her relatives.

The Court ordered the investigation of the facts (with the identification, judgment and sanction of those responsible for her murder), so as to put an end to impunity, as well as pecuniary and non-pecuniary reparations. The Court further ordered the in-training in International Humanitarian Law of members of public security forces. The Judgment raised some relevant points<sup>50</sup>. In his Separate Opinion, President Cançado Trindade recalled that it had been established in the case that the murder of the anthropologist occurred in *aggravating circumstances*, as it resulted from "a covered-up operation of military intelligence undertaken by the Presidential Office (*Estado Mayor*) and tolerated by several authorities and institutions", amidst "a pattern of selective extrajudicial executions launched and tolerated by the State itself", and a "climate of impunity"<sup>51</sup>.

Moreover, the Court established that the aforementioned operation of military intelligence of the Presidential Office (*Estado Mayor*) "sought the hiding of the facts and the impunity of those responsible for them, and, to that end, under the tolerance of the State, resorted to all types of measures, among which were found hostilities, threats and murders of those who collaborated with justice", affecting the independence of the Judiciary<sup>52</sup>. That this case was one of *aggravated* international responsibility of the State was further evidenced by the aforementioned facts and the abusive invocation of the so-called "secret of State" leading to an obstruction of justice<sup>53</sup>.

<sup>50</sup> Five Judges appended Separate Opinions to it.

<sup>51</sup> Paragraphs 138-139, 150, 154 and 157 of the Judgment.

<sup>52</sup> Paragraph 215 of the Judgment.

<sup>53</sup> Cf. pars. 174-181 of the Judgment; and cf. also, on the matter, CEH, *Guatemala, Memoria del Silencio - Informe de la Comisión para el Esclarecimiento Histórico*, vol. VI, Annex I, Guatemala, 1999, pp. 242 and 244.

Judge Cançado Trindade concluded, in his aforementioned Opinion, that such facts rendered it impossible to deny the existence of a *crime of State*, and he upheld the *complementarity* of the international responsibility of the State and the international penal responsibility of the individual.

More recently, in the case of the *Massacre of Plan de Sánchez* (2004), concerning Guatemala, the Inter-American Court established Guatemala's responsibility for grave human rights violations under the American Convention on Human Rights. As demonstrated in the *cas d'espèce*, the crimes committed in the course of the execution, by military operations, of a State policy of "*tierra arrasada*", including the massacre of Plan de Sánchez perpetrated on 18 July 1982, were intended to destroy wholly or in part the members of indigenous Maya communities. The respondent State accepted its international responsibility under the American Convention for the grave human rights violations resulting from the massacre of Plan de Sánchez.

In its Judgment on the merits of the case, of 29 April 2004, the Inter-American Court determined that those violations "gravely affected the members of the *maya-achí* people in their identity and values", and, insofar as they occurred within a "pattern of massacres", they had "an aggravated impact" in the establishment of the international responsibility of the State (par. 51). In another Separate Opinion, Judge Cançado Trindade insisted on the existence of a *crime of State*, as well as the *complementarity* of the international responsibility of the State and the international penal responsibility of the individual<sup>54</sup>.

#### 4. Case-Law pertaining to provisional measures of protection

Under Article 63(2) of the American Convention, the Inter-American Court can also order the Provisional Measures of Protection that it may deem pertinent, in cases of extreme gravity and urgency and in order to avoid irreparable damage to persons. It may do so—and it has in fact done so—in relation both to pending cases and to cases which have not yet been submitted to it, upon request of the Commission. Such measures are gaining a growing importance in the case-law of the Court in recent years, they disclose the preventive dimension of the international protection of human rights, and represent a true jurisdictional guarantee of preventive character in the international safeguard of the fundamental rights of the human person.

The great majority of the petitions of provisional measures have been admitted and ordered by the Inter-American Court, in relation both to cases pending before itself, as well as to cases not yet submitted to it, at the request of the Commission<sup>55</sup>.

<sup>54</sup> For a recent study, cf. A.A. CAÑADO TRINDADE, "Complementarity between State Responsibility and Individual Responsibility for Grave Violations of Human Rights: The Crime of State Revisited", in *International Responsibility Today - Essays in Memory of O. Schachter* (ed. M. Ragazzi), Leiden, M. Nijhoff, 2005, pp. 253-269.

<sup>55</sup> All Provisional Measures of Protection ordered by the Court (only on very rare occasions it decided not to order them) until the end of 2001, are now systematized, in the three volumes published to date, of its new *Series E* of official publications.

Before ordering provisional measures of protection, the Court always verifies if the States at issue have recognized (under Article 62(2) of the Convention) as obligatory its competence in contentious matters. The Provisional Measures of Protection have been ordered in practice in cases implying mainly an imminent threat to the life or the integrity of the person<sup>56</sup>. In various requests of such measures on the part of the Commission in cases not yet pending before the Court, this latter has deemed applicable the presumption that such measures of protection are necessary. The Court has, in practice, not required from the Commission a *substantial* evidence that the facts are true, but proceeded rather on the basis of the reasonable presumption (*prima facie* evidence) that the facts are true.

Until recently, the Provisional Measures ordered by the Inter-American Court, or the Urgent Measures dictated by its President, have effectively protected fundamental rights, essentially the right to life and the right to personal (physical, mental and moral) integrity. But now other rights are being protected as well; this is not surprising, as all human rights are interrelated and indivisible, there does being, juridically and epistemologically, no impediment for them to be ordered so as to safeguard other human rights, whenever are met the pre-conditions of the extreme gravity and urgency, and of the prevention of irreparable damages to persons, set forth in Article 63(2) of the American Convention.

More than 1500 persons (petitioners or witnesses) have been protected to date, by the measures ordered by the Inter-American Court, or its President, what reveals their extraordinary importance. On one occasion, in the case *James and Others versus Trinidad and Tobago* (1999), the measures ordered by the Court (for suspension of the execution of sentences imposing the death penalty) gave rise to significant considerations of doctrinal order. On another occasion, in the case of the newspaper "*La Nación*" versus *Costa Rica* (2001), on freedom of expression, the Court ordered the suspension of the execution of a sentence of a national tribunal against a journalist. In its resolutions on provisional measures, the Inter-American Court, besides the adoption of such measures, has also required the State to inform periodically on them, and the Commission to present to the Court its observations on the State reports. This has enabled the Court itself to exert a *continuous monitoring* of the compliance, on the part of the States at issue, with its own Provisional Measures of Protection.

Fairly recently, a significant new development has taken place in two cases concerning collectivities of people. In the first one, that of *Haitians and Dominicans of Haitian Origin in the Dominican Republic* (2000), the Court adopted Provisional Measures intended, *inter alia*, to protect the life and personal integrity of five individuals, to avoid the deportation or expulsion of two of them, to allow the immediate return to the Dominican Republic of two others, and family reunification of two of them with their children, besides the investigation of the facts. By means of this Provisional Measure, which represents the embryo of an international *habeas corpus*, the Court for the first time thus extended protection to new

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<sup>56</sup> One example, among many, is afforded by the case of *Loayza Tamayo* (1996, Peru), where the Court ordered Provisional Measures of Protection pertaining to the conditions of detention of Mrs. M.E. Loayza Tamayo, so as to safeguard her physical, psychological and moral integrity.

rights (in addition to the fundamental rights to life and personal integrity) under the American Convention.

Shortly afterwards, in the case of the *Community of Peace of San José of Apartadó versus Colombia* (2000), the full Court ratified the Urgent Measures ordered by its President in favour of the members of a "Community of Peace" in Colombia, and required the State, *inter alia*, to secure the necessary conditions for the displaced members of that community to return to their homes. The Provisional Measures of Protection ordered by the Court in those two cases, in the course of the year 2000, are of particular importance, as they greatly enlarge the circle of protected persons. Recently (resolution of 18.06.2002), the Court, in expanding such measures of protection, extending them also to persons who render services to that Community, pointed out the duty of the State to protect the life and personal integrity of all persons under protection by the measures —also *vis-à-vis third parties* (notably clandestine groups and paramilitary). In this way, the Inter-American Court, in my view, acknowledged the pressing need of developing the obligations *erga omnes* of protection in the framework of the American Convention on Human Rights.

By means of another development, the position of individuals seeking protection has been lately strengthened. In the case of the *Constitutional Tribunal* (2000), concerning Peru, one of the three Judges dismissed from that Tribunal lodged directly with the Inter-American Court a request for Interim Measures of Protection. As the case was pending before the Inter-American Court (which was then not in session), its President adopted Urgent Measures, *ex officio* (on 07.04.2000), for the first time in the Court's history, in order to avoid irreparable damage to the petitioner. The same situation occurred in the case *Loayza Tamayo versus Perú* (2000, then under supervision for execution of the Sentence). In both cases (*Constitutional Tribunal and Loayza Tamayo*), the full Court ratified the Urgent Measures ordered by its President. These two recent episodes illustrate the importance of the *direct* access of the petitioners to the Court, even more forcefully in a situation of extreme gravity and urgency.

Along the year 2002, the Court also ordered provisional measures of protection on new cases: thus, in three Resolutions on Provisional Measures (of 27 November 2002) —in the cases of *L. Uzcátegui, Liliana Ortega and Others*, and *Luisiana Ríos and Others*, all concerning Venezuela—, the Court ordered the State to take the necessary measures to protect the life and personal integrity of the individuals concerned. In the second of those cases (*L. Ortega et alii*) the beneficiaries of the measures of protection were human rights defenders, and in the third case (*L. Ríos et alii*) they were workers in a television station in Caracas. In addition, in the case of *Helen Mack Chang and Others versus Guatemala*, the Court's President ordered (Resolution of 14 August 2002) urgent measures, which were endorsed by the Court as provisional measures (Resolution of 26 August 2002), in order to protect the life and personal integrity of the members of the Myrna Mack Foundation in Guatemala.

In the course of the second semester of 2002, the Inter-American Court adopted new and successive provisional measures of protection covering a variety of situations, concerning also collectivities of persons. Thus, in its Resolution on Provisional

Measures of 6 September 2002, in the case of the *Community Mayagna (Sumo) Awas Tingni versus Nicaragua*, the Court ordered the State to adopt the necessary measures to protect the right to the use and enjoyment of the property<sup>57</sup> of the lands belonging to the aforementioned Community Mayagna (Sumo) Awas Tingni in Nicaragua and of the natural resources existing therein (resolatory point n. 1). In addition, in its Resolutions of 18 June and 29 August 2002, in the case of the *Prison "Urso Branco"* concerning Brazil, the Court order provisional measures of protection of the life and personal integrity of all persons detained in the Prison "Urso Branco", and further ordered the State to undertake investigation of the facts which led to the adoption of those measures and to provide further information thereon to the Court.

In yet another recent case concerning a collectivity of persons, that of the *Community of Peace of San José of Apartadó versus Colombia*, the Court, in its resolution of 18.06.2002, in expanding provisional measures of protection ordered earlier on (in the course of the year 2000), extended them also to persons who render services to that Community, and pointed out the duty of the State to protect the life and personal integrity of all persons under the protection of those measures —also *vis-à-vis third parties* (notably clandestine groups and paramilitary). The expansion of those measures of protection coincided with the aggravation of the situation of human rights in Colombia. By means of the adoption of those new measures, the Inter-American Court, as recently indicated, acknowledged the pressing need of developing the obligations *erga omnes* of protection in the framework of the American Convention on Human Rights<sup>58</sup>.

In the course of the year 2003, the Inter-American Court kept on ordering Provisional Measures of Protection, which have been increasing year after year and have become a highlight of its case-law of safeguard of the human person. As an illustration of the constant pattern of the increasing use of such measures, comprising an increasingly greater number of protected persons, it may be pointed out that, the total verified of about 1500 protected persons until mid-2001 had raised, until mid-2003, up to a total of about 4500 protected persons.

Only in the important case of the *Communities of Jiguamiandó and Curbaradó* (2003), concerning Colombia, the Provisional Measures ordered by the Court protect currently an additional total of 2125 persons. In his Concurring Opinion in that case, Judge Cançado Trindade drew attention to the special interest of Provisional Measures of Protection of the kind, for the study and development of the obligations *erga omnes* of protection, as well as of the emerging right of *humanitarian assistance* (under the American Convention) in a situation of generalized internal armed conflict such as that plaguing Colombia nowadays. In his aforementioned Opinion, Judge Cançado Trindade further stressed the convergences between the International Law of Human Rights and International Humanitarian Law, particularly in a situation of the kind.

<sup>57</sup> Under Article 21(1) of the American Convention (right to property).

<sup>58</sup> A.A. CANÇADO TRINDADE, "The Developing Case-Law of the Inter-American Court of Human Rights", 3 *Human Rights Law Review* (2003), pp. 22-23.

The Provisional Measures ordered by the Court (and the Urgent Measures dictated by its President) are, by definition, of a temporal character; several of them have thus been lifted when they proved no longer necessary. Nevertheless, if their pre-requisites —the elements of “extreme gravity and urgency” and the need to “avoid irreparable damage to persons”, set forth in Article 63(2) of the American Convention— persist in time, to the Court there has been no alternative left than to maintain them<sup>59</sup> (and, in some cases, even to enlarge them), as the primacy rests with the imperatives of protection of the human being. It is not at all surprising that, in the region covered by the American Convention, where the conditions of vulnerability of the fundamental rights of the human person are prolonged pathologically in time (despite, in some cases, the efforts of the public power), the Provisional Measures of Protection have had likewise to be maintained in time, in order to face up to the chronic threats to those fundamental rights.

Provisional measures ordered by the Inter-American Court, or the urgent measures dictated by its President, have effectively protected fundamental rights, essentially the right to life and the right to personal (physical, mental and moral) integrity. But now other rights are being protected as well. This is not surprising: as all human rights are interrelated and indivisible, there does appear to exist, juridically and epistemologically, any impediment for those measures to be ordered so as to safeguard other human rights, whenever are met the pre-conditions of the extreme gravity and urgency, and of the prevention of irreparable damages to persons, set forth in Article 63(2) of the American Convention.

In its resolutions on Provisional Measures of Protection, the Court, besides the adoption of such measures, has also required the State concerned to inform periodically on them, and the Inter-American Commission to present to the Court its observations on State reports. This has enabled the Court itself to exert, besides the protection of a preventive character, a *continuous monitoring* of the compliance, on the part of the States at issue, with the aforementioned Provisional Measures ordered by it.

## 5. Concluding Observations

In the case-law of the Inter-American Court, as in the domain of the International Law of Human Rights as a whole, there has been a clear emphasis, in the process of interpretation of human rights treaties, on the element of the object and purpose of such treaties, so as to ensure an effective protection (*effet utile*) of the guaranteed rights. Early in its history, the Inter-American Court stressed the special character of human rights treaties (as distinguished from multilateral treaties of the traditional type)<sup>60</sup>, and further emphasized the objective character of the obligations

<sup>59</sup> E.g., already for more than seven years in the *Colotenango* and *Caballero Delgado and Santana* cases (concerning Guatemala and Colombia, respectively); and more than six years in the *Blake* and *Carpio Nicolle* cases (both concerning Guatemala).

<sup>60</sup> In its Advisory Opinion n. 2 (1982), on the *Effect of Reservations on the Entry into Force of the American Convention*.

set forth in the American Convention<sup>61</sup>. The findings of the Court<sup>62</sup> reinforce the necessarily restrictive interpretation of restrictions (limitations and derogations) to the exercise of guaranteed rights<sup>63</sup>.

Furthermore, the Court's interpretation of the American Convention has been evolutive or dynamic, so as to respond to the new needs of protection. Thus, in its historical Advisory Opinion n. 16, on the *Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law* (of 01.10.1999), for example, the Court stated that "human rights treaties are living instruments, whose interpretation ought to follow the evolution of times and the current conditions of life" (par. 114). In that Opinion, the Court made it clear that, in its interpretation of the norms of the Convention it should aim at extending protection in new situations on the basis of preexisting rights. The same line of evolutive or dynamic interpretation has been followed by the Court in, e.g., its Judgment on the merits in the case *Cantoral Benavides versus Peru* (2000, pars. 99-104), and in its landmark Advisory Opinion n. 18, on the *Juridical Condition and Rights of Undocumented Migrants* (of 17.09.2003).

Of great importance is the Inter-American Court's firm position in tackling key issues of interpretation and application of the American Convention, such as the right of individual petition (in the case *Castillo Petruzzi and Others versus Peru*, preliminary objections, 1998) and the basis of its own jurisdiction in contentious matters (in the cases of the *Constitutional Tribunal* and of *Ivcher Bronstein versus Peru*, competence, 1999, and in the cases of *Hilaire, Benjamin and Constantine versus Trinidad and Tobago*, preliminary objections, 2001). The Court pointed out that those issues pertained to conventional clauses of fundamental relevance (*cláusulas pétreas*) of the international protection of human rights, and warned that any attempt to undermine them would threaten the functioning of the whole mechanism of protection under the American Convention, being thus inadmissible.

The aforementioned Court's decisions regarded those provisions (on the right of individual petition and on the recognition of its compulsory jurisdiction) as con-

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<sup>61</sup> In its Advisory Opinions n. 1 (1982) on "*Other Treaties*" Subject to the Advisory Jurisdiction of the Court, and n. 3 (1983), on *Restrictions to the Death Penalty*. For comments, cf., e.g., A.A. CANÇADO TRINDADE, "The Interpretation of the International Law of Human Rights by the Two Regional Human Rights Courts", in *Contemporary International Law Issues: Conflicts and Convergence* (Proceedings of the III Joint Conference ASIL/Asser Instituut, The Hague, July 1995), The Hague, Asser Instituut, 1996, pp. 157-162 and 166-167.

<sup>62</sup> Cf., moreover, the Court's Advisory Opinion n. 7 (1986) on the *Enforceability of the Right to Reply or Correction*.

<sup>63</sup> It should not pass unnoticed that those restrictions must not be inconsistent with the other obligations under international law incumbent upon the State concerned. Limitations, when permitted, remain exceptional, and are thereby to be interpreted restrictively; they are not meant to confer a wide margin of action upon the respondent State, but rather to secure an effective enforcement of protected human rights. The gradual evolution from a single and general clause on limitations (as found only in the 1948 Universal Declaration of Human Rights) into several particular formulas in relation to certain rights (as found in distinct human rights treaties, including the American Convention on Human Rights) had a purpose: that of tailoring limitations to the extent strictly necessary so as to secure the most effective protection to the individuals. A. Ch. Kiss, "Permissible Limitations on Rights", in *The International Bill of Rights - The Covenant on Civil and Political Rights* (ed. L. Henkin), N.Y., Columbia University Press, 1981, pp. 291 and 308-310.



stituting the basic pillars of the mechanism whereby the emancipation of the individual *vis-à-vis* his own State is achieved<sup>64</sup>. The case-law of the Inter-American Court has thus rightly set limits to State voluntarism, has safeguarded the integrity of the American Convention and the primacy of considerations or *ordre public* over the will of individual States, has set higher standards of State behaviour and established some degree of control over the interposition of undue restrictions by States, and has reassuringly enhanced the position of individuals as subjects of the International Law of Human Rights, with full procedural capacity.

As to Provisional Measures of Protection, the preventive dimension of such Measures is to be properly stressed. Under the American Convention, they have certainly contributed to the strengthening of the protection of the fundamental rights of the human person<sup>65</sup>, and have acquired, in the last four years, a transcendental importance in the case-law of the Inter-American Court. In fact, provisional measures have been ordered by the Inter-American Court in the light of the needs of protection, whenever are met those basic requisites referred to.

Such requisites transform them, in my understanding, into a true *jurisdictional guarantee of a preventive character*. This characterization corresponds to their true *rationale* in the international protection of human rights. In the present domain, those measures, besides disclosing their essentially preventive character, *effectively protect fundamental rights*, in so far as they seek to avoid irreparable harm to the human person as subject of the International Law of Human Rights<sup>66</sup>. In the ambit of this latter, which is essentially a *law of protection* of the human being, provisional measures reach effectively their plenitude, being endowed with a character, more than precautionary, truly *tutelary*<sup>67</sup>.

<sup>64</sup> A.A. CAÑADO TRINDADE, "Las Cláusulas Pétreas de la Protección Internacional del Ser Humano: El Acceso Directo de los Individuos a la Justicia a Nivel Internacional y la Intangibilidad de la Jurisdicción Obligatoria de los Tribunales Internacionales de Derechos Humanos", in *El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI - Memoria del Seminario* (Nov. 1999), vol. I, 2nd. ed., San José of Costa Rica, Inter-American Court of Human Rights, 2003, pp. 3-68.

<sup>65</sup> Cf., recently, A.A. CAÑADO TRINDADE, "The Evolution of Provisional Measures of Protection under the Case-Law of the Inter-American Court of Human Rights (1987-2002)", 24 *Human Rights Law Journal* - Strasbourg/Kehl (2003) n. 5-8, pp. 162-168; A.A. CAÑADO TRINDADE, "Les Mesures provisoires de protection dans la jurisprudence de la Cour Interaméricaine des Droits de l'Homme", 4 *Revista do Instituto Brasileiro de Direitos Humanos* (2003) pp. 13-25.

<sup>66</sup> For a recent study, cf. A.A. CAÑADO TRINDADE, "Provisional Measures of Protection in the Evolving Case-Law of the Inter-American Court of Human Rights (1987-2001)", in *El Derecho Internacional en los Albores del Siglo XXI - Homenaje al Prof. J.M. Castro-Rial Canosa* (ed. F.M. Mariño Menéndez), Madrid, Ed. Trotta, 2002, pp. 61-74.

<sup>67</sup> It should not pass unnoticed that, in his report presented to the Organization of American States (OAS) on 19 April 2002, titled "*Towards the Consolidation of the International Juridical Capacity of the Petitioners in the Inter-American System of Protection of Human Rights*", the President of the Inter-American Court of Human Rights drew attention to the growing importance of provisional measures of protection within the framework of the *locus standi in iudicio* of the individuals in the procedure before the Court (OAS, *Presentación del Presidente de la Corte Interamericana de Derechos Humanos*, Juez Antônio A. Cançado Trindade, ante la Comisión de Asuntos Jurídicos y Políticos del Consejo Permanente de la Organización de los Estados Americanos: "Hacia la Consolidación de la Capacidad Jurídica Internacional de los Peticionarios en el Sistema Interamericano de Protección de los Derechos Humanos" [19 April 2002], OAS doc. OEA/Ser.G/CP/CAJP-1933/02, of 25 April 2002, pp. 7 and 13-15). In his subsequent report, presented to the OAS on 16 October 2002, titled "*The Right of Access to*

In a continent troubled by uncertainties and constant threats to human rights, the evolving case-law of the Inter-American Court of Human Rights is nowadays, as already indicated, the juridical patrimony of all States and peoples of that part of the world. Furthermore, the case-law of the Inter-American Court has indeed contributed to the creation of an international *ordre public* in the region, based upon the respect for human rights in all circumstances. In this connection, there remains in our days a pressing need for the adoption of national measures of implementation of the American Convention on Human Rights so as to ensure the direct applicability of its norms in the domestic law of States Parties as well as the full compliance with the Inter-American Court's decisions, along with a clearer understanding of the wide scope of the conventional obligations of protection undertaken by States Parties, engaging all powers and agents of the State, irrespective of hierarchy, at all levels.

A last point ought to be made: the evolution of the International Law of Human Rights in general, and the *jurisprudence constante* of the Inter-American Court in particular, have helped to achieve the aptitude of International Law to regulate efficiently relations which have a specificity of their own—at intra-State, rather than inter-State, level—, opposing States to individuals under their respective jurisdictions. In so doing, the Inter-American Court<sup>68</sup> has been contributing to the enrichment and humanisation of contemporary Public International Law. It has done so as from an essentially and necessarily anthropocentric (rather than State-centric) outlook, as aptly foreseen, since the xvth century, by the so-called founding fathers of the *law of nations* (*Droit des Gens*). In the present domain of protection, International Law has indeed been made use of, in order to improve and strengthen, and never to weaken or undermine, the protection of the recognized rights inherent to all human beings<sup>69</sup>.

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*International Justice and the Conditions for Its Realization in the Inter-American System of the Protection of Human Rights*", the Inter-American Court's President stressed the importance of the individual right of access (*lato sensu*) to justice at international level (OAS, *Presentación del Presidente de la Corte Interamericana de Derechos Humanos*, Juez Antônio A. Cançado Trindade, ante el Consejo Permanente de la Organización de los Estados Americanos: "El Derecho de Acceso a la Justicia Internacional y las Condiciones para Su Realización en el Sistema Interamericano de Protección de los Derechos Humanos" [16 October 2002], OAS doc. OEA/Ser.G/CP/doc.3654/02, of 17 October 2002, pp. 12-16), which has a bearing also on the individual right (in cases pending before the Court) to request directly to the Court for interim measures of protection.

<sup>68</sup> Like its sister Institution in Strasbourg, the European Court of Human Rights.

<sup>69</sup> A.A. CANÇADO TRINDADE, "Co-Existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *Recueil des Cours de l'Académie de Droit International de La Haye* (1987) pp. 91-112 and 401; A.A. CANÇADO TRINDADE, *Tratado de Direito Internacional dos Direitos Humanos*, vol. II, Porto Alegre/Brazil, S.A. Fabris Ed., 1999, chapter XI, pp. 23-200.

## Part VI

# The African Union and Human Rights



# The African Regional Human Rights System\*

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## 1. Introduction

While the term “human rights” is of relative recent currency on the continent, people have been struggling for freedom, dignity, equality and social justice for centuries in Africa. In Africa, as is the case elsewhere, that which is now called human rights finds its foundations in the struggle to assert these core values of human existence.<sup>1</sup>

Today, the term human rights is used widely in the African context. The written constitutions of every country in Africa recognise the concept; the inter-governmental organisation of African states, the African Union, regards the realisation of human rights as one of its objectives and principles; and the record of ratification of the human rights treaties of the United Nations by African countries is on a par with practices around the world.<sup>2</sup> There is wide acceptance that the security and development of Africa —as in the world at large— will have to be based on human rights.

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<sup>1</sup> For an exposition of the approach that human rights and legitimate struggle are two sides of the same coin, see C. HEYNS: “A ‘struggle approach’ to human rights” in A. SOETEMAN (ed.): *Pluralism and Law*, 2001, p. 171.

<sup>2</sup> For a collection of the primary material dealing with human rights law in Africa on the United Nations, regional, sub-regional and domestic levels of all the countries of Africa, see C. HEYNS (ed.): *Human Rights Law in Africa*, 2004. See also C. HEYNS (ed.): *Compendium of key human rights documents of the African Union*, 2005.

Not surprisingly, given the history of exploitation of Africa, the struggle roots of the concept of human rights are clearly visible in the human rights documents of the continent. The African Charter on Human and Peoples' Rights also reflects in many ways a reaction to the continental experience of slavery and colonialism, for example by recognising a "peoples" right to self-determination. The excesses of some post-independence leaders are reflected in the fact that a significant number of African constitutions explicitly recognise a direct right, located in the people, to protect constitutional and human rights norms, if need be through political struggle, should they be violated.<sup>3</sup> The Constitutive Act of the African Union uniquely provides for a right of humanitarian intervention in member states by the Union, in cases of grave human rights violations.<sup>4</sup>

As is well known, the struggle for human rights on the African continent is far from over or complete. The continent is plagued by widespread violations of human rights, often on a massive scale. The process to establish effective institutional structures, that will help to consolidate and protect the hard earned gains of the freedom struggles of the past, has become a struggle in its own right. No doubt, the most important task in this regard is to establish legal systems on the national level that protect human rights. At the same time regional and global attempts to change the human rights practices of the continent, and to create safety nets for those cases not effectively dealt with on the national level, are assuming increased importance.

This contribution first introduces the main legal instruments relevant to the continental protection of human rights in Africa, then discusses the norms recognised (individual and peoples' rights and duties, etc) and thereafter turns to the regional institutional structures set up to achieve the implementation of the norms. This institutional overview focuses primarily on four important pillars of the African human rights system: the organs of the African Union, the African Commission on Human and Peoples' Rights, the yet to be established African Court on Human and Peoples' Rights and the newly established African Peer Review Mechanism.

## 2. The African Union and Human Rights

### 2.1. Background

The African regional system has been developed under the auspices of the Organization of African Unity ("OAU"),<sup>5</sup> established in 1963, which was transformed

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<sup>3</sup> The explicit recognition of a right of resistance to protect constitutional and human rights norms is present in the Constitutions of Benin (1990) (Art. 66); Burkina Faso (1997) (Art. 167); Cape Verde (1992) (Art. 19); Chad (1996) (Preamble); Congo (2001) (Art. 13); The Gambia (1996) (Art. 6); Ghana (1992) (Art. 3); Mozambique (Art. 80); and Togo (1992) (Art. 150).

<sup>4</sup> Article 4(h) of the Constitutive Act.

<sup>5</sup> The Charter of the OAU is reprinted in *Human Rights Law in Africa* 111. The Preamble stated adherence to the principles of the Universal Declaration of Human Rights. See also Art. II(1)(e). The Charter of the OAU was nevertheless a human rights document in the sense that it was aimed at the abolition of colonialism and apartheid. On the OAU see G.J. NALDI: *The Organization of African Unity: An Analysis of its Role*, 1999, p. 109.

in 2001 into the African Union ("AU").<sup>6</sup> All the states of Africa are members of the AU, except Morocco which withdrew in 1984 when the OAU recognised Western Sahara bringing the membership to 53. While the Charter of the OAU of 1963 made only passing reference to the concept of human rights, the Constitutive Act of the AU of 2000 (entered into force 2001) has now placed human rights squarely on the agenda of the new regional body.<sup>7</sup>

## 2.2. *The Constitutive Act*

The Constitutive Act of the AU, in its Preamble, refers to the African struggles for independence and human dignity "by our peoples" and the determination of the Heads of State and Government "to promote and protect human and peoples' rights". Article 3 sets out the "Objectives" of the AU as follows: "the objectives of the Union shall be to ... (e) encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights;" and to "... (h) promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments ...".

Article 4 deals with "Principles", and provides that:

The Union shall function in accordance with the following principles: ...  
 (g) non-interference by any Member State in the internal affairs of another;  
 (h) the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity; (i) peaceful co-existence of member states and their right to live in peace and security; (j) the right of member states to request intervention from the Union in order to restore peace and security, (l) promotion of gender equality; (m) respect for democratic principles, human rights, the rule of law and good governance; (n) promotion of social justice to ensure balanced economic development; (o) respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities; (p) condemnation and rejection of unconstitutional changes of governments.

There are no entry requirements in terms of their human rights records and practices for states to join the African Union (as is the case for example with the Council of Europe), and all the members of the OAU became members of the AU without scrutiny of their human rights records. There is, however, at least a theo-

<sup>6</sup> Constitutive Act of the African Union CAB/LEG/23.15, entered into force 26 May 2001. For an overview of the AU see C. HEYNS, E. BAIMU & M. KILLANDER: "The African Union" 46 *German Yearbook of International Law*, 2003, p. 252. On the transformation from OAU to AU from a human rights perspective see R. MURRAY: *Human Rights in Africa*, 2004.

<sup>7</sup> For a discussion, see E. BAIMU: "The African Union: Hope for better protection of human rights in Africa?" 1 *African Human Rights Law Journal*, 2001, p. 299. The Constitutive Act is reprinted on p. 315 of the same volume. See also B. MANBY: "The African Union, NEPAD, and Human Rights: The Missing Agenda", 26 *Human Rights Quarterly*, 2004, p. 983.

retical chance that violations of AU human rights standards may lead to suspension from the AU; certainly lesser forms of sanctions are possible.

According to Art. 23(2)

... any Member State that fails to comply with the decisions and policies of the Union may be subjected to ... sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly.

Art. 30 provides: "Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union."

The African Union has seen the establishment of a number of new institutions, many with relevance for the implementation of human rights, which will be discussed below.

### 2.3. *African human rights instruments*

The central document of the African regional human rights system, the African Charter on Human and Peoples' Rights ("African Charter"),<sup>8</sup> was opened for signature in 1981 and entered into force in 1986. It has been ratified by all 53 member states of the OAU/AU.<sup>9</sup> The sole supervisory body of the African Charter currently in existence is the African Commission on Human and Peoples' Rights ("African Commission"). The African Commission was constituted and met for the first time in 1987. The Commission has adopted its own Rules of Procedure (amended in 1995).<sup>10</sup> The work of the African Commission will be discussed later in this article.

The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights ("African Human Rights Court Protocol")<sup>11</sup> was adopted in 1998 and entered into force in January 2004, but as of February 2006 the Court had not yet been established. The African Charter has further been supplemented by the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted in 2003, which entered into force in November 2005.<sup>12</sup>

In addition to these instruments the African regional human rights system is comprised of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969<sup>13</sup> which entered into force in 1974 (45 ratifications); and the

<sup>8</sup> OAU Doc OAU/CAB/LEG/67/3/Rev.5. Reprinted in *Human Rights Law in Africa* 134.

<sup>9</sup> See status of ratification of AU treaties, available on [www.africa-union.org](http://www.africa-union.org). Ratification status given for the treaties mentioned in this article is as of February 2006. For the three reservations to the African Charter, see *Human Rights Law in Africa* 108. The last state to ratify was Eritrea, in 1999.

<sup>10</sup> ACHPR/RP/XIX. Reprinted in *Human Rights Law in Africa* 540.

<sup>11</sup> OAU/LEG/MIN/AFCHPR/PROT (I) Rev. 2. Reprinted in *Human Rights Law in Africa* 170.

<sup>12</sup> The Protocol is discussed further below. As of February 2006 the Protocol had been ratified by 17 states.

<sup>13</sup> OAU Doc CAB/LEG/24.3. Reprinted in *Human Rights Law in Africa* 122. See G. OKOTH-OBBO: "Thirty years on: A legal review of the 1969 OAU Refugee Convention" *African Yearbook of International Law* 8, 2000, p. 3.



African Charter on the Rights and Welfare of the Child ("African Children's Charter") of 1990,<sup>14</sup> which came into force in 1999 (38 ratifications). A special monitoring body for the African Children's Charter, the African Committee on the Rights and Welfare of the Child, discussed further below, held its first meeting in 2002.<sup>15</sup>

The relatively unknown Cultural Charter for Africa of 1976 came into force in 1990.<sup>16</sup> Another treaty with relevance for human rights is the Convention on Preventing and Combating Corruption adopted in 2003.<sup>17</sup> This convention has as of February 2006 not entered into force. The Convention for the Elimination of Mercenarism in Africa was adopted in 1977 and entered into force in 1985.<sup>18</sup> The OAU Convention on the Prevention and Combating of Terrorism of 1999 entered into force in 2002.<sup>19</sup> There are also two African regional treaties dealing with the environment.<sup>20</sup>

### 3. The norms recognised in the African Charter on Human and Peoples' Rights

As alluded to earlier, the 1963 OAU Charter did not recognise the realisation of human rights as such as one of the objectives of that body. It would only be in 1979 that a meeting of experts was gathered by the OAU in Dakar, Senegal, to prepare a preliminary draft of an African human rights charter.<sup>21</sup> This culminated in the Draft African Charter on Human and Peoples' Rights, finalised in Banjul, The Gambia, in 1981 (resulting in the name "Banjul Charter", which is sometimes used for the African Charter). The African Charter was formally adopted by the OAU in Kenya later that year.<sup>22</sup>

<sup>14</sup> OAU Doc CAB/LEG/153/Rev 2. Reprinted in *Human Rights Law in Africa* 143.

<sup>15</sup> See A. LLOYD: "The first meeting of the African Committee of Experts on the Rights and Welfare of the Child" 2 *African Human Rights Law Journal*, 2002, p. 320. See also A. LLOYD: "Report of the second ordinary session of the African Committee of Experts on the Rights and Welfare of the Child" 3 *African Human Rights Law Journal*, 2003, p. 329; A. LLOYD: "The Third Ordinary Session of the African Committee of Experts on the Rights and Welfare of the Child", 4 *African Human Rights Law Journal*, 2004, p. 139.

<sup>16</sup> Reprinted in *Human Rights Law in Africa* 125.

<sup>17</sup> See K. OLANIYAN: "The African Union Convention on Preventing and Combating Corruption: A critical appraisal", 4 *African Human Rights Law Journal*, 2004, p. 74.

<sup>18</sup> Reprinted in *Human Rights Law in Africa* 132.

<sup>19</sup> Reprinted in *Human Rights Law in Africa* 175. A Protocol to this Convention was adopted in 2004.

<sup>20</sup> The African Convention on the Conservation of Nature and Natural Resources (1968/69), reprinted in *Human Rights Law in Africa* 116, revised version adopted 2003, not yet in force, reprinted in C. HEYNS (ed.): *Compendium of key human rights documents of the African Union*, 2005, and the [Bamako] Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (1991/98), reprinted in *Human Rights Law in Africa* 153. See M. VAN DER LINDE: "A review of the African Convention on Nature and Natural Resources", 2 *African Human Rights Law Journal*, 2002, p. 33.

<sup>21</sup> The meeting was convened in terms of a decision of the Assembly of Heads of State and Government of the OAU, AHG/Dec 115 (XVI) Rev 1 1979, reprinted in C Heyns (ed) *Human Rights Law in Africa* 1999, 2002, p. 127.

<sup>22</sup> For the documents leading up to the adoption of the African Charter, see *Human Rights Law in Africa* 1999, pp. 65-105.

A number of reasons have been advanced why the OAU changed its approach and gave the concept of human rights the prominence offered by the Charter during the late 1970s and the early 1980s. These include the increased emphasis on human rights internationally at the time (as in the foreign policy of President Carter of the United States of America), the use to which the concept of human rights was put in international bodies such as the UN and the OAU to condemn the apartheid practices in South Africa, and abhorrence at the human rights violations that had taken part in some member state in particular Uganda, Central Africa and Equatorial Guinea.<sup>23</sup>

The African Charter recognises a wide range of internationally accepted human rights norms, but also has some unique features.<sup>24</sup> The Charter recognises not only civil and political rights, but also economic, social and cultural rights, not only individual but also peoples' rights, not only rights but also duties, and it has a singular system for the restrictions on rights. The Charter also contains provisions concerning interpretation which are very generous towards international law.

### 3.1. *Civil and political rights*

The civil and political rights recognised in the African Charter are in many ways similar to those recognised in other international instruments, and these rights have in practical terms received most of the attention of the African Commission.<sup>25</sup>

The Charter recognises the following civil and political rights: The prohibition of discrimination (Art. 2); equality (Art. 3); bodily integrity and the right to life (Art. 4); dignity and prohibition of torture and inhuman treatment (Art. 5); liberty and security (Art. 6); fair trial (Art. 7); freedom of conscience (Art. 8); information and freedom of expression (Art. 9); freedom of association (Art. 10); assembly (Art. 11); freedom of movement (Art. 12); political participation (Art. 13); property (Art. 14); and independence of the courts (Art. 26).

A number of possible shortcomings in respect of civil and political rights in the African Charter could be noted. There is for example no explicit reference in the Charter to a right to privacy; the right against forced labour is not mentioned by name; and the fair trial rights<sup>26</sup> and the right of political participation<sup>27</sup> are given scant

<sup>23</sup> See U.O. UMOZURIKE: *The African Charter on Human and Peoples' Rights*, 1997, pp. 27-28.

<sup>24</sup> In his welcoming address in 1979 to the Meeting of African Experts preparing the Draft African Charter in Dakar, Senegal, Leopold Senghor, President of Senegal, referred to the example set by international human rights instruments, and said: "As Africans, we shall neither copy, nor strive for originality, for the sake of originality ... [Y]ou must keep constantly in mind our values of civilisation and the real needs of Africa." Reprinted in *Human Rights Law in Africa 1999*, 78 at 79.

<sup>25</sup> For a full discussion, see C. HEYNS: "Civil and political rights in the African Charter" in M. EVANS & R. MURRAY (eds.): *The African Charter on Human and Peoples' Rights*, 2002, p. 137.

<sup>26</sup> There is, for example, no explicit reference to the right to a public hearing, the right to interpretation, the right against self-incrimination and the right against double jeopardy. However, the Commission has interpreted the Charter protection to encompass some of these rights.

<sup>27</sup> While Art. 13(1) the Charter recognises the right "of every citizen to participate freely in the government of his country", it does not stipulate that this should be done through regular, free and fair elections, based on universal suffrage.

protection when measured against international standards. However, the Commission has in resolutions and in cases before it interpreted the Charter protection to encompass some of the rights or aspects of rights not explicitly included in the Charter.

An overview of some Commission decisions in respect of individual communications provides a sample of the Commission's approach:

- In a number of cases the Commission has held that there is a positive duty on state parties to protect those in their jurisdictions against violations by non-state actors. In a case concerning Mauritania, the Commission found that, although slavery had officially been abolished in that country, this was not effectively enforced by the government.<sup>28</sup> In a case involving Chad, the Commission likewise held that the state's failure to protect people under its jurisdiction during a civil war against attacks by unidentified militants, not proven to be government agents, constituted a violation of the right to life.<sup>29</sup>
- The imposition of *Shari'a* law on non-Muslims in Sudan has been held to violate freedom of religion.<sup>30</sup>
- In *Media Rights Agenda and Others v Nigeria*<sup>31</sup> the Commission ruled against the Abacha government's clampdown on freedom of expression, and determined that politicians should be provided less protection from free expression than other people. As with many of the seemingly more bold decisions of the Commission, this decision was unfortunately handed down only after the Abacha regime had fallen. Nevertheless, a positive precedent was set.
- The suspension of national elections was held to violate the right to political participation in *Constitutional Rights Project and Another v Nigeria*.<sup>32</sup>
- The Commission has held that decrees ousting the jurisdiction of courts to examine the validity of such decrees, violate the fair trial provision of the Charter,<sup>33</sup> and also that the creation of special tribunals, dominated by members of the executive, violated the same right.<sup>34</sup>
- The Commission has held that an execution after an unfair trial is a violation of the right to life,<sup>35</sup> but that the death penalty in itself does not violate the African Charter.<sup>36</sup>

<sup>28</sup> *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000).

<sup>29</sup> *Commission Nationale des Droit de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995). See also *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

<sup>30</sup> *Amnesty International and Others v Sudan* (2000) AHRLR 297 (ACHPR 1999).

<sup>31</sup> (2000) AHRLR 200 (ACHPR 1998).

<sup>32</sup> (2000) AHRLR 191 (ACHPR 1998).

<sup>33</sup> *Civil Liberties Organisation v Nigeria* (2000) AHRLR 188 (ACHPR 1995).

<sup>34</sup> *Constitutional Rights Project (in respect of Akamu and Others) v Nigeria* (2000) AHRLR 180 (ACHPR 1995). The appearance of impartiality is enough to constitute a violation (para 12).

<sup>35</sup> *Forum of Conscience v Sierra Leone* (2000) AHRLR 293 (ACHPR 2000).

<sup>36</sup> *Interights and Others (on behalf of Bosch) v Botswana*, communication 240/2001, 17th Annual Activity Report.

- A constitutional amendment providing that anyone who wanted to stand for office in the presidential election in Zambia would have to prove that both parents were Zambians by birth or descent was found to be in violation of the Charter in *Legal Resources Foundation v Zambia*.<sup>37</sup>

### 3.2. Socio-economic rights

A unique feature of the Charter is the inclusion of socio-economic rights in a regional human rights treaty, alongside the civil and political rights mentioned above.<sup>38</sup> The inclusion of socio-economic rights in the Charter is significant, in that it emphasises the indivisibility of human rights and the importance of developmental issues, which are obviously important matters in the African context.

At the same time, the fact that only a modest number of socio-economic rights are explicitly included in the Charter, should be noted. The Charter only recognises “a right to work under equitable and satisfactory conditions” (Art. 15), a right to health (Art. 16) and a right to education (Art. 17). Some prominent socio-economic rights are not mentioned by name, such as the right to food, water, social security and housing.<sup>39</sup>

The socio-economic rights in the Charter have received scant attention from the Commission, but in one case the Commission has dealt extensively with the issue, and has in effect held that some internationally recognised socio-economic rights which are not explicitly recognised in the Charter should be regarded as being implicitly included.

The so-called *SERAC v Nigeria*<sup>40</sup> decision dealt with the destruction of part of Ogoniland by Shell, acting in collaboration with the government of Nigeria. The Commission held that the presence of an implicit right to “housing or shelter” in the Charter has to be deduced from the explicit provisions on health, property and family life in the Charter.<sup>41</sup> Similarly, a right to food has to be read into the right to dignity and other rights.<sup>42</sup> It was accepted, without argument or reasoning, that the Ogoni’s constituted a “people”.

<sup>37</sup> (2001) AHRLR 84 (ACHPR 2001).

<sup>38</sup> For a discussion, see C. ODINKALU: “Implementing economic, social and cultural rights under the African Charter on Human and Peoples’ Rights” in EVANS & MURRAY (n 23 above) 178.

<sup>39</sup> It is also somewhat surprising that the socio-economic rights that are recognised, are not explicitly made subject to the usual internal qualifiers that apply in respect of such rights in most international instruments —such as the provision that the state is only required to ensure progressive realisation, subject to available resources, etc. This is made more problematic by the absence of a general limitation clause in the Charter, as discussed below. A selected few socio-economic rights, stated in near absolute terms, are recognised, while other obvious candidates for inclusion are not present. The Protocol on the Rights of Women, adopted in 2003 and discussed further below, qualifies the provision of socio-economic rights by providing that the government should take appropriate measures with regard to most socio-economic rights. However, it provides for an unqualified right to adequate housing (article 16).

<sup>40</sup> *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*, n 29 above.

<sup>41</sup> Para 60.

<sup>42</sup> Para 65.

The approach of the Commission of filling in the gaps in the Charter as was done in the *SERAC* case could be seen as a creative and bold move on the part of the Commission, but it could also be argued that a too wide divergence between the Commission's interpretation of the Charter and the Charter itself could compromise legal certainty.<sup>43</sup>

### 3.3. *Women's rights*

The way in which the Charter deals with gender issues has been a bone of contention. Article 18(3) provides as follows:

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

This lumping together of women and children, in an article which deals primarily with the family, re-enforces outdated stereotypes about the proper place and role of women in society and has been partially responsible for the drive to adopt the Protocol to the African Charter on the Rights of Women in Africa.<sup>44</sup> The Protocol was adopted by the AU Assembly in 2003 and received the required 15 ratifications on 26 October 2005 thereby entering into force on 25 November 2005.

The Protocol on the Rights of Women is detailed with 24 substantive articles, some dealing with specific issues affecting women, while other deal with rights that should apply equally to men and women, some of which are not included in the African Charter. The rights in the Protocol include elimination of discrimination against women (Art. 2); right to dignity (Art. 3); right to life, integrity and security of person (Art. 4); elimination of harmful practices (Art. 5); marriage (Art. 6); separation, divorce and annulment of marriage (Art. 7); access to justice and equal protection of the law (Art. 8); political participation (Art. 9); peace (Art. 10); protection of women in armed conflict (Art. 11); education (Art. 12); economic and social welfare rights (Art. 13); health and reproductive rights (Art. 14); food security (Art. 15); adequate housing (Art. 16); positive cultural context (Art. 17); healthy and sustainable environment (Art. 18); right to sustainable development (Art. 19); widow's rights (Art. 20); inheritance (Art. 21); special protection of elderly women (Art. 22); women with disabilities (Art. 23); and women in distress (Art. 24).

The African Commission (and after its establishment also the African Court) is responsible for monitoring the implementation of the Charter and as a result also for the Protocol, thereby avoiding the duplication that exists with regard to children's

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<sup>43</sup> C. HEYNS: "The African regional human rights system: In need of reform?", 1 *African Human Rights Law Journal*, 2001, p. 155.

<sup>44</sup> M. NSIBIRWA: "A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women", 1 *African Human Rights Law Journal*, 2001, p. 40. See also J. ODER: "Reclaiming women's social and economic rights in Africa - The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" *ESR Review* vol 5 no 4. A further important development for women's rights was the adoption by the AU Heads of State and Government of a "Solemn Declaration on Gender Equality in Africa" in July 2004.

issues, where as mentioned above a separate Committee on the Rights and Welfare of the Child has been established.

### 3.4. Peoples' rights

In its protection of peoples' rights the Charter goes further than any other international instrument.<sup>45</sup>

All "peoples", according to the Charter, have a right to be equal (Art. 19); to existence and self-determination (Art. 20); to freely dispose of their wealth and natural resources (Art. 21); to economic, social and cultural development (Art. 22); to peace and security (Art. 23); and to a satisfactory environment (Art. 24). Clearly part of the motivation for the recognition of "peoples' rights" lies in the fact that entire "peoples" have been colonised and otherwise exploited in the history of Africa.

The concept of "peoples" has been referred to in some of the cases before the Commission, including the following:

- In a case concerning Katangese secessionists in the former Zaire,<sup>46</sup> a complaint was brought on the basis that the Katangese people had a right, as a people, to self-determination in the form of independence. The Commission ruled that there was no evidence that a Charter provision had been violated, because widespread human rights violations or a lack of political participation by the Katangese people had not been proven. This could be understood to suggest that if these conditions were met, secession by such a "people" could be a permissible option. On the other hand the Commission was careful to emphasize that self-determination can also take forms other than secession, such as self-government, local government, federalism, or confederalism.<sup>47</sup>
- In a case concerning the 1994 *coup d'état* against the democratically elected government of The Gambia, the Commission held that this violated the right to self-determination of the people of The Gambia as a whole.<sup>48</sup> The same conclusion was reached when the Abacha government in Nigeria annulled internationally recognised free and fair elections.<sup>49</sup>
- In the abovementioned *SERAC* case the Commission held that the right to a satisfactory environment in Article 24 requires the state "to take reasonable ... measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources."<sup>50</sup> Significantly, here the rights of peoples are also used outside the context of self-determination.

<sup>45</sup> See R. MURRAY and S. WHEATLEY: "Groups and the African Charter on Human and Peoples' Rights", 25 *Human Rights Quarterly*, 2003, p. 213.

<sup>46</sup> *Katangese Peoples' Congress v Zaire* (2000) AHRLR 71 (ACHPR 1995).

<sup>47</sup> As above, para 4.

<sup>48</sup> *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000).

<sup>49</sup> *Constitutional Rights Project and Another v Nigeria* (2000) AHRLR 191 (ACHPR 1998) para 52.

<sup>50</sup> N 40 above, para 52.

### 3.5. *Limitations, derogation and duties*

The way in which the African Charter deals with restrictions on all rights, including civil and political rights, presents a significant obstacle. The African Charter does not contain a general limitation clause (although, as is noted below, Article 27(2) is starting to play this role). This means that there are no general guidelines spelled out in the Charter on how its rights should be limited —no clear “limits on the limitations”, so to speak—. A well-defined system of limitations is important. A society in which rights cannot be limited will be ungovernable, but it is essential that appropriate human rights norms be set for the limitations.

A number of the articles of the Charter setting out specific civil and political rights do contain limiting provisions applicable to those particular rights. Some of these internal limitations clearly spell out the procedural and substantive norms with which limitations should comply,<sup>51</sup> while others only describe the substantive requirements which limitations must meet.<sup>52</sup>

A last category of these internal limitation clauses merely poses the apparently procedural requirement that limitations should be done “within the law”. An example of this category of internal limitations is Article 9(2), which provides as follows: “Every individual shall have the right to express and disseminate his opinions within the law.” This kind of limitation is generally known as a “claw-back clause”. They seem to recognise the right in question only to the extent that such a right is not infringed upon by national law.

If that was the correct interpretation, the claw-back clauses would obviously undermine the whole idea of international supervision of domestic law and practices and render the Charter meaningless in respect of the rights involved. Domestic law will in those cases have to be measured according to domestic standards; a senseless exercise. What is given with the one hand is seemingly taken away with the other.

As has been noted above, however, the Charter has a very expansive approach in respect of interpretation. In terms of Articles 60 and 61, the Commission has to draw inspiration from international human rights law in interpreting the provisions of the Charter. The Commission has used these provisions very liberally in a number of instances to bring the Charter in line with international practices, and the claw-back clauses are no exception.

In the context of the claw-back clauses, the African Commission has held that provisions in articles that allow rights to be limited “in accordance with law”, should be understood to require such limitations to be done in terms of domestic legal provisions, which comply with international human rights standards.<sup>53</sup>

<sup>51</sup> For example, Art. 11 recognises the right of freedom of assembly, subject to the following proviso: “The exercise of this right shall be subject only to necessary restrictions provided for by law, in particular those enacted in the interests of national security, the safety, health, ethics and rights and freedoms of others.”

<sup>52</sup> Art. 8 provides that the freedom of conscience and religion may only be limited in the interest of “law and order”.

<sup>53</sup> The Commission has held, eg, in *Media Rights Agenda and Others v Nigeria*, n 31 above, para 66: “To allow national law to have precedent over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradicting national law.”

Through this interpretation, the Commission has gone a long way towards curing one of the most troublesome inherent deficiencies in the Charter. However, it remains unfortunate that the Charter, to those who have not had the benefit of exposure to the approach of the Commission, will continue to appear to condone infringements of human rights norms as long as it is done through domestic law.

The African Charter does not contain a provision either allowing or disallowing derogation from its provisions during a state of emergency. This has led the Commission to the conclusion that derogation is not possible.<sup>54</sup> This could mean that in real emergencies the Charter will be ignored, and will not exercise a restraining influence.

The Charter recognises, in addition to rights, also duties.<sup>55</sup> For example, individuals have duties towards their family and society,<sup>56</sup> and state parties have the duty to promote the Charter.<sup>57</sup>

Perhaps the most significant provision under the heading "Duties" is Article 27(2), which reads as follows: "The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest." This provision has now in effect been given the status by the African Commission of a general limitation clause. According to the Commission: "The only legitimate reasons for limitations of the rights and freedoms of the African Charter are found in Article 27(2) ...".<sup>58</sup>

The Commission's use of Article 27(2) as a general limitation clause seems to confirm the view that the concept of "duties" should not be understood as a sinister way of saying rights should first be earned, or that meeting certain obligations is a precondition for enjoying human rights. Rather, it implies that the exercise of human rights, which people have simply because they are human beings<sup>59</sup> may be limited by the duties which they also have. Rights precede duties, and the recognition of certain duties is merely another way of signifying the kind of limitations that may be placed on rights.

## 4. Norms recognised in other treaties

### 4.1. OAU Convention Governing Specific Aspects of Refugee Problems in Africa

The definition of refugee in Article 1 of the OAU Refugee Convention is broader than in the UN Refugee Convention. In addition to "well founded fear of being

<sup>54</sup> *Commission Nationale des Droits de l'Homme et des Libertés v Chad*, n 29 above, para 21.

<sup>55</sup> See M. MUTUA: "The Banjul Charter and the African cultural fingerprint", 35 *Virginia Journal of International Law*, 1995, p. 339.

<sup>56</sup> Arts. 27, 28 & 29.

<sup>57</sup> Art. 25. See also Art. 26.

<sup>58</sup> See *Media Rights Agenda and Others v Nigeria*, n 31 above, para 68. See also *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999), para 41.

<sup>59</sup> "[I]nherent in a human being", in the words of Art. 5 of the Charter, in respect of dignity.



persecuted for reasons of race, religion, nationality, membership of a particular group or political opinion”<sup>60</sup> the OAU Convention also stipulates that anyone who is compelled to leave his country because of “external aggression, occupation, foreign domination or events seriously disturbing public order” shall be considered a refugee. The OAU Convention does not provide for any supervisory system but the African Commission has considered a number of communications dealing with refugees.<sup>61</sup>

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

The African Children’s Charter, adopted in 1990, in many respects has similar provisions to the UN Convention on the Rights of the Child (CRC), adopted less than a year prior to the African instrument. In some respects the African Children’s Charter goes further than the CRC. No person under 18 years should be recruited or take part in direct hostilities.<sup>62</sup> The CRC sets the age-limit at 15 years, though a Protocol adopted in 2000 raises it to 18 years. The African Children’s Charter goes further than the CRC also in other aspects, for example in prohibiting child marriages.<sup>63</sup> The implementation of the African Children’s Charter lies with the African Committee of Experts on the Rights and Welfare of the Child, discussed further below.

#### 4.3. *AU Convention on Preventing and Combating Corruption*

Corruption depletes the resources necessary for a state to be able to fulfil its human rights obligations. This is recognised in the AU Convention on Preventing and Combating Corruption which provides as one of the objectives of the Convention to “[p]romote socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights.”<sup>64</sup> The Convention also provides for rights linked to the fight against corruption such as access to information.<sup>65</sup> The Convention provides for an Advisory Board on Corruption as a follow up mechanism.<sup>66</sup>

<sup>60</sup> OAU Convention Art. 1(1), UN Refugee Convention Art. 1(a)(2) read with the Protocol relating to the status of refugees (1967) Art. 1(2). For a discussion see Lawyers for Human Rights *African exodus*, 1995.

<sup>61</sup> See eg *Organisation Mondiale Contre la Torture and Others v Rwanda* (2000) AHRLR 282 (ACHPR 1996) and *Rencontre Africaine pour la Défense des Droits de l’Homme v Zambia* (2000) AHRLR 321 (ACHPR 1996).

<sup>62</sup> Art. 22(2).

<sup>63</sup> Art. 21(2). See F. VILJOEN: “Introduction to the African Commission” in *Human Rights Law in Africa* 491. See also D.M. CHIRWA: “The merits and demerits of the African Charter on the Rights and Welfare of the Child” 10 *International Journal of Children’s Rights*, 2002, p. 157.

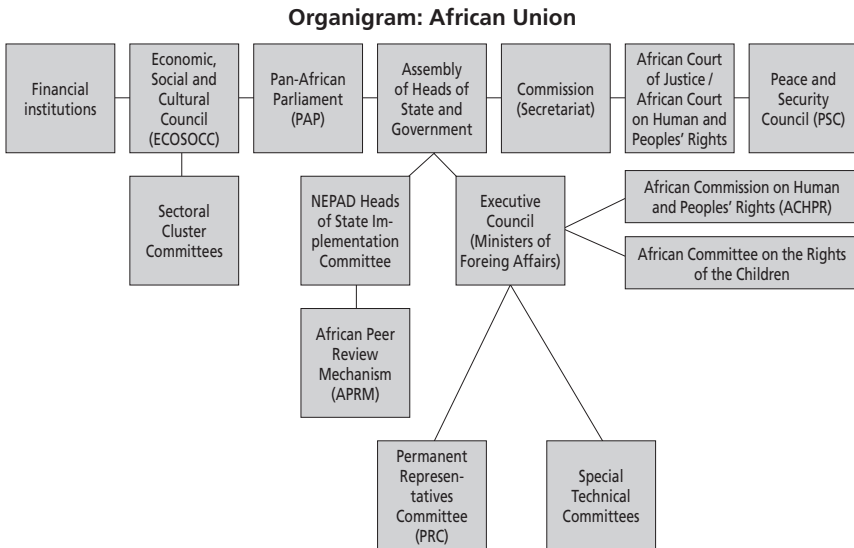
<sup>64</sup> AU Convention on Preventing and Combating Corruption, Art. 2(4).

<sup>65</sup> As above, Art. 9.

<sup>66</sup> As above, Art. 22.

## 5. Organs established for the enforcement of Human Rights

The establishment of the African Union has seen an unprecedented institutional proliferation of bodies with a human rights mandate.<sup>67</sup> Schematically, the continental bodies with a human rights function may be set out as follows:



Source: C. HEYNS (ed.): *Compendium of key human rights documents of the African Union*, 2005, p. 92.

### 5.1. The role of the main organs of the AU in protecting human rights

The African Union has the following main organs: the Assembly of Heads of State and Government, the Executive Council, the Permanent Representative Committee, the Pan-African Parliament, the African Court of Justice, the AU Commission, Specialised Technical Committees, the Economic, Social and Cultural Council, financial institutions and the Peace and Security Council.<sup>68</sup>

The Pan-African Parliament shall “ensure the full participation of African peoples in the development and economic integration of the continent.”<sup>69</sup> The Parlia-

<sup>67</sup> A. LLOYD & R. MURRAY: “Institutions with responsibility for human rights protection under the African Union”, 48 *Journal of African Law*, 2004, p. 165

<sup>68</sup> AU Constitutive Act Art. 5. The PSC is not included as a main organ of the AU in the original Constitutive Act, but will be so under amendments that have not yet entered into force. For a discussion see Heyns and others, n 6 above, 252.

<sup>69</sup> AU Constitutive Act Art. 17(1). The functions of the Parliament is set out in the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament,

ment has as one of its objectives to “promote the principles of human rights and democracy in Africa”.<sup>70</sup> The Parliament held its first session in 2004. Each state party to the Protocol establishing the Parliament sends five national parliamentarians to the Parliament that meets twice a year in Midrand, South Africa. Currently its powers are purely consultative and advisory.<sup>71</sup>

The Economic, Social and Cultural Council (ECOSOCC) is “an advisory organ composed of different social and professional groups”.<sup>72</sup> Its purpose is to provide a role for civil society in the AU. ECOSOCC has as one of its objectives to “promote and defend a culture of good governance, democratic principles and institutions, popular participation, human rights and freedoms as well as social justice.”<sup>73</sup> The statutes of ECOSOCC were adopted by the AU Assembly in July 2004 and the Council held its first meeting in Addis Ababa in March 2005.<sup>74</sup>

The African Court of Justice, one of the main organs of the AU, has not yet been established as the Protocol setting up the court had only received eight of 15 ratifications required to enter into force by November 2005. The Court of Justice will be further discussed below in relation to the African Court on Human and Peoples’ Rights.

The attempts to develop mechanisms to deal with conflict in Africa are also of importance in trying to prevent massive human rights violations.<sup>75</sup> The Protocol on the Peace and Security Council (PSC), adopted in 2002, entered into force in 2003. The PSC is composed of 15 members. The criteria for membership include “respect for constitutional governance ... as well as the rule of law and human rights ...”<sup>76</sup>.

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adopted by the OAU Assembly in March 2001 and entered into force in 2003. Reprinted in *Human Rights Law in Africa* 212. See K.D. MAGLIVERAS & G.J. NALDI: “The Pan-African Parliament of the African Union: An overview”, 3 *African Human Rights Law Journal*, 2003, p. 222 and T. DEMEKE: “The new Pan-African Parliament: Prospects and challenges in view of the experience of the European Parliament”, 4 *African Human Rights Law Journal*, 2004, p. 53.

<sup>70</sup> Protocol on the Pan-African Parliament Art. 3(2).

<sup>71</sup> It is clear that the Parliament has yet to find its feet, but among the activities with relevance for human rights are its fact-finding mission to Darfur, which produced a report to the April 2005 session of the Parliament and its decision at the same session to send missions to Côte d’Ivoire and the Democratic Republic of Congo. The Parliament will also play a role in the African Peer Review process. See Recommendations on the New Partnership for Africa’s Development and the African Peer Review Mechanism, adopted at second ordinary session of the Pan-African Parliament, 16 September - 1 October 2004, PAP-Rec 002/04. [http://www.iss.co.za/AF/RegOrg/unity\\_to\\_union/pdfs/pap/3rdres.pdf](http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/pap/3rdres.pdf) (accessed 26 September 2005).

<sup>72</sup> AU Constitutive Act Art. 22(1).

<sup>73</sup> ECOSOCC Statutes Art. 2(5).

<sup>74</sup> <http://www.africa-union.org/organs/ecosocc/home.htm>. ECOSOCC has a membership of 150 organisations, constituting the General Assembly, and a 18-member Standing Committee. To facilitate policy input into the other AU organs the Council has ten sectoral cluster committees, roughly corresponding to the departments of the AU Commission (Political affairs; peace and security; infrastructure and energy; social affairs and health; human resources, science and technology; trade and industry; rural economy and agriculture; economic affairs; women and gender; and cross-cutting issues. Human rights are considered under political affairs.)

<sup>75</sup> See Declaration on the Establishment of a Mechanism for Conflict Prevention, Management and Resolution, AHG/DECL. 3 (XXIX). The Central Organ of this Mechanism was included as an organ of the AU at the 37<sup>th</sup> OAU Assembly in 2001, AHG/Dec. 160 (XXXVII). According to Art. 22 of the Protocol Relating to the Establishment of Peace and Security Council of Africa, ASS/AU/Dec. 2(1), this Council will replace the earlier Mechanism.

<sup>76</sup> PSC Protocol Art. 5(2)(g).

Article 4 of the PSC Protocol provides that the Council shall be guided by the AU Constitutive Act, the UN Charter and the Universal Declaration of Human Rights. The Protocol further provides as one of the objectives of the Council to

promote and encourage democratic practices, good governance and the rule of law, protect human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law, as part of efforts for preventing conflicts.<sup>77</sup>

Article 19 of the Protocol provides that:

the Peace and Security Council shall seek close cooperation with the African Commission on Human and Peoples' Rights in all matters relevant to its objectives and mandate. The Commission on Human and Peoples' Rights shall bring to the attention of the Peace and Security Council any information relevant to the objectives and mandates of the Peace and Security Council.

From its Annual Activity Reports it appears that the Commission has not made use of this provision, though it has made reference to PSC resolutions in its own country specific resolutions.<sup>78</sup>

The development programme of the AU, the New Partnership for Africa's Development (NEPAD), links human rights to development and provides for the African Peer Review Mechanism, (APRM), discussed below.

## 5.2. *The African Commission on Human and Peoples' Rights*

As was mentioned earlier, the African Charter, as adopted in 1981, provided only for the creation of a Commission and not a Court on Human Rights, in contrast with the other two regional systems in the world—in Europe and in the Americas, which, at the time, had both—.<sup>79</sup> The Commission is not formally an organ of the AU, as it was created by a separate treaty.

### 5.2.1. THE COMMISSIONERS

The African Commission consists of 11 commissioners, who serve in their individual capacities.<sup>80</sup> The Commission meets twice a year in regular sessions for a period of up to two weeks. They are nominated by state parties to the Charter and elected by the Assembly.<sup>81</sup> The Secretariat of the Commission is based in Banjul, The

<sup>77</sup> PSC Protocol Art. 3(f).

<sup>78</sup> See eg Resolution on Côte d'Ivoire and Resolution on Darfur (2004), 17<sup>th</sup> Annual Activity Report of the African Commission on Human and Peoples' Rights

<sup>79</sup> With the entry into force of Protocol 11 to the European Convention on Human Rights in November 1998 the European Commission on Human Rights was abolished.

<sup>80</sup> Art. 31.

<sup>81</sup> Art. 33.

Gambia. The Commission alternates its meetings between Banjul and other African capitals. The Commission has a protective as well as a promotional mandate.<sup>82</sup>

Although the Charter provides that the Commissioners should be independent there have been many instances where the independence of individual Commissioners has been questioned. The fact that many Commissioners have been serving civil servants or ambassadors has received criticism. For example, a Commissioner from Mauritania elected in 2003 became a minister in his home country shortly thereafter. An important step was, however, taken when the AU requested nominations to fill the post of four Commissioners in 2005. In a *note verbale* to the member countries in April 2005 the AU Commission provided guidelines that excluded senior civil servants and diplomatic representatives.<sup>83</sup> The four new Commissioners elected at the July 2005 summit all hold positions which are independent from government.<sup>84</sup>

The main mechanisms employed by the Commission to fulfil its task of supervising compliance with Charter norms by state parties are the following:

#### 5.2.2. THE COMPLAINTS PROCEDURE

Both states and individuals may bring complaints to the African Commission alleging violations of the African Charter by state parties.

The procedure by which one state brings a complaint about an alleged human rights violation by another state is not often used.<sup>85</sup> Currently one such case is pending before the Commission, between the Democratic Republic of Congo and three neighbouring countries.<sup>86</sup>

The so-called individual communication or complaints procedure is not clearly provided for in the African Charter. One reading of the Charter is that communications could be considered only where "serious or massive violations" are at stake, which then triggers the rather futile Article 58 procedure, described below. However, the African Commission has accepted from the start that it has the power to deal with complaints about any human rights violations under the Charter even if "serious or massive" violations are not at stake, provided the admissibility criteria are met.<sup>87</sup>

<sup>82</sup> Art. 45(1) & (2). See V. DANKWA: "The promotional role of the African Commission on Human and Peoples' Rights" in EVANS and MURRAY (n 23 above) 335.

<sup>83</sup> BC/OLC/66/VOL.XVIII

<sup>84</sup> The four members elected were Ms Peine Alapini-Gansou lawyer and NGO activist in Benin; Mr Musa Ngary Bitaye, president of the Bar Association of The Gambia; Ms Faith Pansy Tlakula, Chief Electoral Officer, Independent Electoral Commission of South Africa; and Mr Mumba Malila, chairperson of the Zambian Human Rights Commission.

<sup>85</sup> Provided for in Arts. 47-54.

<sup>86</sup> Communication 227/99, *Democratic Republic of the Congo v Burundi, Rwanda and Uganda*. In a case brought by a Burundian organisation against a number of neighbouring states it was held by the Commission that the complainant was in essence representing the state. However, the communication was considered under the individual communication procedure as the organisation's standing to bring the complaint was not challenged by the responding governments. Communication 157/96, *Association Pour la Sauvegarde de la Paix au Burundi v Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia*, 17th Annual Activity Report of the African Commission.

<sup>87</sup> Following directly after the provisions on inter-state communications, Art. 55 provides for "other communications". The Commission has proceeded from the assumption that this refers to individual communications. See *Jawara v The Gambia*, n 48 above, para 42.

The Charter is silent on the question who can bring such complaints, but the Commission practice is that complaints from individuals as well as NGOs are accepted. From the case law of the Commission it is clear that the complainant does not need to be a victim or a family member of a victim.<sup>88</sup> The Commission in the *SERAC* case expressed its thanks to

the two human rights NGOs which brought the matter under its purview ... This a demonstration of the usefulness to the Commission and individuals of *actio popularis*, which is wisely allowed under the African Charter.<sup>89</sup>

The individual complaints procedure is used much more frequently than the inter-state mechanism of the African Charter, although not as frequently as one would have expected on a continent with the kind of human rights problems that Africa has.<sup>90</sup> This could to some extent be attributed to a lack of awareness about the system, but even where there is awareness, there is often not much faith that the system can make a difference.

According to a recent study on the compliance of states with the findings of the Commission there has been full state compliance in six of the 44 cases where the Commission found state parties in violation of the African Charter. The study finds that there has been non-compliance in 13 cases, partial compliance in 14 cases, seven cases of situational compliance (through change of government) and unclear compliance in four cases.<sup>91</sup> Viljoen and Louw finds that

in the analysis of cases of full and clear non-compliance, it appears that the most important factors are political, rather than legal. The nature of the case, the elaborateness of reasoning or the type of remedy required seems to have little bearing on the likelihood of adherence by states. The only factor of relevance that relates to the treaty body itself is follow-up activities undertaken by the Commission.<sup>92</sup>

As with other complaints systems, the African Charter poses certain admissibility criteria before the Commission may entertain complaints.<sup>93</sup> These criteria include the requirement of exhausting local remedies. The Commission may be approached only once the matter has been pursued in the highest court in the country in question, without success, or a reasonable prospect of success.

The Commission has stated that for a case not to be admissible local remedies must be available, effective, sufficient and not unduly prolonged.<sup>94</sup> In *Purohit and*

<sup>88</sup> *Malawi African Association and Others v Mauritania*, n 28 above, para 78.

<sup>89</sup> N 29 above, para 49.

<sup>90</sup> The Commission has received around 300 individual communications since its inception in 1987, many of them submitted by NGOs.

<sup>91</sup> F. VILJOEN & L. LOUW: "An assessment of state compliance with the recommendations issued by the African Commission on Human and Peoples' Rights between 1993 and 2003" (forthcoming, on file with authors).

<sup>92</sup> As above.

<sup>93</sup> Art. 56. For a discussion, see F. VILJOEN: "Admissibility under the African Charter" in EVANS & MURRAY (n 25 above) 61.

<sup>94</sup> *Jawara v The Gambia*, n 48 above.

*Moore v the Gambia*,<sup>95</sup> a case dealing with detention in a mental health institution, the Commission gave a potentially far-reaching decision on the exhaustion of local remedies when it held that:

the category of people being represented in the present communication are likely to be people picked up from the streets or people from poor back-grounds and as such it cannot be said that the remedies available in terms of the Constitution are realistic remedies for them in the absence of legal aid services.<sup>96</sup>

The Charter also has a requirement that the communications are “not written in disparaging or insulting language directed against the state concerned and its institutions or to the Organization of African Unity”.<sup>97</sup>

When a complaint is lodged, the state in question is asked to respond to the allegations against it. If the state does not respond, the Commission proceeds on the basis of the facts as provided by the complainant.<sup>98</sup> If the decision of the Commission is that there has indeed been a violation or violations of the Charter, the Commission sometimes also makes recommendations that continuing violations should stop (eg prisoners be released);<sup>99</sup> or specific laws be changed<sup>100</sup>, but often the recommendations are rather vague, and the state party is merely urged to “take all necessary steps to comply with its obligations under the Charter.”<sup>101</sup> Sometimes there is no provision at all as to remedies,<sup>102</sup> while in other cases the remedies provided are elaborate.<sup>103</sup> Recently the Commission required some states to report on measures taken to comply with the recommendations in their state reports to the Commission.<sup>104</sup>

Article 58 provides that “special cases which reveal the existence of serious or massive violations of human and peoples’ rights” must be referred by the Commission to the Assembly, which “may then request the Commission to undertake an in-depth study of these cases”. Where the Commission has followed this route, the

<sup>95</sup> *Purohit and Moore v The Gambia*, communication 241/2001, 16th Annual Activity Report of the African Commission on Human and Peoples’ Rights.

<sup>96</sup> As above, para 37.

<sup>97</sup> Art. 56(3). The Commission has only used this provision in one case, see *Ligue Camerounaise des Droits de l’Homme v Cameroon* (2000) AHRLR 61 (ACHPR 1997).

<sup>98</sup> See, for example, *Commission Nationale des Droits de l’Homme et des Libertés v Chad*, n 29 above, para 25. See also R. MURRAY: “Evidence and fact-finding by the African Commission” in EVANS and MURRAY (n 25 above) 100.

<sup>99</sup> See eg *Constitutional Rights Project (in respect of Akamu and Others) v Nigeria*, n 34 above; *Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria* (2000) AHRLR 183 (ACHPR 1995); *Constitutional Rights Project and Another v Nigeria*, n 49 above; *Constitutional Rights Project v Nigeria I* (2000) AHRLR 241 (ACHPR 1999); *Centre for Free Speech v Nigeria* (2000) AHRLR 250 (ACHPR 1999).

<sup>100</sup> See eg *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998); *Avocats Sans Frontières (on behalf of Bwampamye) v Burundi*; (2000) AHRLR 48 (ACHPR 2000).

<sup>101</sup> *Constitutional Rights Project and Others v Nigeria*, n 58 above.

<sup>102</sup> *Huri-Laws V Nigeria* (2000) AHRLR 273 (ACHPR 2000)

<sup>103</sup> See eg *Malawi African Association and Others v Mauritania*, n 28 above; *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*, n 29 above.

<sup>104</sup> See eg *Legal Resources Foundation v Zambia*, n 37 above.

Assembly has failed to respond, but the Commission has nevertheless made findings that such massive violations have occurred. Today, the Commission does not seem to refer cases anymore to the Assembly in terms of Article 58.<sup>105</sup>

The Charter does not contain a provision in terms of which the Commission has the power to take provisional or interim measures requesting state parties to abstain from causing irreparable harm.<sup>106</sup> However, the Rules of Procedure of the Commission grants the Commission the power to do so. The Commission has used these provisional or interim measures in a number of cases. One such case concerned Ken Saro-Wiwa and other Ogoni activists, who had been sentenced to death by a special tribunal, set up by the military government in Nigeria.<sup>107</sup> In that particular case, the interim measures requesting the Nigerian government not to execute them were ignored. The execution of Saro-Wiwa and the others caused a worldwide outcry. The Commission said in its decision that it had tried to assist Nigeria to meet its obligations under the Charter by means of the interim measures, and the execution in the face of the interim measures consequently violated Article 1.<sup>108</sup>

### 5.2.3. CONSIDERATION OF STATE REPORTS

Each state party is required to submit a report every two years on its efforts to comply with the African Charter.<sup>109</sup> Although it is not provided for in the African Charter that the reports should be submitted specifically to the African Commission, the Commission recommended to the Assembly that the Commission be given the mandate to consider the reports. The Assembly has endorsed this recommendation.<sup>110</sup> NGOs are allowed to submit shadow or alternative reports, but the impact of this avenue is diminished by the lack of access of NGOs to the state reports to which they are supposed to respond. The reports are considered by the Commission in public sessions. Reporting by state parties should be done in accordance with guidelines adopted by the Commission. Currently there are two sets of guidelines; one, adopted in 1988<sup>111</sup> is long and complex and one, adopted in 1998<sup>112</sup> which is overly brief.<sup>113</sup> The relationship between these guidelines is unclear and it should be

<sup>105</sup> It seems that the Commission will be able to refer such cases to the PSC (Art. 19 of the PSC Protocol, see above).

<sup>106</sup> Rule 111. For a discussion, see G.J. NALDI: "Interim measures of protection in the African system for the protection of human and peoples' rights", 2 *African Human Rights Law Journal*, 2002, p. 1.

<sup>107</sup> *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*, n 102 above.

<sup>108</sup> However, in a recent decision the Commission held that Article 1 could only be violated if "the State does not enact the necessary legislative enactment". *Interights and Others (on behalf of Bosch) v Botswana*, n 36 above, para 51. In that case non-compliance with interim measures was not held to have constituted a violation of Art. 1.

<sup>109</sup> Art. 62. For a discussion, see M. EVANS and others "The reporting mechanism of the African Charter on Human and Peoples' Rights" in EVANS & MURRAY (n 25 above) 36 and GW Mugwanya "Examination of state reports by the African Commission: A critical appraisal", 1 *African Human Rights Law Journal*, 2001, p. 268.

<sup>110</sup> See AHG/Res 176 (XXIV) 1988, reprinted in *Human Rights Law in Africa* 1999 128.

<sup>111</sup> Reprinted in *Human Rights Law in Africa* 507.

<sup>112</sup> Reprinted in *Human Rights Law in Africa* 569.

<sup>113</sup> Evans and others, 45.



a priority of the Commission to clarify the situation as regards guidelines on state reporting.<sup>114</sup>

Reporting under the Charter, as in other systems, is aimed at facilitating both introspection and inspection. "Introspection" refers to the process when the state, in writing its report, measures itself against the norms of the Charter. "Inspection" refers to the process when the Commission measures the performance of the state in question against the Charter. The objective is to facilitate a "constructive dialogue" between the Commission and the states.

Reporting has been very tardy, and 18 of the 53 state parties to the African Charter have never submitted any report. In 2001 the Commission started to issue concluding observations in respect of reports considered. Their usefulness is diminished by the fact that neither the state reports nor the concluding observations are published by the Commission.

#### 5.2.4. SPECIAL RAPORTEURS AND WORKING GROUPS

The Commission has appointed a number of special rapporteurs, with varying degrees of success. There is no obvious legal basis for the appointment of the special rapporteurs in the Charter; it has been described as another innovation of the Commission.<sup>115</sup> The special rapporteurs are all members of the Commission.

There has been widespread criticism of the lack of effective action on the part of the Special Rapporteur on Summary, Arbitrary and Extrajudicial Executions, while the same is true of at least the first incumbent of the position of Special Rapporteur on the Conditions of Women in Africa. In contrast, the Special Rapporteur on Prisons and Conditions of Detention in Africa has set the standards for years to come.

The Commission has recently appointed special rapporteurs on freedom of expression; refugees and internally displaced persons; and human rights defenders. The Commission has also established a committee to monitor the implementation of the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines). In addition a Working Group on Indigenous People or Communities and a Working Group on Economic, Social and Cultural Rights have been established. Some of the members of these working groups are not members of the Commission.

<sup>114</sup> The Commission's Working Group on Economic, Social and Cultural Rights has in its mandate to "elaborate a draft revised guidelines pertaining to economic, social and cultural rights, for State reporting". Resolution On Economic, Social And Cultural Rights In Africa, ACHPR/Res.73(XXXVI)04, adopted by the African Commission on Human and Peoples' Rights, December 2004.

<sup>115</sup> It has been argued that the legal justification is to be found in Article 46, which allows for "any appropriate method of investigation". For a discussion, see J. HARRINGTON: "Special rapporteurs of the African Commission on Human and Peoples' Rights" 1 *African Human Rights Law Journal*, 2001, p. 247 and M. EVANS & R. MURRAY: "The special rapporteurs in the African system" in EVANS & MURRAY (n 25 above) 280. For the mandates of the special rapporteurs, see [www.achpr.org](http://www.achpr.org).

### 5.2.5. ON-SITE VISITS

The Commission has since 1995 conducted a number of on-site visits.<sup>116</sup> These involve a range of activities, from fact finding to good offices and general promotional visits.<sup>117</sup> Many mission reports have never been published.

### 5.2.6. RESOLUTIONS

The Commission has adopted resolutions on a number of human rights issues in Africa. In addition to country-specific and other more *ad hoc* resolutions, they have adopted resolutions on topics such as the following: fair trial; freedom of association; human and peoples' rights education; humanitarian law; contemporary forms of slavery; anti-personnel mines; prisons in Africa; the independence of the judiciary; the electoral process and participatory governance; the International Criminal Court; the death penalty; torture; HIV/AIDS; and freedom of expression.<sup>118</sup>

### 5.2.7. RELATIONSHIP WITH NGOS

NGOs have a special relationship with the Commission.<sup>119</sup> Large numbers have registered for observer status.<sup>120</sup> NGOs are often instrumental in bringing cases to the Commission; they sometimes submit shadow reports; propose agenda items at the outset of Commission sessions; and provide logistical and other support to the Commission, for example by placing interns at the Commission and providing support to the special rapporteurs and missions of the Commission. NGOs often organise special NGO workshops just prior to Commission sessions, and participate actively in the public sessions of the Commission. NGOs also collaborate with the Commission in developing normative resolutions and new protocols to the African Charter.

### 5.2.8. INTERACTION WITH AU POLITICAL BODIES

The Annual Activity Reports of the Commission, which reflect the decisions, resolutions, and other acts of the Commission, are submitted each year for permission to publish to the meetings of the Assembly of Heads of State and Government

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<sup>116</sup> Countries that members of the Commission has conducted promotional or fact-finding missions to include: Burkina Faso (2001), Chad (2000), Congo (2004), Côte d'Ivoire (2001, 2003), Democratic Republic of Congo (2004), Djibouti (2000, 2002), Libya (2002), Mauritania (1996), Mozambique (2000), Niger (2002), Nigeria (1997, 2005), Senegal (1996, 2002), Seychelles (2001), Sierra Leone (2000, 2004), South Africa (2001), Sudan (1996, 2002), Togo (1995), Zambia (2001) and Zimbabwe (2002).

<sup>117</sup> See R. MURRAY: "Evidence and fact-finding by the African Commission" in EVANS & MURRAY (n 25 above) 100.

<sup>118</sup> For the text of the resolutions see *Human Rights Law in Africa* and [www.achpr.org](http://www.achpr.org).

<sup>119</sup> See A. MOTALA: "Non-governmental organisations in the African system" in EVANS & MURRAY (n 25 above) 246 and CE Welch: *Protecting Human Rights in Africa: Strategies and Roles of Non-governmental Organisations* (1995).

<sup>120</sup> See the resolution reprinted in *Human Rights Law in Africa* 572. National human rights institutions may also register for observer/affiliate status. See the resolution reprinted in *Human Rights Law in Africa* 574.

(“Assembly”) of the OAU/AU that have traditionally taken place in June or July of the following year. The Assembly has now delegated the authority to discuss the Activity Report to the Executive Council.<sup>121</sup> However, it is still formally adopted by the Assembly as this is required by the Charter.<sup>122</sup> The AU has recently started to have summits twice a year and it remains to be seen whether the African Commission will submit a report to each summit.

In practice the Assembly has served as a rubber stamp for the publication of the report by the Commission containing its decisions, but the principle that the very people in charge of the institutions whose human rights practices are at stake—the Heads of State—should take the final decision on publicity undermines the legitimacy of the system. When the 17th Annual Activity Report was considered by the Executive Council at the AU summit in July 2004, Zimbabwe complained that it had not had the opportunity to respond to allegations contained in the report concerning a fact-finding mission undertaken by the Commission to Zimbabwe. The Council suspended the publication of the report and its publication was only finally authorised at the summit in January 2005.

#### 5.2.9. INFORMATION ON THE COMMISSION

The decisions of the Commission are published in the *African Human Rights Law Reports* (AHRLR).<sup>123</sup> A small but growing number of secondary publications on the work of the Commission have appeared.<sup>124</sup> Information on the work of the Commission is available on a number of websites.<sup>125</sup> It is unclear why the Commission makes little use of its own web site which should be the main resource on information on the work of the Commission. In December 2005 the Commission published the 18th Annual Activity Report, adopted by the AU Assembly in July 2005 on its web site. However, the 17th Annual Activity Report, adopted by the AU Assembly in January 2005 had as of February 2006 not been published on the web site.

### 5.3. *The African Court on Human and Peoples’ Rights*

Several reasons have been advanced why only a Commission, and not a Court, was provided for in the African Charter in 1981 as the body responsible for monitoring compliance of state parties with the Charter. On the one hand there is perhaps

<sup>121</sup> Decision on the 16th Annual Activity Report of the African Commission on Human and Peoples’ Rights, Doc. Assembly/AU/7 (II), July 2003, para 5.

<sup>122</sup> African Charter on Human and Peoples’ Rights Art. 59(3).

<sup>123</sup> The first volume, covering the period 1987-2000 was published in 2004.

<sup>124</sup> Among the most prominent are E. ANKUMAH: *The African Commission on Human and Peoples’ Rights: Practice and Procedures*, 1996; U.O. UMOZURIKE: *The African Charter on Human and Peoples’ Rights*; EVANS & MURRAY (eds), n 25 above; and F. OUGUERGOUZ: *The African Charter on Human and Peoples’ Rights: a comprehensive agenda for human rights*, 2003. For a detailed overview, see F. VILJOEN: “Introduction to the African Commission and the regional human rights system” in *Human Rights Law in Africa* 385. Developments in the system are covered on a regular basis in the *African Human Rights Law Journal*, since 2001.

<sup>125</sup> www.achpr.org; www.africa-union.org; www.chr.up.ac.za.

the more idealistic explanation that the traditional way of solving disputes in Africa is through mediation and conciliation, not through the adversarial, "win or lose" mechanism of a court. On the other hand there is the view that the member states of the OAU were jealous of their newly founded sovereignty.<sup>126</sup>

The notion of a human rights court for Africa would be taken up by the OAU 13 years after the adoption of the African Charter when, in 1994, the Assembly adopted a resolution requesting the Secretary-General of the OAU to convene a Meeting of Experts to consider the establishment of an African Court on Human and Peoples' Rights.<sup>127</sup>

Ostensibly, the concept of human rights was accepted widely enough in Africa in the early 1990s for the decision to be taken to give more "teeth" to the African human rights system, in the form of a Court. This came in the wake of the different waves of democratisation on the national level, epitomised by the watershed elections in Benin in 1991, and the advent of democracy in South Africa in 1994. Worldwide, of course, the idea of human rights also gained prominence after the end of the cold war.

The Protocol on the African Court on Human and Peoples' Rights was adopted in Addis Ababa, Ethiopia, in 1998.<sup>128</sup> The Protocol entered into force in January 2004 and by February 2006 had received 22 ratifications.

The AU Assembly decided at its summit in July 2004 that the African Human Rights Court should merge with the African Court of Justice. The protocol establishing the latter court had been adopted by the Assembly in July 2003,<sup>129</sup> without any reference to a merger with the human rights court. The Protocol on the African Court of Justice had as of February 2006 not received the required 15 ratifications to enter into force. A draft merger protocol has been circulated<sup>130</sup> and at the AU summit in July 2005 the Assembly decided that:

2. ... a draft legal instrument relating to the establishment of the merged court comprising the Human Rights Court and the Court of Justice should be completed for consideration by the next ordinary sessions of the Executive Council and the Assembly ...

<sup>126</sup> J. HARRINGTON: "The African Court on Human and Peoples' Rights" in EVANS & MURRAY (eds.), n 23 above, 306. For commentary on the envisaged Court, see also G.J. NALDI & K. MAGLIVERAS: "Reinforcing the African system of human rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights", 16 *Netherlands Quarterly of Human Rights*, 1998, p. 431; N.J. UDOMBANA: "Towards the African Court on Human and Peoples' Rights: Better late than never" 3 *Yale Human Rights and Development Law Journal*, 2000, p. 45; M. MUTUA: "The African Human Rights Court: A two-legged stool?" 21 *Human Rights Quarterly*, 1999, p. 350; "The African Court on Human and Peoples' Rights" in EVANS & MURRAY (n 23 above) 305; and F. VILJOEN: "A Human Rights Court for Africa, and Africans", 30 *Brooklyn Journal of International Law*, 2004, p. 1.

<sup>127</sup> AHG/Res 230 (XXX) 1994. Reprinted in *Human Rights Law in Africa* 1999 139.

<sup>128</sup> The documents leading up to the adoption of the African Human Rights Court Protocol are reprinted in *Human Rights Law in Africa* 1999 233-296. The Protocol is reprinted in *Human Rights Law in Africa*, 2004, p. 170.

<sup>129</sup> Protocol of the Court of Justice of the African Union, adopted by the AU Assembly of Heads of State and Government, Maputo, July 2003.

<sup>130</sup> AMNESTY INTERNATIONAL: "African Union: The establishment of an independent and effective African Court on Human and Peoples' Rights must be a top priority", IOR 30/002/2005, 28 January 2005.

3. ALSO DECIDES that all necessary measures for the functioning of the Human Rights Court be taken, including particularly the election of the judges, the determination of the budget and the operationalization of the Registry;

4. FURTHER DECIDES that the Seat of the merged court shall be at a place to be decided upon by the Member States of the Eastern Region, which shall also serve as the seat of the Human Rights Court pending the merger.<sup>131</sup>

Once the African Human Rights Court is in place, it will “complement” the protective mandate of the Commission under the Charter.<sup>132</sup> Under the 1998 Protocol the Court will consist of 11 judges, serving in their individual capacities,<sup>133</sup> nominated by state parties to the Protocol,<sup>134</sup> and elected by the Assembly. Only the president will be full-time.<sup>135</sup> The judges were elected by the Assembly in January 2006.<sup>136</sup> The seat of the Court is still to be determined,<sup>137</sup> but as is clear from the above resolution it will be in the Eastern Region.

The Protocol provides that the judges will be appointed in their individual capacities,<sup>138</sup> and their independence is guaranteed.<sup>139</sup> Special provision is made that “[t]he position of judge of the Court is incompatible with any activity that might interfere with the independence or impartiality of such a judge ...”.<sup>140</sup> Judges will not be allowed to sit in a case if that judge is a national of a state which is a party to the case.<sup>141</sup>

In respect of the Court’s findings, the Protocol determines that “[i]f the Court finds that there has been a violation of a human or peoples’ right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.”<sup>142</sup> The Court is explicitly granted the powers to adopt provisional measures.<sup>143</sup>

By ratifying the Protocol, states accept that the Commission and the states involved will be in a position to take a case that has appeared before them to the African Human Rights Court, to obtain a legally binding decision.<sup>144</sup> Individuals and those who act on their behalf will be able to take cases to the Court only in respect of those states that have made an additional declaration specifically authorising them to do so. In such instances the case will have to be taken “directly” to the Court, presumably

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<sup>131</sup> Decision on the merger of the African Court on Human and Peoples’ Rights and the Court of Justice of the African Union, Assembly/AU/dec.83 (v).

<sup>132</sup> Art. 2 of the African Human Rights Court Protocol.

<sup>133</sup> Art. 11.

<sup>134</sup> Art. 12.

<sup>135</sup> Art. 15(4).

<sup>136</sup> Assembly/AU/Dec.100(VI).

<sup>137</sup> Art. 25.

<sup>138</sup> Art. 11.

<sup>139</sup> Art. 17.

<sup>140</sup> Art. 18. This is significant because one of the criticisms against the Commission has been that a number of Commissioners have been closely associated with the Executive in their countries.

<sup>141</sup> Art. 22.

<sup>142</sup> Art. 27(1).

<sup>143</sup> Art. 27(2).

<sup>144</sup> Art. 5(1).

bypassing the Commission or, if the Commission was approached first, the case can be taken to the Court without requiring the authorisation of the Commission.<sup>145</sup>

Article 3(1) reads as follows:

The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the states concerned.

The phrase “any other relevant human rights instrument ratified by the states concerned”, according to most commentators, means that adjudication in respect of even UN and sub-regional human rights instruments will fall within the jurisdiction of the African Human Rights Court, provided that such treaties have been ratified by the states concerned.<sup>146</sup>

It is submitted that nothing is wrong with the African Human Rights Court interpreting the Charter in view of international standards.<sup>147</sup> Advisory opinions<sup>148</sup> could also deal with other treaties.<sup>149</sup> However, if contentious cases could be brought to the African Human Rights Court on the ground that for example UN treaties have been violated, with no reference to the African Charter, this could lead to conflicting decisions in the different systems.<sup>150</sup>

The jurisdiction of the African Human Rights Court to give advisory opinions was mentioned above. In addition to member states and AU organs any “African organization recognized by the [AU]” can request an advisory opinion from the Court.<sup>151</sup> Advisory jurisdiction has proved useful in the Inter-American human rights system and could potentially play a similar role in the African system.

<sup>145</sup> Art. 5(3), read with Art. 34(6). Only Burkina Faso has so far made such a declaration, and it will be surprising if many states follow soon. Where a state has not made the additional declaration, the access of the individual to the Court will be as it is under the Inter-American system—the individual does not have the power to seize the Court himself or herself—. Where the additional declaration has been made, the situation of the individual resembles the current European system, where there is no Commission and the Court is accessed directly. For criticism, see Heyns, n 41 above.

<sup>146</sup> See Naldi & Magliveras (n 128 above) 435; Udombana (n 128 above) 90; and Mutua (n 128 above) 354.

<sup>147</sup> It should be noted, however, that technically Arts. 60 and 61 of the African Charter only provide that this should be done by the African Commission.

<sup>148</sup> A.P. VAN DER MEI: “The advisory jurisdiction of the African Court on Human and Peoples’ Rights”, 5 *African Human Rights Law Journal*, 2005, p. 27.

<sup>149</sup> The American Convention on Human Rights provides in Art. 64(1) that the Inter-American Court can give “interpretation of this Convention or of other treaties concerning the protection of human rights in the American states”. The Inter-American Court has interpreted “other treaties” to include “[a]ny provision dealing with the protection of human rights set forth in any international treaty applicable in the American States ...”. See Advisory Opinion OC-1/82 of 24 September 1982, Series A No 1, para 52, quoted in van der Mei, n 151 above, 38.

<sup>150</sup> At the same time it should be recognised that the potential of conflicting decisions will arise in practice only in cases of “direct” access to the Court, where the Commission is bypassed, because in other cases one of the admissibility criteria before the Commission will be compatibility with the Charter. It is submitted that the word “relevant” in the phrase “relevant human rights instrument” should be understood to restrict the contentious jurisdiction of the Court beyond the Charter and the Protocol only to those instances where the instrument in question has explicitly provided for the jurisdiction of the Court. See Heyns, n 41 above, 166-167.

<sup>151</sup> African Human Rights Court Protocol Art. 4.

#### 5.4. *African Committee on the Rights and Welfare of the Child*

The African Children's Charter adopted in 1990 entered into force in November 1999. The 11 members of the African Committee on the Rights and Welfare of the Child, provided for under the Charter, were elected in July 2001. The Committee held its first meeting in 2002. The Committee has adopted its Rules of Procedures and Guidelines for State Reports. States shall report to the Committee within two years from the entry into force of the convention for the state party concerned and thereafter every three years.<sup>152</sup> Apart from state reporting the African Children's Charter, uniquely among international instruments for the protection of the rights of children, also provides for a communication procedure. The Committee has recently received one communication but it remains unclear how the Committee will handle this.<sup>153</sup>

The Committee does not have its own secretariat, and is serviced by the Department for Social Affairs. The AU is in the process of recruiting a Secretary to the Committee. The Committee suffers from a serious lack of resources and the question could be asked whether the Committee should not be merged with the African Commission.<sup>154</sup>

#### 5.5. *The African Peer Review Mechanism*

In July 2002 in Durban the OAU/AU Assembly of Heads of State and Government adopted the Declaration on Democracy, Political, Economic and Corporate Governance (Governance Declaration).<sup>155</sup> The Governance Declaration provided for the establishment of an African Peer Review Mechanism (APRM) "to promote adherence to and fulfillment of the commitments" in the Declaration.<sup>156</sup> The initiative grew out of the New Partnership for Africa's Development (NEPAD), adopted by the AU in 2001 as the development framework for the Union.

The Governance Declaration in section 10 provides as follows:

In the light of Africa's recent history, respect for human rights has to be accorded an importance and urgency all of its own. One of the tests by which the quality of a democracy is judged is the protection it provides for each individual citizen and for the vulnerable and disadvantaged groups. Ethnic minorities, women and children have borne the brunt of the conflicts rag-

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<sup>152</sup> Art. 43. It is unclear how many state parties have actually submitted state reports. However, the Committee has adopted its procedures for considering state reports and has indicated that it will start considering state reports at its meetings. Report of the African Committee on the Rights and Welfare of the Child, EX.CL/200 (VII), report presented to the meeting of the AU Executive Council, 28 June - 2 July 2005, 1.

<sup>153</sup> As above, 11

<sup>154</sup> This would be in line with the current initiative to merge the UN human rights treaty bodies. See Plan of action submitted by the United Nations High Commissioner for Human Rights, A/59/2005/Add.3, para 99.

<sup>155</sup> AHG/235(XXXVIII) Annex I.

<sup>156</sup> As above, para 28.

ing on the continent today. We undertake to do more to advance the cause of human rights in Africa generally and, specifically, to end the moral shame exemplified by the plight of women, children, the disabled and ethnic minorities in conflict situations in Africa.

Under the heading “Democracy and Good Political Governance”, section 13 provides:

In support of democracy and the democratic process, We will: ensure that our respective national constitutions reflect the democratic ethos and provide for demonstrably accountable governance; promote political representation, thus providing for all citizens to participate in the political process in a free and fair political environment; enforce strict adherence to the position of the African Union (AU) on unconstitutional changes of government and other decisions of our continental organization aimed at promoting democracy, good governance, peace and security; strengthen and, where necessary, establish an appropriate electoral administration and oversight bodies, in our respective countries and provide the necessary resources and capacity to conduct elections which are free, fair and credible; reassess and where necessary strengthen the AU and sub-regional election monitoring mechanisms and procedures; and heighten public awareness of the African Charter on Human and Peoples’ Rights, especially in our educational institutions.

At the Durban summit the Assembly also adopted a document specifically dealing with the APRM process, the so-called APRM Base Document:

The process will entail periodic reviews of the policies and practices of participating states to ascertain progress being made towards achieving mutual agreed goals and compliance with agreed political, economic and corporate governance values, codes and standards as outlined in the Declaration on Democracy, Political, Economic and Corporate Governance.<sup>157</sup>

The APRM process consists of a self-evaluation by the country that has signed up to being reviewed and a review by an international review team. It is in this respect similar to the state reporting under the African Charter. However, there are also clear differences such as country visits by the APRM review team and the political stage, when the leader of the country discusses the outcome of the review with his peers in other participating countries.

The highest decision making body in the APRM is the APR Forum consisting of the Heads of State and Government of the participating states. A panel of eminent persons with seven members oversees the review process and a member of this panel is chosen to lead the review team on its country mission.

The international review process consists of five stages.<sup>158</sup> First a background study is carried out by the secretariat assisted by consultants. This stage also includes a support mission to the country that will be reviewed. In the second stage a review team led by one of the eminent persons visits the country for discussions with all

<sup>157</sup> The New Partnership for Africa’s Development (NEPAD): The African Peer Review Mechanism (APRM), AHG/235(XXXVIII) Annex II (APRM base document), para 15.

<sup>158</sup> As above, paras 18-25.



stakeholders, after which the team prepare its report (third stage). A number of partner institutions and independent consultants assist in the process. The fourth stage consists of the submission of the report to the APRM Forum and the discussion among the peers. The last stage is the publication of the report and further discussion in other AU institutions such as the Pan-African Parliament.

The APRM deals with political, economic and corporate governance and socio-economic development. Initially, there was some debate as to the inclusion of political governance aspects, including human rights, but as pointed out by Cilliers: "Without making political governance the core focus of NEPAD, the Partnership is unlikely to make an impact on the continent."<sup>159</sup>

The APRM is voluntary and as of February 2006 26 out of 53 AU member states have signed the Memorandum of Understanding (MOU)<sup>160</sup> that forms the legal basis for the review. In paragraph 24 of the MOU the signatory state agrees to "take such steps as may be necessary for the implementation of the recommendations adopted at the completion of the review process ...". The MOU does not deal with the substantive undertakings of the signatories, but instead refers to the Governance Declaration. The Governance Declaration makes reference to standards that have already been accepted by the participating states in other declarations and treaties, including global and regional human rights instruments. The Governance Declaration comprises of only 28 paragraphs and covers all the areas that are being reviewed, ie political, economic and corporate governance as well as socio-economic development. Further documents have been developed with regard to standards and indicators, including a questionnaire to help participating states complete their self-assessments.

Many observers have emphasised the necessity for civil society to engage the APRM if the mechanism is to make any difference on the ground.<sup>161</sup> The possibilities for such engagement varies greatly between participating countries, as do the approaches to the independence of the national process from government interference.

The APRM integrates the political level of the AU/NEPAD in a way that other parts of the African human rights system have not done.<sup>162</sup> The situation could to some extent be compared to the role, by many perceived as successful, of the Committee of Ministers of the Council of Europe with regard to the European Conven-

<sup>159</sup> J. CILLIERS: "Peace and Security through Good Governance: A guide to the NEPAD African Peer Review Mechanism" *ISS Occasional Paper* 70, April 2003.

<sup>160</sup> Memorandum of Understanding on the African Peer Review Mechanism, adopted by the 6th summit of the NEPAD Heads of State and Government Implementation Committee, 9 March 2003, Abuja, Nigeria, NEPAD/HSGIC/03-2003/APRM/MOU. See also Communiqué on the 4th Summit of the Committee of Participating Heads of State and Government of the African Peer Review Mechanism (APR Forum), 22 January 2006, Khartoum, Sudan, <http://www.nepad.org/2005/files/aprm/communiqueKhartoum2006.pdf> (accessed 3 March 2006).

<sup>161</sup> See eg A. KAJEE: "NEPAD's APRM: A progress report" in *South African Yearbook of International Affairs* 2003/2004.

<sup>162</sup> The main African human rights body, the African Commission on Human and Peoples' Rights submits its Annual Activity Report to the Executive Council of the AU which submits it to the Assembly for adoption. Though the report in 2003 aroused a certain amount of debate, this was not for trying to implement suggestions in the report but rather to shield Zimbabwe from criticism.

tion on Human Rights and the European Social Charter. However, as shown by the activities of the political bodies of the United Nations involved with human rights, the direct involvement of other states in the protection of rights is not without its problems.<sup>163</sup>

As in other parts of the world African leaders have not shown a great interest in criticising their peers. Hence there are reasons to be sceptical about whether “peer pressure” will be employed in the process. However, to solely focus on the pressure exercised at this level would be to underestimate the process as a whole. The APRM Base Document provides for sanctions as a last resort if peer pressure is not enough to convince governments with a lack of political will to rectify identified shortcomings.<sup>164</sup>

There has not been much cooperation between the APRM and the African Commission, which is unfortunate. A look at the composition of the missions to Ghana and Rwanda, the first two states to be subject to the APRM process, also makes it clear that the focus is more on economic than political governance.

## 6. Conclusion

It is not difficult to criticise the African regional human rights system, and many have done so. Some have argued that given the fact that the African Charter was adopted 25 years ago and the African Commission has been in operation for 20 years, the track record of the Commission is less than impressive. The Commission has been poorly managed by its Secretariat for many years. The Commission suffers from a lack of resources, but questions have been asked about the way in which available resources have been managed.

The perceived lack of impartiality of some Commissioners has been a constant bone of contention, as has been the lack of political will in the OAU/AU on a political level to ensure the effectiveness of the Charter system.

The Charter itself has its own internal limitations and thus has required extensive creative interpretation by the Commission. For example, the main mandates of the Commission—receiving individual communications and state reports—are not clearly recognised in the Charter. Some of the internationally accepted rights are recognised only in a cursory form in the Charter.

Moving beyond the Charter system, the need to have established a separate system for the protection of children’s rights (complete with a complaints and reporting mechanism) has been questioned. There is a danger of a proliferation of mechanisms, each one depleting the scarce resources even further, instead of establishing one or two truly effective mechanisms before more are created.

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<sup>163</sup> In his address to the UN Commission on Human Rights on 7 April 2005 UN Secretary General Kofi Annan stated that the work of the Commission had “been undermined by the politicization of its sessions and the selectivity of its work”. He proposed the adoption of a permanent Human Rights Council which should “have an explicitly defined function as a chamber of peer review, and its main task should be to evaluate all States’ fulfilment of all their human rights obligations...”. “Secretary General elaborates on reform of human rights structures in address to Commission on Human Rights’ United Nations press release, 7 April 2005, [www.ohchr.org](http://www.ohchr.org).

<sup>164</sup> APRM base document, n 154 above, para 24.

Some commentators have also focused on the potential weaknesses of the APRM, which relies on Heads of State—who often don't have much interest in promoting a system of finger-pointing about human rights violations—to police each other.

There is undeniably some truth in these criticisms, and much room for improvement. At the same time the merits of the African regional human rights system also need to be recognised.

The fact that Africa has a regional human rights system in the first place—only one of three regions to have that—provides an entry point for international human rights to play a role which would otherwise not have existed. The arguments about a possible “African exception” to the concept of human rights—the idea that human rights is a foreign concept with little applicability to the African situation—are considerably weaker than they would otherwise have been. The regional human rights system provides the possibility of imminent critique through a mechanism created by African states themselves, which cannot be shrugged off as easily as critique expressed by far-away capitals.

The current make-up of the African regional system in terms of the norms recognised and the enforcement mechanisms followed—largely the result of recent changes to the system—are probably well suited to the African environment. The fact that the norms recognised also reflect socio-economic rights, duties and people's rights does not detract from the recognition of civil and political rights, and the rights of individuals, in the system. Their addition ensures that norms that play a strong role on the continent are also reflected. It should be noted in this regard that the jurisprudence of the African Commission so far by and large reflects internationally accepted standards, and constitutes a valuable point of reference also for national courts.

A wider range of enforcement mechanisms than that which is used elsewhere is followed in Africa. While the European regional human rights system places a strong emphasis on the judicial enforcement of individual civil and political rights through the European Court of Human Rights, the African system operates on a number of levels simultaneously. While the African Human Rights Court (under whatever name that may be used) will provide for a component of judicial suspension, the APRM on the other side of the spectrum has a more political character. This is complimented by the quasi-judicial mechanism of the African Commission, which occupies a place somewhere between the other two mechanisms.

On a continent as diverse as Africa, with its multi-layered landscape of human rights issues, employing an enforcement mechanism with such diverse components seems to be a wise approach. Each component of the collective mechanism plays a different and equally important role. Courts can address individual cases in a strong and decisive manner, but they have a more limited role to play in respect of mobilising a political consensus or dealing with widespread human rights violations. A commission on human rights, which can consider state reports and conduct on site visits, can play an important role in identifying human rights issues that need to be addressed in a systematic way and in working towards negotiated solutions which courts cannot always do. To the extent that such a commission functions and is perceived as an independent body, it can to some extent play a role which those placed inside the confines of power politics will have difficulty in playing.

At the same time there is also a role for human rights supervision in the political processes of the continent. A mechanism such as the APRM, although it has limitations because of its political nature, can also precisely for that reason have an impact on aspects of political life which the other mechanisms cannot reach. Standing alone the APRM would probably not have made much of a difference, but as part of a broader network of mechanisms aimed at the protection of human rights the APRM has the potential to play a significant role—and the same probably applies also to the Court and the Commission—.

The issue of political will remains, and it cannot be denied that much remains to be done to turn the potential offered by the available systems and mechanisms into reality. At the same time, the new institutional focus of the African Union on human rights, as reflected in its Constitutive Act, and in the mandates of its organs provides a starting point. Increasingly individuals are encountered within the system in governments and in civil society in Africa who take this orientation seriously. Clearly, it is on their input that the full implementation of an effective African regional human rights system will depend. Much will depend in this regard on the increased realisation of human rights on the domestic level—an international human rights system cannot survive without a critical mass of building-blocks of state parties that take human rights seriously internally at home—.

## 7. Postscript: comparative regional Human Rights Systems

The fairly extensive body of material (primary and secondary) on the African regional system which now exists, allows comparison of the experience in Africa with that in the regional systems of the Americas and Europe, and the development of a new field of study, focusing on the different aspects of the phenomenon of regional human rights systems. Engaging in this task in any detail falls beyond the scope of this study—instead some explanatory remarks will merely be made—.<sup>165</sup>

Some of the issues that will come into play in such a study are how to compare the effectiveness of the different systems and, proceeding from that, to establish why some systems are less or more effective than others. Are regional human rights systems appropriate for all regions? Is it feasible to establish a regional system eg for Asia,<sup>166</sup> or for the Arab-speaking world?<sup>167</sup> Where does regional protection of human rights fit in compared with the global (UN) system on the one hand and the

<sup>165</sup> Some of the ideas advanced here draw on L.R. HELFER and A. SLAUGHTER: "Towards a theory of effective supranational adjudication", 107 *Yale Law Journal*, 1997, p. 275. See also H. KOH: "Why do nations obey international law", 106 *Yale Law Journal*, 1997, p. 2599, D. CASSEL: "Does international human rights law make a difference?", 2 *Chicago Journal of International Law*, 2001, p. 121 and E. NEUMAYER: "Do international human rights treaties improve respect for human rights?", 49 *Journal of Conflict Resolution*, 2005, p. 1.

<sup>166</sup> V. MUNTARBHORN: "Asia, human rights and the new millennium: Time for a regional human rights charter?", 8 *Transnational Law and Contemporary Problems*, 1998, p. 407, S.R. HARRIS: "Asian human rights: Forming a regional covenant", 17 *Asian-Pacific Law and Policy Journal*, 2000, p. 1

<sup>167</sup> M. RISHMAWI: "The revised Arab Charter on Human Rights: A step forward?", 5 *Human Rights Law Review*, 2005, p. 361.

domestic protection of human rights on the other? What role does civil society have in influencing these systems? What is the relationship between the human rights and the other functions of the parent regional bodies (such as the AU)?

To start answering these questions, a more thorough comparison of the different regional systems in the world today than is currently available would have to be made. To a large extent, existing comparisons take the features of the different regional systems and juxtapose them, seen in isolation and divorced from their context.<sup>168</sup> Such comparisons are quick to point out that the case load of the European system is, for example, much higher than that of the African system, that the facilities of the one system are superior to the other, etc. This is a starting point, but analysis will have to move beyond these superficial comparisons, and also bring into the picture the fact that the challenges faced by the respective systems differ in fundamental respects, and this should in turn affect how they are to be assessed.

For example, it is often said that many of the problems faced by the European system—in particular before the enlargement of the membership after the end of the cold war—were “luxury” problems, compared to the gross and systematic human rights violations often witnessed in Africa and the Americas. In Europe, the finer points of fair trial procedure or freedom of expression are often at stake, involving governments with a strong commitment to human rights. On the other side of the spectrum, human rights violations in Africa have often taken the form of massive violations, in states where the basic mechanisms for the protection of human rights are not in place on the domestic level. A comprehensive assessment of the relative effectiveness of a regional human rights system should take the different contexts into account and ask the question how do the systems compare in terms of meeting the often very different challenges they are confronted with.

Based on an initial overview, it seems that considerations such as the following may play a role in terms of the impact of the different regional systems, and are worth investigating further:

Focusing on the role played by the state parties, the following issues may come into play:

- Are there effective domestic systems for the protection of human rights in place in the countries that form part of the regional human rights system? These seem to be the building blocks of any functioning regional system.
- Do states parties have the political will to be subjected to human rights scrutiny? This is reflected among other things in the extent to which they make acceptance of human rights treaties subject to debilitating reservations, and whether they are willing to comply with formal treaty requirements (eg submitting state reports where required, engaging with individual complaints, and implementation of recommendations). It also impacts on the question whether they are prepared to support the creation of a strong regional human rights system through the role they play in the parent regional body (see below).

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<sup>168</sup> See for example C. HEYNS, D. PADILLA & L. ZWAAK: “A schematic comparison of regional human rights systems: An update”, *5 African Human Rights Law Journal*, 2005, p. 308.

- What is the balance in the region between the countries where there is a strong commitment to human rights, and the countries where there is not? Do the majority of the states have a poor or a good domestic human rights record and at what point is a critical mass reached on either side?

On the regional level, a number of considerations could affect the impact of the system:

- Does the human rights system form part of a range of activities of the regional parent body which, taken as a whole, is to the clear benefit of the states concerned? If human rights protection is one part of a broader mandate which includes for example diplomatic, environmental and trade activities, it may have a stronger chance of success. The more attractive the net benefits of membership of the regional body are, the more likely states may be to accept effective human rights supervision as part of the package. In Europe the human rights criteria for membership of the European Union with all the associated financial benefits have led to reforms in many candidate countries.
- Is the human rights component of the activities of the regional human rights body well resourced, in terms of financial as well as human resources (both the number of people involved but also their ability in this field).
- Do the member states follow an approach of appointing independent and capable experts to be members of supervisory bodies?
- Do the members of the supervisory bodies maintain the highest standards of independence and impartiality, and do they develop a jurisprudence which is compelling and persuasive on principled grounds?
- Is there sufficient correspondence or “norm resonance” between the values of the societies in question, and the values recognised in the regional systems? For example, if the concept of the group is important among the people of the region, some emphasis on peoples’ rights and duties could be important in ensuring the legitimacy and as a result the spontaneous acceptance of the systems.
- Is there resonance between the traditional ways of resolving disputes in the region and the methods followed by the supervisory bodies. For example, as was alluded to above in Europe the traditional emphasis on judicial processes could support the central role of the European Court of Human Rights in that system, while the emphasis on non-judicial methods of resolving disputes in Africa could require a more mixed system of supervision, eg not only by a court, but also by a quasi-judicial commission and also by institutions with a strong political component such as the APRM.
- Is there effective publicity for the work of the regional human rights bodies? This appears to be essential in a system based on peer and public pressure.
- Do trade and other links exist between the states involved? Without such links states seem to have little leverage over each other, to implement peer pressure.
- Are the mechanisms in place focused and well coordinated to ensure maximum efficiency in the use of resources? At first glance there seems to be an unnecessary proliferation of systems in the African region.

- Is civil society active in the field of human rights? This applies to NGOs but also other institutions such as universities.
- Is a certain level of homogeneity required for a regional system to be effective?

The issues raised above serve merely to introduce the idea that a comparative study of regional systems in the world today is now a feasible and necessary endeavour, given the availability of information on the African and other regional human rights systems. Comprehensive and ongoing studies of comparative regional human rights systems are bound to open up avenues for the improvement of the existing systems, and will support informed decision-making on the question whether similar systems should be established in other parts of the world.

Regional human rights studies will also serve to integrate into the understanding worldwide of the concept of human rights the experience gained in Africa over the last 20 years in a situation where the concept of human rights is often strongly challenged, but where it arguably also can make its strongest contribution.





# A schematic comparison of regional Human Rights systems

Christof Heyns, David Padilla\* and Leo Zwaak\*\*

Regional systems for the protection of human rights have become an important part of the international system for the protection of human rights, and a rich source of jurisprudence on human rights issues, also on the domestic level. This contribution, taking the form of a schematic exposition, attempts to make possible an easy comparison of the most salient features of the three systems in existence today in terms of the institutions involved and the procedures followed.<sup>1</sup> Except where otherwise indicated, it sets out the situation in respect of the African, Inter-American and European systems as it was at the end of 2005. The usual order in which these systems are presented is reversed, to emphasise that none of these systems necessarily set the norm.

Where two dates are provided behind the name of a treaty, the first one indicates the date when the treaty was adopted, the second the date when it entered into force.

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<sup>1</sup> The English version of this article was published in (2005) 5 *African Human Rights Law Journal*.

|   | AFRICAN   |
|---|---|
| <b>Regional organisations of which the systems form part</b>  | Organisation of African Unity (OAU), replaced by the African Union (AU) in July 2002 (53 members)   |
| <b>General human rights treaties which form the legal base of the systems</b>                                   | <p>African Charter on Human and Peoples' Rights (1981/86) 53 ratifications</p> <p>Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (1998/2004), 21 ratifications</p> <p>The Protocol entered into force in January 2004 and the process is underway to establish the Court. The AU Summit has taken a decision in July 2004 to merge the African Human Rights Court with the African Court of Justice. The entries below are based on the 1998 Protocol.</p> |
| <b>Specialised additional protocols and other prominent instruments that are part of/supplement the systems</b> | <p>OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969/74), 45 ratifications</p> <p>African Charter on the Rights and Welfare of the Child (1990/99), 37 ratifications</p> <p>Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003/2005)<br/>13 ratifications (15 ratifications required)</p>  |
| <b>Supervisory bodies in respect of general treaties</b>  | <p>Court: yet to be established</p> <p>Commission: established in 1987</p>  |

| INTER-AMERICAN  | EUROPEAN   |
|---|--|
| Organisation of American States (OAS) (35 members), established in 1948   | Council of Europe (CoE) (46 members), established in 1949  |
| <p>Charter of the OAS (1948/51), 35 ratifications, read together with the American Declaration on the Rights and Duties of Man (1948)</p> <p>American Convention on Human Rights (1969/78), 24 ratifications (21 states accept the compulsory jurisdiction of the Court)</p>  | Convention for the Protection of Human Rights and Fundamental Freedoms (1950/53), 45 ratifications, and 13 additional protocols, the eleventh protocol created a single court (1994/98)  |
| <p>Inter-American Convention to Prevent and Punish Torture (1985/87), 16 ratifications</p> <p>Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (1988/99), 13 ratifications</p> <p>Protocol to the American Convention on Human Rights to Abolish the Death Penalty (1990/91), 8 ratifications</p> <p>Inter-American Convention on Forced Disappearances of Persons (1994/96), 10 ratifications</p> <p>Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (1994/95), 31 ratifications</p> <p>Inter-American Convention on the Elimination of all forms of Discrimination against Persons with Disabilities (1999/2001), 15 ratifications</p> | <p>European Convention on Extradition (1957/60), 46 ratifications</p> <p>European Convention on Mutual Assistance in Criminal Matters (1959/62), 45 ratifications</p> <p>European Social Charter (1961/65), 27 ratifications</p> <p>European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987/89), 45 ratifications</p> <p>Framework Convention on the Protection of National Minorities (1995/98), 36 ratifications</p> <p>European Social Charter (revised) (1996/99), 19 ratifications</p> <p>Convention on Human Rights and Biomedicine (1997/99), 19 ratifications</p> <p>European Convention on Nationality (1997/2000), 13 ratifications</p> |
| <p>The Court was established in 1979.</p> <p>The Commission was established in 1960 and its Statute was revised in 1979.</p>  | A single Court was established in 1998, taking over from the earlier Commission and Court.   |

|  | AFRICAN  |
|--|--|
| <b>Supervisory bodies based</b>  | Court seat: to be determined (will be in the East Africa region)<br>Commission: Banjul, The Gambia, but often meets in other parts of Africa   |
| <b>Case load: Number of individual communications per year</b>                       | An average of 10 cases per year have been decided by the Commission since 1988; 13 cases during 2000, four during 2001, three during 2002, 13 during 2003 and 11 during 2004.  |
| <b>Case load: Number of inter-state complaints heard since inception</b>             | Commission: One case admitted  |
| <b>Contentious/advisory jurisdiction of Courts</b>                                   | Contentious and broad advisory   |
| <b>Who able to seize the supervisory bodies in the case of individual complaints</b> | Court: After the Commission has given an opinion, only states and the Commission will be able to approach the Court. NGOs and individuals will have a right of "direct" access to the Court where the state has made a special declaration.<br>Commission: Not defined in Charter, has been interpreted widely to include any person or group of persons or NGOs |
| <b>Number of members of the supervisory bodies</b>                                   | Court: will have 11 members<br>Commission: 11  |
| <b>Appointment of members of the supervisory bodies</b>                              | Judges and Commissioners are elected by the AU Assembly of Heads of State and Government.  |

| INTER-AMERICAN  | EUROPEAN  |
|---|---|
| <p>Court: San Jose, Costa Rica. In May 2005 the Court held its first extraordinary session (in Paraguay)</p> <p>Commission: Washington DC, but also occasionally meets in other parts of the Americas</p>   | <p>Strasbourg, France</p>   |
| <p>Court: Until 2003 the Court decided on average 4-7 cases per year. In 2004 the Court issued 15 judgments. By October 2005 11 judgments had been notified. Also one advisory opinion on average per year.</p> <p>Commission: <math>\pm</math> 100 cases decided per year. Total number of cases pending at the moment: <math>\pm</math> 1 000</p> | <p>The Court decides thousands of cases per year, with the case load rapidly increasing. In 2004 the Court delivered:</p> <p>21.191 decisions (1.566 chamber decisions including two decisions of the Grand Chamber, one of which concerned the first ever request by the Committee of Ministers for an advisory opinion, and 19.625 committee decisions);</p> <p>718 judgments (including 15 judgments of the Grand Chamber);</p> <p>At the end of 2004, 78.000 applications were pending before the Court.</p> <p>Communications lodged: 44.100</p> |
| <p>Court: 0</p> <p>Commission: 0</p>  | <p>Court: 13</p>  |
| <p>Contentious and broad advisory</p>   | <p>Contentious and limited advisory</p>   |
| <p>Court: After the Commission has issued a report only states and the Commission can approach the Court. As from 2001, the Commission sends cases to the Court as a matter of standard practice.</p> <p>Commission: Any person or group of persons, or NGO</p>   | <p>Any individual, group of individuals or NGO claiming to be a victim of a violation</p>   |
| <p>Court: 7</p> <p>Commission: 7</p>  | <p>Equal to the number of state parties to the Convention (45)</p>  |
| <p>Judges and Commissioners are elected by the General Assembly of the OAS.</p>   | <p>The Parliamentary Assembly of the CoE elects judges from three candidates proposed by each government. There is no restriction on the number of judges of the same nationality.</p>  |

|   | AFRICAN  |
|---|--|
| <b>Meetings of the supervisory bodies</b>   | <p>Court: Regularity of sessions to be determined</p> <p>Commission: two regular two-week meetings per year. Three extraordinary sessions have been held.</p>  |
| <b>Terms of appointment of members of the supervisory bodies</b>                        | <p>Judges will be appointed for six years, renewable only once, only the President full-time.</p> <p>Commissioners are appointed for six years, renewable, part time.</p>  |
| <b>Responsibility for election of chairpersons or presidents</b>                        | <p>The President is to be elected by the Court (two-year term).</p> <p>The Commission elects its own Chairperson (two-year term).</p>  |
| <b>Form in which findings on merits are made in contentious cases; remedies</b>         | <p>Court: Will render judgments on whether violation occurred, orders to remedy or compensate violation.</p> <p>Commission: Issues reports which contain findings on whether violations have occurred and sometimes makes recommendations.</p>   |
| <b>Permission required from supervisory bodies to publish their decisions</b>           | <p>Court: No</p> <p>Commission: Requires permission of the Assembly. In practice permission has been granted by the Assembly as a matter of course. However, in 2004 the publication of the Activity Report was suspended due to the inclusion of a report on a fact-finding mission to Zimbabwe to which the government claimed it had not been given the opportunity to respond. Permission to publish the report was given in January 2005.</p> |
| <b>Power of supervisory bodies to issue interim/provisional/ precautionary measures</b> | <p>Court: Will have the power</p> <p>Commission: Yes</p>   |
| <b>Primary political responsibility for monitoring compliance with decisions</b>        | Executive Council and Assembly of the AU   |

| INTER-AMERICAN   | EUROPEAN   |
|--|--|
| <p>Court: four regular meetings of two to three weeks per year (one extraordinary session in 2005)</p> <p>Commission: two regular three-week meetings per year and one or two short special sessions</p>                                   | <p>The Court is a permanent body.</p>  |
| <p>Judges are elected for six-year terms, renewable only once, part time.</p> <p>Commissioners are elected for four-year terms, renewable only once, part time.</p>  | <p>Judges are elected for six-year terms, renewable, full-time.</p>  |
| <p>Court: The President is elected by the Court (two-year term).</p> <p>Commission: The Chairperson is elected by the Commission (one-year term).</p>  | <p>The President is elected by the Plenary Court (three-year term).</p>                                    |
| <p>Court: Renders judgments on whether violation occurred, can order compensation for damages or other reparations.</p> <p>Commission: Issues reports which contain findings on whether violations occurred and makes recommendations.</p> | <p>Declaratory judgments are given on whether a violation has occurred; can order "just satisfaction".</p> |
| <p>Court: No</p> <p>Commission: No</p>   | <p>No, decisions and judgments are public.</p>   |
| <p>Court: Yes</p> <p>Commission: Yes</p>   | <p>Yes</p>   |
| <p>General Assembly and Permanent Council of the OAS</p>   | <p>CoE Committee of Ministers</p>  |

|  | AFRICAN   |
|--|---|
| <b>Country visits by Commissions</b>                                       | A small number of fact-finding missions and a larger number of promotional country visits   |
| <b>Commissions have own initiative to adopt reports on state parties</b>   | Yes, occasionally following fact-finding missions   |
| <b>State parties required to submit regular reports to the Commissions</b> | Yes, every two years  |
| <b>Appointment of special rapporteurs by the Commissions</b>               | <p>Thematic rapporteurs: Extra-judicial killings; prisons; and women, freedom of expression, human rights defenders, refugees and displaced persons</p> <p>Follow-up committee on torture (Robben Island Guidelines)</p> <p>Working groups: economic, social and cultural rights; indigenous people or communities</p> <p>Country rapporteurs: None</p> |
| <b>Clusters of rights protected in the general treaties</b>                | Civil and political rights as well as some economic, social and cultural rights, and some "third generation" rights   |
| <b>Recognition of duties</b>   | Yes, extensively  |
| <b>Recognition of peoples' rights</b>                                      | Yes, extensively  |
| <b>Other bodies which form part of the regional systems</b>                | Committee of Experts on the Rights and Welfare of the Child monitors compliance with the African Charter on the Rights and Welfare of the Child   |
| <b>Approximate number of staff</b>   | <p>Court: To be determined</p> <p>Commission: 22 permanent staff members (Secretary to the Commission, seven legal officers, financial/administrative manager, support staff (finance, administration, public relations, documentation officer, librarian)). At the end of 2005 the Commission also had five legal interns.</p>                         |



| INTER-AMERICAN   | EUROPEAN   |
|--|--|
| 95 on-site fact-finding missions conducted so far  | N/A  |
| Yes, 56 country reports and six special reports adopted so far   | N/A  |
| No   | N/A  |
| <p>Thematic rapporteurs: Freedom of expression; prison conditions; women; children; displaced persons; indigenous peoples; migrant workers; human rights defenders; Afro descendants and racial discrimination.</p> <p>Country rapporteurs: Each OAS member state has a country rapporteur drawn from the Commission members.</p>                              | N/A  |
| Civil and political; socio-economic rights in the Protocol.  | Civil and political, also education  |
| In the American Declaration but not in the American Convention   | No, except in relation to the exercise of freedom of expression  |
| No   | No   |
|  | CoE Commissioner for Human Rights (established in 1999): Monitors and promotes human rights in member states; may undertake country visits; assists member states (only with their agreement) to overcome human rights related shortcomings. |
| <p>Court: 15 lawyers, 3 administrative employees, 1 librarian, 1 driver and 1 security guard. Total 26 persons</p> <p>Commission: 24 budgeted posts (2 non-lawyer professionals, 15 lawyers, 8 administrative employees) plus 6 contract lawyers, 8 administrative contract employees, 1 contract part-time librarian, 6 fellows lawyers. Total 45 persons</p> | As of 30 June 2005, total registry staff is approximately 348 of which 187 permanent (including 76 lawyers) and 161 on temporary contracts (including 78 lawyers)  |

|   | AFRICAN  |
|---|--|
| <b>Physical facilities</b>  | Court: To be determined<br>Commission: Two floors used as offices  |
| <b>Annual budget</b>  | Court: To be determined<br>The budget for a session of the Commission is roughly US\$ 200.000.   |
| <b>Other regional human rights fora whose work draws upon/overlaps with the systems</b> | The African Peer Review Mechanism (APRM) of the New Partnership for Africa's Development (NEPAD) reviews human rights practices as part of political governance.   |
| <b>Official websites</b>  | <a href="http://www.achpr.org">www.achpr.org</a><br><a href="http://www.africa-union.org">www.africa-union.org</a>   |
| <b>Other useful websites</b>  | <a href="http://www.chr.up.ac.za">www.chr.up.ac.za</a><br><a href="http://www.issafrica.org">www.issafrica.org</a><br><a href="http://www1.umn.edu/humanrts/regional.htm">www1.umn.edu/humanrts/regional.htm</a> |

| INTER-AMERICAN   | EUROPEAN  |
|--|---|
| <p>Court: Own building</p> <p>Commission: Offices in General Secretariat facilities. 16 individual offices, 1 library, 1 conference room, filing room, 43 computers in total for the Court and Commission</p>  | <p>Five storey building with two wings (16.500 m<sup>2</sup>), two hearing rooms, five deliberation rooms, library; approximately 600 computers</p>   |
| <p>Court: US\$ 1.39 million</p> <p>Commission: US\$ 2.78 million and US\$ 1.28 million in external contributions</p> <p>The Court and Commission's combined budget of US\$ 4.1 million is 5.4% of the total budget of the OAS of US\$ 76.2 million</p> | <p>41 million Euros</p> <p>The Court's budget is approximately 20% of the CoE core budget.</p>  |
|  | <p>European Union (EU): Membership of the CoE and adherence to the European Convention on Human Rights is a prerequisite for membership of the EU. The Convention constitutes general principles of European Union law.</p> <p>European institutions with roles that affect human rights, and which draw upon the Convention, include: The European Council, the Council of the European Union, the European Commission, the European Parliament, the European Court of Justice and the European Ombudsman.</p> <p>Organisation for Security and Co-operation in Europe (OSCE): Although its standards do not impose enforceable international legal obligations as they are mostly of a political nature, it draws heavily upon the principles of the European Convention. It does provide for a multilateral mechanism for the supervision of the human rights dimension of its work.</p> |
| <p><a href="http://www.corteidh.or.cr">www.corteidh.or.cr</a></p> <p><a href="http://www.cidh.org">www.cidh.org</a></p>  | <p><a href="http://www.echr.coe.int">www.echr.coe.int</a></p>   |
| <p><a href="http://www.iidh.ed.cr">www.iidh.ed.cr</a></p>  | <p><a href="http://www.coe.int">www.coe.int</a></p>   |

|  | AFRICAN   |
|--|---|
| <b>Sources (other than websites) where decisions are published</b> | Annual Activity Reports<br><i>African Human Rights Law Reports</i> published by the Centre for Human Rights, University of Pretoria and the Institute for Human Rights and Development in Africa, Banjul, The Gambia  |
| <b>Commonly cited secondary sources on system</b>                  | M. EVANS & R. MURRAY (eds.): <i>The African Charter on Human and Peoples' Rights</i> Cambridge UP, 2002<br>C. HEYNS (ed.): <i>Human Rights Law in Africa</i> Martinus Nijhoff, 2004<br>F. OUGUERGOUZ: <i>The African Charter on Human and Peoples' Rights: A comprehensive agenda for human rights</i> , Kluwer Law International, 2003 |
| <b>Some relevant academic journals</b>                             | <i>African Human Rights Law Journal</i><br><i>East African Journal of Peace and Human Rights</i>  |

| INTER-AMERICAN  | EUROPEAN  |
|---|---|
| <p>Court: Annual report, decisions series, precautionary measures volume, yearbook (with Commission)</p> <p>Commission: Annual report, country reports, rapporteur reports, yearbook (with Court), CD-Rom</p>           | <p>Since 1996 the official European Convention law reports are the <i>Reports of Judgments and Decisions</i>, published in English and French.</p> <p>Prior to 1996 the official law reports were the <i>Series A Reports</i>. The <i>Series B Reports</i> include the pleadings and other documents.</p> <p>From 1974, selected European Commission decisions were reproduced in the <i>Decisions and Reports Series</i>.</p> <p>The <i>European Human Rights Reports</i> series includes selected judgments of the Court, plus some Commission decisions.</p> <p>Decisions and judgments are also available on-line on the Court's official website through the HUDOC database at <a href="http://www.echr.coe.int/Eng/Judgments.htm">www.echr.coe.int/Eng/Judgments.htm</a>. The contents of HUDOC are also accessible via CD-ROM and DVD.</p> |
| <p>T. BUERGENTHAL &amp; D. SHELTON: <i>Protecting Human Rights in the Americas</i> NP Engel Publishers, 1995</p> <p>F. MARTIN <i>et al</i> (eds.): <i>International Human Rights Law and Practice</i>, Kluwer, 1997</p> | <p>P. VAN DIJK &amp; G.J.H. VAN HOOF: <i>Theory and Practice of the European Convention on Human Rights</i>, Kluwer, 1998</p> <p>C. OVEY &amp; R.C.A. WHITE: <i>Jacobs and White, the European Convention on Human Rights</i>, Oxford UP, 2002</p> <p>M. BOYLE, D.J. HARRIS &amp; C. WARBRICK: <i>Law of the European Convention on Human Rights</i>, Butterworths, 1995</p> <p><i>Yearbook of the European Convention on Human Rights</i>, Kluwer</p>  |
| <p><i>Revista del Instituto Interamericano de Derechos Humanos</i> (articles in English and Spanish)</p>  | <p><i>European Human Rights Law Review</i></p> <p><i>Human Rights Law Journal</i></p> <p><i>Netherlands Quarterly of Human Rights</i></p> <p><i>Revue Universelle des Droits de l'Homme</i></p>   |



## Part VII

# Other relevant issues





# The International Financial Institutions and Human Rights. Law and Practice\*

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## Introduction

Human rights obligations of the international financial institutions (IFIs) may flow from different sources. They may originate in norms that are external to the organisations. They may also result from treaties entered into by the organisations, or from internal rules that bind staff.

Even if the existence of human rights obligations for international financial institutions can be established, it remains to be seen whether the IFIs can be held accountable in case of non-compliance. The International Court of Justice does not have jurisdiction to deal with cases brought against the IFIs. Domestic courts face jurisdictional immunity. The World Bank has, on the other hand, established an accountability mechanism: the World Bank Inspection Panel. Requests brought before the Inspection Panel offer valuable insights on World Bank impact on human rights.

## 1. The Law

The international financial institutions<sup>1</sup> are intergovernmental organisations. They are subjects of international law, and thus capable of possessing rights and

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<sup>1</sup> The international financial institutions include IFAD, the International Fund for Agricultural Development, which mobilises financial resources to raise food production and nutrition levels among the poor in developing countries, the IMF, the International Monetary Fund, and the World Bank group consisting of the IBRD, International Bank for reconstruction and development, the IFC, the International Finance Corporation, which assists developing countries through investing in private sector projects, the IDA, International Development Association, which provides loans on concessional terms to poorer developing countries that may not be eligible for loans from the IBRD, ICSID,

duties under international law. The extent of these rights and duties depends on the purposes and functions as specified or implied in the constituent documents of the organisations and developed in practice<sup>2</sup>.

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

Any obligation incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties<sup>3</sup>.

The legal question thus is whether any of these sources contain human rights obligations incumbent upon the international financial institutions.

### 1.1. *Human rights obligations under general rules of international law*

The international financial institutions are intergovernmental organisations enjoying international legal personality<sup>4</sup>.

Intergovernmental organisations are subject to the reach of general rules of international law, *i.e.* custom and general principles of law<sup>5</sup>. Although the establishment of the existence of both customary rules and general principles of law relies on State practice and State legislation, it is generally accepted that their scope is not limited to States. If it were, States would be able to evade their international obligations by creating international organisations acting with impunity. In addition, treaty-based intergovernmental organisations, such as the IFIs, originate in international law, and it therefore follows that the general rules of that system of law apply.

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the International Centre for the Settlement of Investment Disputes and MIGA, the Multilateral Investment Guarantee Agency.

<sup>2</sup> International Court of Justice, *Reparation for injuries suffered in the service of the United Nations*, Advisory opinion, *I.C.J. Reports 1949*, 179-180.

<sup>3</sup> International Court of Justice, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*. Advisory opinion, *I.C.J. Reports 1980*, 89-90.

<sup>4</sup> The constituent documents of the IFIs provide that the institutions have "full juridical personality" "including *i.a.* the capacity to contract and to institute legal proceedings (Article VII, section 2, IBRD Articles of Agreement (27 December 1944), Article IX, section 2, IMF Articles of Agreement (22 July 1944)). The provisions do not explicitly state that the IFIs enjoy *international* legal personality, but there is no doubt that the organisations meet the requirements set by the International Court of Justice in *Reparation for injuries*. Compare SKOGLY, S., *The human rights obligations of the World Bank and the International Monetary Fund*. London: Cavendish, 2001, 64-71.

<sup>5</sup> Compare AMERASINGHE, C.F., *Principles of the institutional law of international organizations*. Cambridge: Cambridge University Press, 1996, 240: "... there can be no doubt that under customary international law (...), international organizations can also have international obligations towards other international persons arising from the particular circumstances in which they are placed or from particular relationships". See also SKOGLY, S., 2001, 113: "... obligations based on customary law and general principles of international law apply to all actors in the international community", and DARROW, M., *Between light and shadow. The World Bank, the International Monetary Fund and international human rights law*. Oxford: Hart, 2003, 126.

Consequently, the international financial institutions are subject to the reach of international human rights law, in so far as human rights law is incorporated in international custom or in general principles of law<sup>6</sup>. There is no doubt that elements of human rights law have obtained the status of custom and of general principles of law<sup>7</sup>.

In order to determine the exact substance and scope of the obligations of general human rights law as applicable to the international financial institutions, the legal capacities of the organisations need to be taken into account. These capacities are defined by the powers and functions entrusted to the organisations. Intergovernmental organisations are prohibited from acting *ultra vires*: they are not allowed to perform acts beyond their powers.

The degree to which the international financial institutions are bound by affirmative duties to act<sup>8</sup> for human rights needs to be determined in the light of the constituent documents and subsequent practice of the organisations. The World Bank and the IMF can only be required to engage in activities for the realisation of human rights to the extent allowed by their respective purposes and functions. As argued below, the application of this test leads to a different result for the World Bank and the IMF.

On the other hand, the international financial institutions are under a duty to respect the prohibitive general rules of human rights law. They are thus under an obligation not to violate or to become complicit in the violation of general rules of human rights law by actions or omissions attributable to them<sup>9</sup>. This obligation results from the starting point that the powers and functions of intergovernmental organisations should not be interpreted in such a way as to permit actions by these organisations that are contrary to prohibitive general rules of international law.

It is difficult, however, to determine the exact content of the general rules of human rights law. The International Court of Justice has not ruled on whether the

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<sup>6</sup> Compare the Committee on accountability of international organisations of the International Law Association: "As part of the process of the humanisation of international law, human rights guarantees are increasingly becoming an expression of the common constitutional traditions of States and can become binding upon international organisations as general principles of law. The consistent practice of the UN General Assembly and of the Security Council points to the emergence of a customary rule to this effect". ILA Committee on accountability of international organisations, Third report presented to the New Delhi Conference, 2002, part two, section three (available from the ILA website).

<sup>7</sup> For a detailed study, see MERON, T., *Human rights and humanitarian norms in customary law*. Oxford: Clarendon, 1989.

<sup>8</sup> Language borrowed from HANDL, G., "The legal mandate of multilateral development banks as agents for change toward sustainable development", *American journal of international law*, Vol. 92, 1998, 662.

<sup>9</sup> Compare Tomuschat: "Nobody doubts, for instance, that international organizations are committed to abide by universally or regionally applicable human rights standards". See TOMUSCHAT, C., "International law: ensuring the survival of mankind on the eve of a new century. General course on public international law", *Receuil des cours*. Vol. 281, 2001, 138; even more specifically: "It has been suggested, for example, that the World Bank is not subject to general international norms for the protection of human rights. In our view, that conclusion is without merit, on legal or policy grounds (...). See SANDS, P., KLEIN, P., *Bowett's Law of international institutions*. London: Sweet & Maxwell, 2001, 459.

Universal Declaration of Human Rights constitutes customary international law<sup>10</sup>. Lists of rights that have achieved this status have been put forward, both in legislation and in legal writings, usually accompanied by the proviso that the lists need to be open-ended in order to allow taking into account new developments. Skogly makes an appealing argument in favour of an approach suggesting that *aspects* of most civil, cultural, economic, political and social rights have attained the status of general rules<sup>11</sup>.

A clear disadvantage of having to rely on custom and general principles is that it opens up the space for challenges to the status of the rule, if only because there is no standing mechanism with the authority to review and determine whether specific human rights obligations have achieved the necessary status or not. It is therefore important that the international financial institutions themselves recognise that they have a legal responsibility for human rights, either as a result of self-regulation or as a consequence of treaties entered into.

## 1.2. *Human rights obligations under IFI constitutions and other internal instruments*

### 1.2.1. ARTICLES OF AGREEMENT

There are no references to human rights in the constituent documents of the international financial institutions.

Article I of the IBRD Articles of Agreement sets out the World Bank's purposes. These include assistance to the reconstruction and development of the territories of its members, *i.a.* by "encouraging international investment for the development of the productive resources of members, thereby assisting in raising productivity, the standard of living and conditions of labour in their territories"<sup>12</sup>.

The World Bank group provides finance for the developmental needs of borrowing countries. Clearly, development extends beyond the macroeconomic realm, and includes environmental, social, human and institutional components. The Bank's

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<sup>10</sup> In *United States diplomatic and consular staff in Teheran* the International Court of Justice held that "wrongfully to deprive human beings of their freedom and subject them to physical constraint in conditions of hardship is manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights", and constitutes a violation of international law (International Court of Justice, *United States diplomatic and consular staff in Teheran* (United States v. Iran)), *ICJ Reports 1980*, 43). In *Barcelona Traction, Light and Power Company*, the ICJ held that all States have a legal interest in protecting certain rights: the Court explicitly mentions genocide and "the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination" (International Court of Justice, *Barcelona Traction, Light and Power Company* (Belgium v. Spain), *ICJ Reports*, 1970, par. 33-34. In *East Timor* the Court confirmed that the right of peoples to self-determination had an *erga omnes* character (International Court of Justice, *Case concerning East Timor* (Portugal v. Australia), *ICJ Reports*, 1995, 102). Note that this right includes a prohibition to deprive a people of its own means of subsistence. This prohibition is sometimes invoked by those allegedly adversely affected by IFI interventions.

<sup>11</sup> See SKOGKY, S., 2001, 120-123. On the Universal Declaration of Human Rights as customary law, see also DE FEYTER, K., *World development law*. Antwerp: Intersentia, 2001, 246-248.

<sup>12</sup> Article I, par. i, IBRD Articles of Agreement (27 December 1944).

current approach to development, as evidenced by its comprehensive development framework<sup>13</sup>, is to achieve the interdependence of all elements of development —“social, structural, human, governance, environmental, macroeconomic, and financial”<sup>14</sup>—.

The multi-dimensional approach to development equally includes the protection and promotion of human rights, as evidenced by the UN Agendas for development<sup>15</sup>, successive UNDP Human development reports<sup>16</sup>, and the UN Declaration on the right to development<sup>17</sup>. The Bank does not disagree. In a paper published on the occasion of the 50th anniversary of the Universal Declaration of Human Rights, the Bank acknowledged that “creating the conditions for the attainment of human rights is a central and irreducible goal of development”; that “the world now accepts that sustainable development is impossible without human rights”, and that “the Bank contributes directly to the fulfilment of many rights articulated in the Universal Declaration”, etc<sup>18</sup>.

If it is agreed that the Articles of Agreement need to be interpreted in the light of the current concept of development, then clearly the mandate of the Bank extends to financing for the promotion and protection of human rights. There is nothing in the definition of the purposes of the Bank precluding the application of affirmative duties to act towards the realisation of general rules of human rights.

<sup>13</sup> Compare WOLFENSOHN, J., *A proposal for a comprehensive development framework*, 1999, available from the World Bank group website ([www.worldbank.org/cdf](http://www.worldbank.org/cdf)).

<sup>14</sup> The Bank's Operational Directive on Poverty (discussed *infra*, section 2,A,a) explains that the Bank's approach to poverty reduction has evolved over time: “Cumulatively, this evolution increased recognition that economic growth alone is not a sufficient objective of development—or adequate measure of success—and that investments in human resources contribute to increasing incomes and reducing poverty” (see OD 4.15 on Poverty Reduction (December 1991), par. 2). Compare also BOISSON DE CHAZOURNES, L., “Issues of social development: Integrating human rights into the activities of the World Bank” in INSTITUT INTERNATIONAL DES DROITS DE L'HOMME (ed.), *Commerce mondial et protection des droits de l'homme*, Bruxelles: Bruylant, 2001, 54-64.

<sup>15</sup> *An agenda for development. Report by the Secretary-General*. UN doc. A/48/935 (6 May 1994), and the subsequent report adopted by the UN General Assembly, UN doc. A/51/45 (16 June 1997). The latter report perceives of respect for human rights as one of the indispensable foundations of development (par. 27).

<sup>16</sup> The UNDP Human development reports have contributed significantly to the integration of human rights into development. See in particular *UNDP Human development report 2000*, Oxford: Oxford University Press, where human rights appear as the central theme.

<sup>17</sup> UN Declaration on the right to development, UN GA resolution 41/128 (4 December 1986). According to the Declaration, States should “eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social and cultural rights” (Art. 6, par. 3). Note that Article 1 of the Agreement establishing the European Bank for Reconstruction and Development (29 May 1990) defines the purpose of the Bank as “to foster the transition towards open market-oriented economies and to promote private and entrepreneurial initiative in the central and eastern European countries committed to and applying the principles of multiparty democracy, pluralism and market economics”.

<sup>18</sup> GAETA, A., VASILARA, M., *Development and human rights: the role of the World Bank*, Washington: the World Bank, 1998, 2-3. Compare also SFEIR-YOUNIS, A., *Economic, social and cultural rights and development strategies: human rights economics in international relations*. UN doc. E/C.12/2001/8, 15 March 2001, 4, where the World Bank Special Representative to the UN asserts that the World Bank has a major history of assisting countries in the implementation of economic, social and cultural rights.

Both from a legal and a policy perspective, the multidimensional approach to development (as endorsed by the Bank) requires that the human rights dimension to Bank fields of activity such as poverty reduction, health services or education is taken into account<sup>19</sup>.

Those resisting *any* consideration of human rights in World Bank activities sought refuge in Article IV, 10 of the IBRD Articles of Agreement:

The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be weighed impartially in order to achieve the purposes stated in Article I.

The former General Legal Counsel of the World Bank, Ibrahim Shihata<sup>20</sup>, clarified, however, that the scope of Article IV, 10 was limited. The provision does not bar the Bank from financing human rights related projects, nor does it suggest that the Bank should enjoy impunity when it becomes involved in human rights violations. The issue addressed by Article IV, 10 is human rights conditionality *strictu sensu*: the Bank should not refuse assistance, because of prevailing violations of human rights<sup>21</sup> in the Borrower's country. In Shihata's view, even this prohibition is not absolute:

(...) Political situations, which have effects on the country's economy or on the feasibility of project implementation or monitoring (...) should (...) be taken into account. Human rights may, under this opinion, become a relevant issue if their violation becomes so pervasive as to raise concerns relating to the matters mentioned above<sup>22</sup>.

The Bank's current position on conditionality is that it is barred from exercising human rights conditionality, except as a consequence of UN Security Council action<sup>23</sup>, or unless the economic consequences of human rights violations are so

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<sup>19</sup> Handl convincingly argues with respect to sustainable development, that as the development banks expand their functions to include a wide array of activities, they must also be deemed subject to a commensurately expanded reach of general or customary international law. See HANDL, G., 657. On the other hand, the author does recognise that the development banks are subject only to functionally limited obligations regarding the enhancement of human rights (HANDL, G., 1998, 663).

<sup>20</sup> See SHIHATA, I., *The World Bank in a changing world*. Dordrecht: M. Nijhoff, 1991, 97-134. For a thorough analysis Article IV, 10 and of its implementation, see Darrow, M., 2003, 149-169.

<sup>21</sup> On the disagreements in the 1960s and 1970s between the UN General Assembly and the World Bank on support to South Africa and Portugal, see MARMORSTEIN, V., "World Bank power to consider human rights factors in loan decisions", *Journal of international law and economics*, 1978, 113-136.

<sup>22</sup> See SHIHATA, I., 1991, 107.

<sup>23</sup> Under the UN-IBRD Relationship Agreement, the Bank is required to take note of the obligations of its members "to carry out the decisions of the UN Security Council", and has undertaken "to have due regard for the decisions of the Security Council under Articles 41 and 42 of the UN Charter" (See Article VI, par. 1, Agreement between the UN and the IBRD (1947). The Bank is thus under an obligation, via the obligation resting on its members, to respect an economic embargo imposed by the UN Security Council in the context of the maintenance of international peace and security. Starting from the 1990s, the UN Security Council has given increasing weight to widespread and systematic violations of civil and political rights in arriving at the determination that a threat to international peace and security existed, and thus as a basis for the taking of economic and military sanctions. See also *infra*, under section A, 3, a.

pervasive that the project under consideration is not feasible. This is a respectable position, given the variety of views on conditionality. Economic sanctions are often counterproductive from a human rights perspective. The trend is towards targeting individuals at fault, rather than societies<sup>24</sup>. In the exceptional cases where sanctions may be useful, current Bank policy allows sufficient latitude.

The Articles of Agreement of the International Monetary Fund do not refer to human rights. The purposes of the IMF, as defined<sup>25</sup>, do not even refer to development. They do not differentiate between countries on the basis of level of development reached. The IMF traditionally portrays itself as a monetary agency, not as a development agency<sup>26</sup>.

Article I of the IMF Articles of Agreement does refer to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of the members, and the notion that the correction of maladjustment in the members' balance of payments should not include "measures destructive of national and international prosperity"<sup>27</sup>. In 1978, a reference to the effect of IMF measures on social policies was included in the Articles in a section dealing with the Fund's overseeing of the compliance of its members with the purposes set out in Article I. While exercising surveillance over the exchange rate policies of its members, the Fund was to respect "the domestic social and political policies of members", and "to pay due regard to the circumstances of members"<sup>28</sup>.

Today, it is debatable whether the IMF still is a purely monetary agency<sup>29</sup>. In the 1980s, the IMF became involved with long-term assistance, and thus with development, as a consequence of its role in debt rescheduling. More recently, in response to mounting criticism of the IFIs, the Executive Boards of the World Bank and the IMF jointly endorsed the comprehensive development framework (CDF) and poverty reduction strategies as the central mechanisms for lending to low-income developing countries. The approach does not change the division of responsibilities between the international financial institutions, but enhances the development impact of the partnership. The CDF text reconfirms the importance of the macroeconomic framework, but goes on to state:

We cannot adopt a system in which the macroeconomic and financial is considered apart from the structural, social and human aspects, and vice versa. Integration of each of these subjects is imperative at the national level and among global players.

<sup>24</sup> Compare GARFIELD, R., *The impact of economic sanctions on health and well being*, London: Relief and Rehabilitation Network, 1999.

<sup>25</sup> Articles of Agreement International Monetary Fund, 22 July 1944.

<sup>26</sup> See WILLIAMS, M., *International economic organisations and the third world*, Hertfordshire: Harvester Wheatsheaf, 1994, 55.

<sup>27</sup> Art. I, par ii and v respectively. The IMF General Counsel, François Gianviti, states that under the latter provision, the IMF "has taken the view that its conditionality could include the removal of exchange and trade restrictions, but also the avoidance of measures that may be damaging to the environment or to the welfare of the population". See GIANVITI, F., *Economic, social and cultural rights and the International Monetary Fund*, UN doc. E/C.12/2001/WP.5, 7 May 2001, par. 50.

<sup>28</sup> Art. IV, section 3, b.

<sup>29</sup> Gianviti still maintains this position, see GIANVITI, F., 2001, par. 56.

In short, the primary responsibility of the IMF remains macroeconomic stabilisation and surveillance, but it is an inevitable consequence of the CDF approach that the IMF increasingly considers its impact on the development objectives for which the World Bank is primarily responsible.

On the other hand, it is unclear whether the reorientation of the IFIs in the direction of poverty reduction will survive the test of time. Some have advocated a back to basics approach, which would include taking the IMF out of long-term involvement in countries, making its operations remote from human rights<sup>30</sup>.

The IMF Articles of Agreement do not include a provision comparable to Article IV, 10 of the IBRD Articles of Agreement, but "the practice of the organisation has nevertheless been to exclude any questions not of an economic or financial nature from its decision-making processes"<sup>31</sup>. In August 1997, however, the Executive Board of the IMF adopted *Guidelines regarding governance issues*<sup>32</sup>, which enabled management "to seek information about the political situation in Member Countries as an essential element in judging the prospects for policy implementation". The Guidelines identify a number of governance problems, including corruption and the quality of key administrative functions of government as integral to the IMF's normal activities. Certainly, the concerns addressed are relevant from a human rights perspective.

Nevertheless, it is far from evident to construct affirmative duties on behalf of the International Monetary Fund to act for the realisation of general rules of human rights on the basis of the IMF's purposes and functions. The key obligation under the general rules of human rights as applicable to the IMF is a prohibitive one, *i.e.* the prohibition to violate, or become complicit in human rights violations.

The IMF General Counsel, François Gianviti, denies that the IMF is under a duty to ensure that its actions do not adversely affect human rights, or do not undermine the Borrower's compliance with human rights obligations. In Gianviti's view<sup>33</sup>, it is up to the Borrower, not to the Fund, to raise considerations related to the implementation of human rights. The IMF has no general mandate to ensure that its members abide by their international obligations. Only obligations

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<sup>30</sup> For an overview of IMF reform proposals, see BIRD, G., "A suitable case for treatment? Understanding the ongoing debate about the IMF", *Third world quarterly*, 2001, Vol. 22:5, 823-848. See also different contributions in NAYYAR, D. (Ed.), *Governing globalization*. Oxford: Oxford University Press, 2002 and EINHORN, J., "The World Bank's mission creep", *Foreign affairs*. Vol. 80, 5, 2001: 22-35.

<sup>31</sup> BOISSON DE CHAZOURNES, L. in Institut International des droits de l'homme (Ed.), 2001, 51.

<sup>32</sup> See Guidelines regarding governance issues, published in *IMF Survey* 1997, Vol. 26: 234-238. The *Guidelines on conditionality* (Decision No. 6056(79/38), Executive Board IMF, 2 March 1979), adopted by the Executive Board of the Fund in 1979, limit the performance criteria the IMF may "normally" use to macro-economic variables. In 1991, the then Special Rapporteur of the UN Sub-Commission on the prevention on discrimination and protection of minorities on structural adjustment, Danilo Türk, proposed the adoption by the Fund of basic policy guidelines on structural adjustment and economic, social and cultural rights, that could serve as a basis for dialogue between the financial institution and human rights bodies. The suggestion was well received by the human rights bodies, but not by the Fund. Danilo Türk's final report is UN doc. E/CN.4/Sub.2/1992/16.

<sup>33</sup> GIANVITI, F., 2001, par 28-36. For a critical assessment of the Gianviti paper, see DARROW, M., 2003, 133-138.



relevant to the Fund's purposes, i.e. the Borrower's financial obligations to the Fund and other donors can be considered by the Fund<sup>34</sup>. The reference in the IMF Articles of Agreement to the need to respect the domestic social and political policies of members, further constrains the Fund's ability to raise social development issues.

No doubt, the primary responsibility for raising human rights obligations in financial discussions lies with the Borrower. The Borrower's responsibility for human rights remains unabated in the context of negotiations with the IMF. As soon as the government raises human rights objections in discussions with the IMF, however, these objections come within the realm of Article IV, 3,b of the IMF Articles of Agreement. The social policies of the Borrower may well include international commitments to economic, social and cultural rights, and in such circumstances Article IV, 3, b functions as a *requirement* to take into account human rights effects, rather than as an impediment, as Gianviti argues. Once the Borrower raises human rights obligations as having an impact on what the government is willing to accept in order to obtain IMF assistance, the IMF cannot reasonably argue that these obligations are irrelevant to its work, as defined in the Articles of Agreement.

On the other hand, even if the Borrower does not raise human rights obligations, the autonomous obligation of the IMF under general rules of human rights prohibiting the organisation as an international legal person from becoming involved in human rights violations still stands. Consequently, the IMF would be well advised to engage in an in-house human rights impact assessment of the measures it proposes. Human rights impact assessment is not current IMF practice.

In addition, it is of interest to note that Gianviti does acknowledge that Fund involvement depends on an assessment of whether a program is viable and likely to be implemented:

This means that, if a program is so strict that it is likely to generate strong popular opposition, it may not be implemented, and the Fund should not support it<sup>35</sup>.

The statement opens the door for civil society. Under current policy, the IMF may well consider human rights impact if civil society actors manage to mobilise sufficiently "strong popular opposition" on the basis of a platform demonstrating that proposed measures are "so strict" as to adversely affect human rights.

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<sup>34</sup> On the principle of specialisation, and the strained relationship between the principle and the current holistic approach to development, compare DE FEYTER, K., 2001, 71-72, 80-81, and 103. Specialisation can co-exist with a comprehensive approach to development, on the condition that care is taken to avoid damage to other, equally important aspects of development, for which the organisation is not primarily responsible. Compare also Norton: "Effective social policy can, in particular, ease the task of adjustment during times of crises, helping build support for necessary refocus and ensuring that the burden of adjustment does not fall disproportionately on the poorest and most vulnerable groups in society"; see NORTON, J., "A 'New International Financial Architecture?' - Reflections on the possible law-based dimension", *The International lawyer*. Vol. 33, 1999: 920-921.

<sup>35</sup> GIANVITI, F., 2001, par. 51.

### 1.2.2. WORLD BANK OPERATIONAL POLICIES AND GUIDELINES RELATED TO POVERTY REDUCTION STRATEGIES

The World Bank has issued a variety of instructions to staff, determining standards for the conduct of operations<sup>36</sup>. Operational Policies, Bank Procedures and the older Operational Directives are binding on staff, unless their wording suggests otherwise. Potentially, these guidelines can be used as mechanisms to ensure that World Bank funded projects are consistent with international law<sup>37</sup>. This section reviews to what extent the current guidelines reflect human rights.

No single World Bank operational policy on human rights exists, although no legal obstacle prevents the adoption of such a policy. Whether the Bank should have one operational policy on the whole range of human rights is an issue for debate. Such an instrument would raise the profile of human rights in Bank practice, and would allow addressing the relevance of human rights to World Bank activities in a systematic way. On the other hand, inevitably the World Bank human rights standards would be self-defined. It is the essence of self-regulation that norms reflect the standards of the relevant professional group. A tentative World Bank operational policy on human rights would differ from general international human rights law, for better or for worse.

The alternative would be to adopt an instrument committing Bank staff to observe existing international human rights law, while ensuring that detailed levels of human rights protection are incorporated in specific Bank policies particularly relevant to human rights, such as the policies on involuntary resettlement and structural adjustment.

Only one current Operational Directive uses human rights terminology. Operational Directive 4.20 on Indigenous peoples states<sup>38</sup>:

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<sup>36</sup> The World Bank's Operational Manual contains the following typology of the different instruments through which Bank Management (after Board approval) issues instructions to staff responsible for determining the Bank's position on granting loans for specific projects:

*Operational Policies (OPs)* are short, focused statements that follow from the Bank's Articles of Agreement, the general conditions, and policies approved by the Board. OPs establish the parameters for the conduct of operations; they also describe the circumstances under which exceptions to policy are admissible and spell out who authorises exceptions.

*Bank Procedures (BPs)* explain how Bank staff carries out the policies set out in the OPs. They spell out the procedures and documentation required to ensure Bank wide consistency and quality.

*Good Practices (GPs)* contain advice and guidance on policy implementation for example, the history of the issue, the sectoral context, analytical framework, best practice examples.

*Operational Directives (ODs)* contain a mixture of policies, procedures, and guidance. The ODs are gradually being replaced by OPs/BPs/GPs, which present policies, procedures and guidance separately.

<sup>37</sup> The UN Committee on Economic, Social and Cultural Rights has urged the Bank and other agencies to fully respect such guidelines in so far as they reflect the obligations in the Covenant "UN Committee on Economic, Social and Cultural Rights, General Comment no. 7(1997): The right to adequate housing: forced evictions, par. 19.

<sup>38</sup> OD 4.20 (September 1991), par. 6. For a critical analysis of OD 4.20 and the Bank's overall indigenous peoples' policy, see PERES BUSTILLO, C., "Towards international poverty law? The World Bank, human rights, and indigenous peoples in Latin America" in VAN GENUGTEN, W., HUNT, P., MATHEWS, S. (Eds.), 2003, 157-203.

The Bank's broad objective towards indigenous people, as for all the people in its member countries, is to ensure that the development process fosters full respect for their dignity, human rights, and cultural uniqueness. More specifically, the objective at the center of this directive is to ensure that indigenous peoples do not suffer adverse effects during the development process, particularly from Bank-financed projects, and that they receive culturally compatible social and economic benefits<sup>39</sup>.

The Operational Directive has a broad personal scope, including all "social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process"<sup>40</sup>. On the other hand, in the on-going revision process, there appears to be a move away from the broader language towards a narrower focus on indigenous peoples and similarly disadvantaged groups<sup>41</sup>. The Bank's human rights approach thus remains *ad hoc*. Indigenous peoples are an issue in Bank practice, and therefore they are singled out as subjects of human rights.

References to rights to natural resources appear sporadically in the operational policies<sup>42</sup>.

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<sup>39</sup> OD 4.20 is under revision, and will be replaced by Operational Policy/Bank Procedure 4.10 on Indigenous Peoples. A consultation process with external stakeholders is currently on going. The most recent draft (23 March 2001) available from the World Bank website, moves the reference to human rights up to the first paragraph of the text in a section entitled "Overview". The proposed text states, "the broad objective of this policy is to ensure that the development process fosters full respect for the dignity, human rights and cultures of indigenous peoples, thereby contributing to the Bank's mission of poverty reduction and sustainable development". Note the deletion of the reference to "all the people", that appears in the current text.

<sup>40</sup> OD 4.20 (September 1991), par. 3. Compare also draft OP 4.10 (23 March 2001), par. 4: "social groups with a social and cultural identity that is distinct from the dominant groups in society and that makes them vulnerable to being disadvantaged in the development process". For an application stressing the need to interpret the scope of the Operational Directive as applying to all groups with a vulnerable status, see Inspection Panel, Investigation Report on Nepal: Arun III Proposed hydroelectric project (22 June 1995), par. 110-113. All Inspection Panel reports are available from the Inspection Panel website: [www.worldbank.org/ipn](http://www.worldbank.org/ipn).

<sup>41</sup> Compare also the findings on the non-applicability of OD 4.20 to project-affected ethnic groups in Chad in Inspection Panel, Investigation report on Chad-Cameroon petroleum and pipeline project (17 July 2002), par. 202.

<sup>42</sup> In human rights treaties, the right to exploit natural resources appears as a component of the right to self-determination. In identifying projects, which require the informed participation of indigenous peoples, OD 4.20 refers to projects "affecting indigenous peoples and their rights to natural and economic resources" (OD 4.20 (September 1991), par. 8.). OP 4.36 on Forestry requires from client countries that they "safeguard the interests of forest dwellers, specifically their rights of access to and use of designated forest areas" (OP 4.36 (September 1993), par. D.iv). OD 4.30 on Involuntary resettlement refers to customary rights to the land or other resources held by people adversely affected by the project (OD 4.30 (June 1990), par. 3,e.) and to the need to treat customary and formal rights as equally as possible (*Ibid.*, par. 17). The conversion process of OD 4.30 into a new OP/BP 4.12 is almost complete. The draft OP 4.12 introduces distinctions as to the compensation that should be provided by the Borrower between those holding rights to land recognised under domestic law and those holding no such rights. For a critique from an NGO coalition, see an open letter by the Forest Peoples Programme to the Executive Directors of the World Bank and the IMF, headed "Concerns about the weakening of World Bank safeguard policies" (2 March 2001), available from the organisation.

International environmental law figures more prominently in the operational policies<sup>43</sup>. OP 4.01 on Environmental assessment is exemplary. This operational policy states that environmental assessment will *i.a.* take into account:

Obligations of the country, pertaining to project activities, under relevant international environmental treaties and agreements. The Bank does not finance project activities that would contravene such country obligations, as identified during the EA.<sup>44</sup>

OP 4.36 on Forestry goes one step further, in insisting that the Borrower provides a level of protection equal to the level guaranteed at the international level, even if the Borrower has not previously accepted such obligations. The operational policy simply states:

The Bank does not finance projects that contravene applicable international environmental agreements<sup>45</sup>.

No legal obstacle prevents the adoption of a similar statement prohibiting the Bank from financing projects that contravene applicable international human rights law. The legal nature of both branches of law is similar. They both consist of relatively succinct binding provisions of treaty law and customary law, clarified by a whole series of declarations, resolutions, guidelines, codes of conduct, and authoritative comments by expert bodies intended to ensure best practices as new situations emerge<sup>46</sup>. It is submitted that the different treatment of international environmental and international human rights law contradicts the logic of the Bank's self-adopted rules, and the logic of international law in the field of sustainable development<sup>47</sup>.

It could be argued that the operational policies, even if they do not use human rights language, still offer a degree of human rights protection.

In the area of civil and political rights, a number of provisions pertaining to required levels of participation of project-affected groups are relevant. Clauses vary considerably, from general encouragements to actively involve beneficiaries and NGOs<sup>48</sup> to fairly specific requirements insisting on regular consultations by the Borrower<sup>49</sup>.

In the area of economic, social and cultural rights the operational directives on poverty reduction and on adjustment lending policy are of particular interest. The Op-

<sup>43</sup> For additional examples, see BOISSON DE CHAZOURNES, L., "Compliance with operational standards: the contribution of the World Bank Inspection Panel" in ALFREDSSON, G. & RING, R. (Eds.), *The Inspection Panel of the World Bank*. The Hague: M.Nijhoff, 2001, 78.

<sup>44</sup> OP 4.01 on Environmental assessment (January 1999), par. 3.

<sup>45</sup> *Ibid.*, par. 2.

<sup>46</sup> Compare BIRNIE, P., "International environmental law: its adequacy for present and future needs" in HURRELL, A., KINGSBURY, B. (Eds.), *The international politics of the environment*. Oxford: Clarendon Press, 1992, 83.

<sup>47</sup> The international law in the field of sustainable development has been described as "a broad umbrella accommodating the specialised fields of international law which aim to promote economic development, environmental protection and respect for civil and political rights"; it is based on "an approach requiring existing principles, rules and institutional arrangements to be treated in an integrated manner". See SANDS, P., "International law in the field of sustainable development", *British yearbook of international law*, 1995, 379.

<sup>48</sup> OP 4.15 (December 1991) on Poverty reduction, par. 39.

<sup>49</sup> See OD 4.30 (June 1990) on Involuntary resettlement, par. 8 and OD 4.20 on Indigenous peoples, par. 8 and 14,a, OP 4.04 (June 2001) on Natural habitats, par. 10.

erational Directive on Poverty reduction recognises that sustainable poverty reduction *i.a.* requires “improved access to education, health care, and other social services”<sup>50</sup>. The section on structural adjustment<sup>51</sup> states:

Within the overall spending envelope given by the macroeconomic framework, special efforts should be made to safeguard, and increase where appropriate, budgetary allocations for basic health, nutrition, and education, including programs that benefit the most vulnerable groups among the poor. Institutional reform and development should also be supported as necessary to ensure that the benefits of policy reach the poor<sup>52</sup>.

The Operational Directive does not, however, include recognition of the need to ensure a minimum essential level of economic, social and cultural rights<sup>53</sup>.

Finally, although there is no doubt that the operational policies are binding on staff (wording permitting), Bank practice may well fall below the standards. The effectiveness of self-regulation depends on the internal discipline of the organisation, and on the commitment of Board and staff at different levels to implementation<sup>54</sup>.

Operational policies govern the granting of loans by the World Bank for specific projects. They do not cover the area of poverty reduction strategies<sup>55</sup>. Those strategies are part of the IFIs approach to debt relief<sup>56</sup>. Briefly: debt relief is *i.a.* conditioned on the adoption and implementation of a poverty reduction strategy by the relevant country. PRSP Strategies are intended to be country-driven, *i.e.* to be prepared and developed transparently with broad participation of civil society, key donors and other relevant international financial institutions.

<sup>50</sup> OD 4.15 on Poverty reduction, par. 3.

<sup>51</sup> Compare also OD 8.60 on Adjustment lending policy (December 1992). OD 8.60 is hugely ambivalent on how the balance between structural adjustment and the provision of social services is to be struck. The OD only requires a specific focus on poverty reduction in the course of adjustment operations when country circumstances so determine, —not on a systematic basis. On the other hand, even if a specific focus is absent, the Bank “should support the government’s efforts to reduce poverty and mitigate the social costs of adjustment”. Compare with the UN Committee on Economic, Social and Cultural Rights’ recommendation that “the goal of protecting the rights of the poor and vulnerable should become a basic objective of economic adjustment”. See UN Committee on Economic, Social and Cultural Rights, General Comment no. 2 (1990) on international technical assistance measures, par. 9.

<sup>52</sup> *Ibid.*, par. 24. A fascinating elaboration of the role of the World Bank in social protection is World Bank, *Social protection sector strategy. From safety net to springboard*. Washington: World Bank, 2001.

<sup>53</sup> The UN Committee on Economic, Social and Cultural Rights is of the view that the realisation of minimum essential levels of economic, social and cultural rights is the minimum core obligation under the International Covenant on Economic, Social and Cultural Rights. See UN Committee on Economic, Social and Cultural Rights, General Comment no. 3 (1990) on the nature of States parties’ obligations, par. 10.

<sup>54</sup> The findings of the Inspection Panel on staff compliance with operational policies are sobering. See in particular, Inspection Panel, Investigation report on the China Western poverty reduction project (28 April 2000), par. 34.

<sup>55</sup> The poverty reduction strategies are an “operational vehicle, which can be a specific output of the comprehensive development framework or of processes based on CDF principles”. See Joint note by James Wolfensohn and Stanley Fischer, “The Comprehensive development framework and poverty reduction strategy papers” (5 April 2000).

<sup>56</sup> The Executive Boards of the IMF and the World Bank endorsed the adoption of the poverty reduction strategy paper approach on 21 December 1999 [see IMF Press release no. 99/65 (22 December 1999)].

Ultimately, the PRSP takes the form of a tri-partite agreement between the government, the IMF and the World Bank<sup>57</sup>. This means that government needs to present the PRSP for approval to the Executive Boards of the World Bank and the IMF. Approval is given on the basis of a Joint IMF/World Bank Staff Assessment (JSA). Guidelines for Joint Staff Assessments have been adopted<sup>58</sup>. Human rights terminology or references to the human rights obligations of governments are absent from these JSA Guidelines<sup>59</sup>. There is no requirement for Bank and Fund staff to take into account the human rights obligations of the Borrower. Some of the assessment criteria are relevant from a human rights perspective<sup>60</sup>.

The poverty reduction strategies are in effect a country's development plan on attacking poverty in the up-coming period, involving also external actors. If human rights are not integrated into such plans, they stand little chance of being prioritised. The Office of the UN High Commissioner for human rights was late in identifying the risk, but, in 2001, at the request of the UN Committee on ESC rights, put together a team of experts to draft guidelines on the integration of human rights into the poverty reduction strategies. The target audience of the guidelines are "practitioners involved in the design of the strategies", primarily States, but also other actors committed to the eradication of poverty<sup>61</sup>.

### 1.3. *Human rights obligations under international agreements to which the IFIs are parties*

Human rights obligations for the international financial institutions may also result from international agreements to which they are parties. Two completely different types of agreements are discussed below:

<sup>57</sup> On progress made so far, consider IMF/IDA, *Poverty reduction strategy papers. Progress in implementation*, Washington: IMF/IDA, 2001.

<sup>58</sup> The Guidelines appear as Annex 2 to IMF/IDA, 2001, 22-27. The JSA "must make an overall assessment for the Executive Boards as to whether or not the strategy presented in the PRSP constitutes a sound basis for concessional assistance from the Fund and the Bank" (JSA Guidelines, par. 2).

<sup>59</sup> *E.g.* in the section on indicators of progress in poverty reduction, reference is made to the international development goals, and to "indicators and targets which appropriately capture disparities by social group, gender and region" (JSA Guidelines, par. C.1), but not to indicators and benchmarks developed to monitor and assess the enjoyment of economic, social and cultural rights. On such indicators and benchmarks, see International Human rights internship program, Asian Forum for human rights and development, *Circle of rights*. Washington: IHRIP, 2000, 365-391. For a general human rights critique of the poverty reduction strategies, see CHERU, F., "The Highly Indebted Poor Countries (HIPC) Initiative: a human rights assessment of the poverty reduction strategy papers", UN doc. E/CN.4/2001/56, 18 January 2001, par. 25.

<sup>60</sup> They include the existence of mechanisms used to consult the poor and their representatives, the extent to which the PRSP has estimated the likely impact of its proposed policy measures on the poor and included measures to mitigate any negative impacts; the existence of measures to promote fair and equitable treatment of poor men and women under the law and avenues of recourse, including with respect to property rights; proposals on steps to be taken to improve transparency and ensure accountability of public institutions and services vis-à-vis the needs and priorities of the poor (See JSA Guidelines, par. A.1, D.5, D.6, D.7).

<sup>61</sup> At the time of writing, an electronic version of the Draft Guidelines: a human rights approach to poverty reduction strategies (10 September 2002) was available from the OHCHR website. The team of experts were Paul Hunt, Manfred Nowak and Siddiq Osmani.

- The relationship agreements the international financial institutions concluded with the United Nations through which the IFIs obtained the status of UN specialised agencies;
- The loan agreements the World Bank concludes with Borrower countries.

### 1.3.1. RELATIONSHIP AGREEMENTS

An organisation wishing to be recognised as a United Nations specialised agency needs to be brought into relationship with the central bodies of the UN<sup>62</sup>. This is achieved through the conclusion of a relationship agreement between the United Nations and the relevant intergovernmental organisation.

Such relationship agreements contain provisions on information sharing, but more importantly in this context, they also include an obligation on behalf of the specialised agency to assist in achieving the objectives of international economic and social co-operation as defined in Article 55 UN Charter. Universal respect and observance of human rights appears as one of the major goals of international economic and social co-operation in Article 55 of the UN Charter. In addition, the Charter identifies the promotion and encouragement of respect for human rights as one of the principal purposes of the UN<sup>63</sup>.

Both the World Bank and the International Monetary Fund have concluded relationship agreements with the United Nations<sup>64</sup>. Consequently, the IFIs are under an obligation to contribute to the universal respect for, and observance of human rights. The UN Committee on Economic and Social Rights has admirably summarised the human rights implications of obtaining the status of a specialised agency:

In negative terms this means that the international agencies should scrupulously avoid involvement in projects which, for example, involve the use of forced labour in contravention of international standards, or promote or reinforce discrimination against individuals or groups contrary to the provisions of the Covenant, or involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation. In positive terms, it means that, wherever possible, the agencies should act as advocates of projects and approaches, which contribute, not only to economic growth or other broadly defined objectives, but also to enhanced enjoyment of the full range of human rights<sup>65</sup>.

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<sup>62</sup> In practice via the Economic and Social Council, see art. 63, UN Charter. Relationship agreements need to be approved by the UN General Assembly. On relationship agreements, see MANIN, A., "Article 63" in COT, J., PELLET, A. (Eds.), *La Charte des Nations Unies*. Paris: Economica, 1991, 977-990, SANDS, P., KLEIN, P., 2001, 79-83.

<sup>63</sup> Art. 1, par. 3 UN Charter, 26 June 1945.

<sup>64</sup> Agreement between the UN and the IBRD (15 April 1948), and Agreement between the UN and the IMF (15 April 1948). Article 1, par. 2 of the UN-IBRD Relationship Agreement states that the Bank is a specialised agency with wide responsibilities in economic and related fields within the meaning of Article 57 of the UN Charter. The Article also adds that the Bank is, and is required to function as, an independent organisation.

<sup>65</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 2 (1990), UN doc. E/1990/23, Annexe III, par. 6.

In other words, although the legal basis of the obligations is different, the result is similar to what is achieved when the obligations are derived from general rules of international law.

### 1.3.2. LOAN AGREEMENTS

The international financial institutions have the capacity under international law to conclude agreements necessary for the achievement of their objectives. Loan agreements concluded by the World Bank with Borrower States belong to this group<sup>66</sup>.

The loan agreements are treaties concluded between a State and an international organisation, governed by international law<sup>67</sup>, that are equally binding for the Borrower and for the Bank. Depending on the attitude adopted by the domestic legal system to international law, loan agreements may supersede domestic law<sup>68</sup>.

From the Bank's perspective, the loan agreements are important instruments for ensuring consistency with operational procedures<sup>69</sup>. By including the provisions of operational policies in loan agreements, binding international obligations are created both for the Borrower and for the Bank. Through the loan agreements, the operational policies become law for both parties. In any case, the agreements give the Bank the right to insist on compliance by the Borrower, which may be particularly helpful when domestic legislation provides less protection to beneficiaries than World Bank standards<sup>70</sup>.

On the other hand, the loan agreements are also a source of legal obligation for the Bank. The failure on the part of the Bank to implement its obligations under a loan agreement involves its international responsibility<sup>71</sup>. Responsibility arises

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<sup>66</sup> According to Skogly, IMF practice is not to enter into treaties with Member States. Stand-by arrangements, the legal instruments through which resources are made available to members are not legally binding, but are governed by "soft law". See SKOGLY, S., 2001, 30-32.

<sup>67</sup> AMERASINGHE, C., *Principles of the institutional law of international organizations*, Cambridge: Cambridge University Press, 1996, 246. See also SKOGLY, S., 2001, 28-30.

<sup>68</sup> For an example, see Inspection Panel, Report and recommendation on request for inspection on India: Ecodvelopment project (21 October 1998), par. 63.

<sup>69</sup> SHIHATA, I., 1991, 183.

<sup>70</sup> Whether the Bank actually insists on compliance, is a different matter. In *Argentina/Paraguay: Yacyreta hydroelectric project* the requesters argued that the Bank had failed to ensure the adequate execution of environmental mitigation and resettlement activities by not supervising and enforcing the relevant legal covenants. Management replied that it was an essential principle of Bank operations that the exercise of legal remedies was not a requirement, but a discretionary tool, to be applied only after other reasonable means of persuasion had failed. The Inspection Panel conceded that there was some room for flexibility, but also pointed out that the Panel's constituent resolution identifies the failure by the Bank to follow up on the borrower's obligations under loan agreements with respect to operational policies as a ground for possible requests. The Bank was under an obligation to ensure timely implementation of the loan agreement, and, in the case under review, had failed to do so by accepting repeated violations of major covenants in the agreements. See Inspection Panel Report and recommendation on Argentina/Paraguay: Yacyreta hydroelectric (26 November 1996), par. 9, 28-31.

<sup>71</sup> AMERASINGHE, C., 1996, 240.



directly from the breach of the obligations, as long as the conduct is attributable to the organisation<sup>72</sup>.

From a human rights perspective, the inclusion of provisions offering human rights protection to persons affected by projects would be a step forward. Although those suffering human rights violations as a consequence of non-compliance with the agreement would not have standing to invoke the agreement directly, they might be able to resort to tort law. The argument would be that the Bank had breached its duty to take care by not contemplating the injurious effect of non-compliance on the affected persons. In determining what the standard of care is, a domestic court might well take into account the Bank's own professional standards as evidenced by the operational policies<sup>73</sup>. If such a claim were attempted, the Bank would no doubt argue that the Borrower rather than the Bank should be held responsible for lack of implementation<sup>74</sup>. On the other hand, a finding on joint responsibilities would certainly be possible<sup>75</sup>.

#### 1.4. *Jurisdictional immunity*

The rationale for allocating privileges and immunities is "to enable organisations to function properly without undue interference in their affairs by States and thus ensure the independent discharge of the tasks entrusted to them"<sup>76</sup>.

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<sup>72</sup> Compare SCOBBIE, I., "International organisations and international relations" in DUPUY, R.J. (Ed.), *A handbook on international organizations*, Dordrecht: M. Nijhoff, 1998, 887. It is generally accepted that the customary rules regulating State responsibility are, in principle, equally applicable to international organisations.

<sup>73</sup> Shihata argues that the mere failure by the Bank to observe its policies would rarely amount to a fault under applicable law: "these policies typically require high standards beyond what borrowers or their foreign financiers otherwise need to observe under national or international law". See SHIHATA, I. in ALFREDSSON, G., RING, R. (Eds.), 2001, 42-43. It is a hypothesis worth testing.

<sup>74</sup> Compare Schlemmer-Schulte, who argues that the Panel's assessment of a failure by the Bank to comply with its own policies does not lead to Bank liability, but "the Panel's assessment however may indirectly contribute to the determination of borrower actions which could constitute a fault under domestic law (...) the Panel's determination of Bank actions could provide an analysis that constitutes a factual basis for those who wish to present a claim against the borrower under domestic law. See SCHLEMMER-SCHULTE, S., "The World Bank's experience with its inspection panel", *Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht*. Vol.58, 2, 1998: 368.

<sup>75</sup> Joint responsibility could be construed by using a concept of complicity between multiple tortfeasors. In a paper on business complicity in human rights abuses, Clapham and Jerbi develop a theory that may be useful here as well. The authors distinguish between direct, beneficial and silent complicity CLAPHAM, A., JERBI, S., "Categories of corporate complicity in human rights abuses", *Hastings international and comparative law journal*. Vol. 24, 2001: 339-350. Direct complicity requires intentional participation, but not necessarily any intention to do harm, only knowledge of the likely harmful effects of the assistance given. In our example, the argument could be made that the Bank could have foreseen that the loan agreement would not be implemented, if staff did not ensure proper follow-up. Primary responsibility might still be attributed to the Borrower, but the Bank could be held responsible for aiding or assisting the State in the commission of a wrongful act. Indirect complicity implies that benefits are derived from harm committed by somebody else. The authors quote the example of human rights violations committed by security forces in the context of a common operation. Silent complicity implies culpability for failing to exercise influence.

<sup>76</sup> SCOBBIE, I., in DUPUY, R.J. (Ed.), 1998, 833.

Such privileges and immunities are functional, *i.e.* limited to what is necessary for achieving the organisations' purpose<sup>77</sup>. The IBRD Articles of Agreement recognise that its immunities and privileges should "enable the Bank to fulfil the functions with which it is entrusted"<sup>78</sup>. The needs of organisations differ, and so do their immunities. On jurisdictional immunity in the courts of Member States, the IBRD Articles of Agreement provide:

Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of the final judgement against the Bank<sup>79</sup>.

The primary purpose of the provision was to provide immunity against suits brought by the Borrower in its own courts originating in loan agreements to which the State is a party<sup>80</sup>. One can understand the Bank's concern in not wishing to submit to the domestic courts of the party with which it is involved in a legal dispute. Still, the consequences are harsh. Borrowers have no legal remedy against the Bank, even when the Bank recognises internally that mistakes were made.

The situation is different for adversely affected parties, however. Amerasinghe argues that there is a presumption of absence of immunity except in the circumstances mentioned above<sup>81</sup>. The immunity of the Bank is of a restricted kind, being limited to claims by member States or persons deriving claims from member States. The immunity therefore does not cover disputes with private parties, unless they derive their claims from member States or would prevent the Bank from fulfilling the functions for which it was established. A claim based on Bank negligence, as discussed above, would not come within that category. The Bank would still enjoy immunity in other respects, but the immunity standard would be "result-oriented", *i.e.* only shield against claims that threaten the Bank's existence or prevent it from fulfilling its core functions<sup>82</sup>. The case would be decided primarily under domestic,

<sup>77</sup> AMERASINGHE, C., 1996, 370.

<sup>78</sup> IBRD Articles of Agreement (27 December 1944), art. VII, 1. Similarly, IMF Articles of Agreement (22 July 1944), art. IX, 1.

<sup>79</sup> IBRD Articles of Agreement (27 December 1944), art. VII, 3. In contrast, the IMF Articles of Agreement provide for immunity from every form of judicial process, except to the extent that the IMF waives its immunity for the purpose of any proceedings or by the terms of any contract. See IMF Articles of Agreement (22 July 1944), art. IX, 3.

<sup>80</sup> AMERASINGHE, C., 1996, 375.

<sup>81</sup> *Ibid.*

<sup>82</sup> Compare REINISCH, A., *International organisations before national courts*. Cambridge: Cambridge University Press, 2000. Dominicé has argued that the jurisdictional immunity of international organisations before domestic courts should not prevail over the human rights of private individuals adversely affected, particularly if the individual does not have access to any other tribunal. See DOMINICÉ, C., "Observations sur le contentieux des organisations internationales avec des personnes privées", *Annuaire Français de droit international*. Vol. XLV, 1999: 625, 638.

rather than international law<sup>83</sup>. No success could be hoped for without an independent judiciary that is at least minimally sympathetic to claims advanced by vulnerable groups within society.

Alternatively, the Bank could commit to a policy of waiving immunity in cases where parties claim their human rights have been adversely affected as a consequence of Bank actions or omissions. A suitable international forum for such a case might be the Permanent Court of Arbitration, which has adopted Optional Rules for arbitration between international organisations and private parties.

## 2. The Practice

### 2.1. *The World Bank Inspection Panel*

The World Bank created the Inspection Panel in 1993<sup>84</sup>. The Panel members adopted its operating procedures in August 1994<sup>85</sup>, and the Panel became operational in September of the same year.

The Inspection Panel is competent to receive requests for inspection presented to it by an affected party demonstrating:

That its rights or interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank (including situations where the Bank is alleged to have failed in its follow-up on the borrower's obligations under loan agreements with respect to such policies and procedures) provided in all cases that such failure has had, or threatens to have, a material adverse effect.<sup>86</sup>

The Inspection Panel is limited to reporting on Bank compliance with its own policies. The Panel is not competent to establish violations of international law, including human rights law. On the other hand, nothing prevents the requesters from

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<sup>83</sup> Note that on issues of immunity too, States are required under the IBRD Articles of Agreement "to make effective in terms of its own law the principles set forth in this Article" (Article VII, 10, IBRD Articles of Agreement (27 December 1944). Both the IBRD Articles of Agreement and the relevant domestic law would thus govern the dispute.

<sup>84</sup> Resolution No.93-10 of the Executive Directors establishing the Inspection Panel for the IBRD (22 September 1993) and Resolution No. 93-6 for the IDA (22 September 1993). For background on the political context leading to the establishment of the Panel, see Fox, J., "Transnational civil society campaigns and the World Bank Inspection Panel" in BRYSK. A. (Ed.), *Globalization and human rights*, 2002, 180.

All Panel-related documents, including Panel reports and recommendations can be found at [www.inspectionpanel.org](http://www.inspectionpanel.org). At the occasion of the 10<sup>th</sup> anniversary of the Panel, the World Bank published a useful book (available from the Bank free of charge) presenting an overview of the Panel's work: IBRD, *Accountability at the World Bank. The Inspection Panel 10 years on*. Washington: IBRD, 2003.

<sup>85</sup> Inspection Panel for the IBRD and IDA, Operating procedures as adopted by the Panel (19 August 1994).

<sup>86</sup> Resolution No. 93-10 (22 September 1993), par. 12.

arguing that their *human* rights have been adversely affected by Bank action. In the three cases reviewed below<sup>87</sup>, they did. Both the Management response and the Inspection Panel responded substantively to the human rights claims. Violations of human rights were considered, in so far as they were related to Bank conduct under the relevant operational policies.

The Panel procedure is administrative rather than judicial in nature, allowing an important role for the Board in the different stages of the procedure. Panel reports are recommendatory only. The Executive Directors have decision-making power, both in whether or not to allow an investigation after the Panel's eligibility report, and in deciding on action after completion of the Panel's investigation. Board decisions are potentially a source of legal obligation for Bank staff, while the Inspection Panel's findings are not.

In practice, the Board never takes an express position on the findings of the Inspection Panel. The Board never identifies a specific Bank practice as a violation of Bank operational policies, and even less as a violation of human rights. The Board decides on action, not on law. Decisions on action after a Panel investigation are "case by case, tailor-made"<sup>88</sup>, and in response to action points proposed by Management. At best, Board decisions constitute an implicit endorsement of the Panel's findings on non-compliance<sup>89</sup>. The Board of Executive Directors does not fulfil the functions usually associated with a decision-making body in the judicial process. The Board does not clarify the scope of the provisions in the operational policies. It does not interpret the legal implications of the policies. It does not facilitate internal application of the rules. It avoids establishing precedent. It does not deal with claimants. As a political body, the Board is concerned with maintaining cohesion among its diverse membership and good working relationships with staff, encouraging it to give precedence to pragmatism over principle<sup>90</sup>. As such, the Board of Executive Directors is an unhelpful institution in promoting World Bank self-regulation on human rights.

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

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<sup>87</sup> For a more elaborate review of the World Bank Inspection Panel case law relating to human rights, see DE FEYTER, K., "Self-regulation" in VAN GENUGTEN, W., HUNT, P., MATHEWS, S. (Eds.), 2003, 79-137.

<sup>88</sup> UMANA, A., "Some lessons from the Inspection Panel's experience" in ALFREDSSON, G., RING, R. (Eds.), 2001, 139. The author is a former Chairperson of the Inspection Panel.

<sup>89</sup> Consequently, the legal impact of Inspection Panel reports is quite limited. In several reports, the Inspection Panel stresses that the investigation process has had a positive impact on the behaviour of relevant project staff, e.g. in *Ecuador: Mining development and environmental control technical assistance*, the Panel finds that there was a positive evolution toward the environmental dimensions of the Project, that "appears to have accelerated significantly after the Request was received" (Inspection Panel, Investigation report on Ecuador: Mining development and environmental control technical assistance project (23 February 2001, par. 7).

<sup>90</sup> On decision-making processes and borrower-donor relationships within the Board, compare Fox, J., "Transnational civil society campaigns and the World Bank Inspection Panel" in BRYSK, A. (Ed.), *Globalization and human rights*, 2002, 187-191.

## 2.2. India: Eco-development

The *India: Eco-development* project demonstrates that in a multi-party development effort responsibility and accountability to project “beneficiaries” will tend to dissipate, unless the project facilitators make and implement detailed agreements on how participatory rights will be ensured. As pointed out earlier, the right of people to participate in decisions that affect their lives is an essential element of a human rights approach to development projects. Participatory rights can be constructed both on the basis of civil and political rights, and on the basis of economic, social and cultural rights. In fact, the need for consultation can also be justified from a purely economic rationale: knowledge is perceived of as a critical condition for optimum bargaining in a free market economy, both for decision-makers and consumers (i.e. affected populations)<sup>91</sup>.

The India Eco-development project targets seven national parks in India, including Nagarhole National Park in Karnataka State, southern India. The project aims at promoting conservation of the environment through the provision of incentives and alternatives to peripheral populations around the seven target parks. The key objective is to reduce pressure on the parks from the resource using communities, by providing for resource-substitution activities<sup>92</sup>.

The Indian Wildlife Protection Act of 1972 prohibits persons from residing *within* a national park. In 1997, the Supreme Court of India, at the request of the World Wildlife Fund for Nature, urged State governments that had not yet done so to implement the act fully. The State government of Karnataka stopped providing basic services to tribal people inside the park, and did not include them in programs to be funded by the World Bank. Tribal NGOs were not part of the consultation process. The stage was thus set for a clash between the environmental agenda and indigenous peoples’ rights.

Although the concept of eco-development in India predated World Bank involvement, the Bank played a crucial role as the largest financial contributor to the project: the Bank was the key donor agency with responsibility for disbursing 71% of total funding<sup>93</sup>. The Bank did not, however, perceive itself as the key manager of the consultation process, although it did raise concerns about the indigenous people living inside the park, as mandated by World Bank Operational Directive 4.20. The loan agreement concluded by the Government of India and the Bank provided that no involuntary resettlement of people resident in the park would be carried out, and that any voluntary relocation would need to meet the Bank’s criteria<sup>94</sup>. The overwhelming majority of the tribal residents wished to remain in the park. There was thus an obvious conflict between the loan agreement (an international

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<sup>91</sup> Compare BOTCHWAY, F., “The role of the State in the context of good governance and electricity management: comparative antecedents and current trends”, *University of Pennsylvania journal of international economic law*. Vol. 21, 2000, 790-793.

<sup>92</sup> See MAHANTY, S., “Conservation and development interventions as networks: the case of India Ecodevelopment project, Karnataka”, *World development*. Vol. 30, 2002, 1371.

<sup>93</sup> *Ibid.*

<sup>94</sup> Inspection Panel, Report and recommendation on request for inspection on India: Ecodevelopment project (21 October 1998), par.54.

treaty) and domestic Indian law<sup>95</sup>. Neither the Borrower, nor the Bank apparently pursued the conflict, and concentrated on other aspects of the project. In practice, none of the project facilitators felt responsible for implementing the provisions of the agreement dealing with the indigenous people, nor did they feel accountable to them.

The tribal rights alliance representing the tribals inside the park forced the other actors to open up a negotiating space for the indigenous, by filing a request with the Inspection Panel. The requesters argued "a violation of our basic right to determine our future and to oppose a project that we think will have a negative impact on our lives, livelihood and the survival of our people"<sup>96</sup>. The *adivasi* had been denied input on the basic assumptions and concepts of the project that clearly affected their traditional rights to use the resources of the park<sup>97</sup>.

The request gave the Inspection Panel an opportunity to apply the human rights clause in the Operational Directive on Indigenous Peoples<sup>98</sup>. The Panel substantively concurred with the requesters, and recommended an investigation. In no uncertain terms, the Panel found that Management, notwithstanding a history of mistrust between the tribal people and the government, had denied the *adivasi* input, had overestimated the support for voluntary relocation, and had misconstrued the reality of the stay option. Tribal leaders had not been adequately informed, and documents not translated in the local language: "Information disclosure in a language understandable to the affected people is an obvious prerequisite to meaningful and informed consultation"<sup>99</sup>. The requesters had proposed an "Alternative People's Plan" to Bank representatives that was consulted with local leaders, but received no response. With a measure of irony, the Inspection Panel notes that the alternative plan "would appear to warrant at least some consideration as IDA struggles "... to ensure that the development process fosters full respect for their dignity, human rights and cultural uniqueness", quoting directly from Operational Directive 4.20<sup>100</sup>.

The Inspection Panel came out strongly in favour of indigenous rights, and assisted the tribal organisations in achieving recognition. Perhaps predictably, however, both the Bank Management and the Karnataka State government criticised the Panel's findings. Bank Management denied all breaches of Bank policies. The Government of Karnataka argued that allowing the tribal groups to remain in the park would deprive them of the educational, health and socio-economic facilities

<sup>95</sup> Indian law provides that in such cases international law prevails.

<sup>96</sup> Inspection Panel, Report and recommendation on request for inspection on India: Ecodevelopment project (21 October 1998), par. 37

<sup>97</sup> In addition, tribal organisations successfully went to Court to obtain a ban on the construction of a resort inside the park by the Taj hotels, of the Tata group companies, one of the largest business houses of India. The Public Interest Legal Support and Research Center, a lawyer's collective brought the claim on their behalf. See *CHERIA, A. e.a., A search for justice. A citizen's report on the adivasi experience in South India*. Bangalore: José Sebastian, 1997, 184, 189-190.

<sup>98</sup> OD 4.20 on Indigenous peoples (September 1991), par. 6. Panel Inspector McNeill visited Delhi and the project site n 30 August-4 September 1998.

<sup>99</sup> Inspection Panel, Report and recommendation on request for inspection on India: Ecodevelopment project (21 October 1998, par. 42).

<sup>100</sup> *Ibid*, par. 49-50.

available outside the park. The relationship between both actors and the tribal organisations remained adversarial<sup>101</sup>.

The Board of Executive Directors agreed that the Panel's findings needed to be addressed, instructed Management to work with government officials at state and federal levels on measures to address them, and to report back in six months. The Panel would be asked to give comments separately. The Executive Directors did not, however, allow a full investigation as recommended by the Panel<sup>102</sup>.

### 2.3. Nigeria: Lagos drainage and sanitation

The *Nigeria: Lagos drainage and sanitation* request is of interest for at least two reasons. First, because the requesters strongly relied on human rights treaties to make their case, and secondly, because the story unravelled in a period of tremendous political upheaval in Nigeria.

The aim of the IDA financed project was to improve the storm-water drainage system in parts of Lagos that suffered from regular inundation from heavy rains. The project implied the removal of a number of shelters built by the slum dwellers that intruded into the drainage right of way. The residents, only one of whom had a certificate of occupancy, were to be resettled and properly compensated.

The IDA's Executive Directors approved the relevant credit on 17 June 1993. Five days earlier presidential elections had been held in Nigeria. The elections had been organised by Nigeria's military ruler Babangida, and were to be the finale of Nigeria's transition towards multiparty-democracy<sup>103</sup>. International observers deemed the elections fair and free. The first results showed a victory for presidential candidate Abiola. On 26 June 1993, however, before the final results were made public, President Babangida "stopped the hands of the nation clock"<sup>104</sup> and announced the annulment of the elections. Thus commenced one of the worst periods of Nigeria's political history that was later characterised as a return to the dark ages and a period of predatory rule<sup>105</sup> that could have led to the total disintegration of the country<sup>106</sup>. General Abacha took power in a coup d'état in November 1993. Abacha's regime

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<sup>101</sup> Mahanty argues that the World Bank should have tried to broker the conflict at an earlier stage, since the lead agency (i.e. the state government) was heavily embroiled in the conflict. If real participation were to be achieved, a more detailed analysis of the groups involved and the space for dialogue would have been necessary in the planning stages. See Mahanty (2002), 1683.

<sup>102</sup> See IDA/IBRD Press release on India: Ecocodevelopment (22 December 1998).

<sup>103</sup> See ROTIMI, A., IHONVBERE, J., "Democratic impasse: remilitarisation in Nigeria", *Third world quarterly*. Vol. 15,4, 1994: 669-689.

<sup>104</sup> SOYINKA, W., *The open sore of a continent. A personal narrative of the Nigerian crisis*. Oxford: Oxford University Press, 1996, 143.

<sup>105</sup> Note GORDON, K., "Multinational enterprises in situations of violent conflict and widespread human rights abuses", OECD working paper on international investment, nr. 2002/1, par.42: "Money laundering authorities in Switzerland reported in 2000 that banks had reported receiving about US\$ 480 million moved there by Nigeria's former president (General Abacha) and his entourage. Following on from the Swiss investigation, the Financial Services Authority of the United Kingdom found that US\$ 1.3 billion from Nigeria had been "siphoned through" London Banks (...)"

<sup>106</sup> See ABUBAKAR, D., "Ethnic identity, democratisation, and the future of the African State: lessons from Nigeria", *African issues*. Vol. 29, 1-2, 2001: 31-36.

committed gross and systematic violations of human rights that continued unabated until his death on 8 June 1998<sup>107</sup>. On 16 June 1998 the Lagos drainage and sanitation request was filed.

At the origin of the request was a leading African human rights NGO, the Lagos-based Social and Economic Rights Action Center (SERAC). The requesters argued that the Bank and the military government of Nigeria had failed to consult with affected communities "in flagrant violation of the Bank's Operational Directive, the Constitution of the Federal Republic of Nigeria, the International Covenant on Economic, Social and Cultural Rights and other relevant international human rights instruments<sup>108</sup>". The demolition of homes and destruction of properties constituted a massive violation of the rights of victims to adequate housing, education, adequate standards of living, security of person, a healthy environment, food, health, work, respect of dignity inherent in a human being, freedom of movement, family life, water, privacy, information and the right to choose one's own residence. Specific allegations were made as to incidents involving policy brutality and gender discrimination.

The Management response consisted of a factual denial that human rights violations had occurred. There was no evidence of police brutality in the context of the Bank-financed project; no gender discrimination had occurred; community leaders had not complained of human rights violations; there had been regular consultation. In short: "The Bank financed project had not violated anybody's rights"<sup>109</sup>. On the other hand, Management conceded that it did not have the resources to observe every activity that happened in the course of the project. The response repeatedly stressed that many of the alleged violations (such as forced evictions by heavily armed police) were unrelated to Bank-financed activities, and thus the sole responsibility of Nigeria: "In any case, the Bank does not have the authority to discipline officials of the Lagos State government"<sup>110</sup>.

The Inspection Panel largely concurred with Management on the lack of factual evidence, and considered that many of the claims were exaggerated or untrue. The Panel did not recommend a full investigation to the Board.

Nevertheless, it is of interest that the Inspection Panel did not hesitate to review and conclude on the issue of human rights violations in connection with the

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<sup>107</sup> Abacha's successor restarted a process of democratic transition that led to presidential elections in February 1999 won by the current president in office, Olusugun Obasanjo. The three visits of Panel Inspector Ayensu occurred during this transition period, in September and October 1993.

<sup>108</sup> See the request for inspection, par.1, as attached to Inspection Panel, Report and recommendation on request for inspection on Nigeria: Lagos drainage and sanitation project (6 November 1998). The request also expressed the belief that "the actions and omissions described in the present Request are the responsibilities of the Bank because they have resulted from a project funded by it. The Bank therefore holds a clear legal obligation to ensure that the project is implemented in accordance with its own Operational Directives as well as applicable domestic and international law. Being a specialized agency of the United Nations, the Bank is bound by the U.N. Charter which recognizes the human rights of every individual" (*Ibid.*, par. 6). Neither Management, nor the Inspection Panel responded to the argument.

<sup>109</sup> Management response to claim 23, as attached to Inspection Panel, Report and recommendation on request for inspection on Nigeria: Lagos drainage and sanitation project (6 November 1998).

<sup>110</sup> *Ibid.*



project<sup>111</sup>. The Panel criticised IDA for overly relying on State officials to do the consultation with communities, and felt that much closer supervision by IDA should have been provided, while recognising the financial constraints, and the division of responsibilities as agreed upon in the loan agreement. In an *obiter dictum* the Panel acknowledged “the concerns and the efforts of SERAC for exhibiting such courage in defending the rights of the affected people during the past regime in Nigeria”<sup>112</sup>. The Panel added that it believed that its presence in the equation had made it possible for the requesters to develop a better dialogue with IDA staff in the resolution of outstanding issues.

SERAC expressed disappointment about the Panel’s decision. The organisation felt that the Panel over-relied on assurances given by the Lagos State government and the Bank that evicted slum dwellers would be adequately compensated: in fact, some slum dwellers were cajoled into accepting inadequate sums. According to the organisation, the project exacerbated the flood damage: “Stagnant waste water now accumulates in open drainage channels that were never completed”<sup>113</sup>.

The handling of the Lagos drainage and sanitation project demonstrates the unease of the Bank in dealing with changing political circumstances. The Board of Executive Directors’ decision to approve the project after elections day but before the final results were made public can be seen as testimony to the Bank’s traditional position that political circumstances are irrelevant to decisions on loans. The timing of the decision also deprived the Bank, however, of a possibility to consider the impact of the annulment of the elections on the feasibility of project implementation and monitoring.

The continued ignorance of the political context by Bank staff —as evidenced by their reliance on State officials that were part of a political system that had demonstrated with the utmost arrogance that it did not value political participation—, shows a real lack of sensitivity to the component of the project dealing with consultation and protection of persons evicted from the area. An argument can be made that the Bank’s attitude in delegating consultation to its authoritarian partner amounted to a breach of its duty to take care.

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<sup>111</sup> See in particular Inspection Panel, Report and recommendation on request for inspection on Nigeria: Lagos drainage and sanitation project (6 November 1998), par. 31: “On the question of human rights violations in connection with the particular Project, the Panel did not find any *prima facie* evidence that IDA did neglect, fail, or refuse to consult with the host communities during the development planning and implementation of the Project, thus, Management does not appear to have violated applicable IDA Operational Directives”. On the issue of police brutality, see par. 27, 39. On discrimination, par. 40. It is a matter for speculation what would have happened, had the Panel found *prima facie* evidence of human rights violations. In any case, the Panel would have to establish that such violations also constituted violations of the relevant Operational Directives; in this case e.g. the Operational Directives/Policies on Involuntary Resettlement, Poverty Reduction and Gender dimensions of development. The language in the policies certainly offers opportunities for an interpretation allowing to consider relevant human rights violations as violations of the operational policies as well.

<sup>112</sup> *Ibid.*, par. 45. The political transition in Nigeria may have played a role in the Panel’s recommendation not to pursue the request.

<sup>113</sup> See MORKA, K., “When wilful blindness doesn’t cut it. Making the case for World Bank accountability to the women in Lagos slums”, *Access quarterly*. Vol. 1, 1, 1999: 5-10. *Access quarterly* is “the official magazine” of SERAC.

The Panel's decision not to pursue the investigation appears to be inspired at least in part by the change in the political circumstances: the demise of the Abacha regime and a quick, credible transition process to democracy that the international community was keen to support. Clearly, the Inspector exhibited a degree of confidence in the willingness of the new regime to treat affected people properly, i.e. to compensate them in accordance with IDA policies.

#### 2.4. *Chad-Cameroon: Petroleum and pipeline*

The *Chad-Cameroon petroleum and pipeline* project involves a huge number of actors. The project is the largest energy infrastructure development on the African continent, at an estimated total cost of US\$ 3.7 billion. It involves the drilling of 300 oil wells in the oil fields of the Doba region of southern Chad and the construction of a 1100 km. long export pipeline through Cameroon to an offshore loading facility.

A Consortium of private actors, consisting of Exxon Mobile (US)(40%), Petronas (Malaysia)(35%) and Chevron (US)(25%) finances approximately 60% of the project. The companies were granted a 30-year concession to develop and operate the oil fields. The remainder of the funds was obtained through market rate loans arranged through the International Finance Corporation; export credit agencies (US and France) and commercial sources [ABN-Amro (The Netherlands) and Credit Agricole Indosuez (France) are the lead arranging banks]. The Governments of Cameroon and Chad have made equity investments in the two pipeline operating companies (3% of the project cost), that were facilitated by the IBRD (39.5 US million) and the European Investment Bank through the provision of loans.

The World Bank Group contribution to the project also includes a number of initiatives financed by the International Development Association to increase the capacity of both the governments of Chad and Cameroon to manage the project: the petroleum sector management capacity building project (23.7 US million) which aims to build Chad's capacity to manage oil revenues and to use them efficiently for poverty reduction; and the management of the petroleum economy project (17.5 US million) to assist the government of Chad in building capacity to implement its petroleum revenue management strategy; the petroleum environment capacity enhancement project aiming at establishing national capacity in Cameroon to protect and mitigate the social and environmental impacts of the pipeline project (5.77 US million).

In financial terms the contribution of the World Bank group to the project is a minor one, but there is no doubt that its commitment was essential, not only in providing funding to the governments involved, but particularly in securing the support of other external actors. Exxon Mobile viewed the World Bank's involvement as central to reducing the risks of investing in the region and stresses the importance of the World Bank's role in advising the Government of Chad on directing oil revenues to poverty reduction and on good governance<sup>114</sup>. The European Investment Bank

<sup>114</sup> See GORDON, K., 2002, Box 4 at 29. Consider also the following comment: "Due to the commitment of World Bank funds, the investment must comply with the Bank's policies (...). If the policies are genuinely respected, the project could mark an important beginning for the establishment

similarly highlighted the Bank's efforts to mitigate the environmental risks associated with the project, and announced that it "will continue to work closely with the World Bank to ensure this opportunity is properly developed and the relevant social and environmental-related conditions are met"<sup>115</sup>.

The other project facilitators thus present the Bank's involvement as a safeguard that the environmental and human consequences of the project will be managed well. In doing so, they are also shifting the burden on the Bank, as if to deny any accountability of their own. The Bank, on the other hand, only accepts accountability for what it has agreed to with the two governments, and insists that they bear the primary responsibility. Both governments may in turn argue that they are only partially in control of the project given their dependency on external resources. As in the *India: Ecodevelopment* example, the risk that an accountability gap develops is real.

The Board of the World Bank approved the project on 6 June 2000. On 22 March 2001, Ngarlely Yorongar and more than 100 residents of the Doba area submitted a request for inspection on the Chad component of the project.

Mr. Yorongar is a member of parliament from the region, who was also running as an opposition candidate in Chad's presidential elections, taking place in May 2001. The request alleged that the pipeline project constituted a threat to local communities and that proper consultation had not taken place. After an on site visit in August, the Inspection Panel recommended an investigation on 17 September 2001<sup>116</sup>. The Board approved the investigation on 1 October 2001. After another on site visit, the Panel sent its investigation report to the Board on 17 July 2002<sup>117</sup>. On 12 September 2002 the Board recorded its approval of the actions and next steps put forth by the Bank Management in response to the Panel's findings<sup>118</sup>.

Although the Inspection Panel's review of the project certainly deserves a more comprehensive analysis<sup>119</sup> only two aspects of the investigation are dealt with here: first, the impact of the overall human rights situation in Chad and secondly, the poverty reduction component of the project.

The requesters invoked the rights to life, to a healthy environment, to fair and equitable compensation, to resettlement not far from their native soil, to work, to respect for their customs and burial places, to social well being, to public consulta-

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of human rights standards for multinational corporations": HERNANDEZ URIZ, G., "To Lend or not to lend: oil, human rights and the World Bank's internal contradictions", *Harvard human rights journal*, Vol. 14, Spring 2001, 198. Note that both Exxon Mobile and Chevron have adopted human rights policies; see NORDSKAG, M., RUUD, A., "Transnational oil companies and human rights. What they say and how they say it" in EIDE, A., OLE BERGESEN, H., RUDOLFSON GOYER, P. (Eds), *Human rights and the oil industry*. Antwerp: Intersentia, 2000, 146, 149-151.

<sup>115</sup> European Investment Bank Press release EXT 2001/018 (22 June 2001): "EUR 144 million for the Chad-Cameroon oil expert system".

<sup>116</sup> Inspection Panel, Report and recommendation on request for inspection on Chad: Petroleum development and pipeline project (17 September 2000).

<sup>117</sup> Inspection Panel, Investigation report on Chad-Cameroon petroleum and pipeline project (17 July 2002)

<sup>118</sup> See IBRD/IDA Press release (18 September 2002): "Chad-Cameroon Pipeline project: outcome of the Inspection Panel Investigation".

<sup>119</sup> The Inspection Panel found that Management had not been in compliance with aspects of a number of Bank policies, dealing with environmental assessment, economic evaluation and poverty reduction.

tion<sup>120</sup>. They argued that there had not been respect for human rights in Chad since President Déby took power and that massive violations of human rights had occurred in the production zone<sup>121</sup>. Bank Management responded that human rights violations were only relevant to the Bank's work if they had "a significant direct economic effect on the project".

Management was of the view that this was not the case here: "The Project can achieve its developmental objectives"<sup>122</sup>.

The Inspection Panel took "issue with Management's narrow view"<sup>123</sup> and quoted the paper produced by the Bank at the occasion of the fiftieth anniversary of the Universal Declaration of human rights to stress the Bank's role in promoting human rights within the countries in which it operates<sup>124</sup>. The requester was jailed in 1998 for speaking out against the project, and again briefly detained and tortured shortly after the May 2001 presidential elections, while the request was pending with the Inspection Panel<sup>125</sup>. This background no doubt contributed to the Panel's frustration with Management's economic effects approach. Relying explicitly on Amnesty International Annual Reports, the Panel concluded that the human rights situation remained "far from ideal": "It raises questions about compliance with Bank operational policies, in particular those that relate to open and informed consultation<sup>126</sup>, and it warrants renewed monitoring by the Bank"<sup>127</sup>.

In an unprecedented move, the Bank published the remarks made by the Chairman of the Inspection Panel, when he presented the investigation report to the Board<sup>128</sup>. Chairman Ayensu further developed the human rights theme. The Panel was convinced that the approach taken in the report "which finds human rights implicitly embedded in various policies of the Bank" was within the boundaries of the Panel's jurisdiction. The Chairman reiterated that the situation in Chad exemplified the need for the Bank to be more forthcoming about articulating its promotional role in human rights. He also invited the Board to study the wider ramifications of

<sup>120</sup> The Inspection Panel found that Management had been in compliance with operational policies on involuntary resettlement and cultural property.

<sup>121</sup> See Request for Inspection, par. 3 and 4, as annexed to Inspection Panel, Report and recommendation on request for inspection on Chad: Petroleum development and pipeline project (17 September 2000).

<sup>122</sup> Inspection Panel, Investigation report on Chad-Cameroon petroleum and pipeline project (17 July 2002), par. 212.

<sup>123</sup> *Ibid.*, par. 214.

<sup>124</sup> See footnote 19.

<sup>125</sup> The Bank's President James Wolfensohn personally intervened to obtain the release Mr. Yorongar (See Inspection Panel, Investigation report on Chad-Cameroon petroleum and pipeline project (17 July 2002), par. 213), by calling President Déby. Reportedly, the World Bank president was alerted by an NGO, not by Bank staff. See HORTA, K., "Rhetoric and reality: human rights and the World Bank", *Harvard human rights journal*. Vol. 15, Spring 2002, 236.

<sup>126</sup> The Inspection Panel noted that in the 1995-1997 period consultations of local communities had taken place in the presence of gendarmes, and found that "consultations conducted in the presence of security forces were incompatible with the Bank's policy requirements". See Inspection Panel, Investigation report on Chad-Cameroon petroleum and pipeline project (17 July 2002), par. 134-135.

<sup>127</sup> *Ibid.*, par. 217.

<sup>128</sup> IBRD/IDA Press release (18 September 2002): "Chairman's statement on Chad investigation". See also IBRD (2003), 97.

human rights violations as they relate to the overall success or failure of policy compliance in future Bank-financed projects.

Public documents provide no evidence of a reply by the Board to the Chairman's call. It is evident however, that the Management action plan as adopted by the Board in response to the Panel investigation does not address the concerns the Panel raises about the effects on the project of the overall human rights situation in Chad. Consequently, it remains to be seen whether the Panel's findings will have any impact on the conduct of Bank staff in the field.

The poverty reduction component of the project is of particular relevance from the perspective of economic, social and cultural rights. Bank Management insisted that its approach with regard to the petroleum revenue Management was to help the Government of Chad target the bulk of direct oil revenues from the project to expenditures in priority sectors for poverty alleviation<sup>129</sup>.

The legal framework to ensure direction of oil revenues to poverty reduction is the Act concerning Oil Revenues Management, approved by Chad's National Assembly on December 30, 1998<sup>130</sup>. The Act provides that the large majority of revenues from the project will be spent on priority sectors, identified by the law as:

Public health and social affairs, education, infrastructure, rural development (agriculture and livestock), environment and water resources<sup>131</sup>.

The Act does not determine the distribution of revenues among the sectors, leaving plenty of room for governmental discretion. 10% of royalties and dividends will be saved "for the benefit of future generations".<sup>132</sup> Five percent of the royalties will be allocated to "decentralized communities in the producing region"<sup>133</sup>. In addition, the Act establishes an Oil Revenues Control and Monitoring Board to authorize and monitor the disbursement and appropriation of the relevant funds<sup>134</sup>.

The Investigation Panel raised various concerns about allocation of revenues for poverty reduction. First of all, the Panel stated that it had not found any analysis in

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<sup>129</sup> See Inspection Panel, Investigation report on Chad-Cameroon petroleum and pipeline project (17 July 2002), par. 267.

<sup>130</sup> Act No. 001/PR/99 concerning Oil Revenues Management appears as Annex 11 to the Bank's Project Appraisal Document, Report no. 19343 AFR. The Act was reportedly passed by 108 votes, without opposition. Yorongar was in prison at the time. The Parliament passed the Act during one three-hour session. See HERNANDEZ URIZ, G., 2001, 222-223.

<sup>131</sup> Oil Revenues Management Act, Art. 7.

<sup>132</sup> *Ibid.*, Art. 9.

<sup>133</sup> *Ibid.*, Art. 8,c. This amount can, however, be changed by presidential decree at five-year intervals. One of the major problems of oil exploitation in poor countries has been the environmental and human burden on the oil-producing regions, while revenues flow towards the capital. Current operational policies of the Bank do not provide standards on equitable revenue sharing within countries.

<sup>134</sup> *Ibid.*, Art. 15-19. Seven out of the nine members of the oversight committee are State officials; the remaining two members represent local NGOs and the trade unions. In June 2002, the NGO member expressed doubts about whether the Committee would be functioning properly by the time first direct oil revenues would be received (2003). See ASSINGAR, D., "The Oversight Committee: a phantom institution" in HORTA, K., NGUIFFO, S., DJIRAIBE, D. (Eds.), *The Chad-Cameroon oil and pipeline project: A call for accountability*. N' Djamena: Association Tchadienne pour la promotion et la défense des droits de l'homme e.a., 2002, 9.

Bank documents justifying the allocation of revenues between Chad and the Oil Consortium<sup>135</sup>, questioning whether the estimated financial returns to Chad could be considered reasonable, given the magnitude of the project. Next, the Panel wondered whether the Oil Revenues Management Act had not defined the priority sectors too narrowly. The Panel in particular deplored that spending on the judiciary and the functioning of the legal system had not been included<sup>136</sup>. More generally, the investigation had revealed serious concerns about the failure to develop and strengthen the institutional capabilities of the Government of Chad to manage the project as a whole, including the capacity to successfully translate oil revenues into social objectives<sup>137</sup>. Consequently, the Panel insisted that the operation of the Act be subject of continuing monitoring, review and assessment by an independent body “such as the IAG”<sup>138</sup>.

The Management Action Plan endorsed by the Board in response to the investigation provided for “continuing and intensifying supervision of and assistance for” the Government’s capacity —building to direct the oil revenues to poverty reduction<sup>139</sup>—.

Within the international community it is agreed that countries with high natural resource endowments need particularly strong institutions for public governance<sup>140</sup>.

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<sup>135</sup> Inspection Panel, Investigation report on Chad-Cameroon petroleum and pipeline project (17 July 2002), par. 232-236. The Bank’s management reportedly deprived the Panel from accessing some important documents with regard to the oil revenue shares for Chad. The Bank’s general counsel consequently issued a legal opinion in early October 2002 confirming that Inspection Panel members may have access to pertinent proprietary information in the course of their work. See IBRD, 2003, 96.

The relationship between Chad and the Oil Consortium is governed by the so-called Convention of Establishment, certain provisions of which supersede domestic law. It has been argued that as a consequence of the agreement, the companies involved bear very little, if any, legal responsibility for the impact of their activity on living conditions. See BREITKOPF, S., “The World Bank response: PR replaces analysis” in HORTA, K., NGUIFFO, S., DJIRAIBE, D. (Eds.), 2002, 22-23.

<sup>136</sup> *Ibid.*, par. 277. Only the Executive Branch of the government benefits from the revenues.

<sup>137</sup> The first project-related experience was not positive. In 2000 the Consortium of private companies paid a “bonus” of US\$ 25 million to the Chad Government, outside of the framework of the Oil Revenues Management Act. In November 2000, president Déby disclosed that US\$ 4.5 million was spent on the acquisition of arms. The arms sale preceded the establishment of the International Advisory Group. Compare e.g. NGUIFFO, S., BREITKOPF, S., *Broken promises. The Chad Cameroon oil and pipeline project; profit at any cost?* Yaounde: CED, Friends of the Earth International, 2001, 12.

<sup>138</sup> Inspection Panel, Investigation report on Chad-Cameroon petroleum and pipeline project (17 July 2002), par. 279. The World Bank appointed the International Advisory Group (IAG) on 21 February 2001. The purpose of the IAG is to advise the World Bank and the governments on the overall progress in implementation of the project and in the achievement of their social, environmental and poverty alleviation objectives. Specific responsibilities include issues such as the misallocation of public revenue, the adequacy of civil society participation and progress in building institutional capacity. Human rights are not referred to in the terms of reference of the IAG. The powers of the IAG are recommendatory only. The IAG is composed of independent experts, and currently chaired by the former Prime Minister of Senegal, Mamadou Lamine Loum. The Group is to visit Cameroon and Chad at least twice a year; NGOs had lobbied for a permanent presence. The critical reports of the group can be found on [www.gic-ia.org](http://www.gic-ia.org). For the terms of reference of the IAG, see World Bank News release 2001/235/S (21 February 2001): “World Bank appoints international advisory group on the Chad-Cameroon Petroleum development and pipeline project”.

<sup>139</sup> See IBRD/IDA Press release (18 September 2002): “Chad-Cameroon Pipeline project: outcome of the Inspection Panel Investigation”.

<sup>140</sup> Compare GORDON, K., 2002, 13.

It is also clear that countries with a history of civil strife such as Chad do not have such institutions. This puts the World Bank group in the uncomfortable position of having “to ensure that systems are in place to avoid or mitigate adverse impacts”<sup>141</sup>, including human rights violations that may occur in the context of the project. In addition, other actors use the Bank’s involvement to deny a responsibility of their own. The Inspection Panel too is limited in its investigation to the role of the Bank, and is barred from discussing governmental or corporate responsibility.

Lack of governmental capacity may not be the only problem. The political will of the Government of Chad to use the oil revenues for poverty reduction and to refrain from using repression against critics of the project remains doubtful. Clearly, the Bank is still deeply ambivalent internally about its role in ensuring respect for human rights and the proper functioning of political institutions. As a consequence of that ambivalence, the Bank cannot effectively take up the safeguard role in human rights/poverty reduction that other actors are happy to entrust it with. Instead, the Bank is on the defensive, constantly in doubt on how to marry the commitment to its own operational policies with reluctance to address or act instead of deficient State institutions.

On 25 September 2002, the Center for the Environment and Development, a local NGO acting on behalf of people living alongside the pipeline, and a number of employees or former employees of the project submitted a request for inspection on the Cameroon side of the project. The Board again approved an investigation, in December 2002. The Panel produced an investigation report on May 2, 2003. The Board approved the management plan developed in response to the investigation report on 24 July 2003.

The requesters complained about an inadequate consultation process, inadequate compensation, disrespect of workers’ rights and a deterioration of the health situation, as a consequence of a renewed outbreak of sexually transmitted diseases and HIV/AIDS all along the pipeline and around the project’s main bases. The Panel was “generally pleased” with Management compliance with operational policies, although it found instances of non-compliance during the design stages of the project. On worker’s rights, the Panel found that the Bank’s policies only dealt with occupational health and safety, and those had been complied with. Other aspects needed to be dealt with by the Cameroonian judiciary that had “a history of involvement in these issues”. There was criticism of how the project dealt with the risk of increased HIV/AIDS, particularly because risk assessment had been poor during the design phase, and little community sensitization had occurred. In response to the investigation, Management reported that agreement was reached with the Ministry of Health to develop health care facilities along the pipeline route, and to contract NGOs on sensitization —activities to be partly funded by IDA—.

The Panel expressed concerns about the fragility of the local institutional framework and delays in the capacity-building part of the project, thus confirming once again that this is a difficult area of work for the Bank, because it closely relates to the political circumstances prevailing in the country.

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<sup>141</sup> Inspection Panel, Investigation report on Chad-Cameroon petroleum and pipeline project (17 July 2002), par. 76.

### 3. Conclusion

The international financial institutions are subject to the reach of international human rights law to the extent that human rights are incorporated in international custom or in general principles of law. The exact substance and scope of the human rights obligations of the IFIs needs to be determined in the light of the powers and functions entrusted to them.

Both the World Bank and the International Monetary Fund are under an obligation not to violate or to become complicit in violations of general rules of human rights law. In addition, the World Bank is under affirmative duties to act for the realization of general rules of human rights law that are relevant to its purposes and functions. To some extent those duties are reflected in current World Bank operational policies.

The adoption of an explicit commitment by the IFIs that they will refrain from engaging in activities that contravene applicable international human rights law would be helpful in ending the debate about the existence of human rights obligations for the IFIs. With respect to the Bank, an argument has been made that it should insist on the inclusion of human rights clauses in loan agreements, and should accept to litigate cases with parties that claim that their rights have been violated as a consequence of Bank activity.

The review of selected cases investigated by the World Bank Inspection Panel has shown that a human rights accountability gap may well develop in the context of multi-party development projects of the type the Bank typically supports. Such an accountability gap can only be addressed if the project facilitators conclude detailed agreements on how accountability is distributed among them.

As a public financial institution, it is an appropriate role for the Bank to insist that mechanisms for sharing accountability are effective in providing human rights protection, both in the areas of civil and political rights (consultation mechanisms) and economic, social and cultural rights (poverty reduction). Such a course of action would be in line with the Bank's obligations under general rules of human rights law. In this respect, there is a long way to go. The review of the Inspection Panel cases shows that the Bank has great difficulty in coping with the impact of the overall domestic human rights situation on projects it supports, and in dealing with governments that are hostile to the human rights inspired provisions in the Bank's own operational policies.



# The Human Rights of Indigenous Peoples

S. James Anaya

**Summary:** 1. Introduction. 2. Written international instruments that specifically address indigenous peoples. 2.1. ILO Convention No. 169. 2.2. Toward UN and OAS Declarations on Indigenous Peoples' Rights. 2.3. Provisions on Indigenous Peoples in Other International Instruments. 3. Authoritative interpretations of human rights treaties and declarations of general applicability. 3.1. United Nations Treaties. 3.2. Inter-American Human Rights Instruments. 4. Emerging customary international law. 5. Conclusion.

## I. Introduction

Largely as a result of their own advocacy at the international level, indigenous peoples or populations are now distinct subjects of concern within the United Nations, the Organization of American States, and other international institutions<sup>1</sup>. While the terminology of *indigenous peoples* or *populations* remains contested, it nonetheless has become widely used in association with a particular set of issues and people that are being attended to within the international human rights regime.

Designation of distinct groups as *indigenous* has its origins in the pattern of European empire building and colonial settlement that proceeded from the sixteenth century onward: those who already inhabited the encroached-upon lands and who were subjected to oppressive forces became known, as native, aboriginal, or indigenous. Such designations have continued to apply to people by virtue of the place and conditions within the life-altering human encounter set in motion by colonialism. Today, the term *indigenous* refers broadly to the living descendants of preinvasion inhabitants of lands now dominated by others. Indigenous peoples, nations, or communities are culturally distinct groups that find themselves engulfed by settler societies born of the forces of empire and conquest. The diverse surviving Indian communities of the Americas, the Inuit and Aleut of the Arctic, the Aboriginal People of Australia, the Maori of New Zealand, the tribal peoples of Asia and Africa, and other such groups are generally regarded as indigenous. They are *indigenous* because their ancestral roots are imbedded in the lands in which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity. Furthermore, they are *peoples* to the

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<sup>1</sup> For detailed discussions about the measures adopted by international and regional institutions concerning indigenous peoples, see S. JAMES ANAYA, *Indigenous Peoples in International Law*, Oxford Univ. Press, 2d ed., 2004; Patrick THORNBERRY, *Indigenous Peoples and Human Rights*, Manchester Univ. Press, 2002; Russel LAWRENCE BARSH, "Indigenous Peoples in the 1990's: From Object to Subject of International Law?" 7 *Harvard Human Rights Journal* 33, 1994, 43-74.

extent they comprise distinct communities with a continuity of existence and identity that links them to the communities, tribes, or nation of their ancestral past.<sup>2</sup>

In the contemporary world, indigenous peoples characteristically exist under conditions of severe disadvantage relative to others within the states constructed around them. They have been deprived of vast landholdings and access to life-sustaining resources, and they have suffered historical forces that have actively suppressed their political and cultural institutions. As a result, indigenous peoples have been crippled economically and socially, cohesiveness as distinct communities has been damaged or threatened, and the integrity of their cultures has been undermined. In both industrial and less-developed countries in which indigenous people live, the indigenous sectors are almost invariably at the lowest rung of the socioeconomic ladder, and they exist at the margins of power.

In the face of tremendous adversity, indigenous peoples have long sought to flourish as distinct communities on their ancestral lands, and they have endeavoured to roll back the historical patterns of colonization. In conjunction with efforts at the domestic level, indigenous peoples have appealed to the international community and to international law, mostly through its human rights regime, to advance their cause. It can hardly be disputed that, through their efforts over the last three decades especially, indigenous peoples have been able to generate substantial sympathy for their demands among international actors. This can be seen in several concrete developments that build upon previously articulated human rights principles of general applicability and upon the matrix of existing international human rights institutions.

A watershed in relevant international activity was the 1971 resolution of the United Nations Economic and Social Council authorizing the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (now the Sub-Commission on the Promotion and Protection of Human Rights) to conduct a study on the "Problem of Discrimination against Indigenous Populations." The resulting multivolume work by Special Rapporteur José Martínez Cobo compiled extensive data on indigenous peoples worldwide and made a series of findings and recommendations generally supportive of indigenous peoples' demands.<sup>3</sup> The Martínez Cobo study initiated a pattern of multiple activities concerning indigenous peoples among United Nations, regional, and affiliated institutions. In addition to drawing attention from throughout the international human rights system, indigenous peoples now are the subjects of specially created institutions and programs, including the United Nations

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<sup>2</sup> Cfr. See *Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of "indigenous people"*, U.N.Doc. E/CN.4/Sub.2/AC.4/1996/2.

<sup>3</sup> See U.N. Sub-commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/ 1986/7/Add. 1-4 (1996 José Martínez Cobo, special rapporteur) The study contains the following definition:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.  
*Id.*, /Add. 4, at para. 379 (1986).

Working Group on Indigenous Populations,<sup>4</sup> the UN Special Rapporteur on the “situation of human rights and fundamental freedoms of indigenous people,<sup>5</sup> and the newly created UN Permanent Forum on Indigenous Issues.<sup>6</sup>

The institutional energies that have been devoted to the concerns of indigenous peoples over the course of several years have shaped—and are continuing to shape—an innovative body of international norms and practice on the subject.<sup>7</sup> The remainder of this chapter discusses the major written instruments, decisions, and other developments that embody these norms and that reflect a growing international consensus on the rights of indigenous peoples. This consensus that can be understood as giving rise to principles of customary international law, which establish obligations for states in addition to their treaty-based obligations.

## 2. Written international instruments that specifically address indigenous peoples

### 2.1. *ILO Convention No. 169*

In terms of already established international law, the most concrete development concerning indigenous peoples is the International Labour Organization Con-

<sup>4</sup> See Human Rights Commission Res. 1982/19 (March 10, 1982); E.S.C. Res. 1982/3 (May 7, 1982). These resolutions established the Working Group as an organ of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities—now the Sub-Commission on the Promotion and Protection of Human Rights—with a mandate to review developments concerning indigenous peoples and develop relevant international standards. The Working Group, allows broad participation by indigenous peoples at its annual week-long sessions, has become an important venue for indigenous peoples to voice their concerns and the important focal point for UN activity on the subject.

<sup>5</sup> Established by the UN Commission on Human Rights by its Resolution 2001/57 (24 April 2001).

<sup>6</sup> The Permanent Forum, was created with a mandate to advise and make recommendations to the Economic and Social Council specifically on “indigenous issues” and to promote awareness and coordination of the activities concerning these issues within the U.N. system. See ECOSOC Res. E/RES/2000/22 (June 28, 2000). Additionally, eight of the sixteen members who constitute the Permanent Forum as independent experts are named by the President of the Council in consultation with indigenous organizations, see *id.*, para. 1; and the eight individuals named by the Council’s President for these positions are themselves leaders of indigenous organizations or peoples. Borrowing from the work method of the Working Group on Indigenous Populations, the Permanent Forum opens its meetings to representatives of indigenous peoples and support groups from throughout the world, in addition to a wide range of government and international agency representatives, providing them the opportunity to raise their concerns and make recommendations in the forum’s public sessions. The definition of the Permanent Forums’ particular functions within the framework of its general mandate is still in its early stages of development. Nonetheless, the forum’s broad mandate in connection with the concerns and rights of indigenous peoples, and its prominent place within the hierarchy of U.N. Organization and within the indigenous movement, will undoubtedly lead to the creation of specialized procedures that will enhance indigenous peoples’ access to the international system and further promote the implementation of relevant international standards. See generally UN Press Release: *Permanent Forum on Indigenous Issues concludes historic first session; Secretary-general says world’s indigenous peoples “have a home” at UN*, HR/4602 (24 May, 2002).

<sup>7</sup> See generally S. JAMES ANAYA, *Indigenous Peoples in International Law*, Oxford Univ. Press, 1996; Patrick THORNBERRY, *Indigenous Peoples and Human Rights*, Juris Publishing 2002; Siegfried WIESSNER, “The Rights and Status of Indigenous Peoples: A Global Perspective and International Legal Analysis”, *Harvard Human Rights Journal*, vol. 12, 1999, p. 57.

vention No. 169 on Indigenous and Tribal Peoples.<sup>8</sup> This international treaty, adopted and opened for ratification by the ILO in 1989, is the successor to the earlier ILO Convention on Indigenous and Tribal Populations of 1957, which the ILO had developed following a series of studies and expert meetings signaling the particular vulnerability of indigenous workers.<sup>9</sup> The newer ILO Convention No. 169 represents a marked departure in world community policy from the philosophy reflected in the earlier convention of promoting the assimilation of indigenous peoples into majority societies. This paradigm shift embodied by Convention No. 169 is indicated by its preamble, which recognizes “the aspirations of [indigenous] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live.” Upon this premise, the Convention includes provisions advancing indigenous cultural integrity, land and resource rights, and non-discrimination in social welfare spheres; and it generally enjoins states to respect indigenous peoples’ aspirations in all decisions affecting them.

Importantly, Convention No. 169 recognizes the collective rights of indigenous “peoples” as such, and not just rights of individuals who are indigenous. These collective rights of indigenous peoples include rights of ownership over traditional lands,<sup>10</sup> the right to be consulted as groups through their own representative institutions,<sup>11</sup> and the right as groups to retain their own customs and institutions.<sup>12</sup> With its affirmations of collective rights, the Convention makes for a substantial innovation in international human rights law, which otherwise has almost exclusively been articulated in international written instruments in terms of individual rights. In the Convention a savings clause is attached to the usage of the term “peoples” to avoid implications of a right of self-determination, given that in other international instruments “all peoples” are deemed to have such a right.<sup>13</sup> At the time the Convention was adopted in 1989, the issue of whether or not indigenous peoples have a right of self-determination—a right universally claimed by indigenous peoples in international discourse—remained an especially contentious one. The Secretariat of the International Labour Organization has taken the position that the qualifying language of the Convention regarding use of the term “peoples ... did not limit the meaning of the term, in any way whatsoever” but rather simply was a means of leaving a decision on the implication of the term in relation to self-determination to the United Nations.<sup>14</sup> In any case, the qualifying language in no way undermines the collective nature of the rights that are affirmed in the Convention.

<sup>8</sup> Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989 (entered into force September 5, 1991).

<sup>9</sup> For a history of the ILO activity leading to the adoption of Convention No. 107, see Hurst HANNUM, “New Developments in Indigenous Rights”, *Virginia Law Review*, Vol. 28, 1988, pp. 649, 652-53.

<sup>10</sup> ILO Convention No. 169, *supra*, Art. 14.

<sup>11</sup> *Ibid.* Art. 6(1)(a).

<sup>12</sup> *Ibid.* Art. 8(2).

<sup>13</sup> *E.g.*, common Article 1 of the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.

<sup>14</sup> Statement of Lee Sweptson of the International Labour Office to the U.N. Working Group on Indigenous Populations, 31 July 1989.

Yet in part because of the qualified use of the term *peoples*, and because several advocates of indigenous groups saw the Convention as not going far enough in the affirmation of indigenous rights, several representatives of indigenous peoples joined in expressing to the ILO dissatisfaction with the new Convention upon its adoption. But since the ILO adopted Convention No. 169 in 1989, indigenous peoples organizations and their representatives increasingly have taken a pragmatic view and expressed support for its ratification. Indigenous peoples' organizations from Latin America have been especially active in pressing for ratification so that now most of the countries in that region are now parties to the Convention, in addition to Nordic countries with indigenous Saami and Inuit populations.<sup>15</sup>

In certain countries that have ratified Convention No. 169, indigenous groups are invoking the Convention in domestic or ILO proceedings with some success in their efforts to gain redress for problem situations. In Colombia, for example, the efforts of the U'wa people to resist oil development on their traditional lands led to a decision of the Colombian Constitutional Court which, relying substantially on ILO Convention No. 169, found invalid a government-issued license for Occidental Petroleum to explore for oil within the U'wa reserve (*resguardo*) because of inadequate consultation with the U'wa people.<sup>16</sup> Subsequently, the government issued to Occidental a different license to explore for oil outside the U'wa reserve but within ancestral land still used by the U'wa. After Occidental proceeded with the oil exploration under the second license, a Colombian labor organization, acting on behalf of the U'wa people, submitted the matter to the ILO under the procedure authorized by Article 24 of the ILO Constitution for examining "representations" alleging violations of ILO Conventions.<sup>17</sup> The ILO Committee of Experts convened to examine the complaint found an absence of compliance with the Convention mandates of consultation as to both exploration licenses and recommended remedial measures.<sup>18</sup>

## 2.2. *Toward UN and OAS Declarations on Indigenous Peoples' Rights*

As already suggested, ILO Convention No. 169 is part of a larger body of international developments concerning indigenous peoples. Most prominent among these other developments are ongoing efforts within the United Nations and Organization of American States to develop declarations on the rights of indigenous peoples for adoption by the principal organs of these institutions.

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<sup>15</sup> As of this writing, the parties to the Convention include Argentina, Bolivia, Brazil, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Norway, Netherlands, Paraguay, Peru, and Venezuela

<sup>16</sup> Colombian Constitutional Court, Ruling SU-039 of 3 February 1997.

<sup>17</sup> For a description of the Article 24 procedure and other ILO procedures to advance adherence to ILO conventions, see Lee SWEPTSON, "Human Rights Complaint Procedures of the International Labour Organization", in Hurst HANNUM, ed., *Guide to International Human Rights Practice*, Univ. Pennsylvania Press, 2nd ed., 1992, p. 99.

<sup>18</sup> Representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under Article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT), decision by ILO Committee of Experts of 21 November 2001.

A draft of a United Nations Declaration on the Rights of Indigenous Peoples<sup>19</sup> was produced and adopted in 1993 by the UN's five-member Working Group on Indigenous Populations, which is part of the Sub-Commission on Promotion and Protection of Human Rights. Representatives of indigenous peoples from around the world actively participated in the years of deliberation by the Working Group that began in the early 1980s and that led to its draft of a declaration on indigenous rights. The draft declaration is now before the Sub-Commission's parent inter-governmental body, the UN Commission on Human Rights, which in 1995 established its own working group to consider the draft.

The focus within the UN on indigenous issues during the 1980s and 90s spawned initiatives in other international arenas, including that which led to ILO Convention No. 169 and the initiative within the OAS to develop its own declaration on the subject. Having been authorized in 1989 by the OAS General Assembly to develop a "juridical instrument" regarding indigenous groups, the OAS Inter-American Commission on Human Rights adopted in 1996 a Proposed American Declaration on the Rights of Indigenous Peoples.<sup>20</sup> The Proposed American Declaration is now being considered by a specially created working group of the Political and Juridical Committee of the OAS Permanent Council, and indigenous peoples' representatives have participated actively, alongside state representatives, in that working group.

The UN and OAS draft texts that are currently under consideration are similar in terms of scope of coverage and in the nature of the rights affirmed. Like the ILO's Convention No. 169 on Indigenous and Tribal Peoples, both draft texts embrace a philosophy that, in contrast to earlier dominant thinking, values the integrity of indigenous communities and their cultures; and the texts identify indigenous groups and individuals as special subjects of concern for the states in which they live and for the international community at large. Further like the ILO Convention, the draft UN and OAS texts presuppose that indigenous peoples will exist as parts of the states that have been constructed around them, but with robust group rights, including rights relating to land and natural resources, culture, and autonomy of decision-making authority. The draft UN and OAS texts are more sweeping than ILO Convention No. 169 in their articulation of such rights; the UN text is the most far reaching, going so far as to articulate "a right of self-determination" for all indigenous peoples.<sup>21</sup>

The sustained international attention to the articulation of indigenous peoples' rights has strengthened the core of common international opinion on the content

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<sup>19</sup> Draft United Nations Declaration on the Rights of Indigenous Peoples, as agreed upon by the members of the U.N. Working Group on Indigenous Populations at its eleventh session, Geneva, July 1993; adopted by the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities by its resolution 1994/45, August 26 1994, U.N. Doc. E/CN.4/1995/2/, E/CN.4/Sub.2/1994/56, at 105.

<sup>20</sup> Proposed American Declaration on the Rights of Indigenous Peoples, approved by the Inter-Am. Comm. on Human Rights Feb. 1997, in: 1997 Inter-Am. Com. H.R. Annual Report, OEA/Ser. L/V/III.95.doc.7, rev. 1997, pp. 654-676 (proposal by the Inter-Am. Comm. H.R.). This proposed text was a revision of an earlier draft, which the Inter-American Commission had published in September of 1995. See OEA/Ser/LV/III.90, Doc. 9 rev. 1, 1995.

<sup>21</sup> See Draft United Nations Declaration on the Rights of Indigenous Peoples, *supra*, art. 3.

of those rights that was the basis for ILO Convention No. 169, a core of common opinion substantially shaped by indigenous peoples' contemporary demands and supported by years of official inquiry into the subject. Since Convention No. 169 was adopted in 1989, government comments directed at developing UN and OAS declarations on indigenous rights generally have affirmed the basic precepts set forth in the Convention; and indeed, despite continuing contentiousness between indigenous peoples and states over the language of the declarations and certain of the declarations more far reaching provisions, government comments indicate movement toward a consensus that even more closely accords with indigenous peoples' demands.

This movement can be seen in the discussion over the provision of the draft UN text that articulates a right of self-determination for indigenous peoples. As noted earlier, states have resisted recognizing indigenous groups as "peoples" entitled to a "right of self-determination." This resistance is mostly the result of an inclination to equate self-determination with a right to secede or to form an independent state, even though indigenous peoples in articulating their demands for self-determination have almost universally denied aspirations of independent statehood, seeing self-determination instead as a basis for securing a dignified existence as distinct groups within the framework of existing state boundaries. More and more governments, however, are moving away from seeing self-determination as necessarily wedded to rights of attributes of independent statehood, and are expressing willingness to include in the UN declaration some form of recognition of indigenous self-determination. The Australian government signaled this trend in a statement to the 1991 session of the U.N. Working Group on Indigenous Populations, expressing "hope" that it would be possible to find an acceptable way to refer to self-determination in the U.N. Declaration:

Events in all parts of the world show us that the concept of self-determination must be considered broadly, that is, not only as the attainment of national independence. Peoples are seeking to assert their identities, to preserve their languages, cultures, and traditions and to achieve greater self-management and autonomy, free from undue interference from central governments.<sup>22</sup>

Such thinking regarding self-determination has increasingly dominated in the discussion of the ad hoc working group of UN Commission on Human Rights that was established to consider the Declaration on indigenous rights. Summarizing the discussion on self-determination among the numerous states participating in the 1999 session of the Commission working group, the delegate from Guatemala observed approvingly that no state had expressly rejected inclusion of the right to self-determination for indigenous peoples in the Declaration.<sup>23</sup> The chair of the working group at the same session concluded from the discussion that the "participants in general agreed that the right to self-determination was the cornerstone of the

<sup>22</sup> Australian Government Delegation, Speaking Notes on Self-Determination, 24 July 1991, p. 2.

<sup>23</sup> *Report of the 1999 session working group on the draft declaration on indigenous peoples*/CN.4/2000/84, para. 73.

draft declaration.”<sup>24</sup> He further identified “broad agreement” that “the right to self-determination could not be exercised to the detriment of the independence and territorial integrity of States”, and he observed that states expressing support for recognizing indigenous peoples’ right of self-determination did so with the understanding that this right does not imply a right of secession.<sup>25</sup> This movement toward a consensus on indigenous self-determination is emblematic of the effect the discussions over the UN and OAS declarations are having on the building of international norms concerning indigenous peoples, even in advance of the adoption of the declarations.

### 2.3. *Provisions on Indigenous Peoples in Other International Instruments*

Already adopted international instruments, in addition to Convention No. 169, reflect and further contribute to the developing international consensus on indigenous peoples’ rights. The Convention on the Rights of the Child, an international treaty that has been ratified by almost all of the world’s states. In particular, Article 30 of the Convention affirms:

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.<sup>26</sup>

Resolutions adopted at the 1992 United Nations Conference on Environment and Development include provisions on indigenous people and their communities. The Rio Declaration,<sup>27</sup> and the more detailed environmental program and policy statement known as Agenda 21,<sup>28</sup> reiterate precepts of indigenous peoples’ rights and seek to incorporate them within the larger agenda of global environmentalism and sustainable development.<sup>29</sup> In the same vein, Article 8(j) of the Convention on Biodiversity, which affirms the value of traditional indigenous knowledge in connection with conservation, sustainable development, and intellectual property

<sup>24</sup> *Id.* para. 82.

<sup>25</sup> *Id.* para. 83.

<sup>26</sup> Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N.GAOR Supp. (No. 49) at 167 U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990. For a discussion of the convention and relevant U.N. procedures, see Patrick THORNBERRY, *Indigenous Peoples and Human Rights*, 2002, 225-241.

<sup>27</sup> Rio Declaration on Environment and Development, U.N. Conference on Environment and Development, Rio de Janeiro, June 13, 1992, principle 22, U.N. Doc. A/CONF.151/26 (vol. 1), Annex 1 (1992).

<sup>28</sup> Agenda 21, U.N. Conference on Environment and Development, Rio de Janeiro, June 13, 1992, U.N. Doc. A/CONF.151/26 (vols. 1, 2 & 3), Annex 2 (1992).

<sup>29</sup> Especially pertinent is Chapter 26 of Agenda 21, *id.*, vol. 3, at 16, Chapter 26 is phrased in non-mandatory terms; nonetheless, it carries forward normative precepts concerning indigenous peoples and hence contributes to the crystallization of consensus on indigenous peoples’ rights. Chapter 26 emphasizes indigenous peoples’ “historical relationship with their lands” and advocates international and national efforts to “recognize, accommodate, promote and strengthen” the role of indigenous peoples in development activities. *Id.*, art. 26.1.



regimes;<sup>30</sup> Resolutions adopted at subsequent major UN conferences—the 1993 World Conference on Human Rights, the 1994 UN Conference on Population and Development, the World Summit on Social Development of 1995, the Fourth World Conference on Women of 1995, and the World Conference Against Racism of 2001—similarly include provisions that affirm or are consistent with prevailing normative assumptions in this regard.<sup>31</sup>

<sup>30</sup> Convention on Biodiversity, art. 8(j), U.N. Summit on the Environment, Rio de Janeiro, June 5, 1992, U.N. Doc. UNEP/BIO.Div/N7 - INC.5/4 and depository notification C.N. 393. 1993. Treaties - 11 of 7 February 1994. Implementation of the convention includes periodic meetings of state parties (Conferences of the Parties), as well as a number of technical committees and working groups on specific issues covered by the convention. The issue of indigenous traditional knowledge has been object of a specific focus by the Conference of the Parties. See Decision III/14 (Implementation of article 8.j), *Report of the Third Meeting of Conference of the Parties to the Convention on Biological Diversity*, U.N. Doc. UNEP/CBD/COP/3/38 (1997), Annex 2, at 90-93; Decision IV/9 (Implementation of article 8.j and related provisions), *Report of the Fourth Meeting of the Conference of the Parties to the Convention on Biological Diversity*, U.N. Doc. UNEP/CBD/COP/4/27 (1998), Annex, at 111-114; Decision V/16 (Article 8.j and related provisions), *Report of the Fifth Meeting on the Conference of the Parties to the Convention on Biological Diversity*, U.N. Doc. UNEP/CBD/COP/5/23 (2000), Annex III, at 141-143; Decision VI/10 (Article 8.j and related provisions), *Report of the Workshop on Traditional Knowledge and Biological Diversity*, U.N. Doc. UNEP/CBD/TKIP/1/3 (1997); *Report of the first meeting of the Ad Hoc Open-ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity*, U.N. Doc. UNEP/CBD/COP/5/5 (2000); *Report of the Ad Hoc Open-ended Inter-Sessional Working-Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity on the work of its second meeting*; U.N. Doc. UNEP/CBD/COP/6/7 (2002); *Report of the Ad Hoc Technical Expert Group on Traditional Knowledge and the Clearing House Mechanism*, U.N. Doc. UNEP/CBD/AHTEG/TK-CHM/1/3 (2003).

<sup>31</sup> See Vienna Declaration and Program of Action, U.N. Doc. A/CONF.157/23 (1993), adopted by the World Conference on Human Rights (Vienna, June 14-25, 1993), at paras. 20 (declaration), 28-32 (program of action); Programme of Action adopted at the International Conference on Population and Development, Cairo, Sept. 5-13, 1994, paras. 6.21-6.27, U.N. Doc. ST/ESA/SER.A/149, U.N. Sales No. E.95.XIII.7 (1995); Copenhagen Declaration on Social Development, in Report of the World Summit for Social Development (Copenhagen, March 6-12, 1995), U.N. Doc. A/CONF.166/9 (1995), chap. 1, Res. 1., Annex I, at paras. 26(m), 29, commitments 5(b), 4(f), 6(g); Programme of Action of the World Summit for Social Development, id., Annex II, at paras. 12(i), 19, 26(m), 32(f) & (h), 35(e), 38(g), 54 (c), 61, 67, 74(h), 75(g); Beijing Declaration, in Report of the Fourth World Conference on Women (Beijing, 4-15 September 1995), U.N. Doc. A/CONF.177/20 (1985), chap. 1, Res. 1, Annex I, at para. 32; Platform of Action, id., Annex II, at paras. 8, 32, 34, 58(q), 60(a), 61(c) 83(m)(n)(o), 89, 106(c)(y), 109(b)(j), 116, 167(c), 175(f); Declaration, in Report of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Durban, South Africa, Aug. 31 - Sept. 8, 2002), U.N. Doc. A/CONF.189/12, chap. 1, at preamble, paras. 13-14, 22-24, 39-45, 73, 103; Programme of Action, id., at paras. 15-23, 78(j), 203-09; Political Declaration in Report of the World Summit on Sustainable Development (Johannesburg, South Africa, August 26-September 4, 2002), U.N. Doc. A/CONF.199/20 (2002), chap.1, Res. 1, para. 25; Plan of Implementation of the World Summit on Sustainable Development, id., at paras. 7(e)(h)(g); 37(f), 38 (i), 40(d)(r), 42(e), 43(b), 44(h)(j)(k)(l), 45(h), 46(b), 53, 54(h), 63, 64(d), 70 (c), 109(a). It should be noted that, from the point of view of the indigenous representatives participating in these conferences, the provisions of these resolutions have not provided sufficient affirmation of rights of the indigenous people. Particularly notable is the dissatisfaction of the indigenous representatives at the Durban conference on racism. See "Press Release: Protest of Indigenous Peoples must be taken seriously: World Conference must withdraw discriminating articles from final resolution", issued by the Society for Threatened Peoples on Sept. 4, 2001. Nevertheless, despite the shortcomings of the Durban Declaration, it should not overlooked that it includes provisions that reinforce the norms reflected in ILO Convention Num. 169 and the draft declarations of the United Nations and of the OAS, in a way similar to the resolutions of the other conferences.

In its 1989 resolution “on the Position of the World’s Indians”, the European Parliament expressed its concern over the conditions faced by indigenous peoples and called on governments to secure indigenous land rights and enter consultations with indigenous groups to develop specific measures to protect their rights.<sup>32</sup> Elaborating upon these and related themes, the European Parliament adopted another resolution in 1994, on “Measures Required Internationally to Provide Effective Protection for Indigenous Peoples.”<sup>33</sup> The 1994 resolution holds that indigenous peoples have the “right to determine their own destiny by choosing their institutions, their political status and that of their territory.”<sup>34</sup> Further, the European Commission, the executive organ of the European Union, released in 1998 a “Working Document on support for indigenous peoples in the development co-operation of the Community and Member States.”<sup>35</sup> This document promotes a series of development programs for the benefit of indigenous peoples which are to be based on their full participation and informed consent, with the objective of establishing conditions by which these peoples are able to maintain control over their own economic, social, and cultural development.

More generally emphasizing the underlying need for international attention and cooperation to secure indigenous peoples in the full enjoyment of their rights are the following: the 1972 resolution of the Inter-American Commission on Human Rights identifying patterns of discrimination against indigenous peoples and stating

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<sup>32</sup> *Resolution on the Position of the World’s Indians, European Parliament, 1989, reprinted in Review of Developments Pertaining to the Promotion and Protection of Human Rights and Fundamental Freedoms on Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/AC.4/1989/3, at 7 (1989).*

<sup>33</sup> *Resolution on Action Required Internationally to Provide Effective Protection for Indigenous Peoples, Feb. 9, 1994, Eur. Parl. Doc. PV 58(II) (1994).*

<sup>34</sup> *Id.*, para. 2.

<sup>35</sup> See Working Document of the Commission on Support for Indigenous Peoples in the Development Co-operation of the Community and Member States, SEC (98) 773 final (May 11, 1998) (promoting new ways of co-operation between the Union and member states and indigenous peoples); EU Development Council Resolution on Indigenous Peoples within the Framework of the Development Cooperation of the Community and Member States, 13461/98 (affirming indigenous peoples’ rights, including self-development, and calling for integrating the concern on indigenous peoples in the Union’s existing procedures and guidelines for development co-operation). Since 1999, the rights of indigenous peoples constitute a thematic priority within the European Initiative for Democracy and Human Rights. See Council Regulation (EC) No 975/1999 of 29 April 1999 laying down the requirements for the implementation of development cooperation operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms, Official Journal L 120, pp. 1-8, art. (1)(d); Council Regulation (EC) No 976/1999 of 29 April 1999 laying down the requirements for the implementation of Community operations, other than those of development cooperation, which, within the framework of Community cooperation policy, contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms in third countries, Official Journal L 120 pp. 8-14, Art. 3 (a)(d). See also Communication from the Commission to the Council and the European Parliament: The European Union’s Role in Promoting Human Rights and Democratization in Third Countries, COM(2001), 252 final (May 8, 2001), at 15, 17, 28 (proposing “Combating Racism and Xenophobia and Discrimination Against Indigenous Peoples” as a thematic priority of the European Initiative); Communication from the Commission to the Council: Review of progress of working with indigenous peoples, COM (2002) 291 final (June 16, 2002) (assessing the progress of the EU policies with indigenous peoples).

that “special protection for indigenous populations constitutes a sacred commitment of the States;”<sup>36</sup> the Helsinki Document 1992—The Challenge of Change, adopted by the Conference on Security and Cooperation in Europe, which includes a provision “[n]oting that persons belonging to indigenous populations may have special problems in exercising their rights;”<sup>37</sup> parts of the Vienna Declaration and Programme of Action adopted by the 1993 United Nations Conference on Human Rights, urging greater focus on indigenous peoples’ concerns within the U.N. system;<sup>38</sup> the 1997 Charter of Civil Society for the Caribbean Community, by which Caribbean states “recognise the contribution of the indigenous peoples to the development process and undertake to continue to protect their historical rights ... culture and way of life;”<sup>39</sup> and the OAS Inter.-American Democratic Charter of 2001, which links promoting the rights of indigenous peoples with the strengthening of democracy.<sup>40</sup>

Following the same normative trend, in 1991 the World Bank adopted a revised operational policy in view of the pervasive role the bank plays in financing development projects in less-developed countries where many of the world’s indigenous people live.<sup>41</sup> Much of the discussion within international institutions about indigenous peoples has focused not just on the potential benefits of development programs aimed specifically at indigenous groups, but also on the damaging effects of many industrial development projects that have taken place in areas traditionally occupied by indigenous groups.<sup>42</sup> The World Bank adopted Operational Policy 4.10 after consultations with indigenous groups<sup>43</sup>. Although its terms fall short of those advocated by indigenous advocates, the Bank’s operational policy recognizes the “customary rights” of indigenous peoples over lands and resources and affirms the principle of their “free, prior, and informed consultation” in relation to Bank-funded projects affecting them.<sup>44</sup>

<sup>36</sup> Resolution on Special Protection for Indigenous Populations, Inter-American Commission on Human Rights, Dec. 28, 1972, O.A.S. Doc. OEA/Ser.P/AG/doc.305/73, rev. 1, at 90-91 (1973).

<sup>37</sup> Helsinki Document 1992-The Challenges of Change, July 10, 1992, para. 6(29), reprinted in U.N. GAOR, 47th Sess., at 65, U.N. Doc. A/47/361 (1992).

<sup>38</sup> Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, June 25, 1993, pt. 1, para. 20; pt. 2, paras. 28-32, U.N. Doc. A/CONF.157/23 (1993).

<sup>39</sup> Charter of the Civil Society for the Caribbean Community, appropriated by the Conference of the Heads of Government of the Caribbean Community (CARICOM) in its 8th meeting (San Juan, Antigua and Barbuda, Feb. 19, 1997).

<sup>40</sup> Inter-American Democratic Charter, issued at Lima, Sept. 11, 2001, by the OAS General Assembly, AG/doc.8 (XXVIII-E/01).

<sup>41</sup> See generally Shelton DAVIS & William PARTRIDGE, “Promoting the Development of Indigenous People in Latin America”, *Finance and Development*, Mar. 1994, at 38, 39 (discussing the role of the World Bank and other international financial agencies).

<sup>42</sup> See Julian BURGER, *Report from the Frontier: The State of the World’s Indigenous Peoples*, 1987, 1-5 (discussing the impact of development projects on indigenous lands, especially in parts of the developing world).

<sup>43</sup> See World Bank, Summary of Consultations with External Stakeholders Regarding the World Bank Indigenous Peoples Policy (Draft PO/BP 4.10), Internal Report, April 18, 2002 (updated October 7, 2002); World Bank, Approach Paper on Revision of OD 4.20 on Indigenous Peoples.

<sup>44</sup> O.P. 4.10, The World Bank Manual: Operational Policies (July 2005). Operational Policy 4.10 replaced Operational Directive 4.20, which was adopted in 1991 after a period of expert study that helped shape attitudes within the Bank toward greater programmatic action concerning indigenous

### 3. Authoritative interpretations of human rights treaties and declarations of general applicability

Aside from the above developments, the rights of indigenous peoples can be seen as part of international law on the basis of relevant provisions of widely ratified human rights treaties and other instruments of general applicability. Even though these instruments do not explicitly address indigenous peoples, relevant international institutions endowed with competent authority have interpreted them in accordance with the now prevailing assumptions about indigenous peoples and their rights.

#### 3.1. *United Nations Treaties*

Significantly, the right of self-determination is affirmed as a right of “all peoples” in the common Article 1 of the widely ratified International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Indigenous peoples repeatedly have invoked common Article 1 as a basis of their claims. Even though the meaning and scope of this article has been hotly debated, the UN Human Rights Committee, which is charged with monitoring compliance with the Covenant on Civil and Political Rights, has weighed in favour of its application for the benefit of indigenous peoples. The Committee has interpreted Article 1 of the Covenant to apply to indigenous peoples in a manner consistent with the prevailing themes in the discussions on the self-determination provision of the draft UN Declaration on the Rights of Indigenous Peoples. In commenting upon Canada’s 1999 report under the Covenant, the Committee stated that the right of self-determination affirmed in Article 1 protects indigenous peoples, *inter alia*, in their enjoyment of rights over traditional lands, and it recommended that, in relation to the aboriginal people of Canada, “the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with Article 1 of the Covenant.”<sup>45</sup> The Committee also has invoked Article 1 in examining reports from Australia and Norway, as they relate to indigenous peoples. Moreover, it routinely examines the situations of indigenous peoples in reviewing the periodic reports by state parties to the Covenant, applying its now apparent understanding about the implications of the general right of self-determination, but often without specifically referring to Article 1.<sup>46</sup>

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peoples affected by bank-funded projects. See generally Michael CERNEA, *Sociologists in a Development Agency: Experiences from the World Bank* 19-21 (World Bank Environment Department, May 1993, Washington, D.C.) (discussing the dynamics leading to World Bank O.D. 4.20). For a critical perspective of the World Bank’s process of developing the currently applicable Operational Policy 4.10, see Fergus MCKAY, “Universal Rights or a Universe unto Itself? Indigenous Peoples’ Human Rights and the World Bank’s Draft Operational Policy 4.10 on Indigenous Peoples”, 17 *American University Law Review*, 2002, 527.

<sup>45</sup> *Concluding Observations and Recommendations of the Human Rights Committee: Canada*, 07/04/99, CCPR/C/79/Add.105., para.8.

<sup>46</sup> See, e.g., *Concluding Observations of the Human Rights Committee: United States of America*, 03/10/95, CCPR/C/79/Add.50 (criticizing U.S. law allowing for “extinguishment” of aboriginal rights and recommending judicial review of Congressional affecting recognition of indigenous peoples and their rights).

The Human Rights Committee has most frequently relied on Article 27 of the Covenant in pronouncing on the rights of indigenous peoples.<sup>47</sup> Article 27 of the Covenant states, “[i]n those States in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language”. In its General Comment on Article 27, the Committee held this provision of the Covenant to establish affirmative obligations on the part of states with regard to indigenous peoples in particular, and it interpreted Article 27 as covering all aspects of an indigenous groups’ survival as a distinct culture, understanding culture to include economic or political institutions, land use patterns, as well as language and religious practices.<sup>48</sup> This interpretation of Article 27 is confirmed in the Committee’s adjudication of complaints submitted to it by representatives of indigenous groups pursuant to the Optional Protocol to the Covenant.

In *Ominayak, Chief of the Lubicon Lake Band of Cree v. Canada*, the Human Rights Committee determined that Canada had violated Article 27 by allowing the provincial government of Alberta to grant leases for oil and gas exploration and for timber development within the ancestral territory of the Lubicon Lake Band.<sup>49</sup> The Committee found that the natural resource development activity compounded historical inequities to “threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of Article 27 so long as they continue”<sup>50</sup>. The Committee

<sup>47</sup> This is especially so in relation to its considerations of individual complaints under the procedure set forth in the Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force March 23, 1976. The Committee has determined that, because its jurisdiction under the Optional Protocol is to consider complaints by “individuals”, it is not competent to admit complaints alleging violations of article 1 self-determination, which is a right of “peoples.” See *Ominayak, Chief of the Lubicon Lake Band v. Canada*, Communication No. 167/1984, U.N. GAOR, 45<sup>th</sup> Sess. Supp. No. 40, vol. 2, at 1, U.N. Doc. A/45/40; *Ivan Kitok v. Sweden*, Communication No. 197/1985 (2 December 1985), CCPR/C/33/D/197/1985; *R.L. et al. v. Canada*, Communication No. 358/1989, U.N. Doc. CCPR/C/43/D/358/1989 (1991); *Länsman et al. v. Finland*, Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (1994).

<sup>48</sup> ICCPR General Comment 23 (Fiftieth session, 1994): Article 27: The Rights of Minorities, A/49/40 vol. I (1994) 107 at para. 7.

<sup>49</sup> Communication No. 167/1984, Hum. Rts. Comm. A/45/40, Vol. II, annex IV.A, para. 32.2.

<sup>50</sup> *Id.* at para. 33. See also *Länsmann et al. v. Finland*, Communication No. 511/1992, Hum. Rts. Comm., CCPR/C/52/D/511/1992 (1994) (*Länsmann I*) (reindeer herding part of Sami culture protected by article 27); *J.E. Länsmann v. Finland*, Communication No. 671/1995, CCPR/C/58/D/671/1995, paras. 2.1-2.4, 10.1-10.5 (*Länsmann II*) (Sami reindeer herding in certain land area is protected by article 27, despite disputed ownership of land; however, article 27 not violated in this case); *Kitok v. Sweden*, Communication No. 197/1985, Hum. Rts. Comm., A/43/40, annex VII.G (1988) (article 27 extends to economic activity where that activity is an essential element in the culture of an ethnic community); *Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1993 (10 December 1992), U.N. Doc. CCPR/C/70/D/547/1993, para. 9.9 (in order for the state to comply with Article 27, measures affecting the economic activities of Maori must be carried out in a way that allows for a continued enjoyment their culture, and profession and practice of their religion in community with other members of their group). *Anni Äärelä and Jouni Näkkäläjärvi v. Finland*, Communication No. 779/1997 (4 February 1997), CCPR/C/73/D/779/1997. (reindeer husbandry is an essential element of Sami culture recognized under article 27). Compare *J.G.A. Diergaardt* (late Captain of the Rehoboth Baster Community) *et al.* (represented by Dr. Y. J. D. Peeters, their international legal

has also found that indigenous religious and cultural traditions are protected by Articles 17 and 23 of the Covenant, which affirm the rights to privacy and to the integrity of the family. In a case involving people indigenous to Tahiti, the Committee determined that these articles had been violated by France when its territorial authority allowed the construction of a hotel complex on indigenous ancestral burial grounds<sup>51</sup>. For its part, the OAS Inter-American Commission on Human Rights has similarly invoked provisions of the International Covenant on Civil and Political Rights, particularly its Article 27, in examining the human rights situations of indigenous groups.<sup>52</sup>

Another notable international treaty is the International Convention on the Elimination of All Forms of Racial Discrimination. Like other relevant human rights treaties, the Convention Against Discrimination does not specifically mention indigenous groups or individuals. Yet the non-discrimination norm that is exalted throughout the Convention, and that is prevalent in all other international human rights instruments, has particular implications in favour of indigenous peoples. The Committee on the Elimination of Racial Discrimination (CERD), which promotes implementation of this Convention, has issued a General Recommendation that identifies such implications. In its General Recommendation on Indigenous Peoples, CERD identifies indigenous peoples as vulnerable to patterns of discrimination that have deprived them, as groups, of the enjoyment of their property and distinct ways of life, and it hence calls upon state parties to take special measures to protect indigenous cultural patterns and traditional land tenure.<sup>53</sup>

CERD applied its understanding of the non-discrimination norm in examining amendments to legislation in Australia that regulates the recognition of indigenous traditional land rights. Invoking its "early warning/urgent action" procedure,<sup>54</sup> the Committee found that the amendments discriminated against indigenous title holders in favour of non-indigenous interests would result in Aboriginal and Torres Strait Islanders losing their "native title" rights.<sup>55</sup> It thus called upon Australia to suspend implementation of the amendments and engage in consultation with the indigenous people of the country in order to arrive at acceptable alternatives.<sup>56</sup> CERD similarly examined the

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counsel) v. Namibia, Communication No. 760/1997, U.N. Doc. CCPR/C/69/D/760/1997 (6 September 2000), para 10.6 and Individual Opinion by Elizabeth Evatt and Cecilia Medina Quiroga (concurring) (cattle grazing of Africaaner community not recognized as a protected practice under Article 27 because no clear relationship existed between cattle grazing and the distinctiveness of the community's culture or self-government practices.)

<sup>51</sup> Francis Hopu and Tepoaitu Bessert, Communication No 549/1993 (29 December 1997) U.N. Doc. CCPR/C/60/D/549/1993/Rev.1.

<sup>52</sup> See, e.g., *The Miskito Case*, Case 794 (Nicaragua), Inter-Am.C.H.R., *Report on the Situation of a Segment of the Nicaraguan Population of Miskito Origin*, OEA/Ser.LN/II.62, doc. 10 rev. 3, at 76-78, 81 (1983); *The Yanomami Case*, Case 7615 (Brazil), Inter-Am C.H.R., OEA/Ser.LN/II.66, doc. 10 rev. 1 at 24, 31 (1985); Inter-Am. C.H.R., *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.LN/II.96, doc. 10 rev., at 03-04 (1997).

<sup>53</sup> CERD, General Recommendation XXIII(51) concerning Indigenous Peoples, adopted at the Committee's 1235<sup>th</sup> meeting, on 18 August 1997.

<sup>54</sup> For an explanation of the function and procedures of the early-warning measures of CERD see Atsuko TANAKA with Yoshinobu NAGAMINE, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Guide for NGO's*, Minority Rights Group, 2001, pp. 364-366.

<sup>55</sup> CERD, Decision 2 (54) on Australia. 18/03/99. A/54/18. para.21(2).

<sup>56</sup> *Id.* at pars. 11-12.

situation of the Western Shoshone and other indigenous peoples subject to the jurisdiction of the United States in reviewing that country's first periodic report under the Convention. The Committee expressed concern about aspects of U.S. law by which the government purports to "abrogate unilaterally" treaties entered into with Indian tribes and treats the tribes as "domestic dependent nations" subject to its plenary power and guardianship, indicating that such aspects are incompatible with the Convention.<sup>57</sup> It further raised specific concerns about the application of these legal doctrines to the Western Shoshone people, whose traditional lands the United States now regards as its own and targets for military use and resource extraction.<sup>58</sup> Signaling then a coherence in its approach in relation to the broader international indigenous rights regime, CERD included in its recommendations to the United States that it to look to ILO Convention No. 169 for guidance in its treatment of indigenous peoples.<sup>59</sup>

### 3.2. *Inter-American Human Rights Instruments*

Within the Americas, the rights of indigenous peoples have been affirmed by the principal institutions of the Inter-American system for the protection of human rights on the basis of the American Convention on Human Rights<sup>60</sup> and the American Declaration on the Rights and Duties of Man.<sup>61</sup> The Inter-American Commission on Human Rights has interpreted Article 4 of the American Convention, which broadly affirms the right to life, as requiring that states take measure to secure the natural environments of "indigenous peoples [that] maintain special ties with their traditional lands, and a close dependence upon the natural resources provided therein"<sup>62</sup>. In its examination of the human rights situation of indigenous peoples of the Amazon region of Ecuador, the Commission interpreted the right to life with a sensitivity toward both the material and cultural dimensions of indigenous peoples' relationship with land, and found the right jeopardized by the environmental effects of oil development in that region.<sup>63</sup>

More directly supporting indigenous peoples' rights in lands and natural resources is the right to property affirmed in Article 21 of the Convention and in Article XXIII of the American Declaration, a right that is also affirmed in other human rights instruments including the Universal Declaration of Human Rights<sup>64</sup>. In the *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*,<sup>65</sup> the Inter-American

<sup>57</sup> CERD, Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America. 14/08/2001. CERD/C/59/Misc.17/Rev.3., par. 21

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

<sup>61</sup> American Declaration on the Rights and Duties of Man, adopted by the Ninth International Conference on American States (Mar. 30-May 2, 1948), O.A.S. Res. 30, O.A.S. Doc. OEA/Ser.L/V/1.4, rev. (1965).

<sup>62</sup> Inter-Am. Comm. H.R., *Report on the Situation of Human Rights in Ecuador*, O.A.S. Doc. OEA/Ser.L/V/II.96, Doc. 10, rev. 1 (24 April 1997), para. 106.

<sup>63</sup> *Id.* Chapter IX.

<sup>64</sup> Universal Declaration of Human Rights, G.A. Res. 217 A(III), Dec. 10, 1948, Art. 17.

<sup>65</sup> *Case of the Mayagna (Sumo) Community of Awas Tingni vs. Nicaragua*, Judgment of Aug. 31 2001, Inter-Am. Court H.R. (Ser. C) No. 79 (2001) (hereinafter "*Awas Tingni case*").

Court of Human Rights found that Nicaragua had violated the property rights of the indigenous Mayagna community of Awas Tingni by granting to a foreign company a concession to log within the community's traditional lands and by failing to otherwise provide adequate recognition and protection of the community's traditional land tenure. The Court held that the concept of property articulated in the American Convention on Human Rights<sup>66</sup> includes the communal property of indigenous peoples, even if that property is not specifically titled or otherwise recognized by the state. Awas Tingni, like most of the indigenous communities of the Atlantic Coast, was without specific government recognition of its traditional lands in the form of a land title or other official document, despite provisions in Nicaragua's Constitution and laws affirming in general terms the rights of indigenous peoples to the lands they traditionally occupy. In the absence of such specific government recognition, Nicaraguan authorities had treated the untitled traditional indigenous lands—or substantial parts of them—as state lands, as they had done in granting concessions for logging in the Awas Tingni area<sup>67</sup>. The Court concluded that, especially in light of Articles 1 and 2 of the Convention, which require affirmative state measures to protect rights recognized by the Convention and domestic law, such negligence on the part of the state violated the right to property of Article 21 of the American Convention.<sup>68</sup>

Although the Court stressed that Nicaragua's domestic law itself affirms indigenous communal property, the Court also emphasized that the rights articulated in international human rights instruments have "autonomous meaning that cannot be limited by the meaning attributed to them by domestic law"<sup>69</sup>. The Inter-American Commission on Human Rights had pressed this point in prosecuting the case before the Court, invoking in its written submissions the jurisprudence of the European Court of Human Rights regarding the analogous property rights provision of the European Convention on Human Rights, and referencing developments elsewhere in international law and institutions specifically concerning indigenous peoples' rights

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<sup>66</sup> By virtue of article 21 of the American Convention on Human Rights, "Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.... No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law." The Court declared that "Article 21 of the American Convention recognizes the right to private property.... 'Property' can be defined as those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value." *Awas Tingni* case, *supra*, at paras. 143-44.

<sup>67</sup> For background on the Awas Tingni case, see S. JAMES ANAYA and Claudio GROSSMAN, "The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples", *Arizona Journal of International and Comparative Law*, vol. 19, 2002, p. 1; S. JAMES ANAYA & S. TODD CRIDER, "Indigenous Peoples, The Environment, and Commerical Forestry in Developing Countries: The Case of Awas Tingni, Nicaragua", 18 *Human Rights Quarterly*, 1996, 345; S. JAMES ANAYA, "Inter-American Commission on Human Rights: Indigenous Lands, Loggers, and Government Neglect in Nicaragua", 9 *St. Thomas L. Rev.* 1996, 157; Jorge JENKINS MOLIERI, *El Desafío indígena en Nicaragua: El Caso de los Miskitos*, 1986, 33-114 (providing the history of the Atlantic Coast region).

<sup>68</sup> *Awas Tingni* case, *supra*, paras. 142-55.

<sup>69</sup> *Id.*, at para. 146.



over lands and natural resources.<sup>70</sup> The Court accepted the Commission's view that, in its meaning autonomous from domestic law, the international human right of property embraces the communal property regimes of indigenous peoples as defined by their own customs and traditions, such that "possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property."<sup>71</sup> Accordingly, the Court determined that indigenous peoples not only have property rights to their traditional lands protected by the American Convention on Human Rights, but that they also are entitled under the Convention to have the state demarcate and title those lands in their favour in circumstances where those rights are not otherwise secure. The Court found that Awas Tingni in particular has the "right that the State ... carry out the delimitation, demarcation, and titling of the territory belonging to the community"<sup>72</sup>. This holding is commensurate with Article 14(2) of ILO Convention No. 169, which provides: "Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession".

In arriving at its conclusions in the Awas Tingni case, the Court applied what it termed an "evolutionary" method of interpretation, taking into account modern developments in conceptions about property as related to indigenous peoples and their lands<sup>73</sup>. In his concurring opinion, Judge García Ramírez expounded upon this interpretive methodology, making specific references to the relevant provisions of ILO Convention No. 169, even though Nicaragua is not a party to that Convention, as well as to parts of the draft UN and OAS declarations on the rights of indigenous peoples<sup>74</sup>.

The Inter-American Commission on Human Rights followed the precedent and interpretive methodology of the Awas Tingni case in addressing a dispute concerning the land rights of the Western Shoshone people. In the case of *Mary and Carrie Dann vs. United States*,<sup>75</sup> the Commission extended the interpretation of the right to property of the American Convention on Human Rights advanced in the Awas Tingni case to the similar property rights provision of the American Declaration on the Rights and Duties of Man,<sup>76</sup> emphasizing the due process and equal protections

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<sup>70</sup> See *Final Written Arguments of the Inter-American Commission on Human Rights before the Inter-American Court of Human Rights in the Case of the Mayagna (Sumo) Indigenous Community of Awas Tingni Against the Republic of Nicaragua*, July 2001, paras. 62-66, reprinted in *Arizona Journal of International and Comparative Law*, vol 19, 2002, p. 325.

<sup>71</sup> *Awas Tingni case*, *supra*, para. 151.

<sup>72</sup> *Id.*, para. 153. See also *Case of Yakye Axa Indigenous Community v. Paraguay*, Inter-Am. Ct. H.R., Judgment of 21 June 2005, para. 102 (affirming that American Convention requires states to provide legal remedies that offer "a real possibility of the return of lands" of which they have been historically dispossessed).

<sup>73</sup> *Awas Tingni case*, *supra*, para. 146-49.

<sup>74</sup> *Id.*, Sergio García Ramírez concurring opinion, paras. 7-9.

<sup>75</sup> *Mary and Carrie Dann v. United States*, Case 11.140, Report No. 113/01, Inter Am. C.H.R., OEA/Ser./L/V/II.114 Doc. 5 rev., 2001 [hereinafter "*Dann case*"].

<sup>76</sup> See American Declaration of the Rights and Duties of Man, *supra* note 6, art. XXII: "Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home." As noted by the commission, its examination of state conduct in relation to the declaration is to promote observance of the general human rights obligations of OAS member states that derive from the OAS Charter. See *id.* at para. 95.

prescriptions that are to attach to indigenous property interests in lands and natural resources. The case arose from the refusal of Western Shoshone sisters Mary and Carrie Dann to submit to the permit system imposed by the United States for grazing on large parts of Western Shoshone traditional lands<sup>77</sup>. Faced with efforts by the United States government to forcibly stop them from grazing cattle without a permit and to impose substantial fines on them for doing so, the Danns argued that the permit system contravened Western Shoshone land rights. The United States conceded that the land in question was Western Shoshone ancestral land, but contended that Western Shoshone rights in the land had been “extinguished” through a series of administrative and judicial determinations. The Commission examined the proceedings by which the United States contended that Western Shoshone land rights had been lost and determined that those proceedings did not afford the Danns and other Western Shoshone groups adequate opportunity to be heard and that the proceedings otherwise denied these groups the same procedural and substantive protections generally available to property holders under United States law.<sup>78</sup> The Commission noted the inadequacy of the historical rationale for the presumed taking of Western Shoshone land—the need to encourage settlement and agricultural developments in the Western United States—and also cited the United States’ failure to apply to the Western Shoshone the same just compensation standard ordinarily applied for the taking of property interests under U.S. law<sup>79</sup>. Thus the Commission found that the United States had “failed to ensure the Danns” right to property under conditions of equality contrary to Articles II [right to equal protection, XVIII [right to fair trial] and XXIII [right to property] of the American Declaration in connection with their claims to property rights in the Western Shoshone ancestral lands”.<sup>80</sup>

<sup>77</sup> For background on this case and the litigious saga that preceded the Commission’s decision in United States Tribunals, see John D. O’CONNELL, “Constructive Conquest in the Courts: A Legal History of the Western Shoshone Lands Struggle—1864 to 1991”, 42 *Nat. Resources J.*, 2003, 765; Thomas E. LUEBBEN & Cathy NELSON, “The Indian Wars: Efforts to Resolve Western Shoshone Land and Treaty Issues and to Distribute the Indian Claims Commission Judgment Fund”, 42 *Nat. Resources J.*, 2003, 835.

<sup>78</sup> See *Dann* case, *supra*, paras. 133-44.

<sup>79</sup> See *id.*, paras. 144-45. As noted by the Commission, its examination of state conduct in relation to the Declaration is to promote observance of the general human rights obligations of OAS member states that derive from the OAS Charter. See *id.* para. 95. The Inter-American Court of Human Rights has held that the provisions of the American Declaration on the Rights and Duties of Man are expressive of the human rights obligations of states under the OAS Charter. See I/A Court H.R., Advisory Opinion OC-10/89 *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*, July 14, 1989, Ser. A N.º 10 (1989), paras. 42-45.

<sup>80</sup> *Id.*, para. 147. The Commission thus effectively condemned, as contrary to international human rights law, longstanding and already much criticized aspects of United States legal doctrine concerning indigenous peoples, including the doctrine that the United States can unilaterally “extinguish” land and other rights of indigenous peoples, including rights protected by treaty, see *Lonewolf v. Hitchcock*, 187 U.S. 553 (1903); and that the extinguishments of indigenous peoples’ land rights based on prior occupancy (aboriginal title) can be extinguished without the government having to provide just compensations as ordinarily required for the taking of property, see *Tee-Hit-Ton v. United States*, 348 U.S. 272 (1955). For a critical assessment of these and related legal doctrines which preceded the commission’s decision in the *Dann* case, see Robert WILLIAMS Jr., “The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man’s Indian Jurisprudence”, *Wisconsin Law Review*, 1986, 219.

In applying and interpreting the cited provisions of the American Declaration in the Dann case, the Commission was explicit in its reliance on developments and trends in the international legal system regarding the rights of indigenous peoples<sup>81</sup>. Significantly the Commission declared that the “basic principles reflected in many of the provisions” of the Proposed American Declaration on the Rights of Indigenous Peoples, “including aspects of [its] article XVIII, reflect general international legal principles developing out of and applicable inside and outside of the Inter-American system and to this extent are properly considered in interpreting and applying the provisions of the American Declaration in the context of indigenous peoples.”<sup>82</sup> Article XVIII of that cited proposed declaration<sup>83</sup> provides for the protection of traditional forms of land tenure in terms similar to those found ILO Convention 169, which the commission also highlighted in its analysis.<sup>84</sup> Thus the Commission further signaled the development of a *sui generis* regime of international norms and jurisprudence concerning indigenous peoples and the benchmark represented by ILO Convention 169 in that development, even in regards to states, like the United States, that are not parties to the Convention.

#### 4. Emerging customary international law

It is evident from the above that indigenous peoples have achieved a substantial level of international attention within the international arena, and with this attention has come a substantial movement toward a convergence of opinion on the existence and content of relevant international norms. While expressing treaty-based obligations, the interpretation and application of human rights treaties in favour

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<sup>81</sup> *Id.* paras. 124-28. The commission note that “a review of pertinent treaties, legislation and jurisprudence reveals the development over more than 80 years of particular human rights norms and principles applicable to the circumstances and treatment of indigenous peoples.” *Ibidem.* para. 125.

<sup>82</sup> *Id.*, para. 129. According to the Commission, these now existing “general international legal principles” include in relation to indigenous land claims:

- the right of indigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property;
- the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied; and
- where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property. This also implies the right to fair compensation in the event that such property and user rights are irrevocably lost.

*Id.*, para. 130 (citations omitted).

<sup>83</sup> Article XVIII of the Proposed American Declaration of the Rights of Indigenous People, *supra*, provides, *inter alia*, “Indigenous peoples have the right to legal recognition of their varied and specific forms and modes of possession, control and enjoyment of their territories and property [and] are entitled to recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied and to the use of those to which they have also had access for their traditional activities and livelihood.”

<sup>84</sup> See *Dann* case, *supra*, paras. 127-28.

of indigenous peoples contribute to the body of developments toward a uniform consensus about the content of these norms. The multiple relevant developments of the last two decades include the discussions over the draft UN and OAS declarations on indigenous rights. Despite persistent gaps in positions over these drafts, the multilateral discussions that have proceeded in relation to them over several years have helped to generate a discernible consensus on core principles of indigenous peoples' rights, which is evident in provisions of several already adopted instruments.

This is not to say that the level of consensus on indigenous peoples' rights is entirely satisfactory or that there is a sufficient commitment by authoritative actors to implementing that consensus. But it is important to take stock of this consensus and to note that, as it develops and further coalesces on the content of indigenous peoples' rights, so too do expectations that the rights will be upheld, regardless of any formal act of assent to articulated norms. Thus, this developing consensus is not just as a political phenomena with potential *future* legal consequences, but rather it also represents emerging customary international law with present legal implications. This effectively is the conclusion of the Inter-American Commission on Human Rights in declaring the existence of "general international legal principles" that have developed in recent years to uphold the rights of indigenous peoples.<sup>85</sup>

The discussion of indigenous peoples and their rights promoted through international institutions and conferences over the last decades has proceeded in response to demands made by indigenous groups over several years and upon an extensive record of justification. The pervasive assumption has been that the articulation of norms concerning indigenous peoples is an exercise in identifying standards of conduct that are required to uphold widely shared values of human dignity. The rights of indigenous peoples do not stand in isolation, but rather, as demonstrated by application of human rights instruments of general applicability, derive from previously accepted human rights principles such as non-discrimination, self-determination, and property. The multilateral processes that build a common understanding of the content of indigenous peoples' rights, therefore, also build expectations of behaviour in conformity with those rights.

Under modern legal theory, these processes that generate international consensus about indigenous peoples' rights are processes that build customary international law. The existence of norms of customary international law is significant in that states generally are bound by them, including those states that have not ratified relevant treaties. Norms of customary law arise when a preponderance of states and other authoritative actors converge upon a common understanding of the norms' content and generally expect future behaviour in conformity with the norms<sup>86</sup>. The traditional points of reference for determining the existence and contours of customary norms are the relevant patterns of actual conduct on the part of state agencies. Today, however, actual state conduct is not the only or necessarily determinative

<sup>85</sup> *Dann case, supra*, para.129, 130.

<sup>86</sup> See generally Myres McDougal et al., *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity*, 1980, 269; Article 38(1)(a) of the Statute of the International Court of Justice describing "international custom, as evidence of a general practice accepted as law."

indicia of customary norms. With the advent of modern international intergovernmental institutions and enhanced communications media, states and other relevant actors increasingly engage in prescriptive dialogue. Especially in multilateral settings, explicit communication may itself bring about a convergence of understanding and expectation about rules, establishing in those rules a pull toward compliance, even in advance of a widespread corresponding pattern of physical conduct<sup>87</sup>. It is thus increasingly understood that explicit communication, of the sort that has been ongoing in United Nations and other international forums in regard to indigenous peoples' rights, is itself a form of practice that builds customary rules<sup>88</sup>.

The claim here is not that each of the authoritative documents and decisions referred to above can be taken in its entirety as articulating customary law, but that collectively they represent core normative precepts that are now or are becoming widely accepted among authoritative actors and that, to this extent, are indicative of emerging customary law. Again, this is significant because customary international law, once crystallized, imposes obligations upon constituent units of the world community independently of obligations formally assumed by acts of treaty ratification or accession.

Norms concerning indigenous peoples that are grounded in human rights precepts and generally accepted by the international community provide motivation for

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<sup>87</sup> See Thomas M. FRANK, "Legitimacy in the International System", 82 *Am. J. Int'l L.*, 1988, 705 (a jurisprudential study concerned with identifying the elements that establish in international norms the "compliance pull"); McDUGAL *et al.*, *supra*, at 272 ("[I]t is easily observable that such organizations, especially the United Nations and affiliated agencies, play an increasingly important role as forums for the flow of explicit communications and acts of collaboration which create peoples' expectations about authoritative community policy").

<sup>88</sup> See *id.* at 272-73; Bin CHENG, "United Nations Resolutions on Outer Space: Instant International Customary Law?" 5 *Indian J. Int'l L.* 23, 1965, 45 (stating that the common belief of states that they are bound to a rule is the "only one single constitutive element" and conforming actual conduct merely provides evidence of the rule's existence); H.W.A. THIRLWAY, *International Customary Law and Codification*, 1972, 56 ("The *opinio necessitates* in the early stages is sufficient to create a rule of law, but its continued existence is dependent upon subsequent practice accompanied by *opinio juris*, failing which the new-born rule will prove a sickly infant and fail to survive for long."). Accordingly, Professor Bownlie defines the "material" sources of "custom" to include "diplomatic correspondence, policy statements, press releases... comments by governments on drafts produced by the International Law Commission, ... recitals in treaties and other international instruments, a pattern of treaties in the same form, practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly." See Ian BROWNIE, *Principles of Public International Law*, Oxford Univ. Press, 6<sup>th</sup> ed. 2003, 6.

Professor Sohn observes that government practice in negotiating the text of an international instrument may itself generate customary law, even in advance of formal adoption or ratification of the instrument: "The Court is thus willing to pay attention not only to a text that codifies preexisting principles of international law but also to one that crystallizes an 'emergent rule of customary law'". LOUIS B. SOHN, "'Generally Accepted' International Rules", 61 *Wash. L. Rev.* 1986, 1073, 1077, citing *Continental Shelf Case (Tunisia/Libyan Arab Jamahiriya)*, 1982 I.C.J. 18, 38. See also LOUIS B. SOHN, "Unratified Treaties as a Source of Customary International Law", in *Realism in Law-Making: Essays on International Law in Honour of Willem Riphagen*, A. Bos. & H. Siblesz eds., 1986; Michael AKEHURST, "Custom as a Source of International Law", 47 *Brit. Y.B. Int'l L.* 1, 1974-75, 15-16; Jorge CASTANEDA, *Legal Effects of United Nations Resolutions*, Alba Amoia trans., 1969, 169-77; Grigori Ivanovich TUNKIN, *Theory of International Law*, William Butler trans., 1974, 114-15; Theodor MERON, *Human Rights and Humanitarian Norms as Customary Law*, 1989, 41.

states to take initiatives to bring about conditions that are in conformity with the norms. Over the last several years, numerous states have enacted constitutional provisions or laws that more or less reflect the developing international consensus about indigenous peoples' rights. The international developments and interpretations of existing international instruments described above are not only impetus for domestic legal reforms, they also are reinforced by these reforms inasmuch the reforms are leading to an increasingly well defined and consistent pattern of domestic legal practice that favours the survival of indigenous communities and cultures. For example, Brazil amended its Constitution in 1988 to accord greater protections to Indians and their land.<sup>89</sup> Article 231 of the amended Constitution recognizes the social organization, customs, languages, beliefs, and traditions of the indigenous peoples and their rights to lands they have traditionally occupied. The 1991 Constitution of Colombia provides indigenous peoples with distinct constitutional status. Indigenous peoples form a special constituency for the election of central government representatives.<sup>90</sup> They have the right to self-government according to their customs and traditions within their lands, including the administration of justice. Cultural, social, and economic integrity is protected generally by Article 330 of the Constitution.

The Ecuadorian Constitution of June 1998 contains several provisions regarding indigenous peoples' rights. In Title III, Article 84, of the Constitution, Ecuador recognizes and guarantees to indigenous peoples collective rights to maintain and develop their cultural and economic traditions, conserve community lands, and maintain possession of ancestral community lands. Article 84 of the Constitution further commits the State to promote indigenous peoples' practices of bio-diversity management, traditional forms of social organization, and collective intellectual property. Indigenous peoples are protected from displacement from their lands and are guaranteed the right to participate in official legislative bodies, with adequate financing from the state, in the formulation of priorities in plans and projects for the development and improvement of their economic and social conditions<sup>91</sup>.

Canada also includes within its legal system constitutional affirmation of indigenous peoples' rights. Canada's Constitution of 1982 maintains that "existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed"<sup>92</sup>. This legal guarantee encompasses aboriginal title as enforceable substantive rights and hereby limits legislative acts that would restrict or extinguish indigenous peoples' aboriginal property rights.

In many countries, such as Australia, new or augmented legal protection for indigenous peoples has resulted from judicial decisions. In the High Court of Australia's decision in the case of *Mabo v. Queensland*,<sup>93</sup> contemporary international human rights law was specifically invoked to uphold indigenous land and resource rights on the basis of historical patterns of use or occupancy. In response to *Mabo*, the Australian federal government passed the Native Title Act in 1993. The main purposes of the act are to

<sup>89</sup> CONSTITUICAO tit. VIII (Brazil).

<sup>90</sup> CONSTITUCION POLITICA Arts. 171, 176 (Colombia).

<sup>91</sup> CODIFICACION DE LA LEY DE DESARROLLO AGARIO Art. 43 (Ecuador).

<sup>92</sup> CONSTITUTION ACT, 1982) pt. II (Rights of Aboriginal Peoples of Canada), sec. 35(1).

<sup>93</sup> *Mabo v. Queensland* No 2 (1992) 175 C.L.R. 1, 69 (Austl.).

recognize and protect native title and to create a national tribunal where claimants can pursue their land claims. Although recent amendments to the Native Title Act were which were the subject of criticism by the UN Committee on the Elimination of Racial Discrimination<sup>94</sup> and have somewhat limited the protections for native title, the Act remains a important legal safeguard for indigenous land tenure.

The interrelation between international and domestic legal developments concerning indigenous peoples can be seen especially in the now regular practice of states to report to international bodies on their respective domestic laws and initiatives. Much, if not most, of this reporting occurs apart from any specific treaty obligation. The government practice of reporting on domestic developments has been a regular feature of annual meetings of the United Nations Working Group on Indigenous Populations and of meetings of the working group's parent bodies, including the UN Commission on Human Rights and its Sub-Commission on the Promotion and Protection of Human Rights. The oral and written statements of governments reporting domestic laws and initiatives to international bodies are indicative of customary international norms in two respects. First, the accounts of state conduct provide evidence of behavioural trends by which the contours of underlying standards can be discerned or confirmed, notwithstanding the difficulties in agreement on normative language for inclusion in written texts. Secondly, because the reports are made to international audiences concerned with promoting indigenous peoples' rights, they provide strong indication of subjectivities of obligation and expectation attendant upon the discernable standards. Evident in the government statements is the implied acceptance and the pull toward compliance of certain normative precepts grounded in general human rights principles.

Of course, a great deal remains to be done to see domestic constitutional provisions and laws fully implemented, just as for many indigenous peoples the emerging international customary norms remain an ideal rather than a reality. Nonetheless, the international customary norms are tools by which indigenous peoples may appeal to authoritative actors in both domestic and international settings and hold states responsible for acts or omissions that are adverse to their interests. The specific content of a new generation of international customary norms concerning indigenous peoples is still evolving and remains somewhat ambiguous. Yet the norms' core elements increasingly are confirmed and reflected in the extensive multilateral dialogue and decision processes focused on indigenous peoples and their rights. These core elements can be summarized as follows:

1. *Self-determination*. Although several states have resisted express usage of the term self-determination in association with indigenous peoples, it is possible to look beyond the rhetorical sensitivities to a widely shared consensus of opinion. That consensus is in the view that indigenous peoples are entitled to continue as distinct groups and, as such, to be in control of their own destinies under conditions of equality. This principle has implications for any decision that may affect the interests of an indigenous group, and it bears generally upon the contours of related norms.

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<sup>94</sup> See *supra*.

2. *Cultural Integrity*. There is today little controversy that indigenous peoples are entitled to maintain and freely develop their distinct cultural identities, within the framework of generally accepted, otherwise applicable human rights principles. Culture is generally understood to include kinship patterns, language, religion, ritual, art and philosophy; additionally, it increasingly is held to encompass land use patterns and other institutions that may extend into political and economic spheres. Further, governments increasingly are held, and hold themselves to, affirmative duties in this regard.
3. *Lands and Resources*. In general, indigenous peoples are acknowledged to be entitled to ownership of, or substantial control over and access to, the lands and natural resources that traditionally have supported their respective economies and cultural practices. Where indigenous peoples have been dispossessed of their ancestral lands or lost access to natural resources through coercion or fraud, the norm is for governments to have procedures permitting the indigenous groups concerned to recover lands or access to resources needed for their subsistence and cultural practices, and in appropriate circumstances to receive compensation.
4. *Social Welfare and Development*. In light of historical phenomena that have left indigenous peoples among the poorest of the poor, it is generally accepted that special attention is due indigenous peoples in regard to their health, housing, education and employment. At a minimum, governments are to take measures to eliminate discriminatory treatment or other impediments that deprive members of indigenous groups of social welfare services enjoyed by the dominant sectors of the population.
5. *Self-government*. Self-government is the political dimension of ongoing self-determination. The essential elements of a *sui generis* self-government norm developing in the context of indigenous peoples are grounded in the juncture of widely accepted precepts of cultural integrity and democracy, including precepts of local governance. The norm upholds local governmental or administrative autonomy for indigenous communities in accordance with their historical or continuing political and cultural patterns, while at the same time upholding their effective participation in all decisions affecting them that are left to the larger institutions of government. Participation in this sense includes the requirement of prior consultation with indigenous peoples in regard to any decision that may affect their interests.
6. *Special duty of care*. Full implementation of the foregoing norms, and the active safeguarding of indigenous peoples' enjoyment of all generally accepted human rights and fundamental freedoms, are the objective of a continuing special duty of care toward indigenous peoples. With heightened intensity over the last several years, the international community has maintained indigenous peoples as special subjects of concern and sought cooperatively to secure their rights and well-being. Additionally, it is ever more evident that authoritative international actors expect states to act domestically, through affirmative measures, to safeguard the rights and interests of the indigenous groups within their borders. Any state that fails to uphold a duty of care toward indigenous peoples and allows for the flagrant or sys-



tematic breach of the standards summarized above, whether or not admitting to their character as customary law, risks international condemnation. The terms “trust” or “trusteeship” are not commonly used in contemporary international discourse concerning indigenous peoples. Today, the principle of a special duty of care is largely devoid of the paternalism and negative regard for non-European cultures previously linked to trusteeship rhetoric. Instead, the principle rests on widespread acknowledgment, in light of contemporary values, of indigenous peoples’ relatively disadvantaged condition resulting from centuries of oppression. Further, in keeping with the principle of self-determination, the duty of care toward indigenous peoples is to be exercised in accordance with their own collectively formulated aspirations.

## 5. Conclusion

Indigenous peoples have inserted themselves prominently into the international human rights agenda. In doing so they have created a movement that has challenged state-centered structures of power and longstanding precepts that failed to value indigenous cultures, institutions and group identities. This movement, although fraught with tension, has resulted in a heightened international concern over indigenous peoples and a developing constellation of internationally accepted norms that are generally in line with indigenous peoples’ own demands and aspirations. These norms find expression in ILO Convention No. 169, other international instruments, and authoritative decisions by international bodies, and they are otherwise discernible in the ongoing multilateral discussion about indigenous peoples and their rights. In essential aspects, the articulated standards concerning indigenous peoples can be seen as developing into customary international law.

The full extent of international affirmation of indigenous peoples’ rights is still developing as indigenous peoples continue to press their cause. Nonetheless, commensurate with the degree of their acceptance by relevant international actors, new and emergent norms concerning indigenous peoples are grounds upon which non-conforming conduct may be subject to scrutiny within the international system’s burgeoning human rights regime. For many indigenous peoples, such scrutiny may be a critical, if not determinative, factor in the quest for survival. The movement toward a new normative order concerning indigenous peoples is a dramatic manifestation of the capacities for social progress and change for the better that exist in the human rights frame of the contemporary international system.



# Religion and Human Rights: a vibrant and challenging marriage

Eva Maria Lassen

**Summary:** 1. Religious traditions and human rights: from 1948 to today. 1.1. From the perspective of the international human rights community. 1.2. From the perspective of religious communities. 2. Freedom of religion. 2.1. From the perspective of human rights law. 2.2. Future challenges: The question of state interference in religious practices. The case of Europe

Ever since human rights became part of international law in 1948, the relationship between human rights and religion has been a subject of continuous wonder, strong and often opposing views, heated debates, and sometimes confusion.

Most people can agree on one thing, however, namely that religion is important to human rights and that religion is an indispensable partner which has to be courted if universal human rights are to experience worldwide implementation. This is a realisation which may be even more obvious today than it was 60 years ago. It is evident, to give an example, that religious institutions as part of civil society (for instance local churches) may be used as a tool to carry human rights into local communities. In this way, religious institutions can potentially be powerful allies of human rights. If, on the other hand, these institutions declare themselves enemies or merely neutral observers of human rights, this can, at least in some countries, have dire consequences for the implementation of human rights. Equally, it is clear that in countries where religion and state law are intertwined, human rights have to find religious acceptance in order to be successfully implemented.

It is therefore hardly surprising that there is a wish among those in favour of human rights to evoke an image of harmony between religious traditions and human rights. This is not a new phenomenon. As early as 1941, Franklin D. Roosevelt emphasised the importance of religion as a source of democracy and “international good faith”:

“Religion... is... the source of democracy and international good faith.

Religion, by teaching man his relationship to God, gives the individual a sense of his own dignity and teaches him to respect himself by respecting his neighbours.

Democracy, the practice of self-government, is a covenant among free men to respect the rights and liberties of their fellows.

International good faith springs from the will of nations to respect the rights and liberties of other nations.

In a modern civilization, all three —religion, democracy and international good faith— complement and support each other”.<sup>1</sup>

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<sup>1</sup> ROOSEVELT, F.D.: *The essential Franklin Delano Roosevelt*, Random House, New York, 1995.

In Roosevelt's view, then, religion, democracy (which includes the respect of rights) and "international good faith" are indispensably, substantially, and constructively linked. As we will see in this article, there still is this push for perceiving religion and human rights as positively inter-linked.

The reality is, of course, much more complex. This complexity is the topic of the present chapter.

The chapter has two parts. In the first part, the relationship between human rights and religion will first be approached from the perspective of the international human rights community in the period from 1948 to today. Then the perspective will be reversed, and the relationship will be looked upon through the lenses of religious communities, in particular those belonging to the three monotheistic religions: Judaism, Christianity and Islam.

In the chapter's second part, focus will be on one specific human right, namely freedom of religion, which on the face of it is most important human right as far as the religions are concerned. By looking at two aspects in particular of freedom of religion—the right to change religion and the right to proselytise—the complexity of the relationship between human rights and religious traditions will once again come to the fore. The chapter finishes by looking at one of the challenges that lie ahead in the area of religious freedom, Europe being used as a case-study.

## 1. Religious traditions and Human Rights: from 1948 to today

### 1.1. *From the perspective of the international human rights community*

#### 1.1.1. FROM THE UNIVERSAL DECLARATION OF HUMAN RIGHTS TO THE UNIVERSALITY DEBATE

In the process of drafting the Universal Declaration of Human Rights prior to its adoption by the UN General Assembly in December 1948, it was discussed whether religious notions should be used to explain the very basis of human rights. Thus lively debates took place among members of the UN Human Rights Commission and the Third Committee in connection with the discussion of the Declaration's Article 1, the final version of which reads:

"All human beings are born free and equal in dignity and rights".

The Brazilian delegate to the UN suggested that the article read as follows: "All human beings are created in the image and likeness of God." If this suggestion had prevailed, religion would have been used to add legitimacy to the very foundation of human rights, explaining why human beings are entitled to rights. The Chinese delegate protested, arguing that not all cultural traditions possess the idea of a god-head, nor indeed the belief that the human being is created in the image of God (a Judeo-Christian concept); as a result, the Brazilian suggestion would detract from the universality of the Declaration. This argument prevailed<sup>2</sup>, and the Universal Declara-

<sup>2</sup> GLENDON, M.A.: *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, New York: Random House, 2001, p. 146.

tion does not use religion as a tool to justify human rights: the language of the Declaration —as international human rights law in general— is religiously *neutral*.

Generally speaking, the *travaux préparatoires* of the UN Commission on Human Rights show that the members of Commission were sensitive to the question of cultural and religious differences as well as of the danger of letting Western thought dominate the picture<sup>3</sup>. Throughout the drafting process of the Universal Declaration the individuals involved in the process made an effort to include rather than exclude the different voices of the world.

The UNESCO Committee on the Theoretical Basis for Human Rights —the “Philosophers” Committee”— assisted them in this effort. In 1947, the Committee asked thinkers from all over the world to respond to questions about the relationship between human rights and cultural traditions. Responses came in from all corners of the world, reflecting a variety of philosophical and religious thought, including that of the world religions. Although the responses revealed fundamental differences between the emerging human rights scheme and the world’s cultural and religious traditions, they also showed that these traditions supported the idea that the human being possesses an *inherent dignity*. As dignity was the underlying notion of the Universal Declaration (cf. Article 1), the architects of the Declaration concluded that the Declaration was in compliance with a basic principle embedded in the major cultural traditions of the world<sup>4</sup>. In this context it has to be kept in mind that thorough studies of the relationship between, on the one hand, human rights and, on the other hand, different cultural and religious traditions had not yet been carried out, and that a certain *vagueness*, for instance of central concepts such as “dignity”, meant that at least superficially a harmony between human rights and religion could be claimed with relative ease.

This way of looking at human rights as being in harmony with the world’s cultural and religious traditions continued to exist in the decades to come. Notably, the UNESCO Committee on the Theoretical Basis of Human Rights studied the *collective ownership*. In 1969 the organisation published “The Birthright of Man”, a collection of philosophical, religious, and legal texts from different cultures voicing support of human rights. The aim was to illustrate “how human beings everywhere, throughout the ages and all over the world, have asserted and claimed the birthright of man”. However, the opposite view —that human rights have no universal roots— played a big role in the decades following the adoption of the Universal Declaration. According to this view, human rights are predominantly Western, and the attempt at spreading human rights universally can therefore be perceived as a new form of Western imperialism. This contention was central in the so-called universality debate, in which the question of cultural relativism versus universal values was central<sup>5</sup>.

<sup>3</sup> A danger spelled out by many involved in the debates at the time, notably the American Anthropologist Association, who submitted a “Statement on Human Rights” to the UN Commission on Human Rights in 1947. In this document, the Association warned the Commission against imposing human rights on non-Western cultures. The statement is printed in *American Anthropologist, New Series*, Vol. 49, 4, 1947, pp. 542-543.

<sup>4</sup> GLENDON, M.A.: *A World Made New...*, *op. cit.*, pp. 72 ff.

<sup>5</sup> The literature on the universality debate is vast. For an introduction, see e.g. STEINER, H.J. and ALSTON, Ph. (eds): *International Human Rights in Context. Law, Politics, Morals*, second edition, Oxford: Oxford University Press, 2000, 366-402 (“Universalism and cultural relativism”).

Within the framework of the UN organisation this scepticism had to be taken serious, and throughout the first fifty years of international human rights law there was a disquieting feeling that human rights found no resonance in at least some of the world's cultural and religious traditions<sup>6</sup>.

### 1.1.2. THE UN POSITION TODAY

Towards the end of the 1990s, the UN made a renewed attempt at bringing the criticism of human rights as non-universal to an end. In 1997, the UN Secretary-General, Kofi Annan, used the occasion of the 50th anniversary of the Universal Declaration of Human Rights to reaffirm its content as well as the universal nature of human rights. Human rights, he claimed, are rooted in the history of all cultures:

“Human rights, properly understood and justly interpreted, are foreign to no culture and native to all nations. The Declaration itself was the product of debates between uniquely representative groups of scholars, a majority of whom came from the non-Western world. They brought to this historic assignment the recent memories of world war and the ancient teachings of universal peace. The principles enshrined in the Universal Declaration of Human Rights are deeply rooted in the history of humankind. They can be found in the teachings of all the world's great cultural and religious traditions... Tolerance and mercy have always and in all cultures been ideals of government rule and human behaviour. Today, we call these values human rights”<sup>7</sup>.

Kofi Annan's statement, which is echoed in much other discourse, reflects a vision of a global culture of human rights nourished by different cultural and religious traditions<sup>8</sup>. Thus almost sixty years after the UN adoption of the Universal Declaration of Human Rights, the UN —represented by key UN officials— express views similar to those voiced by the UN participants in 1948.

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<sup>6</sup> To give an example from the early 1990's: Article 5 of the Vienna Declaration and Programme of Action, adopted by the Second UN World Conference on Human Rights in 1993, may be read as if “cultural systems” are in potential opposition to human rights: “All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.” (Article 5, Vienna Declaration and Programme of Action).

<sup>7</sup> A statement by Secretary-General Kofi Annan on the fiftieth anniversary year of the Universal Declaration of Human Rights, 10 December 1997, the University of Tehran, Iran. Source: UN home page.

<sup>8</sup> On a similar note, the UN High Commissioner for Human Rights at the time, Mary Robinson, concluded from a reading of the *travaux préparatoires* of the UN Commission:

“Today the Universal Declaration of Human Rights stands as a monument to the convictions and determination of its framers who were leaders in their time. It is one of the great documents in world history. The *travaux préparatoires* are there to remind us that the authors sought to reflect in their work the differing cultural traditions in the world. The result is a distillation of many of the values inherent in the world's major legal systems and religious beliefs including the Buddhist, Christian, Hindu, Islamic and Jewish traditions”, Opening address of Mary Robinson at Symposium on Human Rights in the Asia-Pacific Region, January 1998.

There is one important difference, however, between then and now: the UN of today as well as other institutions and individuals working in the field of human rights are able to rest their positions on human rights (regardless of whether these positions are in favour of or oppose human rights) on numerous studies of the relationship between religious and cultural traditions and human rights. As a result, the debate about culture, religion and human rights has become much more qualified and builds on much more solid ground.

A large proportion of the numerous studies of the relationship between human rights and religion have been carried out by representatives and adherents of the religions themselves.

## 1.2. *From the perspective of religious communities*

The question about the relationship between human rights and religion is answered differently by representatives and followers of the different religions, depending amongst other factors, on the religion and denomination in question and whether the talk is on human rights as a general principle or specific human rights.

In what follows, we will look at the development of some main tendencies within the three monotheistic religions: Judaism, Christianity and Islam.

### 1.2.1. JUDAISM

Anti-Semitism and the lack of equal rights experienced by Jews, in Europe and beyond, prompted a proportionally large number of Jewish individuals and organisations to promote international human rights law in the period between the First World War and the 1960s—human rights as a whole and in particular the right to freedom of religion and minority rights<sup>9</sup>—. Although no single authority speaks on behalf of all Jewish communities and denominations, it is fair to say that the Jewish support of the principles of human rights is broad and historically and culturally founded.

Although it was the denial of their basic rights which spurred the Jews actively to promote the creation of binding human rights, many Jews argue in favour of an added reason to support human rights: the see human rights as a natural prolongation and reflection of Jewish culture. The Bible holds a prominent position in Jewish tradition and serves, together with rabbinic traditions, as a starting point of much human rights discourse among scholars as well as non-scholars, who frequently find an overlap between human rights and Jewish law and values<sup>10</sup>.

<sup>9</sup> The Jewish organisations working to promote human rights varied in nature, from the International Association of Jewish Lawyers and Jurists to the World Jewish Congress, to name but a few of this very diverse group. For an overview of different groups of Jewish NGOs and their role in the development of international human rights documents, see COTLER, I.: "Jewish NGOs and Religious Human rights: a Case Study", in J. WITTE and J.D. VAN DER VYER (eds), *Religious Human Rights in Global Perspective. Religious Perspectives*, Vol. 1, The Hague/Boston/London: Martinus Nijhoff Publishers, 1996, 245-249.

<sup>10</sup> See e.g. BRESLAUER, D.S.: *Judaism and Human Rights in Contemporary Thought: a Bibliographical Survey*, Westport, Conn./London: Greenwood Press, 1993; COHN, H.H.: *Human Rights in Jewish*

The view that Judaism and human rights are positively intertwined is widely spread amongst Jewish individuals and organisations. However, it does not represent an all-embracing Jewish consensus. Different approaches to and views of human rights co-exist, sometimes reflecting adherence to different branches of Judaism, for instance reform, conservative or orthodox movements, and certain areas of Jewish law are problematic vis-à-vis human rights. Such tensions come to the fore in the modern state of Israel. This applies to Israeli family law, which in the otherwise mostly secular state is guided by Jewish law and is under rabbinic control. A particular problem relates to divorce, which under Jewish law creates the phenomenon of *agunot*, the “chained wife”, whose husband refuses to grant her a divorce or has disappeared without trace. In such cases, the woman cannot get a divorce and hence cannot remarry. The combination of the provisions of Jewish law and the way in which the law can be exploited by the husband means that the woman and her potential future children may find themselves in a very precarious situation<sup>11</sup>.

### 1.2.2. CHRISTIAN CHURCHES AND HUMAN RIGHTS

In what follows, the position of the Roman Catholic Church—with 1 billion members the largest religious denomination— will be introduced, followed by the position of some Protestant and Eastern Orthodox Churches.

#### *The Roman Catholic Church*

The Second Vatican Council (1962-65) is a landmark in the history of the Catholic Church and a landmark in the history of human rights. With the dignity of the individual as the point of departure of the Church’s understanding of human rights, the Council expressed its strong support of human rights<sup>12</sup>. An example of documents which produced by the Council endorse human rights is *Pacem in Terris* of 1963. This document expresses support of a series of rights included in the Universal Declaration and offers a systematic approach to social, economic and political ques-

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*Law*, New York: Ktav Publishing House, 1984; GOODMAN, L.E: *Judaism, Human Rights and Human Values*, Oxford: Oxford University Press, 1998; NOVAK, D.: “Religious Human Rights in Judaic Texts”, in J. WITTE and J. VAN DER VYER (eds), *Religious Human Rights in Global Perspective*, The Hague, Boston, London: Martin Nijhoff Publishers, Vol. 1, 1996, 175-202; BERGER, M.S. and LIPSTADT, D.E.: “Women in Judaism from the Perspective of Human Rights”, in J. WITTE and J.D. VAN DER VYER (eds), *Religious Human Rights in Global Perspective*, Vol. 1, 1996, The Hague/Boston/London: Martinus Nijhoff Publishers, 297; COTLER, I.: “Jewish NGOs and Religious Human rights: a Case Study”, in J. WITTE and J.D. VAN DER VYER (eds), *Religious Human Rights in Global Perspective. Religious Perspectives*, Vol. 1, The Hague/Boston/London: Martinus Nijhoff Publishers, 1996: 236; BROUDE, M.J.: “The Duty to Educate in Jewish Law: a Right with a Purpose”, in J. WITTE and J.D. VAN DER VYER (eds), *Religious Human Rights in Global Perspective. Religious Perspectives*, Vol 1, The Hague/Boston/London: Martinus Nijhoff Publishers, 1996, 323-335.

<sup>11</sup> For an overview of the problem as well as a discussion of some of the concrete attempts at solving it, see Berger and Lipstadt, *op. cit.*, pp. 313 ff.; LAGOUTTE, S. and LASSEN, E.M.: “Meeting the Challenge: Redefining Europe’s Classical Model for State Intervention in Religious Practices”, *Netherlands Human Rights Quarterly* (forthcoming, March 2006).

<sup>12</sup> TERGEL, A., *Human Rights in Cultural and Religious Traditions*, Uppsala: Acta Universitatis Upsaliensis, 1998, pp. 6-202.



tions. Another document, *Dignitatis humanae* of 1965, proclaims religious freedom, whereas *Gaudium et Spes* of 1965 incorporated fundamental human rights principles into the teaching of the Church<sup>13</sup>.

The Catholic Church's support of human rights rests partly on biblical exegesis. The creation stories of the Old Testament, for instance, are interpreted as a support of the inherent dignity of the individual, and used as the Church's point of departure of human rights<sup>14</sup>. New Testament texts are also used to give human rights a Christian legitimacy. Pope John Paul II sums up the Church's official view of the relationship between the Gospel of Christ and human rights when stating that:

"... It is therefore not through opportunism nor thirst for novelty that the Church ... defends human rights. It is through a true *evangelical commitment*, which, as happened with Christ, is a commitment to the most needy"<sup>15</sup>.

In practice, human rights have proved controversial within the Catholic Church in a number of respects. The position of the Vatican has been challenged by other voices of the Church in a number of areas of relevance to human rights, for example by the theology of liberation. The central core of liberation theology, which grew out of the political climate of the dictatorial regimes of South America in the 1970s and 80s, is the struggle for political freedom and social and economic justice. Local churches fighting the regimes often found themselves at loggerheads with the Vatican, which in a number of cases chose to back the oppressive regimes<sup>16</sup>. Among other areas of controversy are homosexuality and the role of women in family, society and the institution of the Church. Over the last decade, the human rights approach of the Vatican has been subject to fierce criticism from voiced by Catholics on the fringe of the official Church. These critics —of whom the theologian Hans Küng is among the most caustic— accuse the leaders of the Church to have turned away from the progressive stand vis-à-vis human rights of the Second Vatican Council<sup>17</sup>.

### *Protestant and Orthodox churches*

The Protestant churches have no central authority to speak on behalf of them all, but many of them are represented in centralised organisation. These organisations are often dedicated to the promotion of human rights. The Lutheran churches, for instance,

<sup>13</sup> For these and other central human rights documents of the Catholic Church, see FILIBECK, G., (ed.) (1994), *Human Rights in the Teaching of the Church: from John XXIII to John Paul II*, Vatican City: Libreria Deitricce Vaticana, 1994.

<sup>14</sup> For examples of major Catholic documents using the creation stories as a biblical support of human rights, see FILIBECK, *op. cit.*, 39, 224, 380, 421, 431, 78, 203, 219, 230, 164, 178, 287.

<sup>15</sup> John Paul II: Address to the IIIrd Conference of the Latin-American Episcopate, Puebla, 28 January 1979. Quoted from Filibeck (1994) 37. See also e.g.: "... the Church's commitment in the defence and promotion of human rights. Such a commitment springs from the Gospel, where there is the deepest expression of man's dignity and the most pressing motive for efforts to promote his rights. And the Church, as you know, conceives this task in the framework of mission in the service of the full salvation of man, redeemed by Christ." John Paul II: Address to the Committee of Presidency of the International Institute for Human Rights, 22 March 1979. Quoted from Filibeck (1994) 79.

<sup>16</sup> TERGEL, A., *op. cit.*, pp. 107-140.

<sup>17</sup> See e.g. "The Pope's Contradictions" by Hans KÜNG. *Der Spiegel Online*, March 26, 2005. English site.

express a united support of human rights through the Lutheran World Federation<sup>18</sup>. Another example is the World Council of Churches, an umbrella organisation which counts Anglican, Lutheran, Methodist, Reformed Protestants as well as most Orthodox Churches amongst its members and which offers support of human rights<sup>19</sup>.

Major studies of human rights have been carried out within the framework of Protestant theology<sup>20</sup>. The Bible plays an important role to a wide range of Protestant attitudes to human rights, and biblical readings are subject to heated debates about human rights. Extremely strong criticism of human rights has been raised, and although mostly forming minority opinions in the Protestant milieu, the critics often have a powerful voice<sup>21</sup>. Generally speaking, however, biblical exegesis has moved more and more in the direction of supporting concrete areas of human rights, such as the principles of non-discrimination and the right to self-determination, the right to cultural diversity and women's rights, and this reflects an extensive support of human rights in these churches.

The Eastern Orthodox churches have been pointed out as having particular problems with the concept of human rights. The human rights catalogue of civil and political rights, to take an example, stems from an ideology that is radically different from Orthodox theology, and at a more general level individual rights cannot be derived from this theology without difficulty<sup>22</sup>.

### 1.2.3. ISLAM

A great diversity of positions on human rights exists within Islam, from liberal to conservative positions. Four tendencies should be observed:

First, it is common to find a declared Muslim support of human rights. In order for Muslims to offer this support, it is essential to be able to place human rights in an Islamic context. The following quotation of the liberal scholar An-Na'im's expresses an attitude embedded in much Muslim discourse—liberal as well as conservative—about human rights:

"This authority [of the Universal Declaration of Human Rights] is unlikely to be accepted by societies if it is believed to be inconsistent with the established authority of their religion and practical experience"<sup>23</sup>.

This position has been taken a step further. Thus it is commonly argued, not least by conservative Muslims, that human rights have Islamic roots. This view is in

<sup>18</sup> For concrete initiatives of the Federation, for instance with regard to the fight against apartheid and the struggle for women's rights, see TERGEL, *op. cit.*, pp. 259-295.

<sup>19</sup> For this organisation, including its practical human rights initiatives, see [www.wcc-coe.org](http://www.wcc-coe.org). See also the comprehensive analysis of TERGEL, *op. cit.*, pp. 203-295.

<sup>20</sup> From the perspective of Lutheran theology, see e.g. ANDERSEN, S., "Human Rights and Christianity - A Lutheran Perspective", in L. BINDERUP and T. JENSEN (eds), *Human Rights, Democracy and Religion*, Odense: University of Southern Denmark, 2005, pp. 98-104.

<sup>21</sup> LASSEN, E.M.: "World Religions, World Values: In Dialogue with the Bible", in HASTRUP, K. (ed.), *Human Rights on Common Grounds: The Quest for Universality*, The Hague/London/New York: Kluwer Law International, 2005, pp. 177-194.

<sup>22</sup> POLLIS, A.: "Eastern Orthodoxy and Human Rights", *Human Rights Quarterly*, 15, 1993.

<sup>23</sup> AN-NA'IM, A.A.: *Human Rights in Cross-Cultural Perspectives. A Quest for Consensus*, University of Pennsylvania Press, Philadelphia, 1992, p. 46.

direct contrast to the view often voiced in the decades after 1948, where human rights were “accused” of being exclusively Western. An example of a Muslim claim to the genesis of human rights is found in the foreword of the Universal Islamic Declaration of Human Rights, adopted by the Islamic Council of Europe in 1981:

“Islam gave to mankind an ideal code of human rights fourteen centuries ago. These rights aim at conferring honour and dignity on mankind and eliminating exploitation, oppression and injustice”<sup>24</sup>.

Second, this claim to the genesis of human rights has to be qualified, for contrary to most Christian and Jewish approaches to human rights, especially conservative Muslim leaders have advocated for a particular phenomenon, namely *Islamic human rights*, which include sources of law which in content differ radically from international human rights law. This phenomenon can be observed in the two Islamic declarations on human rights, namely the above-mentioned Universal Islamic Declaration of Human Rights and the Cairo Declaration on Human Rights in Islam (produced by the Organization of the Islamic Conference, an organisation representing app. 55 states) of 1990. Although both documents use the terminology of the Universal Declaration of Human Rights, they reveal a conflict between, on the one hand, a particular Islamic understanding of human rights and, on the other hand, universal human rights as expressed in international conventions. According to the documents, specific areas, for instance related to women’s rights, must be practised “in accordance with the provisions of Shari’ah”<sup>25</sup>.

The same can be observed in a number of Muslim countries. The Iranian Constitution, to give an example, does not allow for a non-Islamic approach to human rights, and most of the rights found in the Constitution are explicitly placed within an Islamic framework (see, for instance, Articles 24; 26; 28; 29). It is possible to include international human rights law as a standard-setting foundation of human rights in Iran, but not as the most important legal source.

Third, in theory as well as practice, Islamic law and religion are intertwined in a large number of Muslim countries. This applies to various degrees, depending on the country in question. By contrast, Western countries, predominantly Christian, are typically characterised by a separation of state law and religion. In the state of Israel, Jewish law prevails primarily in the area of family law, which is controlled by the rabbinic courts.

Four, in countries where Islamic law prevails, problems vis-à-vis international human rights law are in particular found within the following three areas: women’s rights, the penal system, and freedom of religion.

#### 1.2.4. GRASPING THE COMPLEX NATURE OF RELIGION AND HUMAN RIGHTS

To sum up, although it is easy to find support of human rights within Judaism, Christianity and Islam, the relationship between these religions and human rights is

<sup>24</sup> Source: website [alhewar.com/ISLAMDECL](http://alhewar.com/ISLAMDECL).

<sup>25</sup> BREMS, E.: *Human Rights: Universality and Diversity*, The Hague, Boston, London: Martin Nijhoff Publishers, 2001, pp. 260-264; TERGEL, *op. cit.*, pp. 94-95.

complicated and in a number of respects deeply problematic. The fierce opposition to the very notion of human rights or to specific human rights, which can be found even within religious denominations officially and strongly endorsing the principles of human rights, illustrates that religious values do not effortlessly translate themselves into human rights.

*Research* has added colour and depth to the complexity of the relationship between human rights and religious traditions. Scholars in increasing number approach human rights in ways similar to the approaches of the UN and the religious communities, searching in a new phenomenon —human rights— something that is old —religious values— and focusing on a number of key notions which a particular religious tradition shares with the human rights world (notably the worth and dignity of each and every individual). Illustrative is “Religious Human Rights in Global Perspective” (1996), a major collective work of scholars of the world religions. According to the introduction to this work, religion is instrumental in securing human rights throughout the world:

“Religions invariably provide universal sources and scales of values by which many persons and communities govern themselves. Religions must thus be seen as indispensable allies in the modern struggle for human rights. To include them —to enlist their unique resources and to protect their unique rights— is vital to enhancing and advancing the regime of human rights”<sup>26</sup>.

#### 1.2.5. INTER-RELIGIOUS DIALOGUES

Scholars also take part in the numerous ecumenical and inter-faith dialogues on human rights which have taken place over the last few decades<sup>27</sup>. Representatives of the three monotheistic religions —lay people, religious leaders, theologians, and scholars— often meet in different forums to discuss the fundamental principles of human rights. The common denominator *par excellence* is the notion of dignity. This view has, for instance, repeatedly been taken by the Roman Catholic Church, cf. Pope Paul John II:

“We must remain convinced that any assault on human dignity, even the most remote one, has repercussions, imperceptible but real ones, on the life of everyone; for an indelible bond unites all human beings. This bond exists for all believers —Christians, Moslems and Jews— and is derived from their

<sup>26</sup> WITTE, J. (1996): “Introduction”, in J. WITTE and J. VAN DER VYER, J.D., *Religious Human Rights in Global Perspective*. Vol 1, p. XVIII.

<sup>27</sup> An example of inter-religious dialogues dedicated to find shared ways to promote universal human rights is the International Council for Christians and Jews, an umbrella organisation of 38 national Jewish-Christian dialogue organisations worldwide. In the aftermath of the Holocaust, the ICCJ member organisations were engaged in the renewal of Jewish-Christian relations: “Founded as a reaction to the Holocaust, the Shoah, in the awareness that ways must be found to examine the deeply engrained roots of mistrust, hatred and fear that culminated in one of the worst evils in human history, theologians, historians and educators included the still fragile structure of enlightenment and the human rights movements of the inter-war period.” The organisation specifically addresses issues “of human rights and human dignity deeply enshrined in the traditions of Judaism and Christianity” (as expressed in the organisation’s mission statement). Source: [www.ICCJ.org](http://www.ICCJ.org).

faith in the one true God who, as Father of all men, is the source and foundation of human dignity. For those who have been called to share Christian faith, this bond is summed up in the words: 'we are all brothers in Jesus Christ'<sup>28</sup>.

The "global ethics" project goes a step further, including all the world religions. Supporters of a global ethic based on religious traditions see religion as a means of establishing harmony between human rights and different cultures. One of the first initiatives to create a global ethic was taken by the above-mentioned Catholic theologian Hans Küng, who was instrumental to the formulation of "A Declaration towards a Global Ethic". In this Declaration, which was adopted by the Parliament of the World Religions in 1993, a global ethics was formulated which links religious traditions with human rights<sup>29</sup>.

## 2. Freedom of religion

One would imagine that religious freedom is the one human right which adherents of all religions would unequivocally endorse and support. The reality is not so simple. In what follows, some of the main international documents concerning religious freedom will be introduced. Then the right to change religion and to proselytise —here used in the neutral sense of this word: to bear witness to one's religion— as part of religious freedom will be brought into focus, first from the perspective of international human rights law, then from the perspective of the religious communities.

### 2.1. *From the perspective of human rights law*

In the preamble of the Universal Declaration of Human Rights, the importance of freedom of religion is emphasised, and Article 18 states that:

"Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

In the Covenant of Civil and Political Rights of 1966, a legally binding document, the content of freedom of religion is unfolded, including the legitimate right of the state to curtail religious manifestations under special circumstances:

"1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with

<sup>28</sup> Jon Paul II: Address to the European Court and Commission of Human Rights, 8 October 1979. Quoted from Filibeck, 1994, p. 49.

<sup>29</sup> KÜNG, H. and KÜSCHEL, K.J. (eds): *A Global Ethic. The Declaration of the Parliament of the World Religions*, London: New York, Continuum, 1993.

others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions."

The next important step taken to protect freedom of religion and belief by means of international documents is the UN Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief of 1981. This Declaration marks the first phase in the process of creating a binding international convention on religious freedom specifically. Such a convention has not yet seen the light, partly a result of a controversy which emerged over the right to change religion.

#### 2.1.1. THE RIGHT TO CHANGE RELIGION AS PART OF RELIGIOUS FREEDOM

In the debates preceding the adoption of the Universal Declaration of Human Rights, conversion, apostasy, coercion and proselytism were discussed in connection with Article 18. Although a number of Muslim states were against the explicit mentioning of the right to change religion, it was included in the final wording of the Article<sup>30</sup>.

The International Covenant of Civil and Political Rights differs from the Universal Declaration by not explicitly mentioning the right to change religion. It simply states that the right to freedom of religion shall include the freedom "to *have or to adopt* a religion or belief of his choice" (Article 18; italics mine). Strong Muslim objections to a binding convention which include the right to change religion were the main reason for this modification compared to the Universal Declaration of Human Rights. The wording "to have or adopt" was a compromise aimed at accommodating the Muslim opposition at the same time as upholding the principle of the right to change religion without explicitly stating so<sup>31</sup>.

What is striking in The UN Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief is the total *absence* of any, implicit or explicit, mentioning of the right to change religion. The right to freedom of religion merely includes:

"freedom *to have a religion* or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching" (Article 1, emphasis added).

<sup>30</sup> GHANEA, N.: "Apostasy and Freedom to Change Religion", in T. LINDHOLM a.o. (eds), *Facilitating Freedom of Religion or Belief: A Deskbook*, Leiden: Martinus Nijhoff Publishers, 2004, p. 672.

<sup>31</sup> *Ibid.*, p. 674

Again, a great number of Muslim states objected to the reference of the right to convert, and the document's silence reflects that this time no compromise was reached<sup>32</sup>.

In 1993, the UN Human Rights Committee formulated General Comment No 22 (Article 18)<sup>33</sup>. The Committee very clearly states that the right to change religion is part of religious freedom:

"Article 18... does not permit any limitation whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice." (3)

"The Committee observes that the freedom to 'have or to adopt' a religion or belief necessarily entails the freedom to choose a religion or belief, including, *inter alia*, the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief...Article 18(2) bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert." (5)

#### 2.1.2. THE RIGHT TO PROSELYTISE AS PART OF RELIGIOUS FREEDOM

While according to international law the state must not place restrictions on the individual's right to change religion, there is room for state limitation of religious practices related to proselytising; cf. for instance Covenant of Civil and Political Rights, Article 18. 3, which states that "freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."

When exactly proselytism is of a nature that calls for state intervention, for instance in order to protect the rights of others, is immensely difficult to determine<sup>34</sup>. It may depend on a number of factors, for instance the role of religion in a given country, the existence or non-existence of a state religion, and the concrete circumstances of the case in question. Illustrative is a case from the European Court of Human Rights from 1993, namely the case *Kokkinakis v. Greece*<sup>35</sup>.

The background of the case is as follows: as the only constitution in the EU countries, the Greek Constitution prohibits "proselytism" (Article 13). The present case concerns the fact that a couple who belonged to Jehovah's Witnesses had been arrested and sentenced for proselytising while going from house to house. This

<sup>32</sup> VAN DER VYVER (2004), "The Relationship of Freedom of Religion or Belief Norms to Other Human Rights", in T. LINDHOLM a.o. (eds), *Facilitating Freedom of Religion or Belief: A Deskbook*, Leiden: Martinus Nijhoff Publishers, 2004, p. 88.

<sup>33</sup> Adopted by the UN Human Rights Committee on 20 July 1993. U.N. Doc. CCPR/C/21/Rev.1/Add. 4 (1993).

<sup>34</sup> For this problem, see e.g. NOWAK, M. and VOSPERNIK, T.: "Permissible Restrictions on Freedom of Religion or Belief", in T. LINDHOLM a.o. (eds), *Facilitating Freedom of Religion or Belief: A Deskbook*, Leiden: Martinus Nijhoff Publishers, 2004, pp. 148-50, 160-1.

<sup>35</sup> *Kokkinakis v. Greece* - 14307/88[1993]ECHR 20 (25 May 1993).

drastic intervention shall be seen in connection with the prohibition to proselytise as well as with the strong alliance between the state and the Eastern Orthodox Church of Christ, which according to the Greek Constitution is the “prevalent” religion of the country. Mr. Minos Kokkinakis, the husband of the Jehovah’s Witness couple and a Greek national, lodged an application against the Greek state with the European Commission of Human Rights on 22 August 1988.

Echoing the Universal Declaration of Human Rights, the European Convention of Human Rights protects the right to change religion and “to teach” as part of religious freedom:

“Everyone has the right to freedom of thought, conscience and religion; this right includes *freedom to change his religion or belief*, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, *teaching*, practice and observance.” (Article 9,1. My italics)

In addition, Article 9 describes the framework for imposing limitations on the freedom to manifest one’s religion:

“Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.” (Article 9,2; my italics).

In the case *Kokkinakis v. Greece*, the Court’s judgement emphasises that freedom of religion:

“includes in principle the right to try to convince one’s neighbour, for example through teaching”, failing which, moreover, “freedom to change [one’s] religion or belief, enshrined in Article 9, would be likely to remain a dead letter”. (31).

The Court makes a distinction between “bearing Christian witness and improper proselytism”. According to the judgment, the latter has not taken place, and:

“the contested measure does not appear to have been proportionate to the legitimate aim pursued or, consequently, ‘necessary in a democratic society... for the protection of the rights and freedoms of others’. In conclusion, there has been a breach of Article 9 of the Convention” (49-50).

According to the Court’s judgement, then —held by six votes to three— Article 9 of the Convention has been violated<sup>36</sup>.

Interestingly, the judges gave six opinions: the majority opinion, a concurring opinion, a partly concurring opinion, a partly dissenting opinion, a dissenting opinion (by the Greek judge) and a joint dissenting opinion. Judge Martens (partly dissenting opinion), for instance, agreed that Article 9 had been violated but went further than the majority opinion. In his opinion, Article 9 does not “allow member States to make it a criminal offence to attempt to induce somebody to change his religion”

<sup>36</sup> See also NOWAK and VOSPERNIK, *op. cit.*, pp. 160-161; VAN DER VYVER, *op. cit.*, pp. 107-109.



(partly dissenting opinion of Judge Martens, 3). Taking a different stance, a dissent of Judge Foighel and Judge Loizou accentuates the protection of others' rights and freedoms and the duty to respect others' religion while "teaching". Emphasising that "one cannot be deemed to show respect for the rights and freedoms of others if one employs means that are intended to entrap someone and dominate his mind in order to convert him", the two judges concluded that there has been no breach of Article 9 (joint dissenting opinion of Judge Foighel and Judge Loizou).

The case is interesting, because it shows a wide variety of opinions on the content of proselytism and the state's right to curtail it as well as on the balance between the right to "teach" and others' rights and freedoms. It also shows how values expressed by religious voices, for instance the World Council of Churches, may influence the judges and be used in their argumentation. Thus Judge Pettiti, when discussing the difficulties in defining "impropriety, coercion and duress" in proselytism, recommended that the state make use of the definitions formulated in documents of religious institutions:

"The forms of words used by the World Council of Churches, the Second Vatican Council, philosophers and sociologists when referring to coercion, abuse of one's own rights which infringes the rights of others and the manipulation of people by methods which lead to a violation of conscience, all make it possible to define any permissible limits of proselytism. They can provide the member States with positive material for giving effect to the Court's judgment in future and fully implementing the principle and standards of religious freedom under Article 9 of the European Convention." (partly concurring opinion of Judge Pettiti).

### 2.1.3. RELIGIOUS COMMUNITIES AND THE RIGHT TO CHANGE RELIGION AND TO PROSELYTISE

In what follows, we will look at some Christian and Muslim positions on the right to change religion and to proselytise. Historically, Christians have carried out a rigorous and often invasive and aggressive form of proselytism, whereas the right to change religion is one of the major problems in the relationship between Islam and human rights.

#### *Christianity*

Historically, the Catholic Church had difficulties in accepting religious freedom. In connection with the Second Vatican Council, however, the Church declared its support of religious freedom, thus in the document *Dignitatis Humanae*<sup>37</sup>. In this document of 1963, the Church's understanding of the content of religious freedom is systematically developed, for instance the role of governments in safeguarding religious freedom, the freedom of the religious communities to "govern themselves according to their own norms", and the right to convert and proselytise. With regard to the right to change religion, the document states:

<sup>37</sup> Declaration on Religious Freedom, *Dignitatis Humanae*, on the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious, December 1965.

“... a wrong is done when government imposes upon its people, by force or fear or other means, the profession or repudiation of any religion, or when it hinders men from joining or leaving a religious community.” (6).

Since the Vatican Council Catholic leaders have repeatedly emphasised the right to change religion as part of religious freedom, as in the following Papal statement:

“Religious freedom constitutes the very heart of human rights. Its inviolability is such that individuals must be recognized as having the right even to change their religion, if their conscience so demands. People are obliged to follow their conscience in all circumstances.” (John Paul II, Message for the 1999 World Day of Peace, 5).

Protestant churches generally join in the choir of churches endorsing the right to change religion. It should be brought in mind, however, that in practice individuals may experience pressure to stay in their religious community as well as a sharp deterioration if social status and protection offered by local networks if they choose to leave their original faith community. This applies to the different Christian denominations, Catholic as well as Protestant.

Mission is at the heart of Christianity: the Christian must bear witness of Christ to the world. This obligation is strongly emphasised in *Dignitatis Humanae*, but by the same token, the danger of using manipulation in this endeavour is condemned in this document:

“in spreading religious faith and in introducing religious practices everyone ought at all times to refrain from any manner of action which might seem to carry a hint of coercion or of a kind of persuasion that would be dishonorable or unworthy, especially when dealing with poor or uneducated people. Such a manner of action would have to be considered an abuse of one’s right and a violation of the right of others” (*Dignitatis Humanae*).

The Catholic position is representative of the approach to proselytism of many Christian denominations. It should be seen in the context of the above-mentioned Christian history of what is often deemed aggressive missionary activities. The World Council of Churches—representing the churches mentioned above—and the Catholic Church have worked together over several decades on this issue and published shared documents, notably on “Common Witness and Proselytism”, according to which religious freedom includes the right to change religion and “bearing witness” must be completely devoid of any form of coercion<sup>38</sup>.

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<sup>38</sup> See e.g. “The Challenge of Proselytism and the Calling to Common Witness”, published in September 1995 and prepared by the joint working group of the World Council of Churches and the Roman Catholic Church. In this document, it is also stated: “While our focus in this document is on the relationship between Christians, it is important to seek the mutual application of these principles also in interfaith relations. Both Christians and communities of other faiths complain about unworthy and unacceptable methods of seeking converts from their respective communities. The increased cooperation and dialogue among people of different faiths could result in witness offered to one another that would respect human freedom and dignity and be free of the negative activities described above” (20). The document can be found on the website [www.wcc-coe.org](http://www.wcc-coe.org).

With regard to missionary activities vis-à-vis other religions, generally speaking Christian approaches to mission has experienced a transformation towards a more dialogue-oriented approach than traditionally. This has contributed to relieving some of the tension which traditionally has existed between religions caused by aggressive proselytism. Thus modern theology on mission usually has the respect of religious freedom as well as the readiness to dialogue with other religions as a point of departure<sup>39</sup>. As a result, the missionary activities of the Christian churches to a large extent adhere to the human rights emphasis on tolerance, respect, and the absence of manipulation and implicit or explicit coercion.

Despite the official widely spread consensus not to carry out missionary activities in an improper or manipulative manner, this is exactly what different denominations are accused of doing locally. A example is found in modern Russia, where tensions can be observed between the Orthodox Church and other denominations<sup>40</sup>.

### *Islam*

The right to change religion is extremely problematic within Islam because of the grave consequences traditionally linked to *apostasy*, the denunciation of Islam.

The prohibition of —and subsequent punishment for apostasy— is against international human rights law standards (cf. the Comment 22 of the Human Rights Committee). It is also subject to heated debates among Muslims. At the one end of the scale are found scholars and non-scholars who claim that according to Islam the penalty for the denunciation of the Islamic faith is death for men and life-imprisonment for women. At the other end of the scale, we find Muslims who claim that there is no coercion in Islam, including coercion to remain a Muslim<sup>41</sup>.

Based on Islamic traditions, a number of Muslim states have laws which prohibit apostasy. In countries where apostasy is an offence, proselytism is typically also prohibited in the sense of encouraging Muslims to leave their religion in order to join another faith.

## 2.2. *Future challenges: The question of state interference in religious practices. The case of Europe*

This chapter has discussed some of the dynamics that exist in the relationship between religion and human rights. It has shown areas of harmony between religious values and human rights, but also areas where human rights challenge the religious communities to have another look at their organisations, to review their teaching, and to reassess their interpretations of sacred texts in the context of hu-

<sup>39</sup> See e.g. the “interfaith dialogue programs” of the Lutheran World Federation. Source: [www.lutheranworld.org](http://www.lutheranworld.org).

<sup>40</sup> In the countries of the former Soviet Union as well as Greece, this tension largely stems from the nexus between Orthodoxy and nationality. See POLLIS, A.: “Eastern Orthodoxy and Human Rights”, *Human Rights Quarterly*, 15, 1993, p. 350.

<sup>41</sup> For a discussion of different Muslim positions, see e.g. GHANEA, *op. cit.*, pp. 681-88.

man rights. In areas like, for instance, women's rights, gays' rights, religious freedom, and political and civil rights, theologians, religious leaders and lay people are urged to face questions not previously asked.

The states, in turn, are challenged by the religious communities. These challenges come in many forms. To conclude this chapter, we shall look at one challenge, played out in Europe, namely the question of state interference in the norms and practices of religious communities.

Practice in Europe has been that religious institutions belong to a category largely outside state control: the principle of religious freedom has been interpreted in such a way as to protect religious institutions and believers from state interference in their internal affairs and private religious lives. This protection is qualified. The European states limit religious freedom in a number of areas, for instance with regard to female circumcision, honour killing, and the prohibition of blood transfusion to minors for religious reasons. Such exceptions notwithstanding, the transgression of which constitutes a criminal offence, the freedom of religious institutions to organise themselves in accordance with their traditions is an area in which Western European states have traditionally been reluctant to interfere<sup>42</sup>.

As a result, a gap has been allowed to exist between, on the one hand, human rights, equality, and democratic principles embedded in Western societies, and, on the other hand, norms and practices expressed in the organisation and teaching of religious institutions. The examples are many: women and homosexual men may be barred from entering priesthood, homosexuals cannot marry in a religious ceremony, women may experience inequality in relation to religious divorce (a phenomenon which exists within Islam and Judaism), and non-democratic types of leadership may characterise the leadership of the religious community, to take but a few examples.

The religious communities have naturally welcomed this limited state interference, the importance of which is explicitly mentioned in documents like *Humanae Dignitatis*:

"Provided the just demands of public order are observed, religious communities rightfully claim freedom in order that they may govern themselves according to their own norms, honor the Supreme Being in public worship, assist their members in the practice of the religious life, strengthen them by instruction, and promote institutions in which they may join together for the purpose of ordering their own lives in accordance with their religious principles." (4).

As a result of these discrepancies, the religions of Europe today experience a certain pressure to respond to modern times. The question is whether the state should interfere more than it has done so far in an attempt to create a greater harmony between religious practices and human rights. In recent years, there has been an increased demand from politicians, lawmakers, the media, for more state interference, and in some cases, the result has, in fact, been increased state intervention.

This, applies, for instance to the phenomenon of religious divorce, which is part of family law in Islam and Orthodox and Conservative Judaism. Religious di-

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<sup>42</sup> LAGOUTTE and LASSEN, *op. cit.*

orce is an institution which discriminates against women: a religious divorce can be obtained if the couple agree or if the husband wishes a divorce. If he refuses a divorce, the woman cannot, in the case of Judaism, obtain a religious divorce and, in the case of Islam, in practice only in rare cases. In Western Europe, a woman can always obtain a civil divorce and religious divorce has no bearing on her civil status or rights. As a result, the state can without too many problems justify non-interference. However, in Norway, the United Kingdom, and France, the state has chosen to interfere—with legislative and other tools—with the aim of facilitating the access to equal religious divorce<sup>43</sup>.

The probability of increased state intervention in religious practices poses major challenges—to the religious communities, which may see their theological and dogmatic foundations shaken; to the state which may experience the greatest difficulties in finding ways in which efficiently to influence religious law and religious norms and practices; and to the very notion of freedom of religion, the traditional interpretation of which is under attack<sup>44</sup>.

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<sup>43</sup> *Ibid.*

<sup>44</sup> The question of increased state intervention is analysed in Lagoutte and Lassen, *op. cit.*



# Facing with the legacy of Human Rights violations. Post-communist approaches to transitional justice

Gábor Halmai

**Summary:** 1. Doing Justice: Retroactivity and Rule of Law. 2. Administrative Penalties: Vetting and Lustration. 3. Access to the Files of the Secret Police.

Transitional societies necessarily face the past in general, and the legacy of human rights violations in the previous regime in particular. The way of dealing with the past very much depends on the existing power relations at the time the transition towards democracy starts. The most radical, revolutionary way of transition is the violent overthrow or collapsing of the repressive regime; there is then a clear victory of the new forces over the old order. Democracy can also arrive either as an initiative of reformers inside the forces of the past, or as a result of joint action and a negotiated settlement between governing and opposition groups. Samuel Huntington, having studied thirty-five so-called third wave transitions that had occurred or that appeared to be underway by the end of the 1980s, calls the overthrow replacement, while he names the two less radical types of transition, between which the line is fuzzy, transformation and transplacement.<sup>1</sup> The problem with this kind of categorization starts when we try to put the different countries, representing unique solutions of transition into one of the categories. Evaluating the East-Central European transitions, which are the subject of this study, Huntington for instance puts Hungary into the category of transformation, while the events in Poland and Czechoslovakia are characterized as transplacements. In his book, *The Magic Lantern*, Timothy Garton Ash, keeping alive “the revolution of 89” as he witnessed it in Warsaw, Budapest, Berlin and Prague, has coined the term *refolution*” for the events of Warsaw and Budapest, because they were in essence reforms from above in response to the pressure for revolution from below, though he uses revolution freely for what happened in Prague, Berlin, and Bucharest.<sup>2</sup> The changes in Hungary and Poland were not triggered by mass demonstrations like in Romania, in the former GDR or in Czechoslovakia, and reforms of revolutionary importance interrupted the continuity of the previous regime’s legitimacy without any impact on the continuity of legality. Ralf Dahrendorf, another Western observer, argues that “the changes brought about by the events of 1989 were both extremely rapid and very radical (which is one definition of revolutions), at the end of the day, they led to the delegiti-

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<sup>1</sup> See Samuel P. HUNTINGTON: *The Third Wave: Democratization in the Late Twentieth Century*, University of Oklahoma Press, 1991, 124-125.

<sup>2</sup> Timothy Garton ASH: *The Magic Lantern: The Revolution of '89 Witnessed in Warsaw, Budapest, Berlin and Prague*, Random House, 1990.

mation of the entire ruling class and the replacement of most of its key members, as well as a constitutional transformation with far-reaching consequences".<sup>3</sup>

But for the purposes of our topic, the more important question is how the differences in the type of transition affect efforts to deal with the past. Huntington gives the following guidelines for democratizers dealing with authoritarian crimes: a) If replacement (revolution) occurred and it is morally and politically desirable, prosecute the leaders of the authoritarian regime promptly (within a year of coming to power) while making clear that you will not prosecute middle- and lower-ranking officials. b) If transformation or transplacement occurred, do not attempt to prosecute authoritarian officials for human rights violations, because the political costs of such an effort will outweigh any moral gains. c) Recognize that on the issue of "prosecute and punish vs. forgive and forget", each alternative presents grave problems, and that the least unsatisfactory course may well be: do not prosecute, do not punish, do not forgive, and above all, do not forget.<sup>4</sup> Similarly, Ruti Teitel argues that trials "are well suited to the representation of historical events in controversy" and are "needed in periods of radical flux".<sup>5</sup> András Sajó observes that if Teitel is right, then perhaps there was no radical flux in East-Central Europe, at least not radical regarding the past.<sup>6</sup> But whatever legal choices of transitional justice a State may or may not choose when dealing with the past, the overwhelming majority of academics argue that, in one form or in another, is a State obligation both under domestic constitutional law and under international law. But there are of course also arguments against every kind of post-communist restitution and retribution. The most radical among them concludes that one should target everybody or nobody, and because it is impossible to reach everybody, nobody should be punished and nobody compensated.<sup>7</sup>

The main complementary rationale for defending a transitional justice policy by new democracies is to provide recognition to victims, as right bearers on the one hand, and to foster civic trust in the other.<sup>8</sup> To formulate it differently, the new States must strive to fulfill different obligations that they owe both to the victims of human rights violations and to the society.<sup>9</sup> These possible obligations are the following:

1. to do justice, that is to prosecute and punish the perpetrators of abuses when those abuses can be determined to have been criminal in nature;
2. to grant victims the right to know the truth; this implies the ability to investigate any and all aspects of a violation that still remain shrouded in secrecy

<sup>3</sup> Ralf DAHRENDORF: *Reflections on the Revolution in Europe*, Random House, 1990. p. 8.

<sup>4</sup> HUNTINGTON, *Ibid*, p. 231.

<sup>5</sup> See Ruti TEITEL: «Transitional Justice as Liberal Narrative», in: András SAJÓ (ed.): *Out of and Into Authoritarian Law*, Kluwer Law International, 2003. p. 6.

<sup>6</sup> András SAJÓ: «Erosion and Decline of the Rule of Law in Post-Communism: An Introduction», in: SAJÓ (ed.), *Ibid*, p. xix.

<sup>7</sup> See Jon ELSTER: *On Doing What One Can: An Argument Against Post-Communist Restitution and Retribution*, East Eur. Const. Rev. Vol. 1, no. 2. (Summer 1992), pp. 15-17.

<sup>8</sup> Pablo de GREIFF: *Vetting and Transitional Justice*, International Center for Transitional Justice, Conference paper, Bellagio, Italy, 2005, pp. 3-4.

<sup>9</sup> See Juan E. MÉNDEZ: «In Defense of Transitional Justice», in: A. James McADAMS (ed.): *Transitional Justice and Rule of Law in New Democracies*, University of Notre Dame Press, 1997. pp. 11-12.



and to disclose this truth to the victims of justice, to their relatives, and to the society as a whole;

3. to grant reparations to victims in a manner that recognizes their worth and their dignity as human beings; monetary compensation in appropriate amounts is certainly a part of this duty, but the obligation should also be conceived as including nonmonetary gestures that expresses recognition of the harm done to them and an apology in the name of society;
4. States are obliged to see to it that those who have committed the crimes while serving in any capacity in the armed or security forces of the State should not be allowed to continue on the rolls of reconstituted, democratic law-enforcement or security-related bodies.

Not all of these four obligations are necessarily fulfilled in every transition. As was suggested by Huntington, in cases of transformations and transplacements, to prosecute is not well advised. The way "justice" is defined depends wholly on who holds effective political power. As Roger Errera puts it: "Memory is the ultimate form of justice"<sup>10</sup>. In this sense, truth-telling can be an alternative of prosecution and punishment. But there are also other legitimate grounds for failing to prosecute. One of the legitimate reasons why a successor government may be unable to prosecute those responsible for human rights abuses during the tenure of the prior regime is the risk of endangering the transitional process, for instance the security forces under the control of, or loyal to the previous regime may be so powerful that any attempt to prosecute them or their political allies could lead to events dangerous to the transition. Another reason can be the existence of insuperable practical difficulties that make it impossible to punish: absence of evidence, a dysfunctional criminal justice system, economic crisis, enormous amount of time to prepare.<sup>11</sup> Also disqualification as a penalty, which can serve the means of decommunization, is not a necessary element of the transition. Many academics argue that decommunization is based on the incoherent idea of collective guilt, and is not a process which a sovereign nation willingly inflicts upon itself, but rather an elite power game.<sup>12</sup> With very few exceptions, in East-Central Europe ordinary citizens care more about personal security and day-to-day survival, and popular clamoring for revenge was very rarely to be heard.

Nevertheless, the new governments answered these calls for purge, "lustration", or at least for information about those who had committed human rights violations differently. Under pressure from former Eastern dissidents, the German government responded by opening the files and purging the past through public trials. The then Czechoslovak Republic, with perhaps the harshest approach, required nearly everyone to be checked against the records of the secret police and to be presumed guilty if listed there. Poland wrestled with the question and in the end did not ask it too loudly in public. Hungary has adopted the view that the best way to

<sup>10</sup> See Roger ERRERA: *Dilemmas of Justice*, 1 East Eur. Const. Rev. 21,22 (Summer 1992).

<sup>11</sup> See Paul van ZYL: «Justice without Punishment: Guaranteeing Human Rights in transitional Societies», in: SAJÓ (ed.): *Ibid*, pp. 54-60.

<sup>12</sup> See Stephen HOLMES: *The End of Decommunization*, East Eur. Const. Rev. Vol. 3, nos. 3-4. (Summer/Fall 1994), pp. 33-36.

deal with the past is to do better now; in other words, for the new Hungarian State, “living well is the best revenge”.<sup>13</sup>

Fulfilling their obligations the successor States seemed to find two ways to demonstrate a clear break between the old regime and the new order: a) dealing with those who participated in, or benefitted from; b) adhering to the new governments pronounced commitments to principles of democracy and the rule of law.<sup>14</sup> The first way is about the repression of the past, while the second one is focusing on the future. The traditional term of transitional justice means the ways of dealing with the past, but institutional reforms, including constitutional ones, as future oriented issues, also belong to the transition, even if I am not intent to deal with them here.

In the different sections of this paper I will concentrate on different approaches to dealing with the past, or as Timothy Garton Ash puts it, using the German words, which are impossible to translate: *Geschichtsaufarbeitung* and *Vergangenheitsbewältigung*. Ash differentiates among “four ways to the truth”: a) legal procedures, court trials; b) vetting and lustration of public officials; c) truth and reconciliation commissions; d) access to the files of the previous secret police.<sup>15</sup>

This list of approaches is completed by many authors with a fifth way of dealing with the past, namely restitution of property or material compensation to victims. Although I won’t elaborate this approach further, it is clear that there is a growing consensus in international law that the State is obligated to provide compensation to victims of egregious human rights abuses perpetrated by the government, and if the regime which committed the acts in question does not provide compensation, the obligation carries over to the successor government.<sup>16</sup>

Since historical commissions of inquiry, which were set up in South-Africa, Latin-America, and in some cases performed by wholly international bodies, such as the truth commission for El Salvador or the UN war crimes Tribunal for Rwanda, were not used in East-Central Europe, I won’t deal with this approach here.<sup>17</sup> But of course most of the functions of these commissions, establishing a full, official accounting and acknowledging of the past are fulfilled by the provided access to the files of the previous regime.

## 1. Doing Justice: Retroactivity and Rule of Law

One of the basic questions confronting all transitional governments is whether to undertake the prosecution of the leaders of the ousted regime for the abuses they inflicted upon the nation. Some argue that the trial and punishment of these

<sup>13</sup> See Gábor HALMAI and Kim Lane SCHEPPELE: «Living Well Is the Best Revenge: The Hungarian Approach to Judging the Past», in: A. James McADAMS (ed.): *Ibid*, pp. 155-184.

<sup>14</sup> Neil J. KRITZ: «The Dilemmas of Transitional Justice», in: KRITZ (ed.): *Transitional Justice. How Emerging Democracies Reckon with Former Regimes. Vol. I. General Considerations*. US Institute of Peace Press, Washington, DC. 1995. p. xix.

<sup>15</sup> See Timothy Garton ASH: *Four Ways to the Truth*, *Die Zeit*, October 2, 1997.

<sup>16</sup> See for instance KRITZ, *Ibid*, xxvi-xxvii.

<sup>17</sup> Several variations of the truth commissions are covered at length in each of the three volumes of KRITZ (ed.): *Transitional Justice*.

people is essential to achieve some degree of justice, while others claim that these are simply show trials unbenefiting a democracy, that they are manifestations of victor's justice. Following the death of Franco, the relatively peaceful Spanish transition was marked by a mutual amnesty, while in Greece or post-apartheid South-Africa a sweeping amnesty was impermissible.

When a decision is made to prosecute, the desire to use criminal sanctions may run directly counter to such principles of a democratic legal order, as *ex post facto* and *nulla poena sine lege*, barring the prosecution of anyone for an act which was not criminal at the time it was committed. In post-war France, for example, thousands of people were prosecuted under a 1944 law establishing the new offense of "national indignity" for acts they had committed prior to the law's adoption.

Some of the worst violations of human rights were crimes under the old system, but they obviously were not prosecuted. If the statute of limitations for these crimes has already elapsed by the time of the transition, can the new authorities still hold the perpetrators accountable for their deeds? In both Hungary and the Czech Republic, post-communist legislators argued that since these crimes, particularly those committed to suppress dissent in 1956 and 1968 respectively, had not been prosecuted for wholly political reasons, it was legitimate to hold that the statute of limitations had not been in effect during the earlier period. Now, freed of political obstacles to justice, the statutory period for these crimes could begin anew, enabling the new authorities to prosecute these decades-old crimes. Legislation was adopted accordingly. In both countries, the matter was put to the newly created constitutional court for review. Each court handed down a decision which eloquently addressed the need to view the question of legacy and accountability in the context of the new democracy's commitment to the rule of law. On this basis—with plainly similar fact patterns—the Czech Constitutional Court upheld the re-running of the statute of limitations for the crimes of the old regime as a requirement of justice, while the Hungarian Court struck down the measure for violating the principle of the rule of law.

In Hungary the first elected Parliament passed a law concerning the prosecution of criminal offenses committed between December 21, 1944 and May 2, 1990. The law provided that the statute of limitations start over again as of May 2, 1990 (the date that the first elected parliament took office) for the crimes of treason, voluntary manslaughter, and infliction of bodily harm resulting in death—but only in those cases where the "State's failure to prosecute said offenses was based on political reasons"—. The President of Hungary, Árpád Göncz, did not sign the bill but instead referred it to the Constitutional Court.

The Constitutional Court, in its unanimous decision 11/1992 (III. 5.) AB, struck down the Parliament's attempt at retroactive justice as unconstitutional for most of the reasons that Göncz's petition identified. The Court said that the proposed law violated legal security, a principle that should be guaranteed as fundamental in a constitutional rule-of-law State. In addition, the language of the law was vague (because, among other things, "political reasons" had changed so much over the long time frame covered by the law and the crimes themselves had changed definition during that time as well). The basic principles of criminal law—that there shall be no punishment without a crime and no crime without a law—were clearly violated

by retroactively changing the statute of limitations; the only sorts of changes in the law that may apply retroactively, the Court said, are those changes that work to the benefit of the defendants. Citing the constitutional provisions that Hungary is a constitutional rule-of-law State and that there can be no punishment without a valid law in effect at the time, the Court declared the law to be unconstitutional.<sup>18</sup>

The Constitutional Court of the Czech Republic in its decision of December 21, 1993 on the Act on the Illegality of the Communist Regime rejecting the challenge filed by a group of deputies in the Czech Parliament upheld a statute suspending limitations period between 1948 and 1989 for criminal acts not prosecuted for “political reasons incompatible with the basic principles of the legal order of a democratic State”.<sup>19</sup> The Czech decision permitting suspension of the limitations period relied, in part, on the decision of the German Federal Constitutional Court from November 12, 1996, in which the Court upheld the convictions of former German Democratic Republic (GDR) officials who had helped hand down the shoot-on-sight policy that resulted in the death of 260 people trying to cross the border between East and West Germany, or East and West Berlin, between 1949 and 1989. It rejected the defense’s argument that the German Constitution’s provision that “[a]n act may be punishable only if it constituted a criminal offense under the law before the act was committed”, Basic Law Article 103, para. 2, prohibited such prosecutions. This article, the Court found, did not apply to a case such as this where a State (the GDR) had used its law to try to authorize clear violations of generally recognized human rights.

In the newly unified Germany, the trial of the border guards for shootings at the Berlin Wall offers another illustration of the dilemma formulated by the Hungarian constitutional judges, whether “the certainty of the law based on formal and objective principles is more important than necessarily partial and subjective justice”. The Border Protections Law of the former GDR authorized soldiers to shoot in response to “acts[s] of unlawful border crossing”. Such acts were very broadly defined and included border crossings attempted by two people together or those committed with “particular intensity”. The custom at the border was to enforce the law strictly: supervisors emphasized that “breach of the border should be prevented at all costs.” The German Trial Courts relied on precedents of the Federal Constitutional Court elevating the principle of material justice over the principle of the certainty of the law in special circumstances.

Thus, the Hungarian on the one hand and the Czech and German courts on the other formulated the dilemma in a similar manner, but came down on opposite sides: the Hungarian Court interpreted the rule of law to require certainty, whereas the Czech and German courts interpreted it to require substantive justice.<sup>20</sup>

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<sup>18</sup> The English language translation of the decision has been published in László SÖLYOM and Georg BRUNNER: *Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court*, The University of Michigan Press, Ann Arbor, 2000. pp. 214-228. (Hereafter, this book will be abbreviated as SÖLYOM/BRUNNER.)

<sup>19</sup> English translation is in KRITZ (ed.) *III Transitional Justice*. pp. 620-627.

<sup>20</sup> The dilemma of successor justice faced by these courts forms part of a rich dialogue on the nature of law; H.L.A. Hart and Lon Fuller’s debate on transitional justice wrestles with the relationship between law and morality, between positivism and natural law. Defending positivism see

## 2. Administrative Penalties: Vetting and Lustration

Similarly as great a challenge to transitional democracies and the rule of law represent the different kinds of non-criminal administrative sanctions, the joint aim of which is to purge from the public sector those who served the repressive regime. The idea behind these processes is the prevention of human rights abuses through personnel reforms by excluding from public institutions persons who lack integrity, or at least by informing the general public, especially the voters about the past of those who run for a public position. In the latter cases (milder forms of lustration), the only sanction is the publication of the data on the involvement of the public officials in one of the repressive institutions, for instance the secret police of the previous regime. Besides lustration in former communist countries, the processes to exclude abusive or incompetent public employees in order to prevent the recurrence of human rights abuses and build fair and efficient public institutions is a general characteristic of countries emerging from conflict or authoritarian regimes. Recent examples include UN vetting efforts in El Salvador, Bosnia and Herzegovina, Liberia and Haiti, but also the "Debaathification" process in postwar Iraq. As the Secretary General's Report on The Rule of Law and Transitional Justice in Conflict and Postconflict Societies puts it: "Vetting usually entails a formal process for the identification and the removal of individuals responsible for abuses, especially from police, prison services, the army and the judiciary."<sup>21</sup>

However, we cannot forget that there have been many transitions in which there has been not vetting or lustration, not even of most important rule of law institutions (e.g. Spain, Chile, Argentina, Guatemala and South Africa). Likewise, in East-Central Europe, besides the more extensive vetting and lustration procedures, as the one in the Czech Republic and East Germany (the former German Democratic Republic, GDR), there have also been transitions with very modest and sector specific vetting as in Poland, and Hungary. During the revolutionary changes in East Germany, as well as in Czechoslovakia, after the 1989 Velvet Revolution vetting and lustration have to be taken as part of the broader politics of decommunisation which targeted exactly the personal aspect of the whole process of postcommunist political and legal transformations.<sup>22</sup>

*Vetting in the unified Germany* took place in two different arenas: on the one hand, elected representatives on the local, state, and federal level were frequently asked about their "first life" in the GDR. In some states (Länder), persons who had

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H.L.A. HART: «Positivism and the Separation of Law and Morals», *Harvard Law Review* 71, 1958. p. 593. Fuller rejected Hart's abstract formulation of the problem, and instead focused on postwar Germany. Arguing that Hart's opposition to selective tampering elevates rule-of-law considerations over those of substantive criminal justice, Fuller justified tampering to preserve the morality of law. See Lon L. FULLER: «Positivism and Fidelity to Law - A Reply to Professor Hart», *Harvard Law Review*, 71, 1958. p. 630. About the debate see Ruti G. TEITEL: *Transitional Justice*, Oxford University Press, 2000. pp. 12-14.

<sup>21</sup> UN Doc. S/2004/616, p. 17.

<sup>22</sup> See Jiri PRIBAN: *Oppressors and Their Victims: the Czech Lustration Law, Decommunisation and the Rule of Law*. Paper submitted within the research project of the International Center for Transitional Justice: Vetting and Excluding Abusive Officials: Developing a Fourth Approach to Transitional Justice. (hereafter: ICTJ Vetting Project) 2004.

worked for the secret police could not be elected mayors. But since parliamentarians cannot be recalled or impeached for prior non-criminal misconduct, any screening conducted in parliaments was not likely to have consequences beyond public expressions of indignation by the “clean” political parties. The vetting of the East German public sector, in contrast, had profound impacts on the lives of many citizens, on the legitimacy of institutions, and on the perceptions of culpability.<sup>23</sup>

The vetting of public sector employees was part of a larger process of downsizing the public sector. In 1989, there were 2.2 million public sector workers in the GDR. Through privatizations and layoffs, this number decreased to 1.2 million in Spring 1991, long before the process of personnel reduction was over. Vetting was the first step in a large-scale process of restructuring and personnel reduction. The process of questioning and screening should identify all those employees who are not suitable for continued public sector employment in a democratic State. Upon the conclusion of the vetting process, employees would be screened for their professional qualifications for the jobs they held or would hold after restructuring. And finally, those employees whose personal integrity and professional qualification were beyond legal doubt were matched with the decreasing number of jobs, resulting in even more layoffs.

Vetting was first proposed in the Fall of 1989 and started, sometimes informally, in the Spring of 1990. At that time, vetting was conceptualized simply as a response to past misconduct, and not much thought was given to how a person’s views and conduct changed after 1989. The legal basis for vetting, in contrast, framed the policy as an attempt to assess the employees’ current and future reliability in a democratic public sector. Although the vetting process was regulated by one general norm in the Unification Treaty, the practice was uneven across sectors, states, and administrative departments. Institutions that demand higher levels of popular trust in their moral authority, such as courts and universities, generally selected more demanding procedures. Their vetting commissions were composed by insiders as well as representatives of civil society or legal professionals who were expected to ensure the impartiality and integrity of the whole process. In other parts of the public sectors, such as in the municipal administrations, the vetting process was differentiated according to the employees’ level of responsibility and public visibility. The commissions were formed from within the institution without elections. They viewed their work as purely administrative. The most significant category of misconduct examined by the vetting commissions was collaboration with the Ministry of State Security (MfS, popularly called Stasi). Available numbers suggest that on average 30% to 45% of those who were listed as MfS informers had to leave the institution. Many opted for ending the employment in mutual agreement, which saved them the embarrassment of having been dismissed but also deprived them of an opportunity to challenge the dismissal in court.

Although vetting was meant to identify various forms of non-criminal misconduct, it was widely understood to be synonymous with the search for MfS informers. This identification is a result of a narrowing of the vetting focus in response to the

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<sup>23</sup> See Christiane WILKE: *The Shield, the Sword, and the Party: Vetting the East German Public Sector*. ICTJ Vetting Project, 2004.

availability of evidence and the criteria introduced by the laws. The focus on the MfS does not reflect an initial judgment of the relative responsibility of the MfS, the communist party, the Socialist Unity Party (SED), and other organizations for injustices. However, the singular focus on unofficial MfS informers for pragmatic reasons implicitly cast this group of people as the main culprits. Other forms of MfS collaboration as well as the abuse of power by the SED, the trade union federation, and other organizations receded in importance behind the character of the secret MfS informer.<sup>24</sup>

The *Czechoslovak Lustration Law*, as formulated in Act No. 451/1991 of the Collection of the Laws "determining some further conditions for holding specific offices in State bodies and corporations of the Czech and Slovak Federal Republic, the Czech Republic and the Slovak Republic" (commonly referred to as the "large lustration law")<sup>25</sup> and Act No. 279/1992 of the Collection of the Laws "on certain other prerequisites for the exercise of certain offices filled by designation or appointment of members of the Police of the Czech Republic and members of the Correction Corps of the Czech Republic" (commonly referred to as the "small lustration law" because it only extended the lustration procedures to the police force and the prison guards service), was based on the idea that the postcommunist Czechoslovak society had to deal with its past and facilitate the process of decommunisation by legal and political means. It intended to specify a carefully selected list of top offices in the State administration which would be inaccessible to those individuals whose loyalty to the new regime could be justifiably questioned due to their political responsibilities and power exercised during the communist regime.

The law provided two lists of offices and activities to which it applied: the first list contained offices requiring a lustration procedure before individuals could take them, while the second list enumerated power positions held and activities taken during the communist regime which disqualified candidates applying for the jobs listed in the first list. Despite a wide range of public offices subjected to the lustration procedure, positions contested in the general democratic elections had not been affected by the law. Offices protected by the lustration law included: civil service, senior administrative positions in all constitutional bodies, the army positions of a colonel and higher, police force, intelligence service, the prosecution office, the judiciary, notaries, State corporations or corporations in which the State is a majority shareholder, the national bank, State media and press agencies, university administrative positions of the head of academic departments and higher, and the board of directors of the Academy of Sciences.

The disqualifying positions and activities during the former regime were: political; those within the repressive secret police, State security and intelligence forces; and linked to the collaboration with these forces. Political disqualifying positions included: Communist Party secretaries from the rank of district secretaries upwards, members of the executive boards of district Communist Party committees upwards, members of the Communist Party Central Committee, political propaganda secretaries of those committees, members of the Party militia, members of

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<sup>24</sup> WILKE, *Ibid*, pp. 58-59.

<sup>25</sup> English translation is in KRITZ (ed.) *III Transitional Justice*. pp. 312-321.

the employment review committees after the communist coup in 1948 and the Warsaw Pact invasion in 1968, graduates of the Communist Party propaganda and security universities in the Soviet Union and Czechoslovakia. Exceptions were made for those party secretaries and members of the executive boards of the party committees holding their positions between January 1, 1968, and May 1, 1969, that is during the democratisation period of the "Prague Spring 68" terminated by the invasion of the Warsaw Pact armies in August 1968.

Regarding the security, secret police and intelligence service positions, the following ones had been enumerated by the law: senior officials of the security police from the rank of departmental chiefs upwards, members of the intelligence service, and police members with political agenda. Nevertheless, the law originally allowed the Minister of Interior, Head of the Intelligence Service, and Head of the Police Force to pardon those members of the former secret police whose dismissal would cause "security concerns".

The most controversial part of the law was the one which listed activities of citizens related to the secret police. They involved the secret police collaborators of the following kind: agents, owners of conspiratorial flats or individuals renting them, informers, political collaborators with the secret police, and other conscious collaborators such as trustees and candidates for collaboration. This complicated structure corresponded to the system elaborated by the communist secret police. The main issue was whether a person consciously collaborated with the police, for instance by signing the confidential "agent" cooperation, or was just a target of the secret police activity and possibly non-intentional source of information gathered during police interviews.

The Constitutional Court of the Czech and Slovak Federal Republic upheld the law's constitutionality in general and stated that the lustration in principle did not violate the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, and the Discrimination Convention (Employment and Occupation) of 1958. Furthermore, the Court declared unconstitutional and therefore void those sections of the law, which legislated specific powers to the Minister of Defence and the Minister of Interior to exempt individuals from the lustration procedure if it was in the interest of State security. According to the Court, these sections contradicted the principles of equality and due process of law guaranteeing that the same rules apply to those in the same position.<sup>26</sup>

The law did not affect Communist Party members in general and, among communists, targeted only the Party officials and the Party Militia members. Individuals who ended up with the "positive lustration" record stating that they had collaborated with the secret police could still be active in politics because the statute did not apply to any office and position contested in the general election. However, the overwhelming majority of political parties introduced a self-regulatory policy demanding all candidates to submit the "negative lustration" certificate before being listed in the parliamentary election. The only parliamentary political party refusing to internally apply lustration rules has been the Communist Party. The law thus created

<sup>26</sup> Decision of the Constitutional Court of the Czech and Slovak Federal Republic on the Screening Law. November 26, 1992. English translation is in KRITZ (ed.) *III Transitional Justice*, pp. 346-365.



a situation in which members of Parliament and local councils could have a secret police record while, for instance, heads of different university departments had been subjected to the lustration procedure.

Lustrations also did not apply to the emerging private economy sector. Private companies did not have access to the secret police files of its employees and therefore could not apply "private lustrations". Regarding the procedure, an individual has to apply for the lustration certificate at the Security Office of the Ministry of Interior. Any person can apply for the certificate and the Ministry has a duty to issue it. The certificate is mandatory only for those holding or applying for jobs listed in the lustration law. An organisation can apply for lustration of its employee only if her job is subject of the lustration law. In the case of the "positive lustration" result, an applicant can submit an administrative complaint to the Ministry and, if the original finding remains unchanged, file a civil suit against the Ministry demanding the protection of "personal integrity".

Available figures show that around five per cent of all lustration submissions resulted in "positive certificates" disqualifying the applicant from his/her office in the mid 1990s. The most recent figures indicate a decline in "positive lustration" results of the screening down to approximately three per cent of all applications received by the Ministry of Interior since the enactment of the lustration law in 1991. The Ministry currently receives between 6.000 and 8.000 lustration requests per year and the total number of lustration certificates issues between 1991 and 2001 was 402.270.<sup>27</sup> Although the law had been originally enacted for a limited period of 5 years, but was subsequently extended by Parliament several times and still is being enforced in the Czech Republic.<sup>28</sup>

The *Polish Lustration Law* adopted by the Polish Parliament in April 1997<sup>29</sup> formally became valid law in August 1997, but could not be enforced without the creation of the V Department (Lustration Court) in the Warsaw Appellate Court in December 1998. A Commissioner for the Public Interest was nominated by the Chief Justice of the Supreme Court in October 1998 and formally took office on 1 January 1999.

The statute imposes a duty on people born before 11 May 1972, which means all who were adults according to law before the transfer of power in 1989 took place, who hold or are candidates of enumerated public positions in the State to make a statement regarding their work or collaboration with secret services (organs of the State security) between 1944 and 1990. The obligation of making a positive or negative lustration statement is imposed on a broad category of people holding executive positions in the State or important positions in the State administration, including the President of the Republic, members of the Parliament, senators, judges, procurators, advocates, and people holding key positions in Polish Television (public), Polish Radio (public), the Polish Press Agency, and the Polish Information Agency.

<sup>27</sup> See PRIBAN, *Ibid*, p. 17.

<sup>28</sup> Slovakia is an example of the opposite approach because, after the split of the Czech and Slovak Federal Republic, Mečiar's populist Movement for Democratic Slovakia and other parties of his coalition government ignored the lustration law.

<sup>29</sup> Uniform text Dziennik Ustaw, 1999, Nr 42, poz. 428.

Lustration statements consist of parts A and B, as stated in the annex to the statute. Part A is simply a declaration that a person did or did not work or collaborate with organs of State security. Part B (not made public) includes details of work or collaboration in the case of a positive statement. Information of a positive statement is published in the Official Gazette "Monitor Polski", or in the case of the candidates for the presidency and the lower or upper houses of Parliament, in electoral proclamations. That means that names of all who return positive declarations are published in the government gazette but without details of the type of collaboration. In the case of candidates for seats in the Sejm and Senate and Presidency, next to their name on the electoral proclamation with the names of all candidates is mentioned that they returned a positive lustration declaration. In that way those who declared that they were members of the secret services or consciously collaborated with secret services can still be candidates to the office and the decision about their future is left in the hands of the electorate. The Polish lustration law penalises only a lie about collaboration with secret services, not the collaboration itself.

Verification of a negative lustration statement is done by the Commissioner for the Public Interest. If there is suspicion of a lie in the lustration statement, the Commissioner for the Public Interest initiates a case before the Lustration Court. Court rulings confirming a lustration lie are made public. The legal effects of such court rulings are different depending on the position held by the person involved. MPs or senators will lose their seat but they can start as candidates in the next election. In the case of judges an additional ruling of the disciplinary court is required.

In the years 1999-2004 about 27.000 people have filled out lustration declarations and according to the Lustration Law all of these declarations are subject to the Commissioner's scrutiny. 278 persons declared work or collaboration with State security organs. Their names were published in "Monitor Polski". The Commissioner filed only 126 cases for the Lustration Court. By 30 April 2004, the Lustration Court made judgements in relation to 103 persons. Among those 103, in 52 cases the Court confirmed that the declaration was not true.<sup>30</sup>

The *Hungarian Lustration Law* was adopted also after a long hesitation early in 1994, toward the end of the first elected government's term of office, and similarly to the Polish case included a compromise solution to the issue of the secret agents of the previous regime's police. The law set up panels of three judges whose job it would be to go through the secret police files of all of those who currently held a certain set of public offices (including the President, government ministers, members of Parliament, constitutional judges, ordinary court judges, some journalists, people who held high posts in State universities or State-owned companies, as well as a specified list of other high government officials). Each of these people would have to undergo background checks in which their files would be scrutinized to see whether they had a lustratable role<sup>31</sup> in the ongoing operation of the previous surveillance

<sup>30</sup> See Adam CZARNOTA: *Lustration law in the post-communist Polish III Republic*, ICTJ Vetting Project, 2004.

<sup>31</sup> The law classified the following activities as lustratable: carrying out activities on behalf of state security organs as an official agent or informer, obtaining data from state security agencies to assist in making decisions, or being members of the (fascist) Arrow Cross Party.

State. If so, then the panel would notify the person of the evidence and give him or her a chance to resign from public office. Only if the person chose to stay on would the panel publicize the information. If the person contested the information found in the files, then prior to disclosure, he or she could appeal to a court, which would then conduct a review of evidence in camera and make a judgement in the specific case. If the person accepted a judgement against him or her and chose to resign, then the information would still remain secret.

After the law had already gone into effect and the review of the first set of members of parliament was already underway, the law was challenged by a petition to the Hungarian Constitutional Court. The Court handed down its decision in December 1994<sup>32</sup>, in which parts of the 1994 law requiring “background checks on individuals who hold key offices” were declared unconstitutional. In its decision the Court outlined key principles of the rights of privacy of the individuals whose pasts are revealed in the files as well as the rights of publicity for information of public interest. The most important declaration of principle in the decision of the Constitutional Court is the following: “The court declares that data and records on individuals in positions of public authority and those who participate in political life—including those responsible for developing public opinion as part of their job—count as information of public interest under Article 61 of the Constitution if they reveal that these persons at one time carried out activities contrary to the principles of a constitutional State, or belonged to State organs that at one time pursued activities contrary to the same.” Article 61 of the Hungarian Constitution provides an explicit right to access and disseminate information of public interest.

The lustration decision was delicate not only politically (since the lustration process was already underway in a recently elected government where many of the top leaders had held important positions in the State-party regime),<sup>33</sup> but also constitutionally, because it represented the clash of two constitutional principles: the rights of informational self-determination of individuals (in this case, the spies) and the rights of public access to legitimately public data by everyone (including those who were spied on). Before the lustration case, both principles had been upheld in strong form. The lustration case, however, pitted the two principles against each other.

Taking the whole range of issues, from the constitutionality of the lustration process to the continued secrecy of the security apparatus files, the Constitutional Court attempted to balance a range of interests. First, the Court held that the maintenance of this vast store of secret records was incompatible with the maintenance of a State under the rule of law, since such records would never have been constitutionally compiled in the first place in a rule-of-law State. But the fact that the records now existed posed other problems, including the freedom of access to information in the files both by an interested public and by individuals whose names appeared in the files either as subjects or as the agents. Disclosing the files to an interested public also would mean disclosing information of great personal importance to the individuals

<sup>32</sup> 60/1994 (XII. 24) AB. See the English translation of the decision in Sólyom/Brunner, pp. 306-315.

<sup>33</sup> For example, the Prime Minister and the Speaker of the Parliament in the term between 1994-98 were both ministers before 1989, and they had standing under the legal regulations of the time as persons who regularly got informational briefings from the secret police.

mentioned. Since individuals have a personal right of self-determination under the Hungarian Constitution, what is left of the claim of public freedom of access to information in determining what can be disclosed from the security apparatus files?

To resolve these questions, the Court made an important distinction. It held that public persons have a smaller sphere of personal privacy than other individuals in a democratic State. As a result, more information about such public persons may be disclosed from the security files than would be permitted in the case of persons not holding influential positions, so conflicts between privacy and freedom of information should be resolved differently for the two classes of persons. With this, the Court placed the problem back in the hands of the Parliament as a “political issue”, with the instructions that the Parliament is free neither to destroy all the records nor to maintain the absolute secrecy of them, since much of what they contain is information of public interest.

The Court also found that the Parliament had more remedial work to do on other parts of the law before it could pass constitutional muster. The specific list of persons to be lustrated also needed to be changed because it was unconstitutionally arbitrary. In particular, the Court found that the category of journalists who were lustratable was both too broad —by including those who produced music and entertainment programs— and also too narrow —by excluding some clearly influential journalists who worked for the private electronic media—. Either all journalists and other public figures who have as part of their job influencing public opinion must be lustrated or none may be, the Court held. Parliament could choose either course. The Court did not, however, find the extension of the lustration process to journalists in the private media to be a violation either of the freedom of the press or a violation of the informational self-determination of journalists. Instead, all those who, in the words of the 1994 law, “participate in the shaping of the public will” are acceptable candidates for lustration, as long as all those in the category are similarly included. Extending lustration to officials of universities and colleges and to the top executives of full or majority State-owned businesses was declared unconstitutional, however, since these persons “neither exercise authority nor participate in public affairs”, according to the Court. A separate provision allowing members of the clergy to be lustrated was struck down for procedural reasons because the procedures to be applied to the clergy did not include as many safeguards as those applied to others.

The decision of the Constitutional Court shows correctly that a lustration law can have two goals, depending on the historical moment. At the beginning of the transition, full lustration might have served to mark the irreversibility of the change and the ritual cleaning of the society. But more than five years after the “rule-of-law revolution”, the better constitutional goal may be found in specifying the circle of freedom of information through a rule-of-law lustration. The behaviour and the past of those people who are now prominent in political public life are appropriate for the public community to know. The lustration of the prominent representatives of the State is constitutionally reasonable, but the publicity of the full agent’s list is not, the Constitutional Court argued.

The new lustration law, LXII/1996, which was approved by the Parliament in July 1996 specifies that only those public officials who have to take an oath before the

Parliament or the President of the Republic or who are elected by the Parliament are to be subjected to the lustration process. This takes care of the problem outlined by the court of an excessive scope of lustratable officials. According to the amendment ordinary court judges, public prosecutors, and majors are excluded from the lustration. After the change of government in 1998, the centre-right conservative governing parties in 2000 adopted Act XCIII, which extended significantly the list of those who should go through lustration compared to the modification in 1996 and the original law of 1994. The amendment extended the scope of vetting of the media beyond the level of editors, to "those, who have the effect to influence the political public opinion either directly or indirectly", and was also applicable to commercial television, radio, newspapers and Internet news agencies.<sup>34</sup>

Soon after the change of the government in 2002, it was disclosed that the then Prime Minister Péter Medgyessy had served as a top secret officer of the former III/II Directorate (counterintelligence) of the communist-era Ministry of Interior. The scandal showed that the legislation in force was inadequate to ensure the purity of post-transition public life, since it concentrated exclusively on the domestic surveillance unit of the Hungarian secret police (former III/III Directorate). But there were other units also, that engaged in spying on Hungarians living abroad, or on foreigners living in Hungary, or on those who served in the military, and those secret police units are not covered by the law, despite a public protest by a number of leading figures insisting that the lustration law cover all spying activities. This problem was subject of a complaint before the Constitutional Court, but it was rejected in 1999. Under the weight of intense press coverage of the Prime Minister's case and opposition pressure, in 2003 the government tabled an amendment of the lustration law involving every former directorates, and also planned to extent the lustration to the churches, by arguing if media representatives are liable for lustration, there is no constitutional reason why the leaders of churches are not. But finally the draft law was rejected by the Parliament.

### 3. Access to the Files of the Secret Police

As the case of the Hungarian statutory regulation has shown, lustration was very much treated together with the problem of the access to the files of the previous regime's secret police both by the victims and the general public. In the other countries these issues were regulated separately. Concerning the wideness of accessibility, one can detect different models within the countries in East Central Europe. Poland, as well as the first Hungarian solution, provided limited access to the victims. The most important limit is the name of the spy, which in these models is not disclosed for the victims. The unified Germany, which was the very first country in the history opening the State archives of the secret police, provided unlimited access to the victims concerning the data on the agent as well, and to government agencies to request background checks on their employees. The law enacted by the

<sup>34</sup> See Elizabeth BARRETT, Péter HACK, Ágnes MUNKÁCSI: *Vetting in Hungary*, ICTJ Vetting Project, 2004.

Hungarian Parliament in 2003, besides following the German way by providing access to victims on their spies, also opened the files for the general public concerning the data of public figures. But the widest access is provided by the similar statutory regulation of the Czech Republic and Slovakia, where —with the necessary protection of third persons' personal data— the secret police files are accessible for everyone.

The *Hungarian* Constitutional Court's mentioned decision on the constitutionality of the 1994 lustration law also ruled that the legislative attempts to deal with the problem of the files were constitutionally incomplete because they failed to guarantee that the rights of privacy and informational self-determination of all citizens would be maintained. Because the Parliament had not yet secured the right to informational self-determination, and first of all the right of people to see into their own files, the Court in its decision declared the Parliament to have created a situation of unconstitutionality by omission.<sup>35</sup> The new law enacted in 1996 did create a "Historical Office", responsible to take control of all of the secret police files and to make them accessible to citizens who are mentioned in those files. Individuals are eventually able to apply to this office in order to see their files, and such access must be granted, as long as the privacy and informational self-determination of others is not compromised. The Historical Office's purpose is to put into effect the prior decisions of the Constitutional Court.

As a consequence of the Hungarian Prime Minister's mentioned scandal in December 2003, the parliament adopted the Act V of 2003, which established a new Public Security Services' History Archive, and brought together all the documents of all of the security service Directorates in this one location. The new law creates the opportunity to reveal the personal past of individuals in public office. Anyone can request the files of those people who are currently in public office or had been in public office. The category of public office is not well defined in the law but has been taken to include anyone who serves (or served) in positions of executive power or the media. Indeed, it can be interpreted very broadly. In the case of those in public office, some very limited information found in the Archive about an individual's relationship to any of the security service Directorates (not just III/III) can be published. Only since 2003 has it been possible for individuals to request that the identity of the agent (i.e., the real person behind the codename) be revealed.

In May 2005 the Hungarian parliament passed an amendment to the Act V of 2003, which intends to open all of files of the former secret police, including the names of the agents not holding any public office. Another provision of the enacted law entitles the Archive to make a lot of information public through its website without any personal request. The President of the Republic before promulgation sent the law to the Constitutional Court for preliminary review. In his application the President used the argument of the Court in its 60/1994. AB decision, saying that only the past of public officials represents data of public interest, which can be published even without the consent of the person, but to disclose information of

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<sup>35</sup> Since this is an unusual power of the Hungarian Court, it deserves a bit of explanation. The Court can declare the Parliament to be in violation of the Constitution by failing to enact a law that it is required by the Constitution or by a law to enact.

ordinary people not holding public offices would violate their right to informational self-determination. The case is still pending before the Constitutional Court.

In *Poland* the issue of access was also discussed in 1997 in connection with the lustration law, but finally the Sejm in December 1998 passed a separate Act on the Institute of National Remembrance - Commission for the Prosecution of Crimes against the Polish Nation.<sup>36</sup> The law regulates access of those persons about whom the organs of the State security collected information between 1944 and 1989.

Even before the German unification, the *East German* Parliament in summer 1990 passed a law at the urgent request of members of the civil rights movement to facilitate "the political, historical, and legal reckoning with the activities of the former Ministry for State Security."<sup>37</sup> The West German negotiators to the Unification Treaty were opposed to giving this law validity under the Treaty, but after a hunger strike by members of the citizens' movement, it was agreed that the unified German Parliament should pass a law on the Stasi files that respects "the basic principles" of the August 1990 law.<sup>38</sup> This was the Law on the Records of the State Security Service of the former German Democratic Republic (Stasi Records Law, *Stasiunterlagengesetz*, StUG).<sup>39</sup>

The law establishes a Federal Office administrating, sorting, and reconstructing the files. The Federal Commissioner for the Stasi Records is elected for five years. During the first two terms, Joachim Gauck, a pastor from Rostock, served as commissioner. The office soon came to be known as the Gauck Authority (Gauck-Behörde). The Stasi Records Law established an elaborate system of making parts of the Stasi's files available to restricted and specified audiences. There are different access rights for the Stasi's victims, the Stasi informers, researchers, and public sector employers. Some people's past is more public than that of other people. Those who were spied upon can petition to see "their" files. From 1991 to 2003, more than two million petitions for access to individual records had been filed.<sup>40</sup> Hundreds of thousands of persons have accessed the Stasi's knowledge about their personal lives. After seeing their file, people could decide whom to tell about what they read: their family, their friends, or the general public? The law had empowered them to decide with whom to share the secret knowledge created by the Stasi.<sup>41</sup> The law stipulated, however, that journalists could be penalized for using information from the files they received from unofficial sources.<sup>42</sup>

In 1996, Parliament of the *Czech Republic* enacted The Act of Public Access to Files Connected to Activities of Former Secret Police.<sup>43</sup> The law originally granted ac-

<sup>36</sup> Journal of Laws, 19 December 1998.

<sup>37</sup> Gesetz über die Sicherung und Nutzung der personenbezogenen Daten des ehemaligen Ministeriums für Staatssicherheit/Amtes für Nationale Sicherheit, August 24, 1990. GDR Official Gazette, I, 1419-1421, [www.bstu.de/rechtl\\_grundl/volkskammer/bilder/original\\_08\\_1.gif](http://www.bstu.de/rechtl_grundl/volkskammer/bilder/original_08_1.gif).

<sup>38</sup> Agreement on the Implementation and Interpretation of the Unification Treaty, September 20, 1990, Bonn. [www.bstu.de/rechtl\\_grundl/volkskammer/bilder/original\\_19\\_1.gif](http://www.bstu.de/rechtl_grundl/volkskammer/bilder/original_19_1.gif).

<sup>39</sup> Available at [www.bstu.de/rechtl\\_grundl/stug/](http://www.bstu.de/rechtl_grundl/stug/) in German and English.

<sup>40</sup> Federal Commissioner for the Records of the State Security Service of the former German Democratic Republic, *Sechster Tätigkeitsbericht* (Berlin, 2003), 21, 71.

<sup>41</sup> See WILKE, *Ibid.*, p. 32.

<sup>42</sup> KRITZ (ed.) *II Transitional Justice*. Country Studies. Germany (after Communism), p. 596.

<sup>43</sup> No. 140/1996 of the Collection of Laws of the Czech Republic.

cess only to persons potentially affected by secret police activities. Nevertheless, the statute was amended in 2002,<sup>44</sup> so that the main registers of secret police collaborators could be made available to the general public.<sup>45</sup> According to the current regulation, any adult person who is a citizen of the Czech Republic can file a request to access the secret police files and documents collected between February 25, 1948, and February 15, 1990.

The access, which is provided by the Ministry of Interior, therefore is not limited to the person's data and files. Nevertheless, the Ministry protects the constitutional rights of personal integrity and privacy of other individuals who might be mentioned in the files demanded by the applicant. The Ministry therefore must make all information possibly affecting those constitutional rights inaccessible to the applicant unless it is related to the activities of the secret police and its collaborators. The applicant thus can access any details regarding the identity of secret police agents but would not be able to see information related for instance to their marital life or health problems. This shift of the State policy naturally resulted in a number of legal cases in which individuals demanded their names to be removed from the registers and moral reputation re-established.<sup>46</sup>

In August 2002 the National Council of the *Slovak Republic* enacted the Act on Disclosure of Documents Regarding the Activity of State Security Authorities in the Period 1939-1989 and on Founding the Nation's Memory Institute.<sup>47</sup> Besides the procedure of disclosure of documents upon the request of victims and State institutions, the law also regulates the disclosure of data by the Institute *ex officio*. According to the law, subject to being disclosed and made public shall be preserved and reconstituted documents, which were created as a result of the activity of the State Security and other security authorities in the period from April 18, 1939 to December 31, 1989. Excluded are only documents the disclosure of which might harm the interest of the Republic in international terms, its security interest or lead to a serious endangerment of a person's life. In order to exclude a document being disclosed and made public, a proposal of the Slovak Information Service or the Ministry of Defense is necessary, which was approved by an appointed Committee of the National Council.

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<sup>44</sup> See The Act No. 107/2002 of the Collection of Laws of the Czech Republic amending the Act No. 140/1996.

<sup>45</sup> These registers are available on [www.mvcr.iol.cz](http://www.mvcr.iol.cz)

<sup>46</sup> One of the most publicised and high profile cases has been the case of Jiřina Bohdalová —a top celebrity actress—. She filed a lawsuit against the Czech Ministry of Interior and demanded her name to be removed from the register of secret police collaborators. The trial revealed how she was psychologically tortured by secret police at the age of 28 in the 1950s but never agreed to collaborate with it. In January 2004, the municipal court of Prague ruled that the actress has never been a secret police collaborator, yet failed to oblige the Ministry of Interior to remove her name from the register, although Bohdalová did not aspire to a political career or positions subject of the lustration procedure. See PRIBAN, *Ibid.*, pp. 52-53.

<sup>47</sup> 553/2002 Coll. Nation's Memory Act. Amendments: 110/2003 Coll, and 610/2004 Coll.



# Truth Commissions And Memory

William A. Schabas

Criminal prosecution of perpetrators of gross and systematic violations of human rights has become viewed as increasingly important in recent years. It is variously described as “transitional justice”, “rule of law”, “accountability”, “struggle against impunity”. Several justifications are advanced, among them the charge that to do otherwise fails to respect the rights of victims, the claim that punishment of past offenders acts to deter those who consider committing them in the future, and the promise that criminal trials can assist in providing a kind of historical benchmark for the collective memory. The Irish journalist Fintan O’Toole has said that among the functions of war crimes tribunals is “to acknowledge the victims, to inscribe their sufferings on the collective memory of mankind”.<sup>1</sup>

Mark Osiel has identified the process as the creation of “collective memory”. Professor Osiel defines the term as the collection of historical accounts that permit societies to draw common lessons for the future, namely, tales that “a society tells [itself] about momentous events in its history, the events that most profoundly affect the lives of its members and most arouse their passions for long periods”.<sup>2</sup> José Alvarez has also discussed in some detail the role of tribunals in preserving “collective memory”.<sup>3</sup> According to Naomi Roht-Arriaza, trials permit entire societies to “draw a clear line between past and future, allowing the beginning of a healing process”.<sup>4</sup>

According to Richard Goldstone, a distinguished South African jurist who was engaged in his own country’s transitional justice project, “collective amnesia doesn’t work. Where there have been violent, systematic human rights abuses a society sim-

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<sup>1</sup> Fintan O’TOOLE, “Not Easy to Draw a Line Under Political Violence”, *Irish Times*, 11 November 1994, p. 14.

<sup>2</sup> Mark OSIEL, *Mass Atrocity, Collective Memory, and the Law*, New Brunswick, New Jersey: Transaction Publishers, 1997, pp. 18-19.

<sup>3</sup> Jose E. ALVAREZ, “Rush to Closure: Lessons of the Tadić Judgment”, 96 *Michigan Law Review* 2031, 1998, p. 2044. Also: Jose E. ALVAREZ, “Lessons from the Akayesu Judgment”, 5 *ILSA Journal of International & Comparative Law* 359, 1999, p. 360; Jose E. ALVAREZ, “Crimes of States / Crimes of Hate”, 24 *Yale Journal of International Law* 365, 1999, p. 392.

<sup>4</sup> Naomi ROHT-ARRIAZA, “Introduction”, in Naomi ROHT-ARRIAZA, eds., *Impunity and Human Rights in International Law and Practice*, New York: Oxford University Press, 1995, pp. 3-10, at p. 7. See also: Donald BLOXHAM, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory*, New York: Oxford University Press, 2001, pp. 169-171.

ply cannot forget. Such atrocities cannot be swept under the rug.”<sup>5</sup> Amnesty, once a dignified term in the human rights glossary, is now treated with disdain. There is even some authority for the proposition that amnesties are contrary to international law,<sup>6</sup> although this seems to push the matter too far.

Louis Joinet, the special rapporteur of the United Nations Sub-Commission on the subject of impunity, has identified as one of his principles “the duty to remember”. According to his report:

A people’s knowledge of the history of their oppression is part of their heritage and, as such, shall be preserved by appropriate measures in fulfilment of the State’s duty to remember. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.<sup>7</sup>

But criminal prosecution cannot provide all of the answers. It is manifestly incapable of dealing with large numbers of offenders, as recent experience in Rwanda has demonstrated. Rwanda initially set out to hold all perpetrators of the 1994 genocide accountable before criminal courts. It tried valiantly to accomplish this, and actually held several thousand trials, despite desperately poor resources. Eventually, it was forced to rethink the approach, holding hearings for “lower-level” perpetrators before traditional conflict resolution institutions drawn from deep in the country’s history. But that process, known as *gacaca*, has created its own problems. Asking perpetrators to confess and identify their accomplices has increased the list of suspects geometrically, making the process of accountability even more daunting.<sup>8</sup>

On an international level, criminal prosecution has shown it can handle only a handful of alleged perpetrators, in costly and time-consuming proceedings. The *ad hoc* tribunals for the former Yugoslavia and Rwanda, with enormous budgetary resources, have together prosecuted fewer than 100 people.<sup>9</sup> Given the costs of international justice, when the United Nations established the Special Court for Sierra Leone it conceived of it as a streamlined version of the earlier tribunals, and financed it accordingly. The Sierra Leone tribunal has so far proceeded against only nine accused. But resources are not the only issue. Sometimes, the offenders are simply not available. They may be dead (Hitler), or their whereabouts may be unknown (Bohrmann, Karadzic), or sheltered by political asylum (Taylor). Or they may be protected

<sup>5</sup> Richard J. GOLDSTONE, “The United Nations War Crimes Tribunals: An Assessment”, 12 *Connecticut Journal of International Law*, 1997, pp. 227-230.

<sup>6</sup> *Prosecutor v. Kallon* (Case No. SCSL-04-15AR72(E)) and *Prosecutor v. Kamara* (Case No. SCSL-04-16-AR72(E)), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004. See also: K. GALLAGHER, “No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone”, 23 *Thomas Jefferson Law Review*, 2000, p. 149; Daniel MACALUSO, “Absolute and Free Pardon: The Effect of the Amnesty Provision in the Lome Peace Agreement on the Jurisdiction of the Special Court for Sierra Leone”, 27 *Brooklyn Journal of International Law*, 2001, p. 347.

<sup>7</sup> “Question of the impunity of perpetrators of human rights violations (civil and political), Final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119”, UN Doc. E/CN.4/Sub.2/1997/20, Annex II.

<sup>8</sup> See William A. SCHABAS, “Genocide Trials and *Gacaca* Courts”, 3 *Journal of International Criminal Justice*, 2005, p. 879.

<sup>9</sup> William A. SCHABAS, *The UN International Criminal Tribunals: the former Yugoslavia, Rwanda and Sierra Leone*, Cambridge: Cambridge University Press, 2006.

from prosecution by the pledge of amnesty, which was the compromise Nelson Mandela effected with F.W. de Klerk in exchange for a peaceful transition to democratic rule in South Africa.

This is where truth commissions enter the picture. Truth commissions have emerged as important components of transitional justice initiatives. According to the United Nations Secretary-General,

Truth commissions are official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law committed over a number of years. These bodies take a victim-centred approach and conclude their work with a final report of findings of fact and recommendations... Truth commissions have the potential to be of great benefit in helping post-conflict societies establish the facts about past human rights violations, foster accountability, preserve evidence, identify perpetrators and recommend reparations and institutional reforms. They can also provide a public platform for victims to address the nation directly with their personal stories and can facilitate public debate about how to come to terms with the past.<sup>10</sup>

Louis Joinet, the United Nations Special rapporteur on impunity, has specifically acknowledged both the significance of truth commissions and their role in establishing the collective memory:

Extrajudicial commissions of inquiry should be established by law. They may be established by an act of general application or treaty clause in the event that the restoration of or transition to democracy and/or peace has begun. Their members may not be subject to dismissal during their terms of office, and they must be protected by immunity. If necessary, a commission should be able to seek police assistance, to call for testimony and to visit places involved in their investigations. A wide range of opinions among commission members also makes for independence. The terms of reference must clearly state that the commissions are not intended to supplant the judicial system but at most to help safeguard memory and evidence. Their credibility should also be ensured by adequate financial and staffing resources.<sup>11</sup>

Joinet's endorsement of the validity and the utility truth commissions has been confirmed by Diane Orentlicher, the independent expert appointed by the United Nations to review and consider the Joinet recommendations. She has challenged the perception that truth commissions are a "next best" response to mass atrocities when amnesty or de facto impunity has foreclosed prosecutions. "Today, truth commissions, prosecutions and reparations are widely seen as complementary, each playing a distinctly important role", Professor Orentlicher has written.<sup>12</sup>

<sup>10</sup> "The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, Report of the Secretary-General", UN Doc. S/2004/616, para. 50.

<sup>11</sup> "Question of the impunity of perpetrators of human rights violations (civil and political), Final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119", UN Doc. E/CN.4/Sub.2/1997/20, para. 21.

<sup>12</sup> "Independent study on best practices, including recommendations, to assist States in Strengthening their domestic capacity to combat all aspects of impunity, by Professor Diane Orentlicher", UN Doc. E/CN.4/2004/88, para. 10.

Archbishop Desmond Tutu, who chaired the South African Truth and Reconciliation Commission, has explained: "The combination of truth telling, compensation and amnesty was a middle ground between those who were saying let bygones be bygones and let's have amnesia, and on the other side those who wanted justice, really retribution. Considering the threat of violence from the white right wing during South Africa's still delicate transition to majority rule, any move toward retribution could have left South Africa with justice and ashes."<sup>13</sup> There have now been several dozen truth commissions in, for example, Argentina, Chile, South Africa, Peru, Ghana, Morocco, El Salvador, Guatemala, Timor-Leste and Sierra Leone.<sup>14</sup> There have also been many analogous initiatives, such as the Saville inquiry in Northern Ireland directed at establishing the truth of the 1972 "bloody Sunday" massacre in which fourteen catholic peace marchers were shot by British troops.<sup>15</sup> The South African Truth and Reconciliation Commission is the most celebrated of them. Its configuration, whereby amnesty could be accorded in exchange for truthful testimony, was somewhat unique, and has tended to distort popular perceptions of how similar institutions operate. In its authority to recommend amnesty, the South African TRC was the exception rather than the rule.

José Zalaquett, a member of the Chilean Truth and Reconciliation Commission, explained this in the following way:

To provide for measures of reparation and prevention, it must be clearly known what should be repaired and prevented. Further, society cannot simply block out a chapter of its history; it cannot deny the facts of its past, however differently these may be interpreted. Inevitably the void would be filled with lies or with conflicting, confusing versions of the past. A nation's unity depends on a shared identity, which in turn depends largely on a shared memory. The truth also brings a measure of healthy social catharsis and helps to prevent the past from reoccurring.<sup>16</sup>

To the extent one can generalise, truth commissions are bodies established in a post-conflict context that aim to provide a measure of accountability for past atrocities. They usually operate as an adjunct or an alternative to criminal justice, although their existence is justified by many of the same rationales. Thus, by acknowledging the crime and identifying, where possible, the perpetrators, they provide a degree of satisfaction to victims. In their stigmatisation of the crime and the perpetrator, there may also be a deterrent effect, although it is one that is perhaps less significant than harsh punishment. Finally, they assist in clarifying the collective memory of the past. In other words, they respond to the same exigencies as criminal prosecution, to varying or greater degrees.

<sup>13</sup> Lynne DUKE, "South Africa Seeks Truth, Not Justice, in Crimes Past; Amnesty-Granting Panel Set to Convené", *Washington Post*, 1 April 1996, p. A01.

<sup>14</sup> Priscilla B. HAYNER, *Unspeakable Truths, Facing the Challenge of Truth Commissions*, Routledge: New York & London, 2002.

<sup>15</sup> Angela HEGARTY, "Truth, Law and Official Denial: The Case of Bloody Sunday", in William A. SCHABAS & Shane DARCY, eds., *Truth Commissions and Courts, The Tension Between Criminal Justice and the Search for Truth*, Dordrecht: Kluwer Academic Publishers, 2004, pp. 199-246.

<sup>16</sup> J. ZALAUQUETT, "Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations", 43 *Hastings Law Journal*, 1992, pp. 1425, 1433.

One of the more recent truth commissions was established in Sierra Leone following a decade-long civil war. The legislation establishing the Sierra Leone TRC described it as “a catharsis for constructive interchange between the victims and perpetrators of human rights violations and abuses”, explaining that “from this catharsis the Commission is to compile ‘a clear picture of the past’”. Accordingly, said the legislation, “the principal function of the Commission is to create an impartial historical record of events in question as the basis for the task of preventing their recurrence”.<sup>17</sup> At the risk of oversimplifying the diversity of truth commissions, this statement probably explains the objectives of many other similar initiatives. The memory dimension of the Sierra Leone TRC has not escaped the attention of academic commentators. For example, Laura R. Hall & Nahal Kazemi have said that “[j]ust as one of the greatest accomplishments of the Nuremberg Tribunal was the creation of an irrefutable record of horrors, unspeakable yet undeniable, the TRC will also be called upon to create a lasting memory of the crimes committed against the people of Sierra Leone.”<sup>18</sup>

Most truth commissions conduct three broad categories of activity. The first is information gathering. This consists of a relatively massive effort of interviewing victims and perpetrators. The statements are analysed and often they are coded so that they can be subject to statistical analysis. But as an exercise, this form of broad public consultation has therapeutic benefits of its own, in that it provides victims with an opportunity to recount their version of the events. The second involves public hearings. These are usually the most vivid and dramatic events in the life of a truth commission. Often, they involve highly emotional testimony by victims and, more occasionally, frank admission by perpetrators. Finally, truth commissions issue detailed reports on their activities. These may include a detailed historical analysis of the conflict that can then provide a kind of gold standard for the collective memory.

Truth commissions can do much to address issues of “memory”, although here too it is dangerous to generalise. Some truth commissions—the South African commission is a good example—have focussed on individual violations, and attempt to clarify the facts and the responsibilities. In South Africa, there was little mystery about the ultimate source of the violations: the racist policy of *apartheid* practised by the South African government for many decades, and the colonialist attitudes of European superiority that underpinned it. Nevertheless, many individuals often had little or no knowledge about the facts of the crimes of which they or their relatives had been victims, and the TRC was able to provide them with some measure of “memory” in this respect.

But in most conflicts, the broad historical issues remain in greater doubt than was the case in South Africa. In Sierra Leone, for example, there was no common narrative of the conflict, which had ended in a ceasefire and a power-sharing agreement between the government and the rebel forces, that is, between the two main protagonists. The government, of course, spoke of the “rebel war”, and implied

<sup>17</sup> *Truth and Reconciliation Commission Act 2000*, Supplement to the Sierra Leone Gazette Vol. CXXXI, No. 9, “Memorandum of objects and reasons (attached to the Bill)”.

<sup>18</sup> Laura R. HALL & Nahal KAZEMI, “Prospects for Justice and Reconciliation in Sierra Leone”, 44 *Harvard International Law Journal* 287, 2003, p. 300.

that the pattern of atrocities could be blamed upon insurgents who did not respect established authority. The theory of the Special Court for Sierra Leone focussed on external actors, including Libyan president Muammar Ghadaffi and Liberian president Charles Taylor, as well as networks of diamond smugglers.<sup>19</sup> The Sierra Leone TRC had to navigate its way among the various visions of the conflict and find its own version of the historical truth. Ultimately, the TRC adopted a position that was quite different from that of the government or the Special Court, blaming the conflict on decades of corruption, despotism and bad governance, and attributing responsibility for this to the oligarchy that ruled, and to large extent still rules, the country. To the extent of its version of the history of the country is accepted, the TRC will contribute to the historical memory of Sierra Leone. Here, its credibility as an independent institution and the quality and depth of its own research and analysis should stand it in good stead although only time will tell.

Many truth commissions have had this “historical memory” dimension to their mandates. The Guatemalan Commission for Historical Clarification, for example, was given the task of examining “human rights violations and incidents of violence” committed during a civil war that lasted thirty-six years it was to provide “objective information about what transpired during this period [including] all factors, both internal and external” and to “measures to preserve the memory of the victims, to foster an outlook of mutual respect and observance of human rights, and to strengthen the democratic process”.<sup>20</sup> The very name of the institution attests to its historical dimension.

There have been important criticisms of this memory function of truth commissions. Rosalind Shaw, for example, has criticised truth commissions for being insensitive to “grassroots practices of memory”. She has argued that truth commissions must develop sensitivities to local approaches and traditions, rather than marginalising them, as they have tended to do.<sup>21</sup> Speaking more broadly about both truth commissions and courts as vehicles for historical memory, Tristram Hunt has spoken of

the dangerous precedent established when lawyers and judges boast of creating a national memory. In his superb recent autobiography, Eric Hobsbawm has warned of history being created in ever greater volumes. Whether it was Franjo Tudjman in Croatia or the BJP in India, new histories are being forged for sectarian and political reasons and with little regard for the truth. Now, of course, Truth Commissions and historical inquiries (like the huge revisionary work about to begin in Belgium into the colonial crimes of King Leopold and his henchmen in the Congo) are often established precisely to counter wilfully misleading interpretations of the past. But I think it is well to be aware

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<sup>19</sup> See, e.g., *Prosecutor v. Sesay et al.* (Case No. SCSL-2004-15-PT), Amended Consolidated Indictment, 13 May 2004; *Prosecutor v. Brima et al.* (Case No. SCSL-2004-16-PT), Amended Consolidated Indictment, 13 May 2004; *Prosecutor v. Taylor* (Case No. SCSL-01-I), Indictment, 3 March 2003; *Prosecutor v. Sankoh* (Case No. SCSL-02-I), Indictment, 3 March 2003.

<sup>20</sup> Agreement on the Establishment of the Commission for the Historical Clarification of Human Rights Violations and Incidents of Violence that have Caused Suffering to the Guatemalan Population (23 June 1994).

<sup>21</sup> Rosalind SHAW, “Forgive and Forget: Rethinking Memory in Sierra Leone’s Truth and Reconciliation Commission”, lecture delivered at the United States Institute of Peace, Washington, 29 April 2004.

of the danger and misappropriation of such language when well-meaning lawyers and investigators talk of forging new memories and creating official histories.<sup>22</sup>

Hunt's point is a legitimate one. Rather than stand above the politicisation of history, truth commissions may simply become part of it, adding their own distortions in the creation of an official history.

One can imagine, for example, competing truth commissions in Armenia and Turkey attempting to analyse the atrocities of 1915, now widely acknowledged as genocide. It is for this reason, of course, that the composition of truth commissions is so important, and that appropriate measures be taken to ensure their independence and impartiality. At the very least, this is the best assurance that the conclusions will be deemed credible. In Sierra Leone, for example, the enabling legislation allowed the president to designate the four "national" commissioners. There was much criticism within civil society at the choices he made. Many felt that his nominees were persons friendly to the regime, and unlikely to adopt an appropriately critical view of the president himself as well as of his political faction. So as to enhance the independence of the Commission, the legislation also provided for three "international" appointees, to be designated by the High Commissioner for Human Rights. In the end, the report was quite critical of the current regime and of its role in the atrocities. There has been no criticism from civil society that the Sierra Leone TRC distorted its perception of the conflict and its history of the country out of deference to President Kabbah, nor any suggestion that the commissioners did not, in practice, operate in a genuinely independent and impartial manner.

But even independent and impartial truth commissioners may make erroneous assessments of "historical truth". They often operate with limited resources, and are simply unable to carry out the research and analysis that are required in the circumstances. The Saville inquiry in Northern Ireland cost approximately €100 million, and its focus was a single incident that lasted no more than 15 minutes. It had the financial might of the United Kingdom behind it. By contrast, the Sierra Leone Truth and Reconciliation Commission had a total operating budget of little more than €3 million. Getting the whole truth costs money, and truth commissions are rarely furnished with the resources to do the job properly. Perhaps the quest for "collective memory" should be less ambitious and more modest. As Michael Ignatieff has famously said. "[a]ll that a truth commission can achieve is to reduce the number of lies that can be circulated unchallenged in public discourse".<sup>23</sup>

Finally, what "collective memory" will result if two complementary institutions that both have truth-seeking functions, each of them acting in good faith with members who are independent and impartial, arrive at different assessments. IN Sierra Leone, for example, this is more than simply idle speculation. The Truth Commission has already staked out its ground, presenting its view of history in its report. Its perception is markedly different from the understanding that seems to underpin

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<sup>22</sup> Tristram HUNT, "Whose Truth? Objective Truth and a Challenge for History", in William A. SCHABAS & Shane DARCY, eds., *Truth Commissions and Courts, The Tension Between Criminal Justice and the Search for Truth*, Dordrecht: Kluwer Academic Publishers, 2004, pp. 193-198, at p. 194.

<sup>23</sup> Michael IGNATIEFF, "Articles of Faith", *Index on Censorship* 25, no. 5, 1996, p. 113.

the Prosecutor's approach. It is quite conceivable that the judges of the Special Court reach a conclusion that is different from that of the Truth Commission. The possibility has already been anticipated by the Court's President, Geoffrey Robertson, who acknowledged that while the "historical narrative" prepared by the Commission would be "helpful to the country and to the Court", there was no guarantee this might not conflict with assessments reached by the judges at a later date.<sup>24</sup> Perhaps the problem is not as exceptional as it appears at first. After all, it is also entirely possible for two judicial institutions to reach differing conclusions about matters of fact, even when they hear essentially the same evidence.

In addition to their very general function of creation of "historical memory", truth commissions have also been instrumental in memorialising conflicts. The Sierra Leone Truth and Reconciliation recommended the official establishment of at least one war memorial, and encouraged local communities to explore their own means of creating public spaces for memory and dialogue.<sup>25</sup> The Commission noted that memorials may take different forms. It gave as examples the establishment of monuments, the renaming of buildings or locations, and the transformation of victim's sites into useful buildings for the community. The Commission also spoke of what it called "symbolic reparations" in this context:

Symbolic reparations comprise non-material measures to show respect for the victims. They are a clear expression of recognition for the harm suffered. Symbolic reparations can preserve the memory of what happened during the conflict and most importantly, serve as a reminder that society must not allow this to happen again. Exhumations, proper burials, the laying of tombstones, national memorial services, the pouring of libations, the carrying out of traditional ceremonies and the erection of appropriate memorials may go a long way to restoring the dignity of victims and facilitating healing and reconciliation.<sup>26</sup>

Naomi Roht-Arriaza has described such initiatives as "moral reparations".

Moral reparations may also be as basic as the identification and exhumation of the bodies of victims, and assistance in reburials and culturally appropriate mourning ceremonies. Assistance with finding the bodies of the disappeared (that is, those kidnapped and surreptitiously killed, usually by security forces) is particularly key. These moral reparations also have a collective aspect, when entire communities dedicate memorials or markers to their dead. Other collective measures of moral reparation may include days of remembrance, parks or other public monuments, renaming of streets or schools, preservation of archives or of repressive sites as museums [\*160] or other ways of creating public memory. Reform of education, re-writing of history texts, education in

<sup>24</sup> *Prosecutor v. Norman* (Case No. SCSL-2003-08-PT), Decision on Appeal by the Truth and Reconciliation Commission for Sierra Leone ("TRC" or "The Commission") and Chief Samuel Hinga Norman JP Against the Decision of His Lordship, Mr Justice Bankole Thompson Delivered on 30 October 2003 to Deny the TRC's Request to Hold a Public Hearing With Chief Samuel Hinga Norman JP, 28 November 2003, para. 15.

<sup>25</sup> *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, Freetown, 2004, Vol. 2, para. 503.

<sup>26</sup> *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, Freetown, 2004, Vol. 2, p. 237.



human rights and tolerance are all encompassed within the idea of “guarantees of non-repetition.” So too, in a broader sense, are reform of courts, police and military forces and the like.<sup>27</sup>

In the course of its activities, the Commission actually engaged in the process of creating monuments and memorials:

In several districts, the Commission, in consultation with the communities, established monuments or memorials in the town where the hearing was held or at the site of a mass gravesite in the district. Traditional reconciliation ceremonies were organised, such as the pouring of libation and cleansing, together with religious ceremonies such as common prayers at locals where massacres took place during the conflict. These activities are extremely important for the communities because they serve as recognition of the suffering of victims as well as the collective memory of the past.<sup>28</sup>

Yael Danieli has discussed the healing nature of commemoration:

Commemorations can fill the vacuum with creative responses and may help heal the rupture not only internally, but also that rupture that victimization creates between the survivors and their society. In contrast to the loneliness, commemoration provides a shared context, with shared pain, mourning and memory. The nation has transformed it into part of its consciousness. What may be an obligatory one-day-a-year ritual to others is experienced by the victims as a gesture of continued support. There should be general awareness on a high level, including information and education about how the situation arose and its consequences. There should be inter-generational dialogue, and dialogues between children of survivors and of perpetrators. There should be statutes, paintings, scholarships, rooms in colleges and museums, and streets named after heroes and martyrs.<sup>29</sup>

In conclusion, truth commissions provide an important mechanism in the search of a collective memory of past atrocity. Their role is broadly similar to that of courts. Truth commissions and courts may be thought of as cognates in the more general scheme of transitional justice. Courts offer something that truth commissions cannot, namely the conviction and punishment of those who perpetrate serious violations of human rights. Truth commissions, on the other hand, may be better at providing an historical narrative. They have more flexible rules of evidence, and the parameters of their inquiry are not defined by the indictments of a prosecutor. But although their inquiry may be a better forum for such matters, it seems unproductive to argue for a division of labour between courts and truth commissions in this area. Both types of institution are engaged in the creation of collective memory. Each has its own important contribution.

<sup>27</sup> Naomi ROHT-ARRIAZA, “Reparations Decisions and Dilemmas”, *27 Hastings International & Comparative Law Review* 157, 2004, pp. 160-161.

<sup>28</sup> *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, Freetown, 2004, Vol. 3B, p. 475.

<sup>29</sup> Yael DANIELI, “Justice and Reparation: Steps in the Process of Healing”, in Christopher C. JOYNER, ed., *Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights*, Association internationale de droit pénal, 1998, pp. 303-320, p. 310.



# Memory and Homosexuality: on suffering, oblivion and dignity

Nikolaos Tsinonis

**Summary:** Introduction. 1. Persecution of homosexuals by the Nazis. 1.1 The drive behind the persecution. 1.2 The war on homosexuality. 1.3 Life in the camps. 1.4 Conclusive remarks. 2. Persecution of homosexuals under nationalist/totalitarian regimes. 2.1 The Cold War and the elimination of subversives from the US federal government. 2.2 The persecution of homosexuals in Franco's Spain. 3. **Collective memory - selective memory?** 3.1 Memory and the "homosexual persona". 3.2 The homosexualisation of the evil - the vilification of the homosexual. 3.3 Steps towards recognition. 4. **Conclusion.**

## Introduction

In a place called Kibimba, in the Gitega Province of Burundi, Africa, there stands a monument bearing the inscription "*plus jamais ça*" ("Never again!"). The white structure commemorates the atrocious act of a school principal who, demented by hatred during the civil war, gathered the first year pupils of the opposite ethnic group in a room, locked them up and burnt them alive.

There are several monuments around the world similar to the above, dedicated to a multitude of innocent victims. There are also several writings, courses, documentaries, all serving the purpose of keeping such appalling memories alive, in an attempt to prevent history from repeating itself. By acknowledging its crimes, society strives to prevent the recurrence of such human rights abuses.

Some of the victims of uncontrollable situations, irrational policies or insane leaders are widely recognized as such. Connections are readily made at the hearing of "Madres-abuelas de Plaza de Mayo", "Schindler's List" or "Tutsis and Hutus", and for very good reasons. The victims of such dreadful events have long been a part of collective memory. It is this memory that acknowledges their suffering; it is the same memory that can protect future generations from a similar fate.

There are, however, other victims, whose ghastly tale has yet to be incorporated in public remembrance. Among these, homosexuals, or lgbt (lesbians, gay men, bisexuals and transgender persons), have long been victimized for a variety of reasons and under different circumstances. Too often seen as "disgusting" or "abnormal", too readily labelled "sinners", "corrupters" or "enemies of the nation", lgbt have been targeted for discrimination, harassment and violence, including incarceration or blatant extermination.

This essay will attempt to present this out-of-the-spotlight victimization of lgbt through reference to major historic events that do form part of collective memory,

yet as connected to other groups of victims. Namely, reference will be made to their inclusion in the Holocaust, connected to the extermination of Jews in Europe, and to their persecution during the Cold War in the USA, as well as during Franco's dictatorship in Spain, both connected to the oppression/elimination of political opponents.

The profile of the persecution will be presented in each case and a short illustration of the reasons behind it will be attempted. Namely, homosexuals will be seen depicted as a pitfall for a nation's imperial ambitions, as security risks during the struggle between two superpowers, and as a shameful element for a virile traditional society. The outcome of the persecution varies, according to the case, from arbitrary dismissals and hindering of personal development, to incarceration or torture, up to outright extermination.

In an attempt to view the reasons behind this omission from collective memory, the argument that will be presented resumes in that LGBT have yet to acquire the "innocent victim" status. Disdain, often pure hatred, for their nature seems to endow acts of discrimination and/or violence against them with a sense of righteousness, which might be what is still keeping their sufferings out of the sphere of public memory.

Given the limited space, references will be kept short and as concise as possible; the bibliographic citations can serve as sources of ample information on the topics addressed. At this point, it should be made clear that this paper does not claim to be a comprehensive analysis of what is clearly a complex issue, but rather aims to serve as an introduction to a chapter of contemporary history that has been ignored for decades.

## 1. Persecution of homosexuals by the Nazis

Although Jews were the main victims of the Holocaust, and the group the Nazi genocidal plan focused on, they were not the only ones who were persecuted and/or perished under Hitler's regime. Prison and concentration camp populations included political opponents, prostitutes, Roma, Jehovah's Witnesses and, among such "undesirables", homosexuals.

The men with the pink triangles reportedly belonged to the lower casts of prisoner "hierarchy" and led particularly harsh lives in the camps. In fact, while other groups, such as Jews or Communists, created support networks to ensure some kind of protection, homosexuals had no such societies. Exposed to brutality, they were unlikely to survive for long.<sup>1</sup>

To this day there are no exact data on the number of homosexual victims of the Nazi frenzy for racial purity. Reports are scarce, and relevant research is quite recent. The suffering of homosexuals during the Nazi era was ignored by most researchers of the immediate post-war period, as well as by the courts and tribunals dealing with Nazi war crimes, as homosexuals were deemed common criminals punished

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<sup>1</sup> "Persecution of Homosexuals in the Third Reich", from the United States Holocaust Memorial Museum website, <http://www.ushmm.org/wlc/en/index.php?ModuleId=10005261&Type=normal+article>

for breaking the laws of the Third Reich. In fact, the anti-homosexual Paragraph 175 remained in force in W. Germany until 1969.<sup>2</sup>

In addition, one should consider that long after the fall of the Reich, the issue of homosexuality remained taboo; hence, although several survivors wrote about their experience in the camps soon after the Holocaust,<sup>3</sup> the shame for the homosexual victims and their families was a good enough reason for them to keep silent. "Now you see why I have kept this a secret for 40 years" testifies Alsatian Pierre Seel, imprisoned in Schirmeck, "I am an invalid of war by 90%, my rectum still bleeds today because of a 25 cm club the Nazis shoved up my ass!" he exclaims, "You think this is something I can speak of? You think it does me any good? [...] I feel shame for humanity!"<sup>4</sup>

What is more, LGBT who wished to emigrate from Europe after WW2 were forced to hide their sexual identity since several countries, including the United States, enforced legislation prohibiting entry to homosexuals.<sup>5</sup> Given the large-scale stigmatization, testimonies of homosexual victims of the Holocaust are hard to find.<sup>6</sup>

The estimates available speak of more than 100,000 males arrested on homosexual charges in Germany from 1933 to 1944<sup>7</sup>, and 50,000 to 63,000 of them

<sup>2</sup> By its decision of 10 May 1957, the West German Federal Constitutional Court (Bundesverfassungsgericht) in Karlsruhe held that the latest version of Article 175 of the German Penal Code, as amended by the Nazis in 1935 to make the definition of male homosexual acts more comprehensive and the penalty more severe, was constitutional because it "did not interfere with the free development of the personality" and it "contained nothing specifically National Socialist." As justification, it maintained that homosexual acts "unquestionably offended the moral feelings of the German people." The court went even further to recommend that the maximum penalty for the offense be doubled—from 5 to 10 years—. Sources: JOHANSSON, W. and PERCY, W. A., "Homosexuals in Nazi Germany", *Simon Wiesenthal Center Annual Volume*, no. 7 (1990), at <http://motlc.wiesenthal.com/site/pp.asp?c=gvKVLcMVluG&b=395203>;

Radio Netherlands Wereldomroep, "Train to Sachsenhausen", from the RNW website, <http://www.rnw.nl/society/html/sachs011025.html>, 25 October 2001.

Lambda, GLBT Community Services, *Symbols of the Gay, Lesbian, Bisexual and Transgender Movements-Pink Triangle*, from the LAMBDA website, [www.lambda.org](http://www.lambda.org).

Zero, *150,000 Triángulos Rosas*, issue 26, April 2001

<sup>3</sup> For two of the most eloquent testimonies on the denudation of humans of their inherent dignity in the camps, see LEVI, P., *Se Questo e un Uomo*, Einaudi, Torino, 1981, and French Communist ANTELME, R., *L'Espèce Humaine*, Editions Gallimard, Paris, 1957.

<sup>4</sup> Testimony taken from interview granted to Klaus Müller, of the US Holocaust Memorial Museum, Washington D.C., as featured in film documentary "Paragraph 175", by Rob Epstein and Jeffrey Friedman, Telling Pictures, 2000.

<sup>5</sup> The US Immigration Act of 1917 excluded applicants who had been convicted of, or admitted to acts of "moral turpitude". The Immigration and Naturalization Service (INS) interpreted this provision to exclude non-citizens who were convicted of sodomy, gross indecency, or open and gross lewdness. The same Act also excluded non-citizens who were diagnosed with "constitutional psychopathic inferiority", a medical phrase often used by the Public Health Service (PHS) and INS for sexual "deviates". In the 1940s, the INS regularly and increasingly used this as a basis for excluding people from entry into this country.

See: ESKRIDGE, W. N., "Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961", *Florida University Law Review*, [Vol. 24:703 1997], p. 740.

<sup>6</sup> See *supra* note 4. In his research used for "Paragraph 175", Klaus Müller managed to locate 8 homosexual victims of Nazi persecution still alive, of whom one was a woman. One of the men was quite reluctant to speak about his sufferings, especially to a German, as he said, while two other victims refused to tell their story.

<sup>7</sup> PRONO, L., "Erasure from History", [http://www.triangles-roses.org/erasure\\_history.htm](http://www.triangles-roses.org/erasure_history.htm)

actually sentenced<sup>8</sup>. The exact number of convicted homosexuals who ended up in concentration camps remains undocumented, as is the number of those who died there. Statistics vary considerably from one report to another, ranging from 5,000<sup>9</sup> to 1,000,000<sup>10</sup> dead in and out of the camps. Some consider a more realistic estimate to be between 5,000 and 15,000.<sup>11</sup> As far as this essay is concerned, the actual numbers are of no real importance, as the magnitude of a crime is not necessarily analogous to the number of the victims.

### 1.1. *The drive behind the persecution*

To comprehend the reasons behind the persecution of homosexuals under the Reich, one should consider the focal point of Nazi politics. As all nationalist regimes, in order to establish their power the Nazis had to promote and uphold the ideal of a unique national identity. As Joanna Mizielińska wrote, "nationalism invents or constructs national identity, basing it on the assumption of the nation's homogeneity, its continuity over time and within certain borders/space of the nation".<sup>12</sup> The purity and growth of the "Aryan Race" is exactly where Hitler based his policy of persecution of "undesirables".

As regards homosexuality, the Nazis actually presented themselves as moral crusaders struggling to eradicate this "vice" from Germany.<sup>13</sup> At this point it should be stressed that, in the context of the Reich, anti-homosexual legislation and practices mainly targeted male homosexuals. Although several lesbians have been traced in prisons or concentration camps<sup>14</sup>, the main victims were men, more precisely homosexual males of German citizenship.

Homosexual males constituted a threat to the Nazi vision of a powerful and ever-growing Aryan nation. One of the reasons was that they were seen as unlikely to produce children, more precisely strong "superior" German citizens. The Nazis seemed to fear that "inferior races" had a higher reproduction rate than Germans, which was a threat to the Reich's imperial ambitions.<sup>15</sup> In fact, they were particularly anxious about the decreasing birth-rate in the German cities, which could be explained by the economic burden that children represented to the urban population. However, for

<sup>8</sup> PLANT, R., *The Pink Triangle: The Nazi War Against Homosexuals*, Henry Holt and Company, New York, 1986, p. 149.

<sup>9</sup> CONSOLI, M., *Homocaust: Il nazismo e la persecuzione degli omosessuali*, Edizioni La Fiaccola, Ragusa, 1984, p. 57

<sup>10</sup> BOISSON, J., *Le Triangle rose: La déportation des homosexuels, 1933-1945*, Robert Laffont, Paris 1988, pp. 201-204.

<sup>11</sup> BURLEIGH, M. and WIPPERMAN, W., *The Racial State, Germany 1933-1945*, Cambridge University Press, Cambridge, 1991, p. 196.

<sup>12</sup> MIZIELIŃSKA, J., "The Rest is Silence..." Polish Nationalism and the Question of Lesbian Existence", *The European Journal of Women's Studies*, Vol. 8(3), 2001, p. 282

<sup>13</sup> "Persecution of Homosexuals in the Third Reich", from the United States Holocaust Memorial Museum website, <http://www.ushmm.org/wlc/en/index.php?ModuleId=10005261&Type=normal+article>.

<sup>14</sup> "Lesbians and the Third Reich", from the United States Holocaust Memorial Museum website, <http://www.ushmm.org/wlc/en/index.php?lang=en&ModuleId=10005478>

<sup>15</sup> "Persecution of Homosexuals in the Third Reich", from the United States Holocaust Memorial Museum website, <http://www.ushmm.org/wlc/en/index.php?ModuleId=10005261&Type=normal+article>

the Nazis it was homosexuality in the large cities that was responsible for the loss of fertility and the unfavourable death-birth ratio.<sup>16</sup>

What is more, homosexuals were deemed diseased and degenerate beings that could corrode the German *Volks* by yet another way, this being the "contamination of normal males", especially by seducing youth.<sup>17</sup> The long-supported, yet so unfortunate, stereotypical representation of homosexuals as immoral sexual predators and corrupters of youth was enough by itself to condone their persecution for the "sake of the nation".

Hence, by not fitting the heterosexual profile of the virile head of family, homosexuals were not only useless to the German nation, they were actually hindering its expansion and predominance over others. In an exaggerated manner, the very ideal of "Deutschland über alles" was under threat. With such a negative, albeit illusive, profile, the homosexual community had to be rendered extinct. SS leader Heinrich Himmler's assertion is representative of the spirit: "We cannot permit such a danger to the country. Homosexuals must be eliminated root and branch".<sup>18</sup>

Interestingly, the Nazis seemed indifferent to the sexuality of "non-Aryans". The vast majority of men convicted and/or imprisoned on homosexuality charges were citizens of the then or future provinces of the Reich, i.e. Germans, Austrians, Alsations, Dutch, and Czechs. Homosexuals in other countries conquered by Germany were not persecuted as such.<sup>19</sup> Possibly, the idea behind such tolerance was that the "degenerates" would hinder the 'lesser' nations' growth and thus provide a safety latch for the ambitions of Germany.

In much the same way, lesbians were rarely persecuted on the basis of their sexual identity. For the Nazis, all German females were potential mothers and thus an asset for the German nation. In fact, lesbianism was not really recognised, either as a sexual orientation or as an offence<sup>20</sup>, what is still the case in many societies. This permitted most lesbians in Germany to remain in relative security, as long as they were discreet.<sup>21</sup>

<sup>16</sup> JOHANSSON, W. and PERCY, W. A., "Homosexuals in Nazi Germany", Simon Wiesenthal Center Annual Volume 7 (1990), at <http://motlc.wiesenthal.com/site/pp.asp?c=gvKVLcMVluG&b=395203>

See also LAUTMANN, R., "The Pink Triangle, Homosexuals as "Enemies of the State", in BERENBAUM, M. and PECK, A. J. (Eds.), *The Holocaust and History, the Known, the Unknown, the Disputed and the Reexamined*, Indiana University Press, Bloomington, 1998, p. 346.

<sup>17</sup> ESKRIDGE, W. N., Jr., "Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961", *Florida University Law Review*, Vol. 24, 1997, p. 766.

<sup>18</sup> *Supra* note 16

<sup>19</sup> "Persecution of Homosexuals in the Third Reich" ..., *op. cit.*

<sup>20</sup> "Lesbians and the Third Reich" ..., *op. cit.*

<sup>21</sup> Historically, lesbians have been less visible than gay men. On the one hand, this can help them lead their lives and experience their sexuality discretely, and also keeps them relatively safe from discrimination and violence. On the other hand though, their invisibility is hindering their emancipation and struggle for equal rights. For instance, the fact that societies all over the world give less importance to expressions of female-to-female affection can make it acceptable for two women to walk holding hands or to kiss on the lips. However, interpreting all expressions of affection between females as mere friendship actually denies women control over their own sexuality. The automatic assumption that "woman is made for man (...and his desires)", so she cannot really love another woman, reflects discriminatory traditional beliefs that female sexuality can only serve for reproduction and male satisfaction. One should not forget that the control over women's sexuality has long, and, alas, successfully, been used for their oppression.

### 1.2. *The war on homosexuality*

Homosexuality, more precisely homosexual activity between males, had been illegal in Germany since 1872, under Article 175 of the Weimar Republic's Penal Code. The original paragraph referred to "lewd and lascivious acts against the order of nature (*widernatürlich Unzucht*) committed between males or between human beings and animals" and commanded that they be punished by imprisonment, possibly also loss of civic rights.<sup>22</sup> However, Weimar Germany was reportedly tolerant towards homosexuals, who had created intellectual circles as well as networks engaged in the struggle for societal reform. For some, such tolerance was a sign of Germany's decadence.<sup>23</sup> In fact, it seems that demands for the elimination of "asocial elements" from the German society were already present at the time of the Weimar Republic. And they came both from society itself and academic circles.<sup>24</sup>

As soon as they came to power, the Nazis engaged in a struggle to dismantle the homosexual support networks. On 6 May 1933, students led by Storm Troopers (*Sturmabteilung*), also known as the SA, raided the Institute for Sexual Science in Berlin and confiscated its unique library, with over 12,000 books and 35,000 irreplaceable pictures. The institute had been founded in 1918 by sexologist Magnus Hirschfeld, a pioneer in the research on human sexuality and a homosexual himself, and conducted both research and counselling. Hirschfeld's progressive ideas that homosexual men and women were normal human beings and should be treated as such were seen by many as a sign of decadence in a society that had abandoned its traditional values.<sup>25</sup> Four days after the raid, most of the confiscated works were destroyed along with thousands of other "degenerate" works of literature in the book burning of Opernplatz, in Berlin's city centre.<sup>26</sup>

The storming of the Institute was a first step in a campaign against the homosexual subculture in Germany. Bars and clubs with homosexual clientele, such as the "*Eldorado*", were raided and eventually shut down, while gay publications, such as *Die Freundschaft* (Friendship), were banned. What is more, in 1934, the Gestapo instructed local police to maintain records of all men suspected of homosexuality, which had already been the case in many parts of the country. The Nazis used these "pink lists" to single out and arrest individual homosexuals.<sup>27</sup>

<sup>22</sup> JOHANSSON, W. and PERCY, W. A., "Homosexuals in Nazi Germany" ..., *op. cit.*

<sup>23</sup> *Supra* note 19.

<sup>24</sup> WASCHMANN, N., "After Goldhagen. Recent Work on the Genesis of Nazi Genocide", *Journal of Contemporary History*, Vol. 34(3), pp. 477-487.

<sup>25</sup> According to Hirschfeld, homosexuality was an innate and non-modifiable attribute of a small minority, 2.2 % of the population, including males and females. Hence, homosexuals were not to blame for their conduct and could not convert others to their inclination, which was inborn. The bottom line of this theory was that homosexuality is natural. See, for example: JOHANSSON, W. and PERCY, W. A., "Homosexuals in Nazi Germany" ..., *op. cit.*; BERGEN, D. L., *War & Genocide, A Concise History of the Holocaust*, Rowman & Littlefield Publishers, Inc., Lanham, 2003, p. 23.

<sup>26</sup> For the testimony of an eyewitness to the burning of the books, see BURLEIGH, M. and WIPPERMAN, W., *The Racial State, Germany 1933-1945*, *op. cit.*, p. 189.

<sup>27</sup> *Ibid.*, p. 186. Reportedly, the person who revealed the existence of such "pink lists" was socialist leader August Bebel, deemed the only leader of a German political party who showed an interest in finding out about the life of Germany's homosexual citizens.



A major incident that dramatically worsened the situation of homosexuals occurred on the night of 29 to 30 June 1934. During what is known as the "Night of the Long Knives" (*Nacht der langen Messer*), SA leader Ernst Röhm and his entourage were brutally murdered at the order of Hitler. Ernst Röhm was a known homosexual, a fact that had been used both against him in person by his opponents within the Nazi party and against Hitler and the Nazis in general by the opposition. Hitler initially protected Röhm from other elements of the Nazi Party which held his homosexuality to be a violation of the party's strong anti-gay policy.<sup>28</sup> However, apparently he finally succumbed to pressure or maybe came to see Röhm as a potential threat to his own power.

Whichever the case, these purges consolidated Hitler's image as a "moral crusader" in the eyes of the German people.<sup>29</sup> In fact Hitler used this argument to justify the killings and pledged to "cleanse" the Nazi party of homosexuals.<sup>30</sup> After that, there was no turning back on the persecution of homosexuals; policy and practice could only get harsher.

In 1935, the Nazi regime revised Paragraph 175 in an effort to enhance its scope. Among other changes, the formulation "against the order of nature" (*widernatürlich*) was omitted in the revised version, thus giving the courts the opportunity to rule, as they did, that the new formulation also encompassed homosexual acts or encounters that did not amount to intercourse, such as kissing or mutual masturbation, whether actually performed or merely intended. Anything that could be deemed as "criminal indecency" between men or behaviour likely to offend "public morality" or "arouse sexual desires to oneself or strangers" was punishable.<sup>31</sup> The Nazis obviously meant to intensify the persecution of homosexuals, in an attempt to eradicate homosexuality from Germany. In 1936, Heinrich Himmler, Chief of the SS, created the "Reich Central Office for the Combating of Homosexuality and Abortion."<sup>32</sup>

From 1937 to 1939, the German police engaged in a multitude of raids of homosexual meeting places, and through a network of informers and secret agents managed to identify and arrest thousands of homosexual men. The majority of those convicted on homosexual charges were sent to prison; they were closely monitored after release and were very often arrested again<sup>33</sup>. On 4 April 1938, the Gestapo issued a directive indicating that men convicted of homosexuality could be incarcer-

<sup>28</sup> In 1932 Hitler stated, though without naming Röhm, that "private life cannot be an object of scrutiny unless it is in conflict with the basic principles of National Socialist ideology." See film documentary "Paragraph 175" ..., *op. cit.*; see also, "Forgotten Victims of the Holocaust", the International Lesbian and Gay Association (ILGA), at [http://www.ilga.info/Information/Legal\\_survey/europe/supporting%20files/forgotten\\_victims\\_of\\_the\\_holocaust.htm](http://www.ilga.info/Information/Legal_survey/europe/supporting%20files/forgotten_victims_of_the_holocaust.htm)

<sup>29</sup> BURLEIGH, M. and WIPPERMAN, W., *The Racial State, Germany 1933-1945*, *op. cit.*, pp. 188-189

<sup>30</sup> See film documentary "Paragraph 175" ..., *op. cit.*

<sup>31</sup> BURLEIGH, M. and WIPPERMAN, W., *The Racial State...*, *op. cit.*, p. 190.

<sup>32</sup> GRAU, G., "Final Solution of the Homosexual Question? The Antihomosexual Policies of the Nazis and the Social Consequences for Homosexual Men", in BERENBAUM, M. and PECK, A. J., (Eds.), *The Holocaust and History, the Known, the Unknown, the Disputed and the Reexamined...*, *op. cit.*, p. 342.

<sup>33</sup> "Everybody knew that you landed in a concentration camp after sitting out your legal sentence..." , testimony recorded in LAUTMANN, R., "The Pink Triangle, Homosexuals as "Enemies of the State", in BERENBAUM, M. and PECK, A. J., (Eds.), *op. cit.*, p. 355.

ated in concentration camps. There are, however, reports of homosexuals being sent to the camps as early as 1933.<sup>34</sup>

### 1.3. *Life in the camps*

Homosexuals sent to the concentration camps met with a fate far worse than that of those incarcerated in regular prisons. As mentioned earlier, homosexuals had no real homogeneity as a group and were thus unable to create support networks within the camps. They were seen as “undesirables” by both the camp authorities and other prisoners. Although homosexual behaviour was, inevitably, widespread in the camps, homosexuals were treated with contempt by other inmates.

For some, sexuality became a tool for survival. In exchange for some kind of protection or support, they would offer themselves to the *kaapos*, common law prisoners given the role of wardens by the SS. It is easily deducible that this would segregate them even more from the others. On the other hand, their sexuality could, and often did, become a reason for extortion and abuse. Many were forced to indulge in sexual activity with wardens, guards or SS officers.<sup>35</sup> Especially those segregated in special barracks, to “avoid contaminating the normal men in the camp”, were practically defenceless against any abuse.<sup>36</sup>

Eugen Kogon reports that in Buchenwald, homosexual prisoners were separated from the others in October 1938 and were worked to exhaustion in the quarry. This identified them as the lowest caste in the camp during the most difficult years.<sup>37</sup> In shipments from Buchenwald to extermination camps, such as Nordhausen, Natzweiler and Gross-Rosen, homosexuals reportedly made up the highest proportionate share, since they were considered as worthless. Virtually all of them perished.<sup>38</sup>

As in the case of many other detainees, homosexual men were used as guinea pigs in medical experiments, while many of them were castrated. It is well known that many people died during such experiments. However, homosexuals in particular were used as subjects in experimental “medicine”, since Nazi doctors were looking for “a cure to the homosexual problem”. Among them, a Danish SS doctor called Vaernet was experimenting with artificial gland implants, based on the assumption that homosexuality was caused by a male hormone deficiency. According to the records found, at least two of his patients did not survive the operation; it goes without saying that this figure may be significantly larger.<sup>39</sup>

<sup>34</sup> *Ibid.*, p. 349.

<sup>35</sup> LASKA, V. (ed.), *Women in the Resistance and in the Holocaust: The Voices of Eyewitnesses*, Greenwood Press, Westport & London, 1983. Excerpts published on the Middle Tennessee State University website, <http://www.mtsu.edu/~baustin/laska.html>

<sup>36</sup> For reports by camp survivors on the treatment of homosexuals in the camps, see LAUTMANN, R., “The Pink Triangle...”, *op. cit.*, p. 348.

<sup>37</sup> This situation is very eloquently depicted in the film *Bent* (dir. Sean Mathias, Channel Four Films, 1997), based on the screenplay by Michael Sherman.

<sup>38</sup> KOGON, E., *The Theory and Practice of Hell: The German Concentration Camps and the System Behind Them*, New York, 1960, p. 44.

<sup>39</sup> For a report by Vaernet on the case of a detainee in Buchenwald, see BURLEIGH, M. and WIPPERMAN, W., *The Racial State...*, *op. cit.*, pp. 195-196.

In film documentary "Paragraph 175", homosexual Holocaust survivors testify on the harsh fate of the "men with the pink triangle". In the camps abuse and beatings were regular, work to exhaustion was the rule, homophobia was rampant. However, as most of them were Christian Germans, they were spared the gas chambers. Finally, many chose the ultimate "act of freedom", suicide.

Pierre Seel is categorical in his statement that homosexuals were the lowest of the low in the camp hierarchy, "right on the ground" as he says. He also recites how his lover was executed in public in Schirmeck, devoured alive by German shepherd dogs.

Heinz Dörmer remembers the "singing forest", an array of poles driven into concrete, where the condemned were hung by their arms, tied behind their back. *"The screaming was inhuman [...] they also did that to the Jews, only they would spin then around as well [...] the "singing forest", it's beyond human comprehension. And so much remains untold"*.

Heinz F. spent a total of around 8 years in concentration camps. He was arrested based on "information that he was homosexual" and initially spent a year and a half in Dachau with no trial or justification, "without knowing why" as he says. After his release, he was under constant surveillance until he was arrested again. While he was in prison for investigation, he remembers, all other homosexual prisoners were sent to Mauthausen. He cannot help weeping when he utters that almost all of them were killed there. The second time he was sent to Buchenwald. He was released and forced to join the German army a few days before the end of the war. As most of the other survivors, Heinz F. did not speak of his sufferings until decades later. When asked for the reason for his silence, he replies "shame".

An estimated 60% of homosexual inmates died in the camps, which is one and a half times the death rate of political prisoners (41%) and Jehovah's Witnesses (35%).<sup>40</sup>

#### 1.4. Conclusive remarks

As seen above, homosexuals form part of the "forgotten victims" of the Holocaust. After experiencing freedom and visibility to a considerable degree during the Weimar Republic, the homosexual community found itself in the scope of the Nazi campaign for the "purification of the Aryan race".

The typical profile of a person persecuted was a homosexual male of German citizenship—regardless of social status— i.e. a part of the male population the Nazis were counting on for the expansion of the "Aryan race". Because of their homosexual orientation, these men were useless to the Nazi ambition for an ever-growing nation; what is more, they represented a danger to "healthy society" since they were seen as potential corrupters of heterosexuals, and especially of German youth. Lesbianism was not taken seriously as a sexual orientation; all women were potential mothers to the Nazis, therefore lesbians who would keep low were usually left unharmed.

<sup>40</sup> LAUTMANN, R., "The Pink Triangle...", *op. cit.*, p. 348.

Germany's homosexual community was deeply harmed by the Nazi persecution; bars and meeting places were raided, scientific research was destroyed, while the fear of arrest and imprisonment or deportation was omnipresent. Many of the homosexuals arrested were sent to regular prisons, but many were sent to concentration camps where they met with contempt by both other detainees and camp authorities and led particularly harsh lives. Practically the lowest cast in camp hierarchy, and with no effective protection, the men with the pink triangle would rarely survive.

In the above case, we see a State with the ambition to construct a strong and "pure" nation, purporting to be cleansing society of immoral elements, and using this argument as justification for the persecution and/or extermination of homosexuals. This persecution also had a legal basis, since homosexuality was illegal according to the German law.

In contemporary legal terms, the harm suffered by the victims amounts to severe violation of their human rights to life, personal security and freedom from torture, among others.

## 2. Persecution of homosexuals under nationalist/totalitarian regimes

As mentioned earlier in this paper, all nationalist, extreme right or totalitarian regimes have one thing in common. They strive to create the idea of a coherent national identity, one that would bring all citizens together, equalising their differences and ideally weakening their ideological defences. For this unique identity to work, however, since this would be a constructed identity<sup>41</sup>, the notion of the "other" is essential. This "other" is what the nation has to be protected from, the enemy the fight against whom can become a common cause; the "other" is the opponent, the traitor. Historically, Communists/Imperialists and "infidèles" have been commonly used as "the others" by nationalists wishing to invest their policies with an air of historical legitimacy.

Consequently, what nationalist/totalitarian regimes became famous for is indubitably the persecution, often extermination, of political opponents. These are the "traitors", the ones who will conspire against their own people and hand state

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<sup>41</sup> The issue of how national identity is created is a rather complicated one. In "The South African National Identity and its Key Postulates", Dr (Col) Rocky Williams argues that there are three approaches as to where national identity emerges from. In his words: "One approach argues that national identity is pre-given, rooted in the mythical (often mystical) and preternatural mists of the past. This religious sense of identity assumes that identity is preordained, predetermined and (often) fatalistic. A second approach sees identity, as such, and all its related constructs as products of the teleological unfolding of the greater Hegelian absolute over which the human agency has little influence. The freedom to shape one's identity in this sense (whether individual or national) is simply to recognise the parameters of necessity. A more realistic approach, and one that is more consistent with the realities of history, is that identities are constructed, are continually changing, and are moulded by a continually changing matrix of historical, cultural and social factors." See: WILLIAMS, R., "The South African National Identity and its Key Postulates", in "Franco-South African Dialogue - Sustainable Security in Africa", compiled by Diane Philander, Monograph No 50, August 2000, from the Institute for Security Studies website, <http://www.iss.co.za/Pubs/Monographs/No50/Contents.html>

secrets to the enemy, a direct threat to national security. The “Red Scare” of the McCarthy era in the USA has made historical the question “*Are you now or have you ever been a member of the Communist party?*”. Inevitably, what public memory readily recognizes is the political “other”.

However, along these lines, yet another group sounds often more alarming to “moral ears”; these are “the perverts”, the group that personifies the moral “other”. It is the group that will corrode and eventually corrupt “healthy” society, thus weakening its defences against the enemy. And, interestingly, the existence of a link between homosexuality and political subversion has been claimed. Gay men and lesbians have in fact been depicted as immoral beings constantly devising both sexual and political plots.<sup>42</sup> Let us take two such examples: in 1934 Maksim Gorky declared “*eliminate homosexuality, and you will make fascism disappear*”<sup>43</sup>, while in 1950, over at the other end, US Senator Kenneth Wherry asked on the Senate floor, “*Can you think of a person who could be more dangerous to the United States of America than a pervert?*”<sup>44</sup>

The persecution of homosexual civil servants in the USA during the “50s will be used as an illustrative example. It is worth noting that, in parallel, a purging of homosexuals from the Armed Forces was conducted, which, however, will not be dealt with in this essay.

### 2.1. *The Cold War and the elimination of subversives from the US federal government*

In February 1950, in his historical Wheeling speech, in West Virginia, US Senator Joseph McCarthy fuelled concerns about the infiltration of Communist spies into the US federal government by claiming he held a list of 205 “card-carrying Communists” working for the State Department. His statement immediately brought him to the political centre stage. From that moment Senator McCarthy became a tireless crusader against Communism in the early 1950s, a period commonly known as the “Red Scare.” As chairman of the Senate Permanent Investigation Subcommittee, he conducted hearings on communist subversion in America and investigated allegations of communist infiltration of the Armed Forces.<sup>45</sup>

<sup>42</sup> PRONO, L., “McCarthyism”, from the Encyclopedia of Gay, Lesbian, Bisexual, Transgender & Queer Culture website, <http://www.glbtc.com/social-sciences/mccarthyism.html>

<sup>43</sup> ESSIG, L., *Queer in Russia, A Story of Sex, Self and the Other*, Duke University Press, Durham and London, 1999, p. 5.

<sup>44</sup> JOHNSON, D. K., *The Lavender Scare, The Cold War Persecution of Gays and Lesbians in the Federal Government*, The University of Chicago Press, Chicago and London, 2004, p. 2.

<sup>45</sup> McCarthy’s political career ended when he was censured by the Senate on 2 December 1954. His suspension from politics coincided with a conversion of his name into a modern English noun “McCarthyism”, or adjective, “McCarthy tactics”, when describing similar witch-hunts in recent American history. [The American Heritage Dictionary gives the definition of McCarthyism as: 1. The political practice of publicizing accusations of disloyalty or subversion with insufficient regard to evidence, and 2. The use of methods of investigation and accusation regarded as unfair, in order to suppress opposition.]

From the Dwight D. Eisenhower Library and Museum (US National Archives and Records Administration) <http://www.eisenhower.utexas.edu/dl/McCarthy/Mccarthydocuments.html>

Collective memory recognizes the McCarthy era as a dark period of persecution of political opponents, often with little proof as to their conduct. What is much less known is that McCarthy's obsession with the Soviet threat resulted in a proper campaign for the elimination of homosexuals from the US federal government.

### 2.1.1. HOMOSEXUALITY AS A SECURITY RISK

After his inflammatory speech, Senator McCarthy found himself besieged by both the media and his colleagues, eager to receive clarifications. Within a few days, and following the State Department's denial of his allegations, he had to modify his claim, and speak rather of 57 "bad risks". When called to support his views on the Senate floor, McCarthy presented individual cases, among which two stories of not only political subversion but also homosexual conduct, as if in an attempt to accentuate the seriousness of the danger for America. Shortly after, John Peurifoy, head of the Department's security program, denied the allegations about Communist infiltration in the federal government, adding, however, that, since 1947, 202 people had been dismissed as "security risks", among them 91 homosexuals.<sup>46</sup>

The news that homosexuals had been let go as "security risks" seemed to establish the view that sexual and political subversion go together. Both homosexuals and Communists were now largely seen as persons who would tend to form cliques, not only to associate amongst themselves but also to conspire against the nation. Both groups were believed to have their own subcultures, meeting places and codes, which was (and is) to some extent true, only in that case these elements somehow pointed to the common fear of most Americans at the time: Russian espionage. Sexual orientation had suddenly become a political issue, what is more, one affecting national security. Things quickly got out of hand and people started talking about "sinister international cliques" spreading within the US government. In a way, the homosexual civil servant had become "the enemy within".<sup>47</sup>

It is important to note that the media, and especially the popular press, supported and enhanced such views against homosexuals. To mention only one of the several examples documented by David K. Johnson, in a series of articles in tabloid magazine *Vitalized Physical Culture*, A. G. Mathews argued that homosexuality in America was promoted by the USSR and used as a weapon to physically weaken the Western world.<sup>48</sup> The resemblance with the Nazi hysteria is evident. As in the case of the gay German citizens being deemed a threat to the growth of the Aryan race, once more homosexuals, Americans this time, were seen as hindering the defence of the nation against the enemy.

Negative depictions of homosexuals continued to appear in the press over the years. The description of the lesbian given by the magazine *Jet* in 1954 is illustrative: "If she so much as gets one foot into a good woman's home with the intention of seducing her, she will leave no stone unturned...and eventually destroy her life

<sup>46</sup> JOHNSON, D. K., *The Lavender Scare, The Cold War Persecution of Gays and Lesbians in the Federal Government, ...*, op. cit., pp. 15-18.

<sup>47</sup> *Ibid.*, op. cit., pp. 30-34.

<sup>48</sup> *Ibid.*, op. cit., p 37.

for good.”<sup>49</sup> Here, unlike in the case of Nazi Germany, the lesbian is no longer a “silly woman”; quite the opposite, she is depicted as a determined sexual predator who will consciously attempt to destroy the heterosexual happiness of the “healthy woman”.

Soon after the McCarthy and Peurifoy revelations the State Department and Washington DC were labelled homosexual havens. In an attempt to defend itself against such rumours, the State Department hardened its screening procedures for future employees. Every new applicant was checked against a list of alleged homosexuals, while every male applicant was interviewed by a team specialising in uncovering homosexuals. Even lie detector systems were used to spot the potential “pervert”. Security officers were equipped with a detailed manual with instructions on how to recognize a homosexual. Section leaders and inspectors were advised to be constantly on the alert to discover homosexuals among their staff. Reportedly, such was the efficiency of the system that more than 80% of those singled out and further investigated eventually confessed to having indulged in homosexual practices. Many also informed on others.<sup>50</sup> As in the case of Communists, the aim of such investigations was not only to exclude the individual homosexual from the government, but to dismantle “the network”.

Getting rid of homosexuals in the State Department was not enough though, they had to be prevented from finding jobs in other federal agencies. Homosexuality had to be eradicated from civil service. The Civil Service Commission discovered that 22 of the 91 dismissed from the State Department on homosexuality charges had been employed by other branches of the federal government. The Department pursued their dismissal and succeeded in getting resignations in all cases but one.<sup>51</sup>

### 2.1.2. THE OFFICIAL INVESTIGATION AND ENSUING ACTION

In the spring of 1950 the Senate authorized an official investigation, a task assigned to a committee chaired by Senator Clyde Hoey (North Carolina). The resulting report detailed the reasons for which “*homosexuals and other sex perverts*” should be excluded from the federal government. According to its findings, the social stigma attached to sex perversion was so pronounced that homosexuals would do a lot to avoid exposure, and were thus easy targets for blackmail. Therefore, the homosexual civil servant would not hesitate to hand state secrets over to the enemy simply to protect their reputation. This would justify their exclusion as security risks. The report went even further to argue that homosexuals lack the emotional

<sup>49</sup> PRONO, L., “McCarthyism”, *op. cit.*

<sup>50</sup> JOHNSON, D. K., *The Lavender Scare, The Cold War Persecution of Gays...*, *op. cit.*, pp. 72-77  
According to the testimony of an Assistant Chief in the Division of Foreign Service, any data regarding security risks, such as homosexuality, had to be sent to the Security Division. As deduced from the minutes of the particular hearing, the Senate Permanent Subcommittee on Investigations, of the Committee on Government Operations, was particularly concerned whether such data actually reached the Security Division or if there were attempts at a cover-up. See, “File Destruction in Department of State”, meeting of 29 January 1953, [http://legalproblems.co.uk/McCarthy\\_hearings\\_1953-1954\\_VOLUME\\_1\\_Part\\_7\\_10.html](http://legalproblems.co.uk/McCarthy_hearings_1953-1954_VOLUME_1_Part_7_10.html)

<sup>51</sup> JOHNSON, D. K., *The Lavender Scare...*, *op. cit.*, p. 81.

stability required for positions of responsibility. Here, the homosexual is presented as a weak person of limited competence. Finally, the report stated that “*perverts*” will frequently attempt to entice heterosexuals (“*normal individuals*”) to engage in their practices. “*One homosexual can pollute an entire office*”: the recurring, and so unfortunate, view depicting homosexuals as immoral sexual predators and homosexuality as a contagious disease.<sup>52</sup> The homosexual thus represented a moral risk as well.

The committee’s findings offered the US Civil Service Commission justification to interpret its own code so as to exclude homosexuals from civil service as persons who engage in “immoral conduct”. What is more, the bipartisan composition of the investigating body (Republicans and Democrats together) rendered the findings practically unquestionable and helped consolidate the view that homosexuality really was a menace to the country.<sup>53</sup>

Soon many different agencies became involved in the hunt for homosexuals, including the Metropolitan Police and the FBI.<sup>54</sup> Police practices included raids of gay bars and entrapment of homosexuals in known gay meeting areas<sup>55</sup>, while people under interrogation were pressured to “name names”. Washington’s gay and lesbian community was living in fear. Even heterosexuals were in fear of being accused of homosexuality, and were very careful to avoid any conduct which could be deemed “deviant”, including social contact with anyone who could be suspected of homosexuality. Any association with a presumed homosexual could by itself be interpreted as proof of “guilt”. Inevitably, such a situation offered fertile ground for absurd denunciations and unfounded allegations, turning the whole thing into a real modern-day witch-hunt.<sup>56</sup> The war on homosexuality was rampant. In 1950 alone, over 380 government employees were investigated for homosexuality. Most were fired or resigned from their jobs.<sup>57</sup>

It should not be disregarded that the purges in the civil service also severely affected the private sector, as the millions of employees working for government contractors needed a security clearance as well. Technically, those who were denied a security clearance could do non-classified work; in practice they were most often fired.<sup>58</sup>

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<sup>52</sup> ESKRIDGE, W. N., Jr., “Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961”, *op. cit.*, p. 739.

<sup>53</sup> JOHNSON, D. K., *The Lavender Scare...*, *op. cit.*, pp. 101-118.

<sup>54</sup> In fact the FBI had informally started collecting information on homosexuals since the 1940s, while after 1950 it did so systematically. The FBI shared the information with other enforcement agencies and with the Civil Service and even private employers. See ESKRIDGE, W. N. Jr., “Privacy Jurisprudence...”, *op. cit.*, p. 768.

<sup>55</sup> In such operations, which are still common practice in some countries, and until recently in the USA, undercover police officers pose as homosexuals in public areas targeted as gay-frequented, aiming to provoke gay men into verbal or physical sexual advances and to then arrest them for lewd conduct. See, for instance, “*Bag a Fag*”: *Police Misconduct, Entrapment and Crimes Against Gay Men in Michigan*, on the Triangle Foundation website, <http://www.tri.org/bagafag.html>, February 1999, and *Plain Clothes Police at Beat Raise Serious Concerns*, on the Victoria Net website, <http://home.vicnet.net.au/~vgirl/media/022604.htm>, 26 April 2002.

<sup>56</sup> JOHNSON, D. K., *The Lavender Scare...*, *op. cit.*, pp. 147-153.

<sup>57</sup> ESKRIDGE, W. N., Jr., “Privacy Jurisprudence...”, *op. cit.*, p. 738.

<sup>58</sup> JOHNSON, D. K., *The Lavender Scare...*, *op. cit.*, p. 167.



### 2.1.3. THE IMPACT ON THE HOMOSEXUAL COMMUNITY

The vast majority of those accused of homosexuality preferred to quietly resign and avoid a scandal, which was not the case of the alleged Communists, many of whom fought the cases in court.<sup>59</sup> As always, allegations of homosexuality carried a heavy social stigma. Consequently, the presumed homosexuals found themselves in a particularly weak position; had they wished to react, they would have had to confront not only their immediate accusers, i.e. the investigators, but in a way the whole of society. Understandably, fighting the case or claiming reparations was at the time out of the question. Renouncing a career in civil service was the quiet way out for most of the victims of such persecution.

What is more, the exclusion/dismissal of homosexuals from work in or for the federal government did not only affect their economic well-being and professional advancement, but also severely deteriorated their everyday life.

As mentioned above, the homosexual community was practically living in fear, not knowing who would be targeted for dismissal next; people were losing friends and contacts overnight, contacts that, having been fired, would disappear to avoid the scandal. *"You would be socialising with somebody and then they disappeared, they had gotten kicked out and left town [...] Even among your gay friends, you never knew who might be pressured to inform on you"* testifies Madeleine Tress, as recorded by David K. Johnson.<sup>60</sup> A culture of insecurity, fear and mistrust took over, especially in Washington DC.

Evidently such official practices of persecution were possible to put forth owing to the general negative attitudes against homosexuality. It should be noted, however, that the State's involvement in such practices offered, in turn, official justification for such negative views, thus enhancing the vulnerability of homosexuals. The two factors combined, that is societal attitudes and their validation through an official practice, deprived homosexual victims of the "benefit of the doubt", any homosexual was a priori "guilty".

Paraphrasing the "Red Scare", in reference to the Communist threat, the homosexual issue was named "The Lavender Scare".

### 2.1.4. CONCLUSIVE REMARKS

As presented above, Communists were not the only "subversives" persecuted in the USA during the Cold War. Homosexuals were considered as dangerous a group as the "Reds", if not more. Determined to cleanse the federal government of potential traitors, the Republican administration launched a campaign to purge homosexuals from the civil service and block the way to those who would wish to enter.

The connection of homosexuality and political subversion is interesting. We have seen how homosexuals were labelled security risks, deemed prone to succumb to blackmail by the enemy. We have also seen how homosexuals were considered

<sup>59</sup> *Ibid.*, p. 5.

<sup>60</sup> *Ibid.*, p. 150.

carriers of a disease which they would strive to spread in their environment. The illusive depiction of the homosexual as an immoral sexual predator is present in this case as well, as in the previous one.

The typical profile of the person persecuted was that of a civil servant —thus normally of higher social and educational background— especially those working for the State Department, with no distinction between males and females. Thus, in contrast with the previous case, lesbians were no safer; they were deemed as immoral and dangerous as gay men.

The anti-homosexual campaign of the US government had a heavy impact on the life of the gay community. The culture of fear and mistrust corroded the homosexual milieu and enhanced the negative societal attitudes towards homosexuality, at a time when anyone suspected of subversion was *a priori* dangerous and undesirable.

In this case, we have seen homosexuality connected to the fear of Soviet spies infiltrating the government, so widespread in the American society of the time —to the degree of obsession—. National security was thus the alleged motive for the persecution. As for the harm suffered by the victims, the serious hindering of their personal development, coupled with the continuous harassment by the police and the security departments of the different services would amount to the violation of their human rights to development, privacy and freedom from discrimination.

## 2.2. *The persecution of homosexuals in Franco's Spain*

General Franco's dictatorship in Spain is another example of persecution of homosexuals with an existing link between homosexuality and the politically opponent left ideology. Only in this case the nuance is different, as the base profile promoted by the regime is specific.

As reported by Fernando Olmeda, Franco's regime strived to establish for itself the image of the strong, virile regime that would put the country back on the path of traditional values, including religious and family values. Clearly in an attempt to discredit the previous regime, Franco projected the illusive picture of a previously decadent society whose libertine ways had to be combated for the sake of the Spanish nation. Only then would Spain appear with the glory it deserved in the eyes of the (red) enemy.<sup>61</sup>

Thus in the Spanish case, the unique national identity being forged —which as mentioned earlier in this essay is essential to all nationalist regimes— was a macho one. The traditional values element was nothing new, as seen in both preceding cases a return to a traditional base is rather common in such instances. Both the Nazis and the Cold War officials believed they needed to reform the decadent societies they had inherited, in order to strengthen the defences of the nation. The new element here is that what is claimed is neither a menace to the internal birth rate nor a threat of treason, but rather the lost dignity of the Iberian male. In the words of Queipo de Llano, as quoted by Olmeda, "*Our legionaries and privates taught the*

<sup>61</sup> OLMEDA, F., *El Látigo y la Pluma, Homosexuales en la España de Franco*, Oberon, Madrid, 2004, pp. 33-34.

*Red cowards what it means to be a man. And their women too. [...] And now [their women] will get to know real men, and not those militia fags*".<sup>62</sup>

Franco seemed to have found two pedestals for his regime. One was the army to which he entrusted, as any other dictator, the elimination of political opponents. The other was the Catholic Church, which he needed to support his "moral crusade".<sup>63</sup> As is well known, the Church (whether Catholic, Orthodox, Jewish or Muslim) has long and steadfastly supported traditional family values, where the only acceptable union is that of a man and a woman with the aim of procreation. The only alternative to that would be absolute abstinence.

As far as science was concerned, homosexuality was placed somewhere between delinquency and mental illness. Psychiatric views of the time were seemingly quite influenced by the national/Catholic profile of the regime, which clearly could not be advantageous to homosexuals. The opinion of one of the renowned psychiatrists of the time is illustrative. In his *Tratamiento de las enfermedades mentales*, Vallejo-Nágera purports that society would not lose much by castrating "sexual psychopaths" such as rapists or homosexuals, adding however that it should be up to the jurists to decide on the penalties imposed on these "sexual delinquents".<sup>64</sup>

The words of Armand de Fluvià, one of the pioneers of the gay movement in Spain, outline the situation for homosexuals at the time. "*In those days [...] all homosexuals were, in the eyes of the State, a kind of public danger prone to crime and corrupters of minors; in the eyes of the representatives of medical science we were mentally ill and suffering from sexual aberration and perversion; in the eyes of the Church we were the worst of sinners who were committing a horrible, unspeakable sin against nature; and in the eyes of society we were scum, the most despicable of perverts, because according to it we had rejected our nature as men, our masculinity, to become, in all disgrace, women*".<sup>65</sup>

### 2.2.1. TACKLING THE HOMOSEXUAL PROBLEM

Given the above, the homosexual citizen had no place in Franco's Spain. Inevitably, a culture of homophobia impregnated official policies. Hence, once the purging of political opponents from the system was well under way, and the regime was feeling safer in that field, they started taking seriously the persecution of sexual subversives, such as homosexuals, alias "*los invertidos*", "*las maricas*", in other words "*perverts*" and "*fags*". Arturo Arnalte places this point in time in 1954, with the revision of the *Ley de Vagos y Maleantes* (the Law on Vagrants and Criminals) to include homosexuals in the list of delinquents to be sentenced or reformed through forced labour.<sup>66</sup>

<sup>62</sup> *Ibid.*, p. 34

<sup>63</sup> UGARTE PÉREZ, J., "Entre el pecado y la enfermedad", *Orientaciones* (monograph on repression under Franco's regime), No 7, p. 8.

<sup>64</sup> ADAM DONAT, A. and MARTÍNEZ VIDAL, A., "Consideraciones sobre tan repugnante tendencia sexual: la homosexualidad en la psiquiatría del franquismo", *Orientaciones*, No 7, p. 51.

<sup>65</sup> As quoted in PETIT, J. and DE CIRES, C. (Eds.), "La Memoria LGTB, 1930-2000", *Revista Zero*, No 74, pp. 82-85.

<sup>66</sup> ARNALTE, A., "Galería de Invertidos. Vida Cotidiana de los Homosexuales en las Cárceles de Franco", *Orientaciones*, No 7, p. 101.

Before the abovementioned revision, homosexual encounters between males were penalised only if they provoked a “public scandal”, were abusive, or involved the “corruption of youth”. The revised version of 15 July 1954 considered homosexuals as dangerous by nature, their “vice” deserving severe punishment. Understandably, this would allow judges quite a wide margin for personal interpretation.<sup>67</sup> Presumption of homosexuality was not enough though, there had to be proof of homosexual conduct in a repetitive manner. The sentence would be incarceration for rehabilitation through forced labour, mostly in labour camps or agricultural camps. What is particular, however, is that the sentence could extend from 6 months to 3 years, depending on the “pace of reform”. It was actually in the hands of the prison warden to decide when the “*invertido*” had been reformed. The sentence was usually accompanied by a fine and the prohibition to reside in the place of arrest for a certain period of time, usually one or two years.<sup>68</sup>

In 1970, the law is reformed again, with the promulgation of the *Ley de Peligrosidad y Rehabilitación Social* (Law on Social Menace and Rehabilitation). The new stipulation again focuses on the author rather than the deed. The homosexual himself is the dangerous element. Again, mere suspicion is not enough for conviction, there has to be proven (e.g. confessed) repetition of homosexual acts. And, once more, there is no clear definition of the sentence, which in practice offers judges the grounds to be severe, based on their personal beliefs.<sup>69</sup>

Among the particularities of the above provisions, it should be noted that the exile measure was rather severe. After the traumatising experience of prison, just when he would most need to reintegrate his circle of family and friends, where he could feel relatively safe from a hostile society, the homosexual ex-detainee was effectively not permitted to seek protection through regaining his habitual context. Even after prison, he would still feel “undesirable”. What is more, such displacement could clearly hinder his ability to find work, and thus his personal development.

As expected, most arrests were conducted during round-ups in known homosexual meeting places. Gay bars, parks, public restrooms, and so on, were frequently raided by the police. Being caught engaging in sexual acts was not a requisite for the arrest, often merely passing by such a “cruising area” or moving in a seemingly homosexual way was reportedly enough to be taken to the police station. Clearly, not all cases were taken to justice; often the men arrested were allowed to leave by paying a sum of money. Inevitably, too often the Police abused the system, humiliating and robbing the detainees.<sup>70</sup> It should be noted that, according to the existing reports, it was mainly members of the lower social strata that were arrested and it was almost exclusively they who ended up in prison. Members of well-off families and artists were reportedly much safer.<sup>71</sup>

<sup>67</sup> See Supreme Court sentence on 5 November 1958, in OLMEDA, F., *El látigo y la Pluma...*, *op. cit.*, p. 99.

<sup>68</sup> *Ibid.*, p. 102.

<sup>69</sup> *Ibid.*, pp. 169-180. See also ARNALTE, A., *Redada de Violetas. La Represión de los Homosexuales durante el Franquismo*, Ediciones La Esfera de los Libros, Madrid, 2003, pp. 151-165

<sup>70</sup> *Ibid.*, pp. 101-102.

<sup>71</sup> “De la cárcel a la igualdad”, *El País*, 1 July 2005

The general culture of homophobia that, as mentioned earlier, had impregnated the official policies, inevitably enhanced the already negative attitudes against homosexuality; as a consequence, some of the arrests would take place after denunciation by some neighbour or other. The case of Antoni Ruiz, now president of the Asociación de Ex Presos Sociales is illustrative. At the age of 17 he was denounced to the police by a nun who was informed of his homosexuality and deemed he could "corrupt" his brothers. While in detention he was tortured, including being raped, to extract of him information on other homosexuals.<sup>72</sup> Again, as in the case of the US civil servants seen earlier, the aim was to arrest as many homosexuals as possible, to dismantle "the network".

What should not be overlooked is that the official policy of persecution, allowing arrest and imprisonment, opened the way for brutality and all sorts of abuses by the forces of order. Of course this is nothing new, people detained for political reasons usually undergo the same maltreatment, or worse; however, the label "danger to society", especially considering the unfortunate stereotypes depicting homosexuals as corrupters of youth, etc., was actually offering justification for such abuse. Homosexuals "deserved" the sufferings they underwent. What is more, as in the previous case regarding the US federal government, this official policy opened the way to absurd denunciations by the public. In a way, it was up to everybody's judgement whether their neighbour was a potential "danger to society" or not. In practice, the very law that claimed to protect society was actually inciting its members to a behaviour much more dangerous and corruptive than the one it was supposedly protecting them from.

### 2.2.2. LIFE IN THE PRISONS

As mentioned earlier, the reasoning behind incarceration was "reform" through work. The practice was to send homosexuals to specific institutions, or, in case this was not possible, to keep them separated from the others. One of the first institutions to receive homosexuals, among other detainees, after the promulgation of the Ley de Vagos y Maleantes was the *Colonia Agrícola Penitenciaria de Tefía*, in Fuerteventura, on the Canary Islands. Reports speak of detainees being worked to exhaustion, without any interest in their well-being, not to mention reform, and being maltreated by prison officials.<sup>73</sup>

Other institutions connected to homosexual detainees were the prisons of Huelva, destined for "passive" homosexuals, and Badajoz, for those who were "active". After the approval of the Regulation regarding the application of the *Ley de*

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<sup>72</sup> In the victim's words: "Four secret police officers appeared at my home at six in the morning. At the headquarters they began to interrogate me so that I would report other homosexuals. A cop began to harass me; because I said nothing he threw me to another prisoner, and told him to rape me. And this is what happened. For three days they took me to gay hangouts at night so that I would betray other homosexuals. They beat me. But I resisted in the way that I could. That is what annoyed them the most". Source: "Una monja me delató a la Brigada Criminal", *El País*, 20 December 2004.

<sup>73</sup> OLMEDA, F., *El látigo...*, *op. cit.*, pp. 104-105; ARNALTE, A., "Galería de Invertidos...", *op. cit.*, p. 101.

*Peligrosidad*, these two were labelled specialised in the “reform” of homosexuals. Reportedly, the reasoning behind the separation was to avoid recurrence of homosexual encounters among the prisoners, which of course was particularly naïve.<sup>74</sup> Often, detainees would pass through other prisons first before ending up in either Huelva or Badajoz. For instance, Barcelona’s model prison and Carabanchel Prison in Madrid also received many homosexual prisoners, who were kept in the “wings for sexual perverts”.<sup>75</sup>

Life in prison was an interesting mixture of oppression and tolerance. First of all, as expected, homosexual prisoners were particularly vulnerable to sexual abuse by other inmates. As in the case of prisoners in Nazi concentration camps, referred to earlier in this paper, sexuality became a tool for survival. Many social prisoners, and particularly the young and pretty, had to find a protector among the stronger inmates who would keep them safe in exchange for sexual favours. Hence the very element of their personality that made them particularly vulnerable vis-à-vis the justice system, i.e. their homosexual identity, was their most common means of self-protection in prison. Not to mention that the very context in which they were supposed to be “reformed” was the one forcing them to engage in homosexual acts, in reality against their free will.<sup>76</sup>

On the other hand, some homosexual behaviour was tolerated. Men were allowed to wear improvised make-up, at times even parties were held with the acquiescence of the guards; again a contradiction between theory and practice. Reportedly, such tolerance aimed at keeping homosexual prisoners “quiet”, it was a practical way for prison officials to avoid trouble.<sup>77</sup>

<sup>74</sup> OLMEDA, F., *El látigo...*, *op. cit.*, p. 182.

<sup>75</sup> ARNALTE, A., “Galería de Invertidos...”, *op. cit.*, p. 104. See also “La aplicación practica de la LPRS a través del estudio de un expediente de peligrosidad por homosexualidad”, *Orientaciones*, No 7, p. 129.

<sup>76</sup> ARNALTE, A., *op. cit.*, p. 105. The extreme vulnerability of homosexual detainees is a fact in all political and judicial contexts and should not be overlooked. No matter the reason of incarceration, the homosexual prisoner is likely to be severely abused by both other detainees and prison officials. The case of a gay man detained in a US prison is illustrative: 33 year-old African-American R. Johnson was subjected to a system of gang-run sexual slavery; he was routinely bought and sold as a sexual object, repeatedly raped, tortured and abused in every other way, only because of his sexual orientation. The prison officials not only refused to protect the victim, despite his multiple appeals for protective separation, but deemed that “a homosexual should enjoy” such treatment, and even threatened him with reprisals in case he attempted to seek redress. This of course is not the only case of such abuse in prisons, nor is it only homosexuals who have to face sexual abuse by other detainees. However, the reaction of the prison officials is illustrative of how aversion towards homosexuality can affect official and unofficial policies and practices. Not only is the homosexual prisoner the “lowest of the low”, not only does he “deserve what is happening to him”, but he actually “should enjoy being raped and abused by men”! For more information on two cases of abuse that made it to the Courts see: AMERICAN CIVIL LIBERTIES UNION, “Texas Officials Complicit in Gang Rape and Sexual Slavery of Gay Black Man”, ACLU Charges, on the ACLU website <http://www.aclu.org/news/2002/n041802a.html>, 18 April 2002. See also the full text of the complaint filed by the ACLU on behalf of Johnson before a US Court, at <http://www.aclu.org/court/johnson.pdf>. See also COUNCIL OF EUROPE, *Rapport au Gouvernement de la République Française Relatif à la Visite Effectuée par le Comité Européen pour la Prévention de la Torture et les Peines ou Traitements Inhumains ou Déggradants (CPT) en France du 6 au 18 octobre 1996*, CPT/Inf (98) 7, 17 May 1998, paras 73 and 205.

<sup>77</sup> ARNALTE, A., *Redada de Violetas. La Represión de los Homosexuales durante el Franquismo...*, *op. cit.*, pp. 199-200. See also OLMEDA, F., *op. cit.*, p. 190, where he refers to how Huelva was trans-

Finally, on the dark side again, some testimonies speak of cases of attempted aversion treatment through electroshock. Reportedly, men would be shown pictures of naked men and women alternatively. While seeing the male nudes, they would be subjected to a stream of electric current; while watching the females there would be no pain.<sup>78</sup> This falls in the context of the still existing, yet widely contested, theory that homosexuality can be “cured”. Clearly, such methods amount to pure torture.

### 2.2.3. CONCLUSIVE REMARKS

In the above case we have seen how homosexuals were persecuted along with political opponents by a dictatorship. As in the previous case, there was a connection between Communists and homosexuals, as both were depicted as weak and effeminate losers, as opposed to the “virile winners” of the regime. This connection was used in an ingenious way to discredit as much as possible the defeated and enhance the glory of the winners.

As in the first case presented, i.e. persecution by the Nazi regime, the anti-homosexual policy was justified by legislation. Many of those arrested ended up in prison, to “be reformed”, yet for a time unspecified by the law. The distinctive element of the Spanish case is that it left it to the prison officials to decide when the prisoner had been reformed.

The typical profile of a convicted social prisoner was that of a young, obviously gay man or transsexual person of lower social and educational background. Again lesbians were relatively safer, as they were more difficult to spot. Arrests were typically conducted during raids or after denunciations. As in the previous case presented, i.e. the Cold War purges, the official policy enhanced the existing homophobic feelings urging citizens to denounce the “perverts”.

In this case, we have seen a regime wishing to present itself as the strong virile head that would lead the country out of the path of decadence, differentiating itself from its left-wing opponents. This return to moral values is a common element in all three cases presented.

The impact on the lives of the victims was heavy, since besides the maltreatment they underwent in prison, they were usually forced to exile for up to one or two years after release. Clearly, their personal development was seriously hindered. Today we would speak of violation of the rights to personal security, development, freedom from arbitrary arrest and from torture.

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formed on Christmas day. In a cynical way, this could take us back to the time of slavery in the USA, where once a year some slaves would be allowed to drink and celebrate as much as they wanted. This once-in-a-year taste of absolute freedom represented a double benefit for the white oppressor. On the one hand, the slave would be grateful to his “kind master”, and on the other, he would later feel attenuated by the abuse (which would be normal, as he would be trying to fit an entire year’s freedom into just one night), and would “realise how sane his life of work was”.

<sup>78</sup> OLMEDA, F., *op. cit.*, p. 183. See also “La Reparación de una injusticia. Homenaje en Huelva a los homosexuales que estuvieron presos hasta 1979”, *El País*, 20 June 2005. It should be noted that such allegations have been contested by some. In the case of Huelva, for instance, the above mentioned article in *El País* confirms the practice of aversion therapy. However, as Olmeda reports, a guard who used to work there denied the allegations purporting this would be impossible as there was neither a doctor nor a psychiatrist in Huelva. See OLMEDA, F., *op. cit.*, p. 194.

### 3. Collective memory - selective memory?

*"You have to imagine...I grew up in Germany and never ever heard about the persecution of homosexuals in Nazi Germany. I did not know anything about the generation of my grandfathers, my gay grandfathers... and that I could be raised in a country where two generations ago they were persecuted, they were sent to concentration camps —and many of them were killed— and I didn't know anything about it, I did not have a past at all."* <sup>79</sup>

The above cited words of Klaus Müller, researcher for the US Holocaust Memorial Museum, outline today's situation as regards public awareness of the sufferings of homosexuals. Though Müller refers in particular to the people who suffered and/or perished in Hitler's Germany, the situation is not different as regards those imprisoned under Franco's regime, or those who continue facing discrimination, persecution and different forms of violence only because of their sexuality. Most people do not know about it. Or is it that they do not care to know about it?

Examining the cases of anti-homosexual persecution mentioned in this essay, we have seen them presenting both similarities and differences as regards the reasons of persecution or the typical profile of the victims. They all have one thing in common though: with the exception of researchers interested in LGBT issues, the vast majority of people simply do not know about them. It is as if neither these victims nor their sufferings ever existed. Yet everyone readily thinks of Jews at the mention of concentration camps, or Communists when speaking of McCarthyism. Collective memory does recognise the historic facts, yet appears to be selective as regards which parts of these facts it has retained. At the same time that society is apologising to some of the victims, trying to exorcise the evil by keeping its memory alive, it is leaving some others in the shade, denying them their dignity.

In an attempt to examine the reasons behind this exclusion of homosexual victims of injustice from collective memory, we have to consider the one thing that all the victims of historical wrongdoings have in common. Whether reference is made to Jews deported, tortured and exterminated by Hitler, or political opponents imprisoned, abducted or executed by dictators, there is one prevailing element that justifies the inclusion of these victims in public remembrance: they all suffered for no legitimate reason, they were all innocent. But how innocent are homosexuals in the eyes, and memory, of society?

#### 3.1. Memory and the "homosexual persona"

It is important to remember that in all three cases presented earlier, the aversion towards homosexuality was not a new element that suddenly appeared and forged the official policies of persecution overnight. Nor did the rulers impose a new practice out of the blue, in the total absence of consensus. All the respective societies

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<sup>79</sup> Testimony obtained in an interview granted to Klaus Müller, of the U.S. Holocaust Memorial Museum, Washington D.C., quoted verbatim in film documentary "Paragraph 175", by Rob Epstein and Jeffrey Friedman, Telling Pictures, 2000



were to a certain degree already homophobic, which allowed for the practices and policies examined in this paper to be established and thrive, consolidating in turn the underlying homophobic feelings of the said societies.

In Germany, for instance, Paragraph 175 criminalising sexual encounters between men had existed since 1871. Reportedly, before the turn of the century, convictions on homosexuality charges reached an average of 500 per year. As expected, this official persecution created ample space for attempts of blackmail and extortion, consequently the pressure on homosexuals took different forms.<sup>80</sup> On the other hand, as mentioned earlier, during the Weimar Republic homosexuals had acquired visibility, which meant for them a certain degree of freedom. However, this enhanced visibility was certainly annoying non-sympathisers who wished for a return to traditional values.<sup>81</sup> Consequently, when the Nazis came to power presenting themselves as moral crusaders, they didn't really launch the persecution of homosexuals; they rather reinforced it, and took it to the extreme, with the acquiescence of society who believed homosexuals to be criminals, as well as abnormal.

In brief, homosexuals couldn't be seen as real victims of Nazi injustice, because they were seen as criminals. It is not by accident that neither the Nuremberg trials nor those of medical doctors dealt with any crimes committed against homosexuals as such.<sup>82</sup> What is more, as Paragraph 175 remained in force until 1969, it was only logical that homosexual survivors be particularly reluctant to tell their stories. Not only were they stories of shame, but they could put them in a precarious position vis-à-vis the law.

Hence, in the case of homosexual victims of the Nazis, on the one hand there was no one interested in hearing their story, and on the other, there were not many who would dare to come forth and tell this story. The homophobic feelings of the receivers and the fear of the potential emitters kept the message "in the closet".<sup>83</sup>

The same is true in the other two cases presented in this essay. In the case of the purges from the US federal government, for instance, as Johnson reports, none of the homosexuals tried to fight the case in court, most of them resigned when confronted with the facts against them. Consequently, there were no dramatic confrontations between the accusers and the accused that would make headlines, so the media had no interest in reporting on such cases, and rather focused on the persecution of alleged Communists.<sup>84</sup> Again, the negative attitudes towards homosexuality made it a great shame to be involved in such a case, urging victims to opt for a quiet withdrawal instead of a confrontation. Also, let us not forget that

<sup>80</sup> BURLEIGH, M. and WIPPERMAN, W., *The Racial State...*, op. cit., p. 184.

<sup>81</sup> BERGEN, D. L., *War & Genocide, A Concise History of the Holocaust*, op. cit., p. 22.

<sup>82</sup> GRAU, G., "Final Solution of the Homosexual Question? The Antihomosexual Policies of the Nazis and the Social Consequences for Homosexual Men", in BERENBAUM, M. and PECK, A. J. (Eds.), *The Holocaust and History...*, op. cit., p. 339.

<sup>83</sup> Concentration camp survivor Heinz F. gives an eloquent picture of the general attitude towards such stories. Explaining why he remained silent for almost 60 years, he describes how every time he would get over his shame and try to speak about his sufferings to someone, the answer he would get was of the sort "leave me alone with these stories of yours, that's over now, it's the past". Testimony taken from interview granted to Klaus Müller, of the U.S. Holocaust Memorial Museum, Washington D.C., ..., op. cit.

<sup>84</sup> JOHNSON, D. K., *The Lavender Scare...*, op. cit., p. 5.

several American states retained anti-sodomy laws; hence homosexuals were indeed considered criminals in some parts of the country.<sup>85</sup>

### 3.2. *The homosexualisation of the evil - the vilification of the homosexual*

We have already seen how homosexuals have been depicted as ruthless sexual predators, corrupters of youth, as “undesirables”. In a way, the homosexual is the ultimate social “other”. It is common knowledge that no popular hero has ever been acknowledged as homosexual, and vice versa.<sup>86</sup> But what if we are talking about “villains”?

Let us take the first case presented here, persecution under the Nazi regime, as it is connected to the most widely known of the three historical facts, the one recognized as atrocious by the vast majority of humanity. Hitler and the Nazis have been accused with, and proven guilty of, anti-Semitism, crimes against humanity, mass murder; in a way, Hitler and the Nazis represent evil. Surprisingly, some attribute yet another “evil trait” to the same group of criminals: homosexuality.

In *The Pink Swastika, Homosexuality in the Nazi Party*, Scott Lively and Kevin Abrams purport that homosexuality was rampant in the Nazi party and that Hitler himself had had homosexual encounters, either for money as a young man or for pleasure.<sup>87</sup> The writers present their book as a “documentation of homosexuals as the true inventors of Nazism and the guiding force behind many Nazi atrocities”.<sup>88</sup>

So homosexuals were not victims of the Holocaust; to the contrary, they were the driving force behind it. Homosexuals simply “cannot be victims”. In his “Closing thoughts” Scott Lively states “Such people have been persuaded that ‘gays’ are society’s victims in need of protection. But the ‘gay’ movement I have seen and investigated is neither benign, nor are its members ‘victims’. It is vicious, deceptive and enormously powerful. Its philosophy is Machiavellian and its tactics are (literally) Hitlerian”.<sup>89</sup>

The above authors cited are not the first to write on the presumed homosexuality of Hitler and his close collaborators. In his *Hidden Hitler* (2001), historian Lothar Machtan argues that Hitler led a secret gay life.<sup>90</sup> Indubitably, Adolf Hitler was an

<sup>85</sup> For an overview on existing anti-sodomy legislation see INTERNATIONAL GAY AND LESBIAN HUMAN RIGHTS COMMISSION, *Sodomy Fact Sheet: A Global Overview*, on the IGLHRC website, <http://www.iglhrc.org/news/factsheets/sodomy.html>.

<sup>86</sup> For instance, the views that Abraham Lincoln and the historical equivalent of Robin Hood might have been homosexuals have been steadfastly, and *a priori*, denied by the general public.

<sup>87</sup> LIVELY, S. and ABRAMS, K., *The Pink Swastika, Homosexuality in the Nazi Party*, Veritas Aeterna Press, Sacramento, 2002., pp. 151-157.

<sup>88</sup> *Ibid.*, Preface. It is not in the scope of this essay to elaborate on the credibility of the cited book. Suffice it to say that, in the opinion of the author, the aversion of Lively and Abrams towards homosexuality and the gay rights movement is so evident in their writing, that their work cannot be considered as objective. What is more, Lively’s 1997 Article “How American ‘gays’ are Stealing the Holocaust”, in *The Poisoned Stream*, Founders Publishing Corporation, might be pointing to another reason for this attack on homosexuality.

<sup>89</sup> *Ibid.*, p. 341.

<sup>90</sup> Lively and Abrams quote Machtan extensively. However, his argument does not necessarily point at Hitler’s presumed homosexuality as being at the root of his evil. See SIGNORILE, M., “Outing Hitler”, <http://www.signorile.com/articles/nyp118.html>

intriguing personality, and one whose actions marked world history, so it is only normal that people try to analyse him. However, mentions of his presumed homosexuality can be taken to present it as forming part of "Adolph the villain".

It is interesting to note that Lively and Abrams go further than Hitler and Nazism, to present a list of the top ten serial killers in the USA, eight of whom were reportedly homosexuals.<sup>91</sup> Immediately preceding that reference is a testimony by a former FBI agent stating that "*when a deceased male is found nude or partially clothed and the murder involves "over kill" (i.e. much more violence than necessary to kill) and/or multiple stab wounds [...] and/or mutilation [...] the investigator begins with the supposition that the crime is a homosexual-related murder*".<sup>92</sup> From this the above authors conclude that the perpetrator is a homosexual; only they are wrong. In this classic anti-gay hate crime description, it is the victim who is the homosexual and the perpetrator the heterosexual.<sup>93</sup> At this point it should be noted that the point of this reference is not to present a counter-argument, but to note the negative depiction of homosexuals, which in this case would present homosexuality as inextricably linked to evil in many of its personifications.

To take a more recent painful memory, that of the September 11 attacks on New York, not only have homosexuals been mentioned by some as among those to blame for the attacks,<sup>94</sup> but many references to the person presented as the leader of the kamikaze terrorists, insinuated he was a homosexual. Indeed, Mohamed Atta has been presented as a misogynist, someone who even forbade the presence of women at his funeral, and a person described by his own father as "not virile enough to do such a thing".<sup>95</sup> Clearly, the people who reproduced such views were not thinking

<sup>91</sup> LIVELY, S. and ABRAMS, K., *The Pink Swastika...*, *op. cit.*, p. 333.

<sup>92</sup> *Ibid.*, p. 332.

<sup>93</sup> As confirmed by the Australian Institute of Criminology, what is particularly alarming as regards anti-gay crimes is the brutality of the assaults. Especially when the victims are gay men or transgender persons, the violence can be overwhelming. Research has shown that gay-hate related incidents are significantly more likely to involve "overkill" or arson. It is not uncommon to find victims of anti-gay violence repeatedly stabbed to death, bludgeoned with heavy objects or lynched to death. Many of the incidents involve savage beatings, multiple stabbings, mutilation and/or dismemberment. Also, there have been cases where the victim was burnt alive or immediately after being beaten to death. See, AUSTRALIAN INSTITUTE OF CRIMINOLOGY, *Gay-Hate Related Homicides: An Overview of Major Findings in New South Wales*, on the AIC website, <http://www.aic.gov.au/publications/tandi/ti155.pdf>, June 2000. See also, MINNESOTA GAY HOMICIDE STUDY, *Recognizing Gay Homicide*, on the MGHS website, <http://www.mngayhomicide.org/findings.html>, October 1999. For more on anti-gay violence, see TSINONIS, N., *Still Burning Witches - Violence on the Basis of Sexual Orientation/Gender Identity - The Facts, the Laws and the Question of Protection*, Marangopoulos Foundation for Human Rights, Ant. N. Sakkoulas, Athens, & Bruylant, Brussels, 2003.

<sup>94</sup> Rev. Jerry Falwell, of the Thomas Road Baptist Church, on the broadcast of the US television program "The 700 Club", on 13 September 2001: "[T]he pagans and the abortionists and the feminists and the gays and the lesbians who are actively trying to make that an alternative lifestyle, the ACLU, People for the American Way —all of them who have tried to secularize America"... "I point the finger in their face and say 'you helped this happen'". Sources: ABC News.com, *Falwell Suggests Gays to Blame for Attacks*, [http://abcnews.go.com/sections/politics/DailyNews/WTWC\\_Falwell010914.html](http://abcnews.go.com/sections/politics/DailyNews/WTWC_Falwell010914.html), 14 September 2001;

CNN.com/U.S., *Falwell Apologizes to Gays, Feminists, Lesbians*, <http://www.cnn.com/2001/US/09/14/Falwell.apology/>, 14 September 2001.

<sup>95</sup> SIGNORILE, M., "Outing Hitler", *op. cit.*

of the extreme Islamist context in which Atta belonged and of its depreciation of women.

However, it is not the purpose of this paper to elaborate on the sexuality of Atta, or Hitler, or any other major or less important criminal. Elaborating further on the issue would go beyond the scope of this essay; the element to retain here is that homosexuals have been linked to major atrocities, including the Holocaust, only not as victims, but as the perpetrators, who —what is more— formed a powerful and “degenerate” network. Examining the reasons behind such views would require a whole separate research project; however, one question inevitably arises: Would anyone care to prove that any of the world’s criminals are or were heterosexual? And if so, would this be considered as a trait enhancing their evilness?

The above is not an exhaustive list of negative references involving actual or presumed homosexuals. Nor is it important whether the “accused” are or were homosexuals or not. It is however alarming how readily the term “homosexual” is combined with “evil”, “wrong”, “corrupt”. And it doesn’t take scientific research to know that rejection of homosexuality is common in most societies over the world.

As stated by Carolyn J. Dean, with reference to the Holocaust, and based on Goldhagen, “the genocide of Jews was possible in Germany because ordinary Germans had been conditioned by anti-Semitic rhetoric into becoming a nation of murderers”.<sup>96</sup> We could use this “formula” to try and understand the omission of the sufferings of homosexuals from collective memory. In fact, the widespread negative feelings towards homosexuality and the official policies and practices condemning it are “conditioning” societies, inciting them to homophobia. So when the persecution comes, whether in the form of extermination, arbitrary dismissal or imprisonment and torture, the given society sees it as acceptable and justified. And so it stays in its memory.

Homosexuals are often seen as “dangerous”, “sexually aggressive”, and “paedophiles”; as we have seen in this essay, also as “traitors”, “degenerates useless to the country” and “a shame to a virile nation”. As presented, such views expressed by leaders were most probably shared by the respective societies, and have been consolidated by legislation outlawing homosexual relations. Hence, it is only normal that homosexuals be recorded in public memory as “bad”. Hence, if they were bad, how can they be victims? Innocent victims suffer, guilty criminals pay. Victims can be heroes, criminals don’t deserve recognition.

It has been said that what collective memory retains depends on what is on whose agenda. As Carme Molinero has noted, “in mass society, collective memory is to a large extent determined by public policy on historical memory”<sup>97</sup>. Apparently, the powerful agendas so far never included the homosexual issue. Or maybe not enough victims have so far managed to overcome the shame attached to homosexuality so as to come forth and make their story heard.

<sup>96</sup> DEAN, C. J., “History Writing, Numbness, and the Restoration of Dignity”, *History of the Human Sciences*, Vol. 17, Nos. 2/3, pp. 57-96.

<sup>97</sup> MOLINERO, C.: “Lugares de memoria y políticas de memoria”, in GÓMEZ ISA, F. (Dir.): *El derecho a la memoria*, Instituto de Derechos Humanos-Diputación Foral de Guipúzcoa, Alberdania, Zarautz, 2006, pp. 295 and ff.

However, and most fortunately, there are some indications of progress in this domain.

### 3.3. *Steps towards recognition*

As established by the recently adopted Basic Principles and Guidelines on the right to reparation, reparation for victims of human rights violations can also come in the form of “*satisfaction*, which can include complete public disclosure of the truth [...], an official declaration or court ruling that restores the dignity, reputation and rights of the victim, a public apology, commemoration of or tributes to the victims, a precise account of the violations in the sphere of education and in teaching material at all levels...”.<sup>98</sup>

Such satisfaction has so far been given to several innocent victims, such as the Jewish victims of the Nazis, or people persecuted as political opponents by totalitarian regimes, etc. Some of them have even obtained financial reparation, while others have seen their oppressors brought to justice. But most importantly, these victims have gained the right to speak of their sufferings in dignity. Because they are innocent, they have been innocent from the beginning, and now everybody knows it. Their anguish is gratified through recognition in the form of monuments, apologies, official acknowledgement. Their past carries a lot of pain, but no shame. Surprisingly, but fortunately, some timid steps of recognition of the sufferings of homosexuals can be referred to.

Following years of lobbying by gay-rights organisations, different cities around the world have erected or are planning to erect memorials dedicated to the gay victims of the Holocaust. These include, Amsterdam, Berlin, New York, San Francisco and Sydney. Of course, it is not a coincidence that these cities are known for their progressive civil societies and strong gay-rights movements. It should be noted that some of these monuments aspire to encompass all people who have been victimised on the basis of their sexuality, such as the Amsterdam Homomonument, in the shape of a pink triangle. It should not be disregarded that it was not without resistance that these monuments were established.<sup>99</sup>

Furthermore, in a very important, albeit rather belated, move of official acknowledgement, in 2002 the German government released an official apology to the gay community. By a unanimous vote on 7 December, the *Bundestag* stated that “*the parliament is convinced that the honour of the homosexual victims of Nazism*

<sup>98</sup> *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law*, Resolution 60/147 of the UN General Assembly, 16 December 2005, principle 22.

<sup>99</sup> For an interesting account of attempts to establish such a monument in Amsterdam that met with resistance by the public, see GOLDMAN, J., “Homomonument”, *GIBTO, An Encyclopedia on Gay, Lesbian, Bisexual, Transgender and Queer Culture*, on the GLBTQ website, <http://www.glbtc.com/arts/homomonument.html>, 2002. About the gay memorial of Sydney, symbolically erected in close proximity to the Jewish museum, and the importance of this proximity, see the dedication speech by the Honourable Justice Marcus Einfeld, on the New South Wales Council for Civil Liberties website <http://www.nswcccl.org.au/docs/pdf/Marcus%20Einfeld%20Speech%20G&L%20Memorial%202001.pdf>

See also the Memorial’s webpage <http://www.pridecentre.com.au/memorial/default.html>

*must be rebuilt and apologizes for the harm done to homosexual citizens up to 1969 in their human dignity, their opening out and their quality of life.*"<sup>100</sup>

In the Spanish case, it is very encouraging that at least one of the victims of official homophobia under Franco's regime managed to obtain reparation as a victim of anti-homosexual discrimination. Having spent 3 years in the penal colony at Tefia, Juan Curbelo Oramas is the first homosexual ex-prisoner to obtain from the Canaries' Government the same reparation given to political prisoners of the Franco regime.<sup>101</sup> Moreover, just before the end of 2004, the federal government approved a declaration in "acknowledgement of all those people who, during the Franco regime, were persecuted or incarcerated due to their sexual orientation or identity, and whose suffering has not yet been acknowledged". The next logical step was the opening of the way for requests for reparation.<sup>102</sup>

The Spanish government has also participated in activities paying tribute to the gay victims of Franco's regime, offering the invaluable official support to the efforts of gay-rights activists to bring the sufferings of homosexuals out of oblivion and into the sphere of public memory.<sup>103</sup>

Clearly, the short references above constitute important steps forward, considering the still unfavourable situation of homosexuals in most societies. It goes without saying that they are not unique; with the progressive strengthening of the gay rights movement in different parts of the world, references to the sufferings of homosexuals are multiplying. However, as mentioned at the beginning of this essay, it is still mainly the gay-rights activists and researchers who deal or care to deal with them.

Indeed, how many books, articles, films, documentaries or other source of relevant information can the average citizen come across without specific research? How many educational institutions have included such references in their curriculum? How many people have had a chance to notice a monument dedicated to the homosexual victims of injustice? In two words, how many people remember it all happened? The author prefers to let the reader judge based on his/her own experience.

#### 4. Conclusion

What has been attempted in this article is to present a reality that not many people know or fully comprehend. The victimization of homosexuals by the Nazis, their purge from the US federal government in the 50s, and their persecution during

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<sup>100</sup> See "German Apology to Gays for Nazis", <http://www.globalgayz.com/german-news00-02.html>  
See also "Germany Votes to Pardon Gays Persecuted by Nazis", <http://www.nytimes.com/reuters/world/international-germany-nazi-gays.html>

<sup>101</sup> ARNALTE, A., *op. cit.*, pp. 101-102.

<sup>102</sup> See "Indemnización para los Presos Homosexuales del Franquismo", at <http://www.gaybarcelona.net/actualidad/062005/5.htm>. See also *El País*, "El Congreso Pedirá una Indemnización para los Gays, Lesbianas y Transexuales Presos en el Franquismo", *El País*, 12 November 2004.

<sup>103</sup> EUROPA PRESS, "El PSOE y Colectivos Gays Rinden Hoy Homenaje a los Homosexuales Represaliados por el Franquismo", at <http://www.lukor.com/not-soc/cuestiones/0410/30092801.htm>, 30 October 2004.

the dictatorship of General Franco in Spain have in general been ignored by historians and the public. Relative references, whether academic, monumental, artistic or even trivial, are scarce, while the multitude of those referring to the named historical periods focus on other victims. In fact, homosexuals are listed among the "forgotten victims" of such historical wrongdoings, their sufferings having been excluded from collective memory.

However, as has been presented through the three chosen but not unique examples above, homosexuals have indeed been severely victimised, in reality only because of their nature, and in different ways. They have been named a hurdle to the expansion of the "Aryan nation", labelled bad security risks prone to involvement in espionage, and tagged a disgrace to a macho society. The form of their suffering differed in each case, ranging from dismissal, to imprisonment and all sorts of abuse and torture, also resulting in death.

As to the profile of the average target for persecution, there were differences from one case to another. The Nazis almost exclusively targeted males of German citizenship; the US federal government "cleansers" were after both male and female homosexuals of higher educational and social background; while Franco's "moral watchdogs" in theory persecuted all gay men and transsexuals, but usually only prosecuted the weak, those of lower social and financial status. In brief, if all the cases are put together, no group was spared.

In terms of impact to the wider homosexual community, it should not be disregarded that the culture of fear and mistrust that was quick to take over in all three cases severely affected the lives of millions of homosexuals. The official policies of persecution, in two of the cases supported by specific legislation, gave everyone the right to point the finger at anyone, arbitrarily taking up the role of the moral judge. Clearly, besides the severe harm done to the immediate victims, the negative impact as to the development of the whole homosexual community was enormous. As with the other victims in the three cases presented, those immediately connected to each case by public conscience, the persecution also served to send a strong message to those who were lucky, or powerful, enough to escape arrest. As presented earlier, the aim of the persecution in each case was not to deal with the individual cases, but to "dismantle the evil network", to eradicate homosexuality from the given society. Thus, it should not be wrongly deduced that it was only male homosexuals who suffered as a result of the abovementioned cases of persecution, or that those who escaped arrest were left intact. Severe harm was inflicted upon all members of the homosexual community, whether directly or indirectly.

Lesbians, for instance, were in their majority spared the Nazi concentration camps or Franco's prisons; however, their lives dramatically changed with the beginning of both dictators' "moral crusades"; bars and meeting places were shut down, unfeminine attitudes were immediately condemnable, any notion of freedom disappeared. The stigma of shame returned even stronger than before, forcing lesbians to hide, often into heterosexual marriages. It should be stressed that this inflicted a double injury on their personalities; because such lesbians were not only women suppressing their sexuality because of fear, but also women forced to assume the role of the wife and bearer of children traditionally reserved to females by male-dominated societies; clearly, a double blow on a person's freedom. In practice,

although most lesbians were spared great physical harm, they did not escape the severe emotional damage of being forced to live under a false identity.

The same is true for some virile homosexual or bisexual men who could pass for heterosexuals, and, if not arrested during a raid or turned in by someone, may have to a certain extent stayed safe from physical harm, some of them even having got married to women and kept a low profile. However, the forceful suppression of one of the most important traits of one's personality, namely sexual identity, it doesn't take particular knowledge of psychology to understand, can practically ruin a person's life. Forcing oneself to fit the profile required for one's gender by a given society, and this to avoid arrest, imprisonment, torture and/or death, imposes an enormous burden on one's self and creates great confusion about one's identity. Hence, in reality, those homosexuals who escaped persecution in each case were not necessarily much more fortunate than the rest.

As the above references hope to have demonstrated, the harm inflicted on homosexuals because of their identity at different times in modern history, which was the period examined here, is indisputable. However, their suffering has yet to be acknowledged in the conscience of the wider public. Despite the increasing visibility of homosexuals in recent times and the progress achieved in the struggle for equal rights, the veil of shame and guilt covering anything and anyone connected to homosexuality has yet to be lifted. Partly because of discriminatory legislation at the time of persecution, but mainly due to the omnipresent social rejection of homosexuality, the homosexual victim has still not been recognised as "innocent" as regards public remembrance. Apparently, besides its effect as a hurdle in interpersonal relations, homophobia can also affect the forming of public opinion as regards the definition of a victim.

As for the importance of the claimed inclusion in collective memory, it goes without saying that it is not so much about financial reparations, and not at all about claiming exclusivity as the only victims in each particular case. Rather it is about claiming, or reclaiming, the dignity due to all innocent victims. As mentioned right at the beginning of this paper, remembrance of past wrongdoings can help avoid their repetition. It can also help restore the victims in the eyes of the rest. Acceptance that the subjects of discrimination, imprisonment, torture, or even extermination, were not "criminals being rightfully punished" but clearly victims of an irrational policy, can effectively raise the veil of shame that is still suffocating homosexuals. As aspired by the relatively recent official gestures of recognition referred to earlier, attributing to homosexuals the dignity all humans deserve will help take all of us forward.

What is more, recognition of the harm inflicted on homosexuals for no good reason, will also represent an important step forward as regards the community's claim for equal rights. By taking as a basis that it is wrong to see homosexuals as criminals—or "immoral", or "corrupters" or "evil" and so on—and by condemning those who have done so in the past, society will be able to see that there should be equal rights for all, regardless of sexual orientation. Hence, inclusion of homosexual victims of the past into collective memory can be a powerful weapon against homophobia, sadly still rampant in many modern societies.

For, despite the advancement of human rights issues, and the progress achieved in matters involving discrimination and hate, such as gender and racial issues, despite



the omnipresent talk of equality and tolerance, homosexuals have yet to be accepted as individuals who have dignity and deserve respect. Lesbians, gay men, bisexuals and transgender people from all over the world continue to have their fundamental rights violated, solely because of who they are. What is more, they continue to have their very human nature questioned. As was the case in the past, many ordinary and less ordinary people still consider them “abnormal”, “unnatural”, “freaks”, many still believe they deserve to be treated with contempt and violence or that they should be rendered extinct. Remembering that homosexuals have been through all that before and that this was wrong can help spare the new generations, regardless of their sexual orientation, the repetition of past mistakes.

It is often said that history tends to repeat itself. It is well known that we study history in order to learn from it. It is also well known that it is mostly from our mistakes that we learn. When collective memory starts to “remember” that persecuting homosexuals was a mistake, all of us who form this collective memory will have become wiser and better prepared in our quest for a brighter future.



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## Socrates

At the beginning of the nineties, there was an expectation within the human rights community that the next decade would be a period of consolidation for the international human rights regime. This did not happen. In fact, the human rights regime underwent dramatic changes in response to new circumstances. We have tried to highlight both the achievements and the challenges ahead in this Manual, the result of a joint project under the auspices of HumanitarianNet, a Thematic Network on Humanitarian Development Studies led by the University of Deusto (Bilbao, the Basque Country, Spain), and the European Inter-University Centre for Human Rights and Democratisation (EIUC, Venice, Italy).



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