Chapter 5 PRECEDENTS AND PROSPECTS - THE REALISATION OF HUMAN RIGHTS IN REGIONAL SYSTEMS OUTSIDE AFRICA

Comparison is made here with other regional and sub-regional systems. Some of them already provide for extensive realisation of rights. This is the case particularly with the European and Inter-American systems, to which most of this chapter is devoted. In other regions, such as Asia and the Middle East, regional human rights sytems have not been developed. What follows here is not a detailed analysis of each of these systems. Rather, the purpose is to focus on the extent to which rights have been realised in the supra-national sphere under the auspices of inter-governmental organisations, and methods used and mechanisms created to ensure this. Attempts at erecting new systems will also be under consideration. The relevance of these experiences for the African human rights system will be highlighted, or is implicit.

5.1 The European system

Discussions about the European human rights system usually centre around the European Convention for the Protection of Human Rights and Freedoms ("the European Convention").[1] An abundance of literature already exists about the Convention and its two main bodies, the European Commission of Human Rights ("European Commission") and the European Court of Human Rights ("the Court").[2] But this convention and these institutions are by no means the only institutional mechanisms created to ensure the realisation of human rights in Europe.[3] In fact, they are, like the CCPR, directed only at **civil and political rights**.[4] So, too, is the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment ("the ECPT"), and its implementing body, the European Committee for the Prevention of Torture. This first "line of defence" will be discussed briefly.

A second group of rights, directed at the **socio-economic** position in European states, developed later. A different regime was established for their monitoring under the European Social Charter. The role and impact of this level of human rights guarantees will also be explained.

The dependence of human rights on political stability and peace between states has been accepted as the point of departure for a system **linking human rights and security** in Europe, under the Organisation for Security and Co-operation in Europe ("OSCE"). This mechanism forms a third trench in the defence of human rights.

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1 Signed on 4 November 1950, entered into force on 3 September 1953. The text is reprinted in numerous sources, see eg Brownlie (1988) at 320. See also the eleven Protocols adopted thereto.

2 See eg Van Dijk and Van Hoof (1990), Macdonald *et al* (eds) (1993), Harris *et al* (1995) and Kempees (1996).

3 The discussion here is not exhaustive of all human rights conventions and bodies in Europe. For example, the Convention on Human Rights and Bioethics is not discussed here. For a full text, see (1997) 39 *ILM* at 817.

4 With the possible exception of the right to education (usually considered a socio-economic right) in Protocol no 1. As the duty on states parties in terms of the Protocol is not to promote or fulfil the right, but to respect and protect it, it also fits in the category of civil and political rights. The relevant part of the article (art 2) reads as follows: "No person shall be denied the right to education".

Finally, closer **economic co-operation** has increased the role and influence of European Community law in all European member states. The Court of Justice of the European Communities is playing an ever-increasing role in the construction of a just Europe. Matters pertaining to human rights concerns cannot be divorced totally from "economic" issues. By incorporating human rights concerns into its jurisprudence, the European Court of Justice has gradually created a fourth line of defence of human rights in Europe.

5.1.1 Civil and political rights under the European Convention

5.1.1.1 Deciding on ways of realising rights in Europe

The aftermath of the Second World War saw inroads into state sovereignty in Europe, as a number of regional organisations were formed. An effort was immediately launched to adopt a global human rights instrument under UN auspices. In the light of the difficulties experienced to reach agreement on the text, it was decided to adopt a "hortatory declaration" as a starting point, to be followed by a legally binding document.[5] Soon after the adoption of the Universal Declaration in 1948 it became clear that reaching agreement on a legally binding embodiment of the Declaration would be a protracted process. This process was accelarated at the regional level and culminated in the adoption of the European Convention as the "first steps for the collective enforcement of certain of the rights stated in the Universal Declaration".[6]

Not only the atrocities of the recent war, but also the impending threat of communism, underscored the value of democracy and the protection of human rights to European states and served as a basis for co-operation. The most important of these bodies was the Council of Europe. Its Statute was signed on 5 May 1949, highlighting the recognition of human rights both as a declared purpose and

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5 See Buergenthal (1995) at 29.

6 Preamble to the European Convention.

as a precondition for membership.[7] At the first session of the Council of Europe (August 1949), Teitgen of France proposed the establishment of an organisation to ensure human rights protection collectively for all Europe.[8] Within a relatively short time, the European Convention was finalised and signed (on 4 November 1950), introducing two revolutionary features which flew in the face of traditional concepts of state sovereignty: **individual complaints** and **binding court decisions**. The willingness of states to transfer sovereignty (albeit to a limited extent) accounted for the swiftness with which agreement was reached on principle and detail.

This willingness was by no means universal. Several delegations attempted to obstruct various aspects of the proposed system. Underlying tensions are apparent from a perusal of the deliberations during the negotiating process that led to the adoption of the European Convention, especially in relation to an appropriate enforcement mechanism. From a current African perspective, it is instructive to investigate the reasons forwarded against the establishment of a court, particularly allowing for individual petition to the Commission (and to the Court). Some of the arguments and counter-arguments were the following:

i *Redundancy*[9]

The institution of a court is not a priority in most of the European countries, it was argued, seeing that in most of them "freedom has been, traditionally, better defended than in any other part of the world".[10] Another argument on redundancy was that a Commission would serve as a sufficient guarantee, rendering a court "superfluous".[11] Teitgen answered this argument by drawing attention to the fact that a report by the Commission is not the same as a legally binding court decision.[12]

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7 Art 3 of the Statute of the Council of Europe reads as follows: "Every Member of the Council of Europe must accept the principles of the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms ...".

8 See in general Council of Europe (1979) vols I to VIII. References to deliberations are to this source.

9 See ch 8.1.11 on the argument that establishing an African Court on Human and Peoples' Rights will cause unnecessary and costly duplication.

10 Fayat (Belgium) in vol I at 90.

11 Rolin (Belgium) in vol II at 154.

12 Vol II at 172.

Only a court will illustrate the resolve of European countries to respect fundamental rights, he continued, "not by simple Recommendations appearing in the newspapers, but by legal verdicts which shall have the authority of a Court in the conscience of public opinion".[13]

Another argument based on considerations of redundancy was that there already was a court in place, the PCIJ.[14] Teitgen answered this contention by showing that it would be inappropriate to rely on an international organ to adjudicate on issues arising in Europe. The fact that the PICJ was made up of all nationalities also meant that Europeans would have to submit disputes to judges "belonging to countries whose political structures, ideals and morality are different from those which constitute our common heritage".[15] The important development of a common European system was regarded by some to be undermined by recourse to a court outside Europe. A representative from Italy, Dominedo, formulated this concern: "Appeal to a Court whose competence is extra-European does not contribute to the progressive formation of European unity."[16]

ii Anti-democratic nature

Basing his view on experience in the United States, Ungoed-Thomas described individual petition as "the most anti-democratic" procedure that could possibly be conceived.[17]

iii State sovereignty violated[18]

Akan (Turkey) saw no need to allow an individual to bring a case against his own state before a supra-national court: "Before a united Europe can be achieved, it will be very difficult to obtain from national Parliaments, in spite of their concern for the protection of human rights, their

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13 Vol II at 180.

14 See statement by Rolin (Belgium) vol II at 148. In fact, the ICJ replaced the PCIJ when the UN Charter was adopted in 1945 (see art 92 of the UN Charter).

15 Teitgen (France) in vol I at 288.

16 Vol II at 158.

17 Vol II at 168.

18 Refer to ch 8.1.1 on "state sovereignty as main obstacle" to acceptance by states of the proposed African Court on Human and Peoples' Rights.

approval on this point, because these Parliaments and their national courts would be subjected to the control of a supra-national body".[19] A representative of the United Kingdom (Maxwell-Fyfe) responded that the establishment of a court would mean some voluntary surrender of sovereignty: "the sovereign right to suppress liberty and democratic institutions".[20] Like all treaties, he added, a surrender of some sovereignty is implied. Creating a court would be a "new departure", and an "international assurance of what ordinary people want".[21]

iv Public embarrassment[22]

Rolin (Belgium) motivated his view that individual petition to a court would be unacceptable to states, by referring to the potential danger of a finding of a "particularly degrading character" against a state.[23] He also warned against the "serious political implications" of such a system.[24] A human rights system not backed by effective enforcement would be hypocrisy, retorted Bibault (France). Without a minimum means of execution, a proclaimed European law of human rights "would be vain and the legislator useless".[25] A system of human rights protection "without a Court is something worse than the absence of law".[26]

v Opposition to world order

The post-war era was one of optimism and a belief in a new world order based on universal values and peace. Criticism was expressed that a regional system would gravitate into the opposite direction. Although the majority of the delegates were of the opinion that the European project

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19 See vol II at 164.

20 Vol I at 122.

21 *Ibid.*

22 This argument is closely linked to the previous one, as it is also directed at placing domestic concerns beyond international scrutiny.

23 Vol II at 154.

24 *Ibid.*

25 Vol II at 162.

26 *Ibid.*

aimed at creating a European legal order, they did not consider the European system of law as presenting a threat to the evolution of an international system.[27]

vi Political manipulation[28]

A fear expressed particularly in relation to individual complaints directed to the Commission (and, then, to the Court) was that individuals may be motivated by political goals. Ungoed-Thomas made the following intervention: "It will be open to politically inspired application. This is the kind of opportunity which invites action by those on the extreme right and those on the extreme left, with whom none of us here have sympathy".[29]

vii Fear of being overrun by applications

Another argument raised against individual petition was that the Commission (and Court) would be overrun by "shoals of applications".[30]

From the discussion that follows, it will transpire to what extent these concerns have indeed become realities in the development of the European human rights system.

5.1.1.2 A gradual process

The present system of human rights protection under the Council of Europe is generally recognised as the most comprehensive and most frequently utilised of the regional systems, if not of all supra-national human rights systems. But the present system was not put into place overnight. A gradual evolution saw the development of the present features of the system, which are as follows:

- Two main institutions, the Commission and the Court of Human Rights, are functioning.

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27 Vol II at 172 (*per* Teitgen).

28 See, in this regard, the comments of some OAU member states on the "exceptional jurisdiction" provided for the Cape Town proposal for an African Court on Human Rights (ch 7.1.8).

29 Vol II at 188.

- Accession to the European Convention is a political precondition for membership of the Council of Europe.
- The Court has jurisdiction in respect of all contentious disputes.
- Individuals may complain to the Commission about the alleged violation of their rights.
- Aggrieved individuals may participate in the proceedings before both the Commission and the Court.
- In most instances, an aggrieved individual may decide to refer a case to the Court.

These features overlap along the following historical route:

i Institutional evolution

The European Convention was adopted in 1950. Ten ratifications were required for its entry into force.[31] This condition was met in three years, and the Convention turned into force in 1953. The Commission started functioning soon thereafter, but the Court was only established in 1959. The delay was due mainly to the fact that the Convention made the acceptance of the Court's jurisdiction optional.[32] In terms of the Convention, the Court would only be established once eight states have accepted its jurisdiction.[33] In 1960, the Commission referred the first case for the Court's consideration, leading to its first judgment on 1 July 1961, more than ten years after the Convention was adopted.[34] Another case was filed in the same year.[35] Thereafter, five years lapsed

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30 Vol II at 188.

31 Art 66(2) of the Convention. See eg Van Dijk and Van Hoof (1990) at 2 (for a brief history).

32 See art 46 of the Convention.

33 Art 56 of the Convention.

34 The *Lawless* case, Series A 3, judgment of 1 July 1961 on the merits. See also Series A 1 and A 2, dealing with preliminary objections and procedure.

35 The *De Becker* case, Series A 4, judgment of 27 March 1962.

before the next case reached the Court.[36] Judgment on the merits of that case was delivered only in 1968.[37]

The initial trickle of cases stands in stark contrast to the constant stream that has been gathering in volume since the early 1980s.[38] The number of annual applications to the Commission exceeded 500 for the first time in 1970, and passed the 1 000 mark in 1988. By 1994, the number of applications received yearly stood at 2944. If the Court's work from 1959 to 1994 is divided into two periods, a similar contrast is noted. In the first period of eighteen years (1959 - 1976), eighteen cases were referred to the Court, and 26 judgments (on preliminary issues, on the merits and on compensation) were delivered. The second period of eighteen years (1977 - 1994) saw 488 cases being referred to the Court, with 472 judgments delivered.[39]

ii Ratification of Convention

Ratification of the European Convention is only open to members of the Council of Europe.[40] From its foundation, the Council set out to ensure that democracy and human rights are strengthened in Europe, so as to prevent the recurrence of atrocities such as those committed in Nazi Germany. Acceptance of the Council principles of "the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms" is therefore a political prerequisite for ratification of the Convention.[41] There was, traditionally, no compulsion on members of the Council to ratify or accede to the Convention. When states from the former "Eastern bloc" started joining the Council of Europe in the 1990s, the practice had already been established that Council members accede to the Convention when becoming members of the Council. This has been incorporated as a political, rather than a legal prerequisite. By 31 December 1996 40 states had

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36 Buergenthal (1995) at 135.

37 *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium,* Series A 6, judgment of 23 July 1968.

38 Based on an analysis of data in *Council of Europe Survey* (1994B) at 20 - 21.

39 Council of Europe (1995) *Organisation and Working of the Court* at 6.

40 Art 66(1) of the European Convention.

41 Art 3 of the Statute of the Council of Europe.

become members of the Council of Europe.[42] Of these states, 34 had ratified the European Convention.[43] The other six Council members had by then already signed the Convention.

iii Compulsory jurisdiction of Court

The acceptance of the Court's jurisdiction was made optional.[37] This was one of the compromises arising from the drafting process. It took from 1953 to 1959 before eight states had accepted the Court's jurisdiction.[44] All the states parties to the Convention in 1995 have accepted the Court's compulsory jurisdiction.[45] In respect of states that ratified or acceded to the Convention in the last decade, almost all accepted both the Court's jurisdiction and the individual complaints procedure at ratification or accession.[46] By 31 December 1996 all 34 states parties to the Convention have accepted the compulsory jurisdiction of the Court.[47]

iv Acceptance of individual complaints procedure

The right to individual petition does not follow automatically from a state's ratification of the Convention, but requires a declaration by a state to that effect.[48] The first state to do so was Sweden, on 4 February 1952,[49] some two years after the Convention had been adopted. In the case of other major European powers, it took much longer. The UK only accepted the right to individual petition in 1966, and France as late as 1981.[50] Today it is accepted as a political obligation that all new member states should accept the right of individuals to bring complaints against them. By 31 December 1996 all 34 states parties to the Convention have made

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42 See (1997) 22 *EurLRev* 82.

43 (1997) 22 *EurLRev* 82 at 83 – 84. Five other states have only signed the Convention. They are Croatia, Latvia, Moldova, Russia and Ukraine. The sixth state, Macedonia, ratified the Convention in April 1997.

44 See the list of declarations in (1996) 17 *HRLJ* 234.

45 See Harris *et al* (1995) at 653.

46 See (1996) 17 *HRLJ* 234.

47 See (1997) 22 European Law Review 82 at 83 – 84. Macedonia ratified the Convention on 10 April 1997, but did not immediately accept the jurisdiction of the Court.

48 Art 25(1) of the Convention.

49 See table in (1996) 17 *HRLJ* 234.

50 *Ibid.*

declarations accepting the right of individuals to claim that their rights under the Convention have been violated.[51]

v Competence of individual complainant to seize the Court

Although the idea of empowering individuals to seize the European Court of Human Rights has been raised when the Convention was drafted, it was not accepted by member states. Only the Commission or a state party was allowed to seize the Court.[52] In the drafters' view, the interests of individuals would be sufficiently defended by either the Commission, or by states (by directing complaints against other states).[53] Protocol no 9, adopted in 1990, provides individual complainants with the right to seize the Court. These provisions only entered into force after the Protocol was ratified by ten states. This happened on 1 October 1994.[54]

Under Protocol no 9 an individual has an unrestricted right to refer a case to the Court. But the Court was protected against a possible flood of individual references by the creation of a "screening" system by a three-member panel of the Court.[55] The panel may dispose of the matter only by unanimous vote.[56] If they do not unanimously decide that the case should be heard, the Court will then not consider the matter. They will reject the request for the Court's consideration if it "does not raise a serious question affecting the interpretation or application of the Convention".[57] The extension of the list of those who may seize the Court is another illustration of the greater emphasis placed on the role of the individual in international (human rights) law in recent times.[58] It also illustrates the tendency to incorporate the substantive provisions relating to procedural

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51 (1997) 22 *EurLRev* 82 at 83 – 84. Macedonia has not made such a declaration when it ratified the Convention. For a web site with information on the status of ratification of European human rights instruments, see http://www.coe.fr/tablconv/.

52 Art 48 of the original Convention.

53 See Council of Europe (1990) at 5.

54 See table of ratification in (1996) 17 *HRLJ* 234 - 235.

55 See art 48(2) of the Convention, as amended.

56 Interestingly, the panel must include the judge elected in respect of the country from which the complainant comes.

57 Art 48(2) of the Convention, as amended.

58 Sometimes referred to as the "humanisation of international law".

rights, which international tribunals apply, into the procedure of these tribunals. Under the Convention, an individual has the right of access to his or her local courts; surely this right must also apply to the Court itself.[59]

vi *Individual complainant's* locus standi *and participation*

Initially, the Convention did not provide for the participation of an individual complainant in proceedings before the Court. The individual was, for obvious reasons, involved in the process of establishing facts by the Commission. In its first judgment, the Court had to address the extent of an individual's participation in proceedings before the Court. The Court acknowledged that it is in the interests of justice to take the views of the applicant into consideration.[60] The Court also observed that it could hear individuals in terms of its own Rules.[61] In 1970, the Court held that the lawyers of the petitioner could be included in the Commission's legal team.[62] This process culminated in the Court adopting amended rules in 1983, which authorised "individuals to appear in their own right and to be separately represented in proceedings before the Court".[63] This still applies in respect of individuals from states parties that have not ratified Protocol no 9.

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59 "Equality of arms", and the right of both parties to participate in proceedings concerning them, are rights guaranteed under the Convention, but were negated in front of the Court prior to the reforms brought about by Protocol no 9.

60 See the *Lawless* case, Series A 1, judgment of 14 November 1960 (at 15: "the whole of the proceedings in the Court ... are upon issues which concern the Applicant ... accordingly, it is in the interests of the proper administration of justice that the Court should have knowledge of, and, if need be, take into consideration, the Applicant's point of view...").

61 In terms of Rule 40 (as amended), the Court may hear a witness or expert or anyone else whose evidence seems "likely to assist in the carrying out" of the Court's task.

62 See the *De Wilde, Ooms and Versyp* case, Series A 12, judgment of 18 November 1970.

63 Buergenthal (1995) at 138.

5.1.1.3 The Commission and the realisation of rights

The European Convention creates a Commission of Human Rights. It consists of a number of full-time commissioners equal to the number of states parties to the Convention.[64] Its seat is at Strasbourg, France. It was created in 1954, but started operating only in July 1955, after the requisite six states had recognised the right of individual petition to the Commission.[65]

In contrast to other human rights commissions and other non-judicial human rights bodies, the European Commission only has a protective mandate. Promotion of human rights and examination of state reports, functions which are for example central to the African Commission, are omitted from this Commission's mandate. On-site investigations and the drafting of country reports, important functions of the Inter-American Commission, also do not feature on the agenda of its European counterpart.

In principle, the Commission is a quasi-judicial screening mechanism in relation to individual and inter-state petitions. Most complaints have been directed by individuals.[66] From 1955 to 1995, over 25 000 applications have been registered.[67] The Commission receives some 6 000 applications annually, of which only about 2 000 are registered.[68]

In considering individual petitions, the Commission goes through the following steps:

- Its first, and most frequently exercised function, is consideration of the admissibility of a complaint. For this purpose, the Commission divides itself into committees of at least three members. Committees may declare petitions inadmissible, but only by a unanimous decision.

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64 Art 20 of the Convention.

65 In terms of art 25 of the Convention. See also Robertson and Merrils (1992) at 110.

66 See Council of Europe (1995b) at 7.

67 *Ibid.*

68 See Schermers and Blokker (1995) at 425.

Chambers of seven members may also decide on admissibility. Only about five percent of all registered cases are declared admissible.[69]

- After a complaint has been declared admissible, the Commission establishes the facts.
- During this process of fact-finding, the Commission must involve itself in an effort to secure a friendly settlement between the parties. It is estimated that about ten percent of cases submitted for friendly settlement succeed on that basis.[70]
- In those cases not settled amicably, the Commission draws up a report. A "report" is a finding on the question whether a Convention right has been violated or not. The finding is based on the facts found by the Commission. This decision is usually given by a seven-member chamber of the Commission. This route is followed whenever the case can be dealt with on the basis of "established case-law" or when it raises no "serious question affecting the interpretation or application of the Convention". When this route cannot be followed, the plenary (full) Commission decides whether a right has been violated or not.
- The report is then transmitted to the Council of Ministers.[71]
- Within three months of sending the report to the Council, the parties to the case, as well as the Commission, may decide to refer the matter to the European Court for its final decision. As far as the Commission is concerned, this decision is taken by a plenary session.

In considering inter-state petitions, the procedure differs in the following respects: An inter-state petition is assigned to a rapporteur, who prepares a report. From the rapporteur, the case goes directly to the plenary Commission, which has exclusive jurisdiction in such matters. By 1996, only eleven inter-state applications had been lodged with the Commission.[72] The most far-reaching was that submitted by a number of member states against Greece in 1967 and 1970, after the

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69 Approximately 90 percent of all registered cases are rejected as inadmissible (see Council of Europe (1995b) at 7).

70 Krüger (1990) *NTVM* 127.

71 On the role of the Council of Ministers, see par 5.1.1.5 below.

72 For a list, see Steiner and Alston (1996) at 594 - 595.

"Greek Colonels" had seized power and suspended democracy.[73] The Commission undertook a fact-finding mission and found that the Convention had been violated. Greece denounced the Council of Europe and the Convention, but became a member again later and ratified the Convention again.[74]

5.1.1.4 The Court and the realisation of rights

The European Court consists of a number of judges equal to the number of states parties to the Council of Europe.[75] These judges serve on a full-time basis. The seat of the Court is in Strasbourg, in the same building as the Commission.

The Court has contentious and advisory jurisdiction. The latter was only introduced in 1970, when Protocol no 2 entered into force. It is of a very limited nature and has rarely been invoked.

Within three months of the date on which the Commission submitted its report to the Committee of Ministers, any of the parties to the dispute and the Commission may refer the case to the Court. As far as the Court's consideration of these cases is concerned, a distinction should be drawn between cases referred by the Commission and a state party (on the one hand), and cases referred by an individual, an NGO or group of individuals (on the other hand).

Cases referred by states parties or the Commission are considered by a panel of nine judges. In contrast, cases brought by individuals have to be screened first. A three-member panel may, by unanimous vote, decide that the Court need not consider the matter. Such a decision may be based on a finding that the case "does not raise serious questions affecting the interpretation and application of the Convention" or that there are no other reasons that "warrant consideration by the

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73 The Commission also undertook an on-site investigation to establish the facts (see Robertson and Merrils (1992) at 112).

74 On this history, see Robertson and Merrils (1993) at 278.

75 Art 38 of the Convention.

Court".[76] If the panel makes such a finding, the Committee of Ministers decides whether a violation has occurred.

The President (or Vice-President) of the Court sits as *ex officio* member of the Court. The remaining members are drawn by lot. Up to 1993, the nine-member chamber relinquished jurisdiction in favour of a Plenary Court (consisting of all the judges of the Court) when serious questions affecting the interpretation of the Convention arose.[77] After an 1993 amendment, the Rules of Court now provide for the composition of a Grand Chamber of nineteen members in such matters.[78] This change was necessitated by the increase in the number of participating states (and judges). In exceptional cases, the Grand Chamber in turn relinquishes its jurisdiction to the Plenary Court. This is the case when "the issues raised are particularly serious or involve a significant change of existing case-law".[79]

As for the substantive matters considered by the Court, the main issues dealt with relate to articles 5 and 6, and arose in the context of a "fair trial".[80] Other aspects typically dealt with include the right to a private life and freedom of expression.[81]

5.1.1.5 The role of the Committee of Ministers

The Committee of Ministers of the Council of Europe consists of all the Foreign Affairs Ministers of the member states of the Council. It is the Council's policy-making and executive organ. As such, it is involved in various aspects of the life of the Council, which include human rights. However, the Committee remains a political body, comprised of government representatives. Almost by definition, decisions taken are motivated by their political interests, not their independent

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76 Art 48 of the Convention, as amended by Protocol no 9.

77 See eg Harris *et al* (1995) at 655.

78 Amended Rule of Court 51.

79 Rule of the European Court 51(5).

80 See the overview of case-law by Kempees (1996), covering pages 31-503 of the 839 pages on substantive provisions.

81 See again, Kempees (1996) at eg 523 - 538, 647 - 664.

human rights expertise. The Committee of Ministers of the Council of Europe plays an important role in the European human rights system. Its functions may be classified as political, judicial and supervisory.

i Political function

Its political function derives from its power to control the budget of all the Council bodies,[82] to determine the emoluments paid to the judges of the Court[83] and to elect the members of the Commission.[84]

ii Judicial function

The Committee's judicial function relates to both inter-state and individual complaints under the Convention. Inter-state applications are investigated by the Commission and may be referred to the Court for its decision. If the state complained against had not accepted the jurisdiction of the Court, the Committee decides the question of a violation of the Convention on the basis of the report drafted by the Commission. In the case of individual applications, the Committee has a complementary role. When neither the Commission nor a state party has referred a case to the Court, it is the Committee that has to decide whether the Convention has been violated.[85]

Granting a judicial functions to a political body was one of the compromises reached when the Convention was adopted. The potential conflict between political considerations and human rights concerns has largely been avoided as the Committee has "in almost all cases"[86] followed the findings in the Commission report.

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82 Art 3 of the Statute of the Council of Europe.

83 Art 42 of the Convention.

84 Art 21 of the Convention.

85 Art 32 of the Convention.

86 Gomien *et al* (1996) at 36.

iii Supervisory function

The Committee's executing function is that of supervising the execution of the Court's judgments.[87] The judgment may relate to the Court's order of "just compensation"[88] or to "general measures that involve changes of practice or of legislation to avoid repetition of similar situations of violations".[89] This function comes into play once the Court (or the Committee itself) found a violation, and also when the parties agreed to a friendly settlement before the Court. In the latter instance, the Committee oversees any promise made by a party.

The method of ensuring compliance is based on the fear of governments to be exposed publicly and repeatedly as violators of human rights. The details are as follows: The violator-state must provide the Committee with written confirmation of payment or of any other steps it was required to take. If the state does not provide this assurance (either because it has not yet paid or because it can, for some other reason, not inform the Committee of the measures taken in execution) the case will remain on the Committee's agenda. This implies that at least twice a year a representative of that state "will be required in front of the Committee to provide information, explanations or justification with regard to the state of execution".[90]

5.1.1.6 Institutional reforms

The major reform which the European system is currently undergoing envisages the phasing out of the Commission.

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87 Art 54 of the Convention.

88 In terms of art 50 of the Convention.

89 Ravaud in Macdonald *et al* (1993) at 654.

90 Ravaud in Macdonald *et al* (1993) at 654.

i Historical process

As early as 1982, the Council's Committee of Experts discussed the possible merger of the European Commission and Court of Human Rights.[91] The Swiss government introduced the idea at the political level in 1985 (during the Ministerial Conference on Human Rights).[92] The Parliamentary Assembly, in a 1988 recommendation on the improvement of the procedures of the European Convention, recommended that "the Committee of Ministers consider the possibility of merging the European Court and Commission of Human Rights, while weighing carefully the arguments for and against".[93] When, at the beginning of 1992, it appeared that an impasse was reached, the Committee on Legal Affairs and Human Rights decided to hold a hearing on the matter. This took place on 15 June 1992 and led to the Parliamentary Assembly adopting a resolution on "Reform of the Control Mechanisms of the European Convention".[94] Further deliberations resulted in Protocol no 11 to the European Convention being signed on 11 May 1994.[95]

ii Reasons for reform

- Overburdening workload caused backlogs and delays

The need for reform arose primarily from the success of the Council and the Convention. Soon after the "democratic revolutions" in Eastern and Central Europe took place, the new states approached the Council for membership. At the end of 1989, the membership of the Council numbered 23; by the end of 1996 it had grown to 39.[96] As explained elsewhere,[97] accession to the European Convention and acceptance of the optional clauses had at that stage become a political

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91 Meyer-Ladewig in Macdonald *et al* (eds) (1993) 909 at 917.

92 *Ibid.*

93 Recommendation 1087 (1988).

94 Recommendation 1194 (1992).

95 See, generally on Protocol no 11, Schermers (1995) 20 *EurLRev* 559.

96 In chronological order, the following states joined: Estonia, Lithuania, Slovenia, Czech Republic, Slovakia, Romania, Andorra, Latvia, Albania, Moldowa, Macedonia, Ukraine and Russia (see (1996) 17 *HRLJ* 234 - 235).

97 See ch 5.1.1.2 above.

precondition for membership of the Council. Many of the new states have fulfilled the conditions by ratifying the Convention, and became members of the Council. This meant that a few million more people could potentially lodge complaints with the European Commission.

Even without such a surge of new states becoming party to the Convention, the system had already become overburdened by the number of complaints directed against states parties. A few statistics will provide proof: In 1955, 138 applications to the Commission were registered. In the following two years, the number was even lower (104 applications in 1956 and 101 applications in 1957).[98] The contrast with the number of applications registered in the early 1990s is overwhelming:[99]

- 1990 : 1657 applications
- 1991 : 1648 applications
- 1992 : 1861 applications
- 1993 : 2037 applications

Explanations for this dramatic increase are the acceptance by more states of the Convention and its optional clauses, the increased awareness of the general public through media exposure (creating a domino-effect of similar cases),[100] and the greater involvement of lawyers in the system.[101] The Convention institutions could not adequately handle the increase in workload. This resulted in an unacceptable backlog of and delay in disposing of cases. The backlog at the Commission is

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98 (1993) *European Commission of Human Rights: Survey of Statistics* at 16.

99 (1993) *European Commission of Human Rights: Survey of Statistics* at 17.

100 See eg the cases decided against Italy in 1991 (Series A 195, 196 and 197, judgments of 19 February 1991). From 1961 to 1990, Italy was involved in only nine cases before the Court. Suddenly, in 1991, 16 cases against Italy were decided. Fourteen of these cases dealt with delays in trial proceedings. This stream of complaints may be traced back to two previous judgments of the Court which involved claims based on delays in criminal proceedings (*Corigliano v Italy*, Series A 57, judgment of 10 December 1982 and *Capuano, Baggetha and Milasi v Italy*, Series A 119, judgment of 25 June 1987). The Court's decisions in the 1991 applications were delivered on the same day, and all amounted to a finding of violation. The impact of this in any domestic system could not have been insignificant.

101 According to Commission Statistics ((1993) *European Commission of Human Rights: Survey of Statistics* at 16-17) the percentage of applications introduced through lawyers remained below 20% until 1969. This percentage increased steadily, exceeding 50% for the first time in 1987.

illustrated by the following:[102] By the end of January 1994, the number of cases pending a decision by the Commission stood at 2 672. Of these, more than 1 487 had not yet been looked at by the Commission at all. The number of cases pending before the Court also continued to rise, reaching 97 at the end of May 1991.[103] On average, it took more than five years for the Commission or Court to reach a final decision.[104] If these problems were left unresolved, they could easily cause a loss of confidence and trust in the system. The Convention system itself is taking almost as long to resolve cases as it allows for in domestic systems.[105]

- Unnecessary duplication

This concern is related to the first, and is a product of the two-tier system arrived at as a compromise during the drafting of the Convention. In the light of the pressing workload, the duplication of functions performed by both the Commission and the Court has been scrutinised critically. Under the two-stage procedure, the Commission decides on admissibility of complaints and on the merits of each case declared admissible. The Commission's report to the Committee of Ministers must "state its opinion as to whether the facts found disclose a breach by the State concerned".[106] This decision is "taken again" by the Court. The Court may also reconsider the issue of admissibility. The duplication "concerns the written pleadings, the hearings, and the deliberations in camera".[107]

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102 From Council of Europe (1994b) *Protocol no 11 to the European Convention on Human Rights and Explanatory Report* at 19.

103 Meyer-Ladewig in Macdonald *et al* (eds) (1993) at 911.

104 Meyer-Ladewig in Macdonald *et al* (eds) (1993) at 193. See also Sudre *et al* (1993) 5 *RUDH* at 4, 219, 380: In 1992 the average time it took for a case to be decided in Strasbourg was 5 years and 6 months (4 years and 4 months at the Commission phase; 13 months at the Court phase). In 1993 the average period increased to 5 years and 8 months.

105 See eg *Maj v Italy*, Series A 196, judgment of 19 February 1991 (total delay found was more than five years and eight months. Case lodged with Commission on 18 July 1987, meaning that the case took three and a half years to be resolved by the Convention system).

106 Art 31(1) of the Convention.

107 (1992) *Council of Europe: Explanatory Memorandum to Recommendation 1194* at 10.

- Political nature of decisions by Committee of Ministers

The role of a political organ, the Committee of Ministers, in the process of deciding on human rights violations is also an inheritance as part of the drafters' compromise. Because the jurisdiction of the Court was made optional (at the insistence of some states), the report of a quasi-judicial body, the Commission, would have been the only "finding" in matters not referred to the Court. This was unacceptable. As a result, it was agreed that the Committee of Ministers should be empowered to play the role of the Court in those cases. This provided the Committee with the competence to give final and binding decisions in some cases. Criticism has been directed at the inclusion of the Committee in the decision-making process. It does not decide on legal grounds but by considerations of political expediency, potentially undermining the impartiality and neutrality of the process.

- More transparency

The Commission phase is shrouded in secrecy. The system is also rather complicated, making it difficult to understand and rendering it inaccessible to the ordinary person.

- Saving costs

Procedural simplification and streamlining could have the effect of lower litigation costs to the individual complainant, and also to the governments keeping the system in place.

iii Proposals for reform

Three main proposals for reform, each aimed at correcting the defects of the present system, emerged during deliberations:[108]

- Some interested parties, especially serving members of the European Court, were of the opinion that a radical improvement of the present working conditions would redress the

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108 See Council of Europe (1994b) at 15 - 20.

problem of an overburdened and beleaguered system. This could amount to better technical support, and to converting semi-full-time positions into full-time positions.[109]

- The Swedish and Dutch governments came up with proposals that were broadly similar to one another. In terms thereof, a two-tier judicial system would be created. Decisions taken by the existing Commission would be transformed into legally binding decisions. The Commission-become-Court will serve as court of first instance, to be supplemented by a second judicial structure. This second court would be a final court of appeal. To ensure that it does not become clogged with cases, this Court would have to grant leave to appeal against decisions of the court of first instance.

- Others supported the merging of the Commission and Court into one, new judicial institution. This would mean that a single court becomes responsible for both admissibility decisions and final decisions on the merits, and that the Commission as a separate institution disappears.

iv *Reform introduced by Protocol no 11*

The Council of Europe adopted the third of the three proposals discussed above, in the form of Protocol no 11. When Protocol no 11 will have been ratified by all the states parties to the European Convention, the institutional framework of the Convention will be changed dramatically.[110] The present two-tier process will make place for a single process before a single judicial institution, the European Court of Human Rights.[111] This reform will discard with the quasi-judicial roles of the European Commission and the Committee of Ministers.[112] The Court will consist of full-time members, equal in number to the number of parties to the European Convention.[113]

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109 Compare the argument in ch 8.2.9 below that the existing African Commission should be strengthened, rather than creating a new institution (such as an African Court on Human and Peoples' Rights).

110 See art 34 of the Protocol.

111 It can also be seen as a "merger" of the Commission and Court. See eg Council of Europe (1994b) at 17.

112 The Committee of Ministers retains its supervisory role, though, in terms of art 46(2) of the Convention, as it will be amended.

113 See art 2 of the Protocol.

An individual or state may direct petitions directly to the Court. As a rule, cases will be heard by a Chamber that consists of seven judges.[114] The Chamber will ordinarily consider the admissibility and merits of the violation separately.[115] A committee of three judges may dispose of the matter, if they reach a unanimous finding of inadmissibility.[116] The Court never sits in plenary session, but provision is made for a Grand Chamber of seventeen judges. The Grand Chamber enters into the picture when a Chamber decides to relinquish its jurisdiction. It serves as court of final appeal. A Chamber may at any time relinquish its jurisdiction on two grounds:[117]

- A serious question about the interpretation and application of the Convention has arisen.
- There is a possibility that the Chamber may deviate from a previous judgment of the Court.

In such an event, the Grand Chamber will pronounce on the matter. The Grand Chamber will also hear appeals against decisions by Chambers. Appeals are not lodged directly with the Grand Chamber. Provision is made for a "leave to appeal" procedure: A panel of five judges of the Grand Chamber will decide if a case should be referred to the Grand Chamber. Two grounds would justify such higher consideration:[118]

- If the request raises a serious question about the interpretation and application of the Charter.
- If the request involves a serious issue of general importance.

Although the Court is a judicial body, it will retain the Commission's function to make itself available with a view to securing a friendly settlement "on the basis of respect for human rights".[119] This prospective function is dealt with in some detail, and provides for the Court to undertake investigation, "for the effective conduct of which the States concerned shall furnish all necessary

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114 See arts 27 and 29 of Convention, as it will be amended.

115 Art 29(3) of the Convention, as amended by Protocol no 11.

116 See art 28 of the Convention, as it will be amended by Protocol no 11. This finding is not appealable.

117 See art 30 of the Convention, as it will read after Protocol no 11 has turned into force.

118 See art 43(2) of the Convention, as it will be amended.

119 Art 38(1) of the future version of the Convention.

facilities".[120] It remains to be seen whether a single (judicial) institution will be able to perform both judicial and conciliatory functions.

The coming into force of the Protocol will make the reforms brought about by Protocol no 9 irrelevant.[121] Under Protocol no 11, there is no restriction on the parties who are allowed to approach or seize the Court. By the end of 1996, eighteen of the 39 members of the Council of Europe have ratified Protocol 11. Absent from the list of ratifying states are not only some of the new members (Croatia, Latvia, Poland, Moldova, Russia and Ukraine), but also some of the founding members (Belgium and Italy).[122]

5.1.1.7 The Convention against Torture

The European instrument against torture developed directly as a result of frustrations with shortcomings of the UN instrument. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") was adopted under UN auspices in 1984.[123] It entered into force in 1987, after twenty UN member states had ratified it.[124] International supervision of this convention takes the traditional form of compulsory periodic state reporting and an optional individual complaints procedure.[125] It goes a step further, though, by providing for a "confidential inquiry" when the Committee against Torture receives "well-founded indications that torture is being systematically practised" in a ratifying state.[126] This inquiry may include a visit to the state, but only with the consent of the state concerned.[127] Confidentiality will surround the entire process, unless the Committee includes "a summary account" thereof in its annual report.[128]

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120 As detailed in art 38 of the Convention, as it will read after amendment by Protocol no 11.

121 See art 2(8) of Protocol no 11.

122 See table (1997) 22 European Law Review 82 at 83 – 84. This means that only three states which have already ratified the Convention are still required to ratify Protocol no 11.

123 See discussion at ch 2.4.5 above.

124 Art 27 of CAT

125 See arts 19 and 21 of CAT.

126 Art 20 of CAT.

127 See art 20(4) and 20(5) of CAT.

Efforts have been made to adopt an optional protocol to CAT, in terms of which *compulsory* on-site investigations would be undertaken by the Committee.[129] When it became clear that the universal realisation of such a protocol was unlikely, these principles were incorporated in the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("ECPT"). This regional equivalent of CAT was adopted in 1987, and took effect in 1989.[130] By the end of 1996 30 states had already ratified the ECPT.[131] Another four states joined in first half of 1997.[132]

The supervision provided for is quite revolutionary. The ECPT rejects both the two main traditional implementation mechanisms, state reporting and individual complaints, and accepts the proposals previously raised in the UN context. States who ratify the ECPT permit the European Committee for the Prevention of Torture to visit any place within their jurisdiction "where persons are deprived of their liberty by a public authority" without needing to obtain permission.[133] In other words, by virtue of their ratification, states accept this competence of the Committee, rendering the requirement of consent obsolete.[134] Visits may be periodic or on an *ad hoc* basis. The extent of the Committee's powers are quite astounding: It may interview all detainees in private,[135] it has unlimited access to any place where persons are deprived of their liberty,[136] and it is entitled to all information necessary to carry out its task.[137]

As in the case of the UN body, the Committee draws up a general annual report. This report is submitted to the Committee of Ministers transferred to the Parliamentary Assembly, and may then

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128 Art 2095) of CAT.

129 Danelius in Macdonald *et al* (eds) (1993) at 266.

130 In terms of art 19 of the European Convention for the Prevention of Torture ("ECPT").

131 See (1997) 22 *EurLRev* 82 at 89 – 90.

132 They are Albania, Andorra, Estonia and Ukraine ((1997) 22 *EurLRev* 82 at 89 – 90).

133 Art 2 of ECPT.

134 Exceptional circumstances are provided for states to make representations against a visit by the Committee, on grounds of eg national defence and public safety (art 9). See also art 14, for state competence to refuse particular individuals to visit.

135 Art 8(3) of ECPT.

136 Art 8(2)(c) of ECPT.

137 Art 8(2) of ECPT.

be made public.[138] In general, the principle of confidentiality obtains. The Committee's report will always be published if the state party concerned requests its publication.[139] After a visit, the Committee draws up an *ad hoc* report in which its findings are set out. This may contain recommendations about how the situation of persons deprived of liberty may be improved in that particular state.[140] The most powerful tool in the hands in the Committee is its competence to "make a public statement" if a state fails to co-operate or to implement its recommendations.[141]

The Committee is made up of independent experts. The number of experts is equal to the number of states parties.[142] A "competence in the field of human rights or having professional experience in the areas covered by this Convention"[143] is required in order to be chosen. These requirements have led to medical doctors and specialists on the penitentiary system being elected as Committee members.[144] This non-judicial approach created the possibility of undertaking visits and of taking proactive steps, enabling the Committee to achieve certain results that would not have been possible using strictly juridical means.[145] Some of these results are that regular visits were carried out,[146] conditions were "thoroughly"[147] investigated and reports were published with the consent of the states concerned.[148] This method of securing the realisation of detainees' rights supplement the judicial means provided for in the European Convention.[149] This dual system of judicial (*ex post*

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138 Art 12 of ECPT.

139 Art 11(2) of ECPT.

140 Art 10(1) of ECPT.

141 Art 10(2) of ECPT.

142 Art 4 of ECPT.

143 Art 4(2) of ECPT.

144 Danelius in Macdonald *et al* (eds) (1993) at 266.

145 Danelius in Macdonald *et al* (eds) (1993) at 274.

146 In 1990, four periodic and one ad hoc visit (to Turkey) were undertaken. An *ad hoc* visit was again undertaken to Turkey the following year. By 1994, the emphasis has shifted: In that year, an equal number (five) of periodic and ad hoc visits were carried out (see Council of Europe (1995b) at 121 – 122).

147 Danelius in Macdonald *et al* (eds) (1993) at 274.

148 By the end of 1994, a total of 38 reports have been made public (see Council of Europe (1995b) at 123 – 130).

149 Art 3 of that Convention, the prohibition against torture or inhuman or degrading treatment or punishment, still applies. Complaints under this article which led to a decision by the European Court include *Ireland v*

Footnotes continued on next page.

facto) and non-judicial (proactive and preventative) protection may serve as a model for future developments in the eternal quest for effective human rights guarantees, especially for detainees. An important aspect that may be improved, is the attention devoted to NGOs. Their role should be strengthened to secure reliable fact-finding and to alert the Committee. At present, the Committee heavily relies on its secretariat in Strasbourg.[150]

5.1.2 Socio-economic rights

Member states of the Council of Europe adopted the European Social Charter in 1961.[151] It was intended as a pendant to the European Convention, as it supplements the Convention by providing for social rights, such as the right to just working conditions, the right to organise and to social security.[152] But the Social Charter does not deal with aspects such as non-discrimination on the basis of sex in the workplace or participation of workers in decisions affecting working conditions. Where the European Convention may be regarded as the regional counterpart to the CCPR, the European Social Charter finds its equivalent in the CESCR.

The European Social Charter entered into force in 1965, well before its international counterpart.[153] By the end of 1996 21 member states of the Council of Europe had ratified the Charter.[154]

State reporting is the only means of supervision provided for in the Social Charter. These reports deal with the extent to which governments have complied with their obligations. It is submitted bi-annually to a Committee of Experts.[155] The Committee consists of seven independent experts.[156]

UK, Series A25, judgment of 18 January 1978 (1978) and the *Soering* case (Series A 161, judgment of 7 July 1989). See Cassese in Macdonald *et al* (eds) (1993) 225.

150 Boyle in Hannum (ed) (1992) 133 at 151-152.

151 For the full text, see UN Treaty Series vol 529 at 89, adopted on 18 October 1961, entered into force 26 February 1965.

152 See Shrubsall (1989) 18 *Industrial Law Jnl* 39.

153 See ch 2.4.3 above.

154 See (1997) 22 *EurLRev* 82 at 87 – 88.

155 Art 21 of the European Social Charter.

These experts are mostly academics.[157] The Committee may also request states to submit reports at different intervals. The Committee of Experts considers the state report and issues "conclusions", which are contained in its own report.[158] A group of governmental civil servants, the Governmental Social Committee, then considers the report. Their own "conclusions", to which the Committee of Experts' report is appended, is transmitted to the Committee of Ministers.[159] The Parliamentary Assembly of the Council of Europe is also provided an opportunity to consider the report of the Committee of Experts and issue its "views".[160] After considering these various reports, the Committee of Ministers "may make to each Contracting Party any necessary recommendations".[161]

The brief discussion so far reveals substantive omissions and difficulties in supervision. These defects have subsequently been addressed.

In May 1988, the Committee of Ministers adopted an additional Protocol ("the additional Protocol") to the European Social Charter.[162] This Protocol starts off with policy aims which all ratifying states have to pursue "by all appropriate means".[163] This is followed, in Part II, by four articles dealing with equal treatment, the right to information and consultation, the right to take part in the determination of improvement in working conditions and the right of elderly persons to social protection. States have to accept at least one of these articles at ratification. The Additional Protocol entered into force on 4 September 1992.[164]

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156 Art 25 of the European Social Charter.

157 See eg Shrubsall (1989) 18 *Industrial Law Jnl* 39 at 51.

158 See art 27(1) of the European Social Charter.

159 Art 27 of the European Social Charter.

160 Art 28 of the European Social Charter.

161 Art 29 of the European Social Charter.

162 At the end of 1996 only 6 states have ratified the Additional Protocol ((1997) 22 *EurLRev* 82 at 87 – 88. They are Denmark, Finland, Italy, the Netherlands, Norway and Sweden.

163 Part I of the Additional Protocol.

164 See eg Council of Europe (1995b) at 21.

Apart from the Protocol adding these substantive provisions, an amending Protocol ("the amending Protocol") was adopted to improve existing supervision.[165] In terms of the amending Protocol, adopted in 1991, the following changes will be effected:

- The number of members of the Committee of experts is increased to "at least nine".[166] This was necessitated by the considerable workload experienced by the Committee.

- The complicated and multiple consideration of state reports is simplified. The Parliamentary Assembly no longer has a role in the normal process of supervision. The role of the governmental committee is limited. Experience has shown that the governmental committee was much less likely to find violations on the part of states parties than the Committee of Experts. In the eleventh reporting cycle, for example, the experts found 46 violations, and the governmental committee only ten.[167] Under the amending Protocol, the Committee of Experts decide alone whether a violation has occurred or not. The governmental committee retains a role, though. Based on the finding by the Committee of Experts and policy considerations, the governmental committee recommends specific steps which the Committee of Ministers may adopt. The Committee shall adopt a resolution covering individual recommendations to the states parties concerned.[168] This amendment also aims at ensuring that the Committee of Ministers adopts country-specific recommendations, and not only recommendations general to all states parties.

- NGOs are accorded a more important role, for instance, in respect of the submission of their views about state reports.[169]

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165 For the text, see (1992) 31 *ILM* at 155. It was adopted on 21 October 1991, but it has not yet entered into force. This will happen when all the states parties to the Charter have ratified the amending Protocol (see art 8 of the amending Protocol). At the end of 1996 11 of the 21 parties to the Charter have already ratified the 1991 Protocol ((1997) 22 *EurLRev* 87 – 88). See also Boerefijn *et al* (1991) *ICJ Review* 42.

166 Art 3 of the amending Protocol.

167 See Harris (1992) 41 *ICLQ* 659 at 662.

168 Art 5 of the amending Protocol.

169 Art 1(1) of the amending Protocol.

Improvements to the existing system of state reporting have been followed by deliberations about radical reform of Charter supervision. "Radical" refers not only to extent of reforms of the European system, but to global patterns of supervising socio-economic rights. In 1995, the Council of Europe adopted a further Protocol to the European Social Charter ("the collective complaints Protocol"), which will provide for a system of collective complaints.[170] The Protocol requires ratification by five parties to the Charter before it will enter into force.[171] By the end of 1996 only two states (Cyprus and Norway) had ratified the collective complaints Protocol.[172]

In terms of its Preamble, the aim of the Protocol is to improve effective enforcement of the Charter and to strengthen the participation of management, labour and NGOs. The Protocol provides that states may recognise the right of organisations to file complaints against them for non-compliance with the provisions of the Social Charter, as amended. Organisations that may lodge complaints are employer bodies, trade unions, or any other organisation recognised by a government.[173] These complaints will be investigated by the Committee of Experts, who will adopt a resolution and will compile a report.[174] The Committee of Ministers will then make a finding. The report may be published.[175]

A revised text of the Social Charter, incorporating and consolidating the changes brought about since 1961, has been adopted in 1996.[176]

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170 It was adopted on 9 November 1995. For a text of the Protocol, see (1995) 34 *ILM* at 1453 and (1995) 54 *ICJ Review* 105.

171 Art 14 of the 1995 Protocol.

172 (1997) 22 *EurLRev* at 87 – 88.

173 Arts 1 and 2 of 1995 Protocol.

174 See arts 6 - 8 of the 1995 Protocol for the procedure before the Committee of Experts and the Committee of Ministers.

175 Art 8(2) of the 1995 Protocol.

176 For the text, see (1997) 36 *ILM* at 31.

5.1.3 The Organisation for Security and Co-operation in Europe

What is now the Organisation for Security and Co-operation in Europe ("OSCE") was created in 1975 as the Conference on Security and Co-opeartion in Europe ("CSCE").[177] The CSCE was created when the Helsinki Final Act was signed. At the Budapest Summit of December 1994 it was decided to change the name to the OSCE. The term "organisation" more accurately reflects the functioning of the grouping, which serves as a forum in which security and human rights concerns are discussed and reconciled. It is not strictly a "European" organisation, as the USA and Canada are also members.

Unnecessary duplication and rivalry between the OSCE and the Convention organs should be avoided. This has already been highlighted in the Charter of Paris. It recognised the contribution of the Council of Europe in the promotion of human rights and democracy, welcomed the accession to the Convention by member states of the OSCE and the "readiness of the Council of Europe to make its experience available to the OSCE".[178]

The CSCE established a "Human Dimension Mechanism" in 1989.[179] This "mechanism" is geared towards a diplomatic resolution of human rights issues at the political level. States may be requested to reply to queries. If this does not prove to be staisfactory, the complaining state may seek a bilateral meeting. If this also fails, a full meeting of the CSCE will discuss the matter. As this procedure is not open to individuals or NGOs, its impact may remain limited. The OSCE has highlighted human rights in international relations, and has ensured its constant place on the political agenda, especially in the process of democratisation in Eastern Europe.

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177 For a background to the change, see Sapiro (1995) 89 *AJIL* 631.

178 Charter of Paris, in (1990) *HRLJ* 379.

179 See, generally, Boyle in Hannum (ed) (1992) 133 at 155-156.

5.1.4 European Community law and human rights

The European Economic Community ("EEC") was founded in 1958[180] as an instrument for European economic integration.[181] When the European Union ("EU") was formed in 1993, the EEC was incorporated as one of its institutions,[182] but it was renamed the European Community ("EC").[183] At present most states of what has traditionally been considered to be "Western Europe" are members of the EU, and therefore also of the EC.[184] It should be distinguished clearly from the Council of Europe, which gave birth to the European Convention and administers its organs. Under that system, the European Court of Human Rights, based in Strasbourg, gives final judgments. In contrast, the Court of Justice of the European Communities, based in Luxembourg, interprets and enforces EC law.[185] At its inception the EC was seen as primarily concerned with economic integration and harmonisation in Europe. The Court of Justice was seen as the organ that would resolve disputes about the application of EC law, and about the actions of the EC institutions. It should hardly come as a surprise that the Treaty of Rome did not make reference to the concept of human rights. When it was adopted, only a few years had lapsed since the elaboration of the European Convention on Human Rights, which turned into force in 1953.

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180 By the Treaty of Rome, signed in Rome on 25 March 1957.

181 Excluding those aspects regulated by the European Coal and Steel Community ("ECSC") and the European Atomic Energy Community ("Euratom"). These institutions no longer have an independent existence, but are absorbed into the EC (see Mathijsen (1995) at 4).

182 The EU embraces three "pillars": One is the EC; the other two deal with foreign and security policy, and with justice and home affairs (see Duff *et al* (1994) at 19).

183 Article G, Treaty of European Union. It commenced on 1 November 1993.

184 The Treaty of Maastricht (or the "Treaty of European Union") of 1992 was signed by 12 countries: Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxemburg, Netherlands, Portugal and the UK (see web site gopher://wiretap.spies.com for the Treaty). The membership of the Union was expanded to 15 on 1 January 1995 when Austria, Finland and Sweden became members. Although Norway had applied for membership, its electorate rejected the proposed adhesion by referendum. This relative homogeneity is bound to be upset in the near future, as the Commission has proposed that five Central and East European states (Poland, Hungary, the Czech Republic, Slovenia and Estonia) should be invited to begin accession talks in 1998, along with Cyprus, towards whom a commitment to admission already exists. All these states have already become members of the Council of Europe, have acceded to the European Covention and have made declarations in terms of arts 25 and 46 thereof.

185 Art 164 of the EEC Treaty.

Although human rights had at that stage gained importance globally, it was regarded as separate from and not impacting on the process of economic integration.[186]

Despite the fact that explicit reference to the concept is omitted, a number of substantive provisions of the Treaty establishing the EEC embodied fundamental rights.[187] These provisions include the prohibition against discrimination,[188] freedom of movement of workers,[189] freedom of association[190] and equal pay for men and women.[191] In its interpretation of these provisions, the Court of Justice involved itself in matters of "equal treatment, access to employment and the promotion of sexual equality from schooling to public life".[192]

However, these specified rights did not provide for all instances of potential violation of fundamental human rights within the EC context. Soon cases based on the infringement of non-included rights ended up before the Court of Justice. The process started in the domestic law of Germany, when the compatibility of EC law with the German Basic Law was raised. Initially, the Court of Justice refused to recognise that EC law provisions may be declared incompatible with fundamental rights not included in the EC Treaty.[193] A crisis was caused by the German Constitutional Court's subsequent response. It held that German citizens may invoke the German Basic Law to test the compatibility of EC law with domestic constitutional guarantees. This meant

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186 See Cohen-Jonathan (1981) 29 *European YB* 112.

187 See Grabitz in Bates *et al* (1983) at 194.

188 Eg arts 7, 36, 40(3), 67(1), 68(2), 85(1)(d).

189 Eg art 48 of EEC Treaty. Not to be confused, as was done in the South African case, *Case v Minister of Safety and Security* 1996 3 SA 617 (CC) at par 31 - reference should have been to the European Court of Human Rights, not to the European Court of Justice.

190 Eg art 118(1) of EEC Treaty.

191 Art 119 of EEC Treaty.

192 Duparc (1992) at 12.

193 See the Court's decisions in *Stork v High Authority* [1959] ECR 17 and *Geitling v High Authority* [1960] ECR 423 and *Sgarlata v Commission* [1965] ECR 215. Brown and Kennedy (1994) 333 speculates that the "issue may have been presented in the wrong way". In *Sgarlata*, for instance, the applicants objected that, if a specific article was applied, individuals would be deprived of all protection by the Court both under EC law and under national law. These considerations were held not to override the clearly restrictive wording of the applicable article (at 227).

that EC law could be investigated domestically to ensure that it does not detract from existing domestic constitutional protection.[194] Obviously such a situation could not be tolerated, as different national constitutions (and courts) could provide (or decide) differently. Differences in EC law would undermine the very aim towards which the EC was directed.

Gradually the Court of Justice addressed this problem. The main difficulty was that the EC Treaty did not create or stipulate a basis on which EC law may be extended beyond values which were "purely economic".[195] In *Stauer v Ulm*[196] the Court made its first *obiter* reference to fundamental rights "enshrined in the general principles of Community law".[197] Addressing the issue squarely in *International Handelsgesellschaft v Einfuhr und Vorratsstelle Getreide*,[198] the Court found that EC law cannot be invalidated for running counter to fundamental rights set out in the state Constitution. However, the Court had to ensure the compatibility of EC law with the general principles of law protected by the Court of Justice. Because fundamental rights form an integral part of EC's general principles of law, it provides an "analogous guarantee" to that in domestic bills of rights. In other words, not the European Convention, but the common tradition of rights protected in the various European states has been recognised as incorporating human rights into the general legal principles of EC law.

One has to take the parallel progress made by the European Court of Human Rights into consideration. While it came into being on 21 January 1959,[199] it handed down its first judgment only in November 1960. From 1963 to 1966 no judgments were given. The total number of judgments for the period 1960 to 1974 was nine, less than one annually.[200] In other words, when these developments were taking place in the Court of Justice, there was no comprehensive human rights case-law or consciousness in Europe.

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194 See Wessman (1992) at 26.

195 Duparc (1992) at 12.

196 [1969] ECR 419.

197 *Ibid.*

198 [1970] ECR 1125.

199 See Harris *et al* (1995) at 648.

200 *European Court of Human Rights: Survey 1959-1994* (1995) at 36-37.

In 1974, the European Court of Justice repeated that it is "bound to draw inspiration from constitutional traditions common to all Member States"[201] and must declare invalid "incompatible with fundamental rights recognised and protected by the Constitutions of those States".[202] However, it enlarged the pool from which inspiration could be drawn to include "treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories".[203] In *Nold*[204] the Court did not spell it out that the European Convention is now also a source of "general legal principles" of EC law. The reason probably was because France, the state involved in that case, only ratified the European Convention subsequent to the proceedings. However, in cases thereafter, it was unequivocally stated that the European Convention is one of those treaties which may be invoked to supplement EC law.[205] The rights protected under Community law is not restricted to the content of the European Convention, but extends to rights not included under the Convention[206] and to general principles of equity.[207]

This process of including human rights into EC law culminated in the European Parliament, the Council of Ministers and the Commission of the European Communities adopting a Joint Declaration on Fundamental Rights in 1977.[208] In this declaration these three community institutions emphasised the importance of human rights within the European Community. As far as the content of these rights is concerned, specific rights where not elaborated. The Constitutions of Member States and the European Convention on Human Rights were cited as sources from which these rights are derived.

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201 *Nold v Commission* [1974] ECR 491 at 507.

202 *Ibid.*

203 *Ibid.*

204 *Nold v Commission* [1974] ECR 491.

205 *Rutili v Minister of the Interior* [1975] ECR 1219 dealing with aliens at 1232: See also *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727 at 3745.

206 See the *Nold* case above: The right to freely pursue a trade is a fundamental right recognised under Community law, although it is not included in the Convention.

207 See *Klensch v Secrétaire d'Etat* [1986] ECR 3505 par 9.

208 Wessman (1992) at 6.

In retrospect, it seems clear that the EC should have had a specified human rights basis at its inception. As the powers of the European Communities increase, the lack of systematic protection of human rights becomes more and more apparent. It is also clear that human rights will play an increasing but paradoxical "push and pull" role in the European Community. On the one hand, rights may serve as a tool to "pull" towards greater integration. Clapham [209] referred to rights such as freedom of movement from country to country and the prohibition against discrimination that will facilitate integration. On the other hand, potential victims of the increasing integration may use rights to "push away" the tentacles of an increasing bureaucracy (for instance, by securing the right to participation in decision making).

Two ways of addressing the inadequacy of human rights protection under current Community law have been identified:[210]

- A codified catalogue of human rights to be observed by the EC may be adopted.
- The EC may accede to the European Convention on Human Rights.

The first option will give concrete content to the Joint Declaration of 1977. Arguments raised against this option include the following:

- It is unlikely that sufficient consensus about its content will easily be reached, especially on socio-economic rights.
- Anyone within an EC member state can already rely on the rights set out in the European Convention. As it is unlikely that a separate community human rights charter will "go further" than existing protection, it would be superfluous.[211]
- The European Commission and Court of Human Rights have been in existence for a considerable period of time. These institutions have built a reputation in Europe and

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209 (1991) at 10.

210 See eg Wessman (1992) at 7-9 and Brown and Kennedy (1994) at 338-339.

211 Kapteyn and Verloren van Themaat (1990) at 169.

internationally and have accumulated a comprehensive case-law. Rather than "risk denigrating the achievements" of theses institutions, these achievements "should be built on".[212]

The European Parliament has, in 1989, indicated its preference for the first option by adopting the Charter on Rights of Citizens of the European Community.[213] This includes social and economic rights,[214] a step which has been explained as an attempt by the European Parliament to improve its image in the eyes of the Community citizens.[215]

A less drastic step than adopting a "Community Catalogue" of rights, would be to amend the Treaty, by inserting a simple article reading "measures incompatible with fundamental rights are inadmissible in the field of application of Community Law".[216]

Accession to the European Convention, on the other hand, would require the following:

- All the present members to the Convention would have to agree to such a step.
- Special procedural and substantive problems raised by the accession of a non-state party, will have to be negotiated through an accession protocol.

The Court of Justice of the European Communities has also given a negative answer when asked for its opinion on the question whether accession of the EC to the European Convention would be compatible with the EC Treaty.[217] The Court of Justice held that the EC Treaty does not allow the EC to accede to the Convention. No Treaty provision explicitly or implicitly allows for a power to conclude international human rights conventions. Accession to the European Convention would amount to an amendment to the EC Treaty, as "it would entail the entry of the Community into a

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212 Clapham (1991) at 96.

213 See Neuwahl in Neuwahl and Rosas (eds) (1995) 1 at 16.

214 Kapteyn and Verloren van Themaat (1990) at 168.

215 Kapteyn and Verloren van Themaat (1990) at 169.

216 Clapham (1991) at 96.

217 Opinion 2/94 of 28 March 1996, reproduced in (1996) 17 *HRLJ* 51.

distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order".[218]

The advantages of accession to a potential victim are minimal. As Clapham pointed out, there "is nothing to stop anyone complaining to the Strasbourg Commission of Human Rights about the national implementation of a Community provision".[219] The only added remedy would be the opportunity for Community citizens to complain to the Strasbourg institutions about acts and legislation of Community organs. In principle, though, even these complaints could be adjudicated by the European Court of Justice.

5.1.5 Relevance for Africa

5.1.5.1 The prime example of regional human rights protection

The Universal Declaration of 1948 marked a rhetorical commitment to human rights by those states adopting it. From the outset, the idea was to concretise these declared rights into a legally binding form. Long before this could be attained at the global level, the member states of the Council of Europe adopted the European Convention, providing the first example of an enforceable regional human rights treaty. The Convention marks the first application of the principle that a state may be held accountable in the supra-national arena for the way in which it treats its own nationals. This aspect of the Convention served as a precedent for the development of the right to individual petition provided for in the Optional Protocol to the CCPR, in the American Convention and also in the African Charter. It has evolved into an efficient and effective system for the realisation of human rights in Europe and served as a model for other regional human rights systems.[220]

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218 See par 34 of its Opinion 2/94.

219 (1991) at 97.

220 See Mubiala (1997) 9 *RADIC* 42 at 54.

5.1.5.2 The impact of the Convention in Africa and on Africans

i Impact of Convention on independence Constitutions

Viewed historically, the European Convention had a significant influence on the present position pertaining to human rights in Africa. At the national level, many African constitutions contain a Bill of Rights in which rights reminiscent of those in the European Convention are set out. On the supra-national level, the Convention has "served to some extent as a model" for the African Charter. [221]

The impact of the Convention on the African Charter stands, at first glance, in need of explanation. Why did the drafters use as a model something from the European continent, associated with former colonial masters? The answer lies in the fact that the Convention had been appropriated by numerous African states. Firstly, the Convention was extended to "European colonies" in Africa.[222] Secondly, the Convention became incorporated into domestic legal systems. Nigeria was the first country to include a Bill of Rights, modelled on the European Convention, in its independence Constitution.[223] As Heyns explains, the Minorities Commission, involved in the drafting of the Nigerian independence Constitution, had to address the "fears of exploitation of the minorities"[224] in Nigeria. It opted to guarantee a list of fundamental rights to all individuals. In its motivation, the Commission remarked: "We have therefore considered what provisions may suitably be inserted in the Constitution and have given particular attention to the Convention on Human Rights to which, we understand, Her Majesty's Government has adhered on behalf of the

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221 Heyns (1995) 11 *SAJHR* 252 at 253.

222 That is, by means of art 63 of the Convention, the "colonial clause". In terms thereof, a state party to the Convention could extend its application to any colony. An eloquent attempt by Leopold Senghor to ensure that the Convention is extended automatically to all colonies and dependencies, was rejected. The "colonial clause" gave states the option of extending the Convention, as opposed to extension being a necessary consequence of ratification.

223 See Elias (1959 - 1960) 2 *Jnl of the ICJ* 30.

224 (1995) 11 *SAJHR* 252 at 257.

Nigerian Government".[225] This is a reference to the fact that the United Kingdom had made a declaration in 1953,[226] in terms of which the European Convention was extended to its colonies.

Many other anglophone states in Africa, gaining independence soon after Nigeria, followed its example by also including a Bill of Rights in their Constitutions.[227] Independence constitutions influenced by the European Convention in this indirect way are those of Botswana, Kenya, Lesotho, Malawi, Sierra Leone, Swaziland, Uganda and Zambia. In most of these countries the new Constitution was not clothed with legitimacy, as it was perceived as an alien structure imposed by a colonial power. Its classic liberalism contained very little which reverberated with collectivist African ideologies.[228]

In at least one anglophone country, Liberia, the idea of a Bill of Rights was not incorporated through the European Convention. Liberia was established as a colony of freed slaves from the United States. It gained independence in 1847. Already then, individual rights were protected, indicating that the United States example inspired the drafters.[229]

One of the original states parties to the Convention, the United Kingdom, served as an example of a state without a written constitution and Bill of Rights. Basing itself in part on this example, Tanzania in 1968 rejected the introduction of a Bill of Rights.[230]
Taking the present as point of departure, how deeply has the Convention been implanted in African soil? Three related questions are posed:

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225 Command Paper 505, H M S O London (1958) 97.

226 In terms of art 63 (the "colonial clause") of the European Convention. See Heyns (1995) 11 *SAJHR* 252 at 255.

227 See De Smith (1961) 10 *ICLQ* 83 and (1961) 10 *ICLQ* 215.

228 See eg De Smith (1964) at 184 - 185.

229 Adegbite in Eide and Schou (eds) (1968) at 72.

230 The United Republic of Tanzania (1968) at 32: "Behind this decision is our belief that the rights of the individual in any society depend [more] on the ethical sense of the people than on formal guarantees in the law. The process of Government in the United Kingdom provides a striking example of the force of a national ethic in controlling the exercise of political power."

ii *Have the Convention-based human rights provisions been retained in subsequent constitutions in these states?*

One of the salient characteristics of both the Convention and the Nigerian Independence Constitution is the exclusion of socio-economic rights. This has been taken over into other independence constitutions. Later constitutions addressed this omission, often only by adding directives of state policy.

The property clause in most post-independence constitutions represented an attempt to retain the vested rights of privileged minorities. These versions, again based on the Nigerian model, were subsequently discarded in numerous states, such as Lesotho, Malawi, Swaziland, Uganda and Zimbabwe.[231]

iii *Where Convention-based human rights provisions were retained, what was the Convention's indirect impact?*

Ghai and McAulsan[232] noted that the Convention had a minimal impact in a Commonwealth state like Kenya. Some of the reasons for this lack of influence are:

- The Convention did not automatically become incorporated into Kenyan law. Applicants could therefore not bring cases of violations to domestic courts. In Commonwealth Africa, the dualist theory is followed, in terms of which international treaties have to be made part of domestic law by specific legislation. This was not done in respect of the European Convention.

- Individuals could also not bring cases to the European Commission or European Court of Human Rights, as Britain had not accepted the right to individual petition. An aggrieved individual depended on another state party to the Convention to take up his or her case. International relations dictate that states parties are reluctant to initiate proceedings against other states.

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231 See Roux (1996) 8 *RADIC* 755 at 762 n44. In the case of Zimbabwe, a constitutional amendment was adopted on changes to the Declaration of Rights after the expiry of the ten year moratorium (at 781).

232 Ghai and McAulsan (1970) at 412-413.

Heyns cites one case in which an attempt was made to seize the Court in respect of violations of rights in Africa.[233] This avenue was necessitated by the fact that the UK had only accepted the right to individual petition on 14 January 1966.[234] At that stage, most of the former British colonies had already gained independence. The other major colonial power, France, accepted individual petition much later, in 1981.[235] Another important player in Africa, Portugal, only ratified the Convention in 1978.[236]

Other reasons for the meagre impact of the Convention is that it had hardly become known at all in Africa,[237] and that colonial extension of the Convention was made "with due regard ... to local requirements", undermining the potential effect of the Convention.[238]

iv What is the role of the extensive jurisprudence of the European Convention in the legal systems of these countries?

With reference to examples from courts in Botswana, Namibia, Mauritius, Namibia, South Africa and Zimbabwe, Heyns has shown that the Convention has been referred to by municipal courts in Africa "when dealing with human rights-related issues".[239] But much more encompassing is the reliance on case-law of the European Court and Commission of Human Rights, sometimes without reference to the Convention as such. This list of Southern African courts invoking both the Convention and European Court of Human rights case-law, compiled by Heyns, is now updated:[240]

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233 At 255 - 256. See Vasak (1962) at 8: In 1960, two African statesmen visited Iceland, in connection with the detention of Banda, leader of the independence movement in Nyassaland. Iceland was chosen because it was, at the time, engaged in a dispute of its own with the UK about the right of British vessels to fish in Icelandic waters. Banda was released before Iceland could finally decide whether to file an inter-state complaint.

234 See table in (1996) 17 *HRLJ* 234.

235 *Ibid.*

236 *Ibid.*

237 See Vasak (1962) at 8.

238 Art 63(3) of the Convention.

239 (1995) 11 *SAJHR* 252 at 253, footnotes 5 to 9.

240 Heyns set out the full list in (1995) 11 *SAJHR* 252 at 253.

- In Namibia, one may add the Supreme Court decision in *Kauesa v Minister of Home Affairs*.[241]

- As for South Africa, one may add *S v Shuma*,[242] *Gardener v Whittaker*,[243] *De Klerk v Du Plessis*,[244] *S v Makwanyane*,[245] *S v Williams*,[246] *Shabalala v Attorney-General, Transvaal*,[247] *Case v Minister of Safety and Security*,[248] *Coetzee v Government of RSA*,[249] *Ferreira v Levin*,[250] *Bernstein v Bester*,[251] *Dabelstein v Hildebrandt*[252] and *ex parte Gauteng Legislature*.[253] For instance, more important than its reference to the Convention, is the South African Constitutional Court's reliance in *S v Williams*[254] on the European Court of Human Rights decision in *Tyrer v UK*.[255] Not only the Convention, but other human rights instruments

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241 1996 4 SA 965 (NmSC) (at 978 - 983). As for South Africa, see also *S v Harber* 1988 3 SA 396 (A) (at 422), where reference is made to the European Court of Human Rights decision on contempt of court in *The Sunday Times v UK*. The court found the decision not compelling because South African courts are "obviously free to strike a balance between the dictates of freedom of expression and those of due administration of justice, and are not enjoined to regard freedom of expression as the superior or even primary principle".

242 1994 4 SA 583 (E) (at 590 D-E, noting that there is no general limitation clause in the European Convention).

243 1995 2 SA 672 (E) (at 682 H-I).

244 1995 2 SA 40 (T) (at 48).

245 1995 3 SA 391 (CC) (at par 35, 68 (*per* Chaskalson P), at par 324 (n 221) (*per* O'Regan J)).

246 1995 3 SA 632 (CC) (par 21, n 24, par 27).

247 1995 1 SA 608 (T) (at 639, before rejecting all public international law and foreign judgments - at 642 J).

248 1996 3 SA 617; 1995 1 SACR 587 (CC) (at eg par 31 (*per* Mokgoro J) and par 104 (*per* Madala J)).

249 1995 4 SA 631; 1995 6 SACLR (CC) (the Explanatory Report on the Fourth Protocol to the Convention is quoted by Sachs J at par 53; see also par 57 and 58).

250 1996 1 SA 985 (CC) (at par 170 (*per* Chaskalson P), also at par 58 (nn 64, 65) (*per* Ackermann J)).

251 1996 2 SA 751 (CC) (at par 72, 74, 106 (*per* Ackermann J)).

252 1996 3 SA 42 (C) (at 61G-62A).

253 1996 3 SA 165 (CC) (par 71).

254 1995 3 SA 632 (CC).

255 At par 27, 33, 42, 48.

subsequently adopted under the auspices of the Council of Europe, have featured in South African case-law.[256]

- In Zimbabwe,[257] recent cases that referred to the Convention are *Rattigan v Chief Immigration Officer, Zimbabwe,*[258] *Nyambirai v National Social Security Authority,*[259] and *Retrofit v Posts and Telecommunications Corporation.*[260] Madhuku[261] analysed some Zimbabwean cases and concluded that case-law of the European Court of Human Rights strongly influenced the development of a constitutional jurisprudence in Zimbabwe. Relying on these comparative cases has freed judges from "the ghost of precedent", enabling them to adopt an activist approach. In her view, the Court has in at least one instance gone too far. The application in *Rattigan v Chief Immigration Officer* was based on freedom of movement.[262] In its interpretation of this right, the Zimbabwean Supreme Court made reference to European case-law based on the protection of family life. This went beyond "adopting interpretations of ECHR on similar provisions" and was "perhaps an abuse of comparative analysis".[263] Zimbabwean cases in which European case-law, rather than the Convention, served as interpretative tools include *Woods v Minister of Justice, Legal and Parliamentary Affairs,*[264] *Rattigan v Chief Immigration Officer, Zimbabwe*[265] and *Nyambirai v National Social Security Authority.*[266]

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256 See eg Sachs J's reliance on the European Convention on the Protection of Minorities in *Dispute Concerning the Constitutionality of Gauteng School Education Bill of 1995* 1996 2 SACLR 117 (CC) (at par 88).

257 For a discussion of the impact of the European Convention on Zimbabwean law, see Madhuku (1996) 8 *RADIC* 932.

258 1995 2 SA 182 (ZSC) (at 189G-H).

259 1996 1 SA 645 (ZSC) (at 645-646).

260 1996 1 SA 847 (ZSC) (at 861A).

261 (1996) 8 *RADIC* 932.

262 Art 22 of the Zimbabwe Constitution.

263 (1996) 8 *RADIC* 932 at 941.

264 1995 1 SA 703 (ZSC) at 705-706 (*Golder v UK, Silver v UK).*

265 1995 2 SA 182 (ZSC) at 190 (*Moustaquim v Belgium, Beljoudi v France* and a judgment by the European Commission).

266 1996 1 SA 636 (ZSC) (at 645-646) (Commission reports; *James v UK*).

v *Impact of proceedings in terms of the Convention on Africans*

Africans have also approached the European Commission, alleging violations of the European Convention by member states in respect of Africans resident in a European state. Without at all attempting to provide a catalogue of cases in which this had been the case, a few examples are cited:

- An infamous example is the case of *East African Asians v UK*,[267] which concerned persons resident in Africa. A number of applicants, of Asian origin, but holding UK passports, were refused permission to remain in the UK permanently. They made these applications in 1970, arising from a campaign to expel all Asians from Kenya and Uganda, their country of residence. The European Commission of Human Rights (in 1973) found the UK in violation of various provisions of the European Convention. As the case was not referred to the Court by either the Commission or the UK, it was left to the Committee of Ministers to adopt an appropriate resolution. In this resolution, adopted in 1977, the Committee of Ministers concluded that no violation of the Convention had occurred.[268] In arriving at this conclusion, the ministers took into account that the applicants were all given permission to stay permanently in the UK during the proceedings before the Commission. It further took into account that the annual quota of East African Asians allowed to settle permanently increased from an initial 1500 to 5000 in 1975.

- Another example, that of *Lamguindaz v UK*, also involves the UK.[269] The applicant, a Moroccan citizen, had been living in the UK since an early age. He was convicted on numerous offences while living in the UK. After another conviction in 1990, he was deported to Morocco. His application was based on the violation of his right to a family life, as his whole family lived in the UK. He also alleged that he was discriminated against on grounds of nationality. After the Commission had found a violation of article 8 of the Convention, the matter was settled amicably when the British government revoked the deportation order, allowed the applicant to re-enter the UK, granted him indefinite leave to remain, allowed him to

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267 See the Commission's report in (1994) 15 *HRLJ* 215.

268 See the text of the resolution in (1994) 15 *HRLJ* 232.

269 See Commission's view on admissibility in (1992) 13 *HRLJ* 400.

apply for naturalisation and paid his costs.[270] The Court took notice of the terms of the friendly settlement and struck the case off its list of cases.[271] The Convention has clearly granted material relief to this African applicant.[272]

vi What is the role of the Convention in the practice of the African Commission?

As has been pointed out, the Commission has not developed any case-law to speak of.[273] In none of the decisions made public so far has the Commission referred to provisions of or case-law decided under either the European (or American) Convention. Such reliance is possible by virtue of articles 60 and 61 of the Charter, which provide that the Commission must draw inspiration "from international law on human and peoples' rights" and must take "special international conventions" into consideration. A careful reading of articles 60 and 61 reveals that the reference to international law is qualified. Article 60 includes a list of provisions from which the Commission should "particularly" draw inspiration. This refers to other regional (African) instruments, and to instruments adopted in the global sphere (under UN auspices). No reference is made to other regional systems. Also, article 61 refers to international conventions laying down rules *which OAU member states expressly recognize*. In other words, the European Convention could be invoked as an interpretative aid only insofar as the Charter contains provisions similar to those in the Convention. Article 61 further refers to "*African* practices" and "general principles of law recognised by *African* states" as sources of inspiration.[274] The only aspect which is stated in unqualified terms is "customs generally accepted by law".

As for its future relevance, Heyns warns that Convention jurisprudence should not be followed as a wholesale "common law" of a number of African states, but rather considered "critically and cautiously as one of the available options".[275]

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270 See (1993) 17 EHRR 213 at 218 for the Commission's decision.

271 See (1993) 17 EHRR 213 at 220 for the Court's judgment in this matter.

272 See also in this regard *Moustaquim v Belgium* (1991) 13 EHRR 802 and *Beldjoudi v France* (1992) 14 EHRR 801.

273 See ch 6.2.3 below.

274 Emphasis added.

275 (1995) 11 *SAJHR* 252 at 262.

5.1.5.3 European aid and human rights in Africa

A series of Lomé Conventions have been concluded between member states, the Council and the Commission of the Community (on the one hand) and states in Africa, the Caribbean and Pacific (the "ACP" states, on the other hand). The first Lomé Convention was concluded in 1975 between 46 ACP states and nine European states. It was revised after five years. Lomé III spanned the next five year-period, 1986 - 1991.[276] In terms of the Fourth Convention, an amount of 12 000 million ECU (the equivalent of about 8 000 million pounds) has been made available for development aid in the ACP countries.

The preamble to the Fourth Lomé Convention reaffirms the faith in fundamental rights expressed in the UN Charter. It further recognises the "need to respect and guarantee civil and political rights and to strive to bring about full enjoyment of economic, social and cultural rights". In the body of the Convention the close link between human rights and development is highlighted: "Co-operation shall be directed towards development centred on man, the main protagonist and beneficiary of development, which thus entails respect for and promotion of all human rights".[277] Specific provision is made for the allocation of financial resources to the promotion of human rights in the ACP states, but at the request of the states.[278] Lomé IV marks the first time human rights has been made an essential element of ACP-EU relations.[279]

Development aid is, however, not granted conditional to human rights compliance. From the European perspective, at least two reasons may be cited for the omission of a provision suspending aid in the case of violations of human rights. The one is the difficulty of assessing facts and of making such a decision. In the absence of elaborate procedures, "suspension of aid on the grounds

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276 See eg (1996) 10 *Interights Bulletin* at 2.

277 Art 5(1) of Lomé IV.

278 Art 5(3) of Lomé IV.

279 An opinion expressed in (1996) 10 *Interights Bulletin* at 2.

of violations of human rights will prove open to abuse".[280] In the second place, there is no clear consensus that aid embargoes will effectively further the protection of human rights.[281]

Not only the particular states have received aid from external sources - also the African Commission has been a recipient of funds, especially from Europe. Major supporters of the African Commission have included the Raoul Wallenberg Institute (Lund, Sweden) and The Danish Centre for Human Rights. Some commissioners have expressed their misgivings about the Commission's dependence on these outside sources.[282] In the opinion of the majority the Commission was not compromising their objectives by accepting donations from "partners" who work towards the same goal: the realisation of human rights globally.[283]

To some commentators, these steps represent limited attempts by former colonial powers to redress the "excessive exploitation, indeed the theft, of resources"[284] of former colonies by powers that formerly administered their territories. The question has been raised whether depleted states are entitled to sue the state which was responsible for administering the colonial territory in terms of the right to development.[285] Bedjaoui shows that this issue had already been raised by the first conference of Non-aligned countries in 1961, where a formula for the right to reparation and compensation was suggested.[286] Aid by former colonial masters is never couched in such terms, but is presented as "mutually beneficial co-operation".

The campaign for African reparations was relaunched in the 1990s, when a conference on reparations was held in Lagos, Nigeria.[287] This was followed by a second conference in 1993, and

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280 Clapham (1991) at 80.

281 *Ibid.*

282 See interviews with Commissioners Beye, Kisanga and Ndiaye ((1996) (Oct - Dec) *AFLAQ* at 18, 31 and 43 respectively.

283 Interviews with Commissioners Nguema, Ben Salem and Rezzag-Bara, for example: see (1996) (Oct - Dec) *AFLAQ* at 8, 35 and 46, respectively.

284 Bedjaoui (1986) 2 *Lesotho Law Jnl* 93 at 117.

285 See eg Bedjaoui (1986) 2 *Lesotho Law Jnl* 93 at 118.

286 See Bedjaoui (1986) 2 *Lesotho Law Jnl* 93 at 128 (n 12).

287 See Abiola (1992) at 4.

the adoption of the Abuja declaration.[288] The African Reparations Movement ("ARM") is aimed at obtaining reparation for enslavement and the effects of colonialism in Africa. Slavery retarded African development, the movement argues, when millions of active Africans were removed into forced labour in the "new world". With the abolition of slavery, foreign focus turned to Africa itself, resulting in the exploitation of its resources and potential. Economic aid is not regarded as sufficient reparation.[289] International precedent are cited in support of the movement's contentions.[290]

5.1.5.4 Some differences with the African system

i European homogeneity

Africa lacks the homogeneity of the European system. The European Convention system is "closed", departing from a strong sense of common identity, concretised in common membership of the Council of Europe. To become a member of the Council of Europe, states have to comply with the basic principles of the Council. These are democracy, rule of law, and respect for human rights. Initially, "respect for human rights" did not imply that ratification of the Convention (or acceptance of the individual complaints and of the Court's jurisdiction) served as a prerequisite for membership of the Council. Only in 1989 have all the member states of the Council complied with the three requirements of ratification, acceptance of individual complaints, and consent to the Court's jurisdiction. This meant that membership of the Council of Europe has become "regarded

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288 See the web page of the African Reparations Movement (UK) ("ARM (UK)") at http://the.arc.co.uk/arm/FAQs.html

289 At the cited web page, the ARM (UK) observes as follows: ARM believes that foreign aid is a double-edged sword which usually ends up with the recipient country owing more to the donor countries than they originally received. ARM also believes that African people owed many trillions of dollars compensation ... The wage bill of 50 million people for a period of over 400 years is so vast that, were the ARM to demand full compensation, all the countries in the North would be pauperised and they would indeed be in the position of the current countries of the South".

290 The state of Israel receives vast amounts of money yearly from Germany. The basis of this compensation is the suffering of Jews under Nazi rule during the Holocaust. Recently, the ICJ has ordered Iraq to pay reparations to Kuwait for damages suffered by Kuwait during the Gulf War.

as inseparable from the undertaking to accept all obligations under the Convention, including the optional clauses".[291]

At the same time (1989) revolutionary changes saw new states emerging in Central and Eastern Europe. When some of these states started expressing the desire to become part of the Council of Europe, compliance with the three requirements listed above were made a political condition. The question of a state's admittance to the Council rests with the Committee of Ministers, responding to a proposal by the Parliamentary Assembly. In order to report on requests for membership by the "new" states, the Assembly set up teams of experts to visit the states concerned (with their consent). Such teams visited and compiled reports on Lithuania, Latvia, Estonia, Slovenia, Rumania, the Czech Republic, Slovakia, Russia and the Ukraine.

Russia applied for membership of the Council of Europe on 7 May 1992. Two rapporteurs examined and reported to the Parliamentary Assembly of the Council. The reports dealt with the legal system, the state of democracy, the economy, areas of political and military tension, the organisation of the judiciary, criminal law and human rights. Rapporteur Meuhlemann concluded as follows: "Russia does not yet meet all Council of Europe standards but integration is better than isolation; co-operation is better than confrontation".[292] On 25 January 1996 the Parliamentary Assembly of the Council of Europe decided to invite Russia to become a member. On 28 February 1996 Russia became the Council's 39th member.[293]

ii Democratic basis of Council of Europe

Democracy is, at worst, a stranger, and at best a recent arrival on the African continent. The Convention is founded on the idea that states maintain a basic democratic system. This forms part of the prerequisites for becoming a member of the Council of Europe. No similar requirement is

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291 Strasser in Macdonald (ed) (1993) at 777.

292 See Meuhlemann "Information Report" (1996) 17 *HRLJ* 185, and decision by Parliamentary Assembly (1996) 17 *HRLJ* 185.

293 See Meuhlemann (1996) 17 *HRLJ* at 194.

set for membership of the OAU. On the contrary, the OAU has until the late 1970s largely been a club of African dictators.

Under the European Convention, the principle of state-compliance is ensured. The Commission and Court only have to deal with the fine-tuning of the system. In exceptional instances, the Convention has played some role in restoring democracy. An example is provided in the inter-state complaint of *Denmark, Sweden, Norway and the Netherlands v Greece*.[294]

Even in the context of the criminal trial, where complaints mostly originate, violations are exceptional occurrences embedded in generally favourable conditions. Exceptions confirm this trend. Tomuschat observes that a series of cases brought against Italy reveals not just non-compliance on an individual case basis, but "a general breakdown of the judicial system".[295] He continues to show that the general effectiveness of the Convention organ also suffered a "breakdown" under these circumstances.[296] This gives support to a contention that the European system is directed at individual cases that represent isolated events against a backdrop of habitual compliance.

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294 Applications 3321 – 3323 and 3344/67, (1968) 11 *YB of the European Convention* at 690. The Commission set a task team to undertake investaigations in Greece. Following a finding by the Commission and the Committee of Ministers that the Greek government was responsible for a practice of torture and ill-treatment, Greece denounced the Statute of the Council of Europe, withdrew from the institution and denounced the European Convention. In 1974, after the restoration of democratic government, Greece resumed its membership and once again ratified the Convention (see Robertson (1977) at 40 – 42).

295 Tomuschat (1992) 13 *HRLJ* 401 at 406.

296 Tomuschat (1992) 13 *HRLJ* 401 at 404 - 405.

5.2 *The Inter-American system*

5.2.1 A brief history

As in the case of Europe, the Inter-American system took some time to become a functional system. In the Americas, institutional and substantive evolution stretches more years and considerably more phases than in Europe. This story needs to be told briefly:

It started at the political level, with states in the region seeking closer co-operation since the previous century.[297] In 1948, this movement culminated in the establishment of the Organisation of American States ("OAS") through the adoption of the OAS Charter. Not a very detailed, but at least a principled, commitment to human rights was included in the founding Charter.[298] At the same conference, the founding members adopted the American Declaration of the Rights and Duties of Man. This was, however, simply a resolution and not intended as a binding obligation on states.[299] No institutional arrangement was made for the implementation or supervision of the proclaimed rights either.

The lack of any institutional framework, apparent in the face of numerous human rights violations in the region, received the attention of the OAS ministers of foreign affairs meeting in 1959. By a resolution, they created a Commission to further ensure respect for human rights. Members of this Commission were elected and it started functioning as an autonomous entity within the OAS framework in 1960. The basis of its promotional and protective functions was the American Declaration. Through the Commission's activities, the Declaration has gradually been accepted as a "normative instrument that embodies the authoritative interpretation" of the "fundamental rights"

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297 See Buergenthal and Shelton (1995) at 37.

298 The principle of "the fundamental rights of the individual without distinction as to race, nationality, creed or sex" was affirmed in art 5(j) of the original Charter.

299 See Buergenthal (1975) 69 *AJIL* 828 at 829. This Declaration was in fact adopted before the Universal Declaration.

referred to in the OAS Charter.[300] Eventually, to draw this development to its conclusion, the Inter-American Court of Human Rights declared that "the Declaration is for these states (OAS member states) a source of international obligations related to the Charter of the Organization".[301]

The fact that the Commission lacked a clear treaty basis, did not deter it from functioning proactively. As will be discussed below, it examined complaints, made recommendations and drafted reports. In 1970, the Commission was converted into one of the principal organs of the OAS, with the coming into effect of the Protocol of Buenos Aires.[302] Almost simultaneously, in 1969, the American Convention on Human Rights was adopted at an inter-governmental conference organised by the OAS. It took until 1978 to secure the ratification of eleven of the member states.[303] Its entry into force required the OAS General Assembly to provide for a new Statute for a reconstituted Commission. The new Statute, adopted in 1979, highlights the Commission's dual role, the one under the OAS Charter (in relation to all OAS member states) and the other under the American Convention (in relation to those OAS members that have ratified the Convention).

The American Convention of 1969 also provides for the establishment of the Inter-American Court of Human Rights. The Court was only established in 1980, after its first seven judges had been elected and its Statute had been approved by the OAS General Assembly and entered into force.[304] The Court delivered its first advisory judgment in 1982.[305] Two cases were submitted and decided (in 1981 and 1993) on the jurisdiction of the Court, but the first judgment in which the Court proceeded to consider the merits, was given only in 1988.[306]

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300 Buergenthal (1995) at 180.

301 Advisory Opinion OC-10/89, I-A Court Series A 10 at par 45.

302 This protocol amended the OAS Charter and gave the Commission an "institutional and constitutional legitimacy it had not previously enjoyed" (Buergenthal (1995) at 183).

303 As required by art 74(2) of the American Convention.

304 See eg Mower (1991) at 114.

305 The *'Other Treaties' Subject to the Consultative Jurisdiction of the Court* case, I-A Court Series A 1, judgment of 24 September 1982.

306 The *Velásquez Rodríguez* case, I-A Court Series C 4, judgment of 29 July 1988. See also the Preliminary Objections judgment in this case, I-A Court, Series C 1, judgment of 26 July 1987.

The reasons why the first judgment of the Court was delivered only then, are the following:

- Most obviously, the non-acceptance of the optional jurisdiction of the Court by a majority of states reduces the potential impact of the Court.[307]

- The Commission was established first, quite some time before the Court. An inevitable feeling of loss of power, stature and influence on the part of serving commissioners and secretarial personnel no doubt contributed to some feeling of resentment at the "intrusion" of the new institution. In the first few years a number of cases could have been referred to the Court, but the Commission persisted in virtually ignoring the Court. Mower euphemistically refers to the Commission's inclination to "concentrate on own responsibilities".[308]

- Even though the Commission had not referred cases to the Court, the possibility of such a referral induced states to co-operate with the Commission. The mere presence of a court was used to exert pressure on states to work with the Commission in order to resolve disputes. By exerting its influence in this indirect way, the Court was deprived an opportunity to adjudicate publicly in contentious cases.

With the ratification of more states and the changing attitude of the Commission, the first contentious case was brought to court. The Court's decision was in itself also instrumental in generating publicity and enthusiasm for the Court, accentuating its role and accelerating its progress. In its first fifteen years of existence, the Court issued fourteen advisory judgments and seventeen judgments in various phases of eleven different cases submitted to it.[309]

The normative framework was also extended progressively. The Inter-American Convention to Prevent and Punish Torture was adopted in 1985, and entered into force in 1987. It reinforces and expands upon guarantees in the American Declaration and Convention. No additional supervisory body was created. The Commission is given the rather weak mandate to "endeavor in its annual

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307 See art 62(3) of the American Convention. By 1987, only ten states have accepted the Court's jurisdiction (Mower (1991) at 122).

308 Mower (1991) at 79.

report to analyze the existing situation in the member states ... in regard to the prevention and elimination of torture".[310] Further elaboration of civil and political rights are: the Protocol to the American Convention on Human Rights to Abolish the Death Penalty,[311] the Inter-American Convention on Forced Disappearance of Persons[312] and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women.[313]

An important additional Protocol, dealing with socio-economic rights, was adopted in 1988. It is known as the "Protocol of San Salvador", but is officially called the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights.[314] It has not entered into force yet, but when it does, states parties will have to submit periodic reports to the Inter-American Economic and Social Council on the progressive measures taken to ensure respect for the rights set out in the Protocol.[315] The Commission may also "formulate such observations and recommendations as it deems pertinent concerning the status of the economic, social and cultural rights" in the Protocol.[316] In respect of the right to organise and to join trade unions, the right of trade unions to function freely, and the right to education, individuals may apply to the Commission in terms of the complaints mechanism provided for under the American Convention.[317]

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309 See list in Buergenthal and Shelton (1995) at 687 - 689, also giving references to where the full texts of these judgments may be found.

310 Art 17 of the Inter-American Convention to Prevent and Punish Torture; full text quoted in Buergenthal and Shelton (1995) at 638 - 640.

311 The Protocol enters into force for those states that ratify it; see full text in Buergenthal and Shelton (1995) at 637.

312 It requires ratification by two states, not secured by 1 August 1995: Buergenthal and Shelton (1995) at 641 - 644.

313 In force since 3 March 1995, see Buergenthal and Shelton (1995) at 645 - 648.

314 See the full text of 22 articles in Buergenthal and Shelton (1995) at 631 - 636.

315 Art 19 of the Protocol.

316 Art 19(7) of the Protocol.

317 Art 19(6) of the Protocol. This is only the case when these rights are violated "by actions directly attributable to a State Party to this Protocol".

By 1995, the OAS had 35 members, of which 25 had by then ratified the American Convention.[318] The major OAS members that had not ratified, are Canada and the USA. Other non-ratifying states include the "smaller English-speaking Caribbean nations".[319] At the same date, sixteen states parties have recognised the contentious jurisdiction of the Court. They were, with date of acceptance: Costa Rica (1980), Peru, Honduras, Venezuela (1981), Ecuador, Argentina (1984), Uruguay, Colombia (1985), Guatemala (1987), Suriname (1988), Panama, Chile, Nicaragua (1990), Trinidad and Tobago (1991) ,as well as Paraguay and Bolivia (1993).[320]

5.2.2 The Commission and the realisation of human rights

The Commission's dual role appears from the brief historical introduction above. At first, the Commission acted on the basis of the OAS Charter. Later, it was mandated to act in terms of the Convention.

5.2.2.1 Commission as Charter-based organ

To explain the way in which the Commission started functioning in the 1960s, one must take the contemporaneous social, political and economic factors into account. Politically, numerous Latin American regimes were repressive and authoritarian. There was little room for the rule of law to exist, and for an independent judiciary to function. Socio-economic conditions led to further deprivations. Arising from this context, the Commission became confronted with violations of three rights in particular: the **right to life**, the right to **liberty,** and the protection of **personal security and integrity**.[321] Violations of these rights did not present themselves as isolated events, severed in time and space, but as threats to masses of people, stretching over lengthy periods of time. In most instances, a significant sector of the population, or the population as a whole,

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318 See Buergenthal (1995) at 174 and 194.

319 See Buergenthal (1995) at 194.

320 Buergenthal and Shelton (1995) at 617.

321 See Medina Quiroga (1988) at 76 - 85, on the Commission's initial handling of gross and systematic violations.

suffered from threats to the three stated rights. Redress could generally not be postponed, as the nature of the interests threatened dictated urgency of response.

The Commission still considered individual complaints, but could not use that method as the model for its total functioning. The individual complaints procedure, as it is used under the European Convention, departs from certain assumptions. It assumes that the rule of law is in place within an existing democracy. Breaches of rights are isolated events that should be brought to conformity with generally-accepted standards. It assumes, further, that states will co-operate, by, for instance, giving consent for investigations and by providing the Commission with information necessary to fulfil its functions. After being faced repeatedly with the incorrectness of these assumptions, the Commission developed a system that caters for both "individual" and "general" cases. "General" or massive and serious violations received priority.

The Commission's competence to protect human rights was formally acknowledged only in 1965. An amendment to the Statute of the Commission was adopted, followed by changes to the Commission's own regulations.[322] In these, a distinction was drawn between the supervision of human rights of a "general" and of an "individual" nature. The Commission had a general competence to survey all rights contained in the American Declaration. On the basis of violations, the Commission draws up reports about the situation in a specific country. The procedure adopted by the Commission is swift and flexible. Formal, legalistic requirements about time periods and the exhaustion of domestic remedies do not apply. Information is obtained from individual complaints directed to the Commission, other sources, and on-site investigations if the state agrees thereto. This report may at any time be made public by the Commission. This country-specific report could also be included in the Commission's comprehensive annual report to the OAS.

Individual complaints could also be examined. Under the 1965 resolution, individuals could only base their claims on seven of the 27 rights in the Declaration. These were the "preferred rights".

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322 See Medina Quiroga (1988) at 78 - 80.

They were articles 1, 2, 3, 4, 18, 25 and 26 of the American Declaration.[323] This avenue was more legal in nature, as strict requirements of exhaustion of local remedies had to be followed. An investigation of the complaint could lead to a finding that a right had been violated, to recommendations to states, and a report.

One of the most significant contributions of the Commission was the system of reporting on its examination of the human rights situation in OAS member states. In cases where states concerned did not consent to a visit by the Commission, reports were prepared on the basis of complaints received and evidence heard outside the state.[324] The Dominican Republic became the first state to permit the Commission to undertake an on-site investigation. The Inter-American Commission is unique among inter-govermental organs in its ability to react to widespread violations of human rights and in initiating investigation of the human rights record in a country. Through these reports governments were exposed to unfavourable publicity, causing changes in conduct and raising public awareness.[325]

5.2.2.2 Commission as Convention-based organ

Under the Convention, the Commission has three main functions: It may undertake on-site investigations and draw up country reports, it may process individual complaints, and it may recommend measures to promote human rights in the region.[326] While country studies and reports constituted the main function of the Commission in the 1970s and 1980s, it has declined in importance after most military dictatorships have been replaced by democratically-elected governments in the 1990s. Country studies played a significant role in this change. Vivanco

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323 The preferred rights deal with the right to life, liberty and security (art 1), the right to equality (art 2), the right to religious freedom (art 3), the right to freedom of expression (art 4), the right to a fair trial (art 18), the right to protection from arbitrary arrest (art 25), and the right to due process of law (art 26).

324 The first two countries investigated on this basis were Cuba and Haiti (see Buergenthal and Shelton (1995) at 290).

325 See Mower (1991) at 85.

326 Art 41 of the American Convention.

argues that the importance of reports is declining, and that individual complaints present the most direct and feasible way of realising rights in the Americas today.[327]

The Commission decides on the admissibility of individual complaints.[328] If a complaint is declared admissible, the Commission investigates the facts. During this process the Commission must place itself at the disposal of the parties "with a view to reaching a friendly settlement".[329] If the parties do not arrive at an amicable resolution of the dispute, the Commission sets out its conclusion on the matter in a report.[330] The report is transmitted to the state concerned. The state now has three months within which to react to the recommendations of the Commission. The case may also be referred to the Court in that period.

The Commission is responsible for overseeing the implementation of its recommendation if the matter is not referred to the Court. A state may be required to implement recommendations within a specified period. After expiry of the period the Commission may decide to publish its report. Eventually, the matter may be placed before the OAS General Assembly.

5.2.3 The Court and the realisation of human rights

The Inter-American Court derives its powers exclusively from the American Convention. In terms thereof, the Court can issue three kinds of judgments: advisory opinions, findings of and remedies to violations in individual cases, and interim orders.

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327 See Vivanco (1993) at 11.

328 For an overview of the Commission's procedure, see eg Buergenthal (1995) at 199 – 207 and Mower (1991) at 67 – 88.

329 Art 481(f) of the Convention.

330 Art 50 of the Convention.

5.2.3.1 Advisory jurisdiction

It is especially in the exercise of its advisory jurisdiction that the Court has been influential. So far, the Court has made use of its advisory jurisdiction more extensively than its contentious jurisdiction. It has issued fourteen advisory opinions in the first fifteen years of its existence. The Court's advisory jurisdiction extends beyond the states parties to the Convention, as all OAS member states may request advisory opinions.[331] Thus far, however, all requests have come from the Commission and states parties only.[332] Although advisory opinions are not legally binding, it will be shown below[333] that these judgments "have considerable persuasive effect not only for the states which are party to such proceedings, but for the entire inter-American system".[334]

5.2.3.2 Contentious jurisdiction

The contentious jurisdiction of the Court has been used relatively infrequently. One reason is the fact that the Court's contentious jurisdiction has to be accepted by states. Another reasons why the Court's jurisdiction has not been invoked more frequently, is that the most pressing and prevalent violations in Latin America are by their very nature better supervised by a non-judicial or quasi-judicial institution. This is especially true for the period of widespread military rule in Latin America during the 1970s and 1980s. The mechanism of country reports provided the best means of addressing these situations of massive and systematic human rights violations. With the election of democratic governments in most of the OAS member states in the 1990s, on-site investigations and specific country reports have declined notably. In future, human rights victims will have to rely increasingly on individual petitions to redress violations of their rights.[335] This is bound to increase the importance of the Court's contentious jurisdiction.

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331 See cases listed in Buergenthal and Shelton (1995) at 687.

332 See Buergenthal and Shelton (1995) at 265.

333 Par 5.2.5(f) below.

334 Davidson (1997) at 232.

335 See Vivanco (1994) at 16 –17 of typed manuscript.

5.2.3.3 Interim orders

At present, the American Convention is the only international human rights instrument which provides for interim orders. The Court must adopt provisional measures in "cases of extreme gravity and urgency" when such measures are "necessary to avoid irreparable damage to persons".[336] Interim measures may be ordered after a case has been submitted to the Court,[337] or at the request of the Commission, when the case is still under consideration by it.[338]

5.2.4 Co-existence with institution providing of regional economic integration

The Organisation of American States set out as a regional political body. Only later, with the forming of MERCOSUR, initiatives were taken towards economic integration in the region.[339] The objectives of MERCOSUR are trade liberalisation, co-ordination of macro-economic policies, establishing a common external tariff, negotiation of special agreements and the institutionalisation of a dispute-solving framework.[340] MERCOSUR lacks a court to interpret community law, such as the European Court of Justice. Instead, an arbitration procedure is provided for.[341] Arbitration only enters the picture after direct negotiations and recourse to conciliation have proved to be unsuccessful.[342] Only then will an arbitration panel of three members be appointed to give a binding judgment. This has been described as "the only instance where a MERCOSUR body has

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336 Art 63(2) of the American Convention.

337 As was done in the *Velásquez Rodríguez*, *Godínez Cruz*, and *Garbi* and *Corrales* cases, see (1981) 2 *HRLJ* 108.

338 More often invoked, see eg *Chunimá* case (1992) 13 *HRLJ* 253, *Chipoco* case (1993) 14 *HRLJ* 257 and *Reggiardo-Tolosa* case (1994) 15 *HRLJ* 259.

339 MERCOSUR is the acronym for the Common Market among Brazil, Argentina, Uruguay and Paraguay. For a background, see Viejobueno (1995) 20 *SAYIL* 81.

340 Viejobueno (1995) 20 *SAYIL* 81 at 102.

341 See Protocol of Brasilia for the Settlement of Disputes (1997) 36 *ILM* at 691.

342 Viejobueno (1995) 20 *SAYIL* 81 at 113 -114.

been granted a degree of supra-nationality, in that the interpretation laid down by the tribunal is taken as the final word on the matter".[343]

The *ad hoc* nature of the tribunal means that a body of case-law will not readily develop. It seems unlikely, at least in the short term, that a human rights-based jurisprudence will evolve along the lines of the trend traced in the European Court of Justice. It is further unlikely that an overlap of the two institutions will occur in the field of human rights adjudication, as has been the case in Europe.

5.2.5 Relevance for Africa

Of the two major regional regimes which have preceded the adoption of the African Charter, the Inter-American system is of much more relevance to the African situation than the European.[344] Some of the reasons for this statement are now discussed. Despite this fact, African courts have made infrequent use of Inter-American case-law as a guide to consitutional interpretation.[345] Examples of reliance on this system in Southern Africa are found in Namibian,[346] South African[347] and Zimbabwean case-law.[348]

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343 Viejobueno (1995) 20 *SAYIL* 81 at 114.

344 For a general overview and comparison of the three systems, see Weston, Lukes and Hnatt (1987) 20 *Vanderbilt Jnl of Transnational Law* 585.

345 Especially compared to the extent of reliance on cases decided under the European Convention. This state of affairs has been influenced by Africa's (post) colonial link with Europe, as well as by inaccessibility, language differences and the fact that relatively few judgments have to date been delivered by the Inter-American Court of Human Rights.

346 See eg *Kauesa v Minister of Home Affairs* 1995 1 SA 51 (NmH) (at 90,91).

347 In South Africa, it was referred to in *S v Rudman* 1989 3 SA 368 (C), where Cooper J emphasised that the Convention had not been ratified by South Africa and that it did not form part of customary international law (at 376), in *S v Makwanyane* 1995 3 SA 391 (CC) (at par 35, nn 48, 52), *Coetzee v Government of RSA* 1995 6 SACLR 1 (CC) (at par 52) and *Ferreira v Levin* 1996 1 SA 984 (CC) (at par 170).

348 Reference is found in eg *S v Juvenile* 1990 4 SA 151 (ZSC) (at 155 H-I) and *Retrofit v Posts and Telecommunications Corporation* 1996 1 SA 847 (ZSC) (at 856 G-H).

5.2.5.1 Socio-economic similarities

The generally favourable economic conditions in Western Europe contrast sharply with those in Latin American states. Poverty was and still is an acute problem in all of Latin America. One indicator of the consequences of poverty is low life expectancy - one-tenth of children in Central America, for example, will die before the age of five.[349] These countries also have high unemployment, low literacy and education levels, and carry heavy burdens of external debt.[350] The socio-economic profile of Africa is broadly similar to that of Latin America.

An example of how these factors impact on the work of the Inter-American Commission and Court is the way in which the requirements of "exhaustion of local remedies" had been dealt with. In its request for the Court's advisory opinion in *Exceptions to the Exhaustion of Domestic Remedies*[351] case, the Commission asked the Court's advice on the following question: Is an indigent, who is unable to avail himself (or herself) of potential remedies in his or her own legal system due to economic circumstances, required to exhaust local remedies? The Court answered in the negative, concluding that "if legal services are required ... and a person is unable to obtain such services because of his indigence, then that person would be exempted from the requirement to exhaust local remedies".[352] The basis of this finding was that requiring the exhaustion of domestic remedies under such circumstances would infringe a person's right to equal protection before the law. Equal protection before the law includes the right not to be discriminated against by reason of economic status.[353] Such an approach seems equally appropriate in an African setting.

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349 See Mower (1991) at 5.

350 Mower (1991) at 6.

351 Advisory opinion OC 11/90, judgment of 10 August 1990, see also (1991) 12 *HRLJ* 20.

352 At par 30 of the judgment.

353 See par 22 of the judgment.

5.2.5.2 Political contexts similar

To be admitted to the Council of **Europe**, prospective member states have to be **stable** and established **democracies**. With the exception of Greece in the 1970s, democracy as an accepted form of governance has never been threatened in states parties to the European Convention. Democratic governance and stable governments in European enhanced the commitment of states parties to human rights and their co-operation with the Commission. In contrast, **authoritarianism** has characterised forms of government in **Latin America**. Mower finds its basis in similar political practices of native Indians and hierarchical institutions imposed by Spanish and Portuguese colonial rule.[354] A movement towards democracy may be discerned in Latin America during the 1980s. This process was also enhanced by the Commission. This movement itself led to regional **instability**, with states hovering between the old (despotism, authoritarianism) and the new (democracy).

The co-operation of governments has been a major obstacle in the Inter-American system. Similarly, the first ten years of the African Commission's functioning has only seen a very gradual shift towards better state co-operation. This has been illustrated, in recent years, by states allowing the Commission to undertake on-site visits, and by their participation in the activities of the Commission. But the limited extent to which states sometimes contribute positively, is overshadowed by their non-compliance of basic duties, such as reporting and responding to queries by the Commission.

5.2.5.3 Negative impact of colonialism

Latin America and Africa share **a history of colonialism**. Its legacy partly informs the current socio-economic and political situation in both Africa and Latin and Central America. This factor underlies many of the problems and disadvantages experienced in a post-colonial context. The European system does not have to grapple with these burdens of the past.

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354 (1991) at 13.

5.2.5.4 Nature and scope of violations

From the three first features, it follows that the nature and scope of human rights violations differ in Western Europe (on the one hand) and in Africa and Latin America (on the other). Findings of violations under the European Convention are not directed at achieving fundamental institutional reform. They are directed at aberrations in a democratic system directed towards the realisation of basic rights. Some of these "aberrations" were very serious, for instance torture and maltreatment of prisoners. But typically, violations are raised within the context of the right to a fair trial, to ensure its "fairness". So, issues such as the length of proceedings, the impartiality of presiding officers, and the provision of legal defence have been raised. While these issues are important, they amount to a "fine-tuning" or technical refinement of the engine of the European system. Recently, some cases involving allegations of patterns of gross human rights violations have demonstrated the shortcomings of the European system in this regard.[355]

In contrast, considering the nature of regional violations, the image of a complete "overhaul" of the engine in the case of the Inter-American system comes to mind. Mower[356] identifies three recurring violations of a "grim" and "devastating" form in Latin America: forced disappearances (which led to politically motivated killing); summary executions (again, on political grounds) and systematic torture. The initial focus of the Commission was exclusively on series or patterns of violations, and not on individual cases. Individual cases only become relevant as examples of mass violations. Addressing isolated incidents in an *ad hoc* way would not have gone to the root causes - the existence of repressive regimes that implemented these atrocities.

In short, the Inter-American system was directed not merely at enhancing the human rights performance of established democracies, but at establishing and strengthening democracy itself. The extent of human rights violations in Africa, the struggle for democracy to take root and the nature of violations already submitted to the African Commission[357] all underscore the similarity between the Latin American and African experience.

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355 See Reidy, Hampson and Boyle (1997) 15 *NQHR* 161.

356 (1991) at 25-30.

357 See ch 3.3.3 (b) above.

5.2.5.5 Lack of regional homogeneity

The profile of members of the Council of Europe has traditionally been clearly more homogenous than that of the OAS. With states like Canada, the USA, Cuba, Brazil, Chile, Mexico and Antigua all under one umbrella, the cumulative effect of socio-economic, ideological, cultural, linguistic,[358] political and historical differences are more pronounced in this region than in Europe. After the fall of the Berlin Wall and the demise of socialism, many former "East" European states have joined the Council of Europe.[359] This has changed the character of the Council of Europe, introducing socio-economic, cultural, linguistic and political differences. Although not all OAS member states have ratified the American Convention, they are all bound by the OAS Charter and the Commission's mandate thereunder. Africa, with 53 OAU member states, and with its linguistic, cultural, legal, political and economic dissimilarities, resembles the Americas more than Europe. This factor will determine to a large extent how far judicial activism can extend.

5.2.5.6 Role of advisory opinions

The acceptance of the jurisdiction of the European Court is today regarded as a political requirement for ratification of the Convention. Before the increase in numbers of Council member states after the events of 1989, all the Convention states parties had already accepted the Court's jurisdiction. In Latin America, the number of states accepting the Court's jurisdiction grew slowly. By 1995, 17 of the 25 states parties to the Convention have accepted it.[360] A similar trend may be expected in Africa. However, acceptance only refers to the Court's "contentions" jurisdiction. This leaves room for the Court to impact on the position in all states through its advisory judgments, even where they have not accepted the Court's contentious jurisdiction.

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358 The dominant language in Latin America is Spanish, but Portuguese is the official language of Brasil. To this list should be added English (official language in eg Jamaica and Trinidad and Tobago) and French (in parts of Canada).

359 Fifteen states joined the Council of Europe between 1990 and 1996. They are Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Macedonia, Moldova, Poland, Romania, Russia, Slovakia, Slovenia and Ukraine ((1997) 22 *EurLRev* 82 – 83).

360 See Buergenthal (1995) at 208 – 209.

The following example from the Inter-American system illustrates this. In *Restrictions to the Death Penalty (articles 4 (2) and 4(4); American Convention on Human Rights)*[361] the Commission presented a case to the Court for an advisory opinion on a situation related to Guatemala. In terms of the Convention, states may not apply the death penalty to crimes for which it was not provided previously under the domestic law of that state. The government of Guatemala extended the penalty to political offences by creating Courts of Special Jurisdiction. Guatemala had not accepted the Court's contentious jurisdiction at that stage.[362]

The government of Guatemala attended the Court sitting and argued that an advisory opinion should not be issued. This argument arose from the state's concern "that this was a contentious case disguised as a request for an advisory opinion".[363] Rejecting this argument, the Court drew a clear distinction between contentious and advisory proceedings:[364] "There are no parties (in advisory proceedings) in the sense that there are no complainants and respondents; no State is required to defend itself against formal changes, for the proceeding does not contemplate formal changes; no judicial sanctions are envisaged and none can be decreed." As for the merits, the Court found the prohibition on the extension of the imposition of capital punishment to be absolute. Despite the fact that the judgment was not binding on the Guatemalan government, it abolished the Courts of Special Jurisdiction in 1983. The government also granted amnesty to all those sentenced to death by these courts previously.[365] Although it was a subsequent government that implemented these steps, the present ruler had already promised them.[366]

Another example is presented by the Inter-American Court's *Advisory Opinion on International Responsibility for the Promulgation and Enforcement of Laws in Violation of the American Convention on Human Rights*.[367] The judgment was given following a request by the Commission

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361 IA Court HR OC-3/83, 8 September 1983. Series A 3, reprinted in (1983) 4 *HRLJ* 339.

362 It did so in 1987 (Buergenthal and Shelton (1995) at 617).

363 Cerna (1992) 63 *British YB of Intl Law* 135 at 162.

364 At par 22.

365 By Decree Law 74/84, see Cerna (1992) 63 *British YB of Intl Law* 135 at 164.

366 Cerna (1992) 63 *British YB of Intl Law* 135 at 164.

367 Advisory Opinion OC-14/94, decided on 9 December 1994. The text of the judgment is reprinted in (1995) 34 *ILM* at 1188.

for an advisory opinion on the extension of the death penalty for additional crimes in the new Constitution of Peru.[368] Peru had at that stage not made a declaration accepting the jurisdiction of the Court. The government of Peru raised the preliminary objection that the Court was not mandated to express an opinion on the compatibility with the Convention of the local law of Peru. Finding the questions posed for the Court's determination to be "general in nature", the Court found that the Commission had standing to make the request for an opinion.[369] The principle enunciated by the Court was of a general nature, but its application to the situation in Peru was no secret to anyone.[370]

The Commission has also requested opinions on matters of general concern, not involving any particular state. An illustration is provided by the Court's advisory opinion on the question whether the judicial guarantee of *habeas corpus* may be suspended during a state of emergency.[371] *Habeas corpus* is not guaranteed in the American Convention, but the Court linked it to the right to liberty and not to be exposed to torture. As this is a non-derogable right, the judicial guarantee was also held to be non-derogable. Following this judgment, the Nicaraguan government desisted from suspending *habeas corpus* guarantees.[372]

5.2.5.7 Necessity of urgent interim relief

The nature of violations in the Inter-American system (mainly disappearances and systematic torture) and the lack of co-operation (or, even worse, the undermining) by violating states make

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368 This extension of the death penalty is in clear conflict with art 4(2) of the Convention, which provides that that the application of the death penalty "shall not be extended to crimes to which it does not presently apply".

369 Par 24 of the judgment.

370 The general principle enunciated was that "the promulgation of a law in manifest conflict with the obligations assumed by a State upon ratifying or acceding to the Convention is a violation of that treaty" and "gives rise to international responsibility for the State in question" (Court's finding).

371 *Habeas Corpus in Emergency Situations (Article 27(2), 25(1), 7(6) of the American Convention*), case OC - 8/87, judgment of 30 January 1987, Series A 8. See also (1988) 9 *HRLJ* 94, and Cerna in (1992) 63 *British YB of Intl Law* 135 at 186 - 189.

372 See Vivanco (1993) at 13 (n 28).

urgent interim relief imperative. Already during its consideration of the first contentious case, the Inter-American Court made use of the powers granted by the Convention. Witnesses who testified or still had to be called in the *Velàsquez Rodriguez* case were threatened. The Commission reported that a Honduran, summoned by the Court to appear as witness, was killed "on a public thoroughfare (in the capital city) by a group of armed men who .... fled in a vehicle". Soon thereafter, the Court was informed of the assassination of a man who testified before the Court, and whose testimony was hostile to the Honduran government.[373] The Court held a public hearing and issued provisional measures requiring the government to report within two weeks on measures it had adopted to protect witnesses and about the investigation of the assassinations.

Two more recent instances in which the Inter-American Court ordered provisional measures are *Tamayo v Peru* and *Lancayo v Nicaragua*.[374] In the latter case, the Court ordered provisional measures for the protection of the life of a presidential candidate, Arnoldo Aleman Lacayo. He was subsequently elected as president and took office in 1997. In Europe, the Court refused the Commission's competence to order interim measures.[375]

The Protocol establishing an African Court on Human Rights provides explicitly for interim measures.[376] This provision is informed by the failure of existing mechanisms to prevent the escalation of serious human rights violations on the continent. In this respect, again, the Latin American experience is of relevance to Africa.

5.2.5.8 Importance of conciliation functions

Friendly settlement procedures are allowed under both the European and Inter-American systems. The practice of the European Commission has rendered conciliation through amicable settlement almost irrelevant under the European Convention. From 1955 to 1989, for example, of the 14 241

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373 See Steiner and Alston (1996) at 652.

374 See (1996) 4 *Human Rights Brief* at 2,7.

375 See *Cruz Varas v Sweden*, Series A 201, judgment of 20 March 1991 (but with a slender 10 - 9 majority.)

376 See ch 7 below.

cases finally decided by the Commission, only 84 amounted to "friendly settlements".[377] With the adoption of Protocol no 11, the total obliteration of non-judicial, conciliatory means is a likely consequence of the future evolution of the European system. In a single institution, the emphasis will tend to fall almost exclusively on the legal dimension of rights realisation.

In contrast, the evolution of the Inter-American system was dominated by a non-judicial body, the Commission. Conciliation was very much part of its fact-finding activities and on-site investigations. By their very nature, these functions lend themselves much better to conciliation. This will ensure the "continuing relevance" of non-judicial conceptions in the American system.[378]

Factors such as the low level of "infiltration" of a culture of adjudication in traditional African societies, the (often) massive scale of violations and Africa's traditional preference for informal dispute resolution methods all support conciliation rather than adjudication as a method of social organisation and control.

5.2.5.9 Pre-existence of Commission

Under the Inter-American system a non-judicial structure (the Inter-American Commission) was established initially (in 1960). A judicial mechanism, the Inter-American Court, was launched only in 1980, twenty years after the first Commission was established.[379] This has led to a measure of tension in the relationship between the two institutions. Their inter-relationship is of particular importance, because the Commission is the main mechanism through which cases are referred to the Court. Two institutions - a commission and a court - were also set up under the European Convention, but they started off more or less simultaneously.

The African experience is again set to follow the Latin American example closer than the European. The African Commission was established in 1987. It has gradually settled itself over a

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377 Council of Europe (1989) at 16.

378 See Cerna in Janis (1992) at 131.

379 See eg Buergental (1995) at 181.

decade as a body of importance. In my view, the establishment of an African Court on Human Rights should not be expected before the turn of the century. This means that the African Commission will have been in existence for more than a decade and a half by that time. Similar tensions as in the Inter-American system may be expected, and should be anticipated and planned for.

5.2.5.10 More importance attached to reparations

The Inter-American and European systems differ from one another in two respects when it comes to reparations. The **competence** of the Inter-American Court to order reparations is **much broader** than that of the European Court.[380] The Inter-American Court has not only ordered pecuniary damages, but also **nonpecuniary or moral damages, rehabilitation and satisfaction**.[381] The Inter-American Court has also ruled that both the **victim's entitlement** to pecuniary and nonpecuniary damages automatically **passes to the victim's heirs**.[382] It is doubtful whether the position under the European Convention is similar.[383]

In these two respects, too, the Inter-American system has undergone developments which are closer to African values. In traditional African societies reparations were indispensable to restore the balance caused by some disruption of the societal fabric. Given the importance of the family, also in its extended form, the Latin American approach to the heir's entitlement would also seem closer to home to an African.

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380 The European Court is restricted to financial compensation - it may not order other remedial measures (see Pasqualucci (1996) 18 *Michigan Jnl of Intl Law* 1 at 10-11).

381 See ch 7 below, and Pasqualucci (1996) 18 *Michigan Jnl of Intl Law* 1 at 32-42.

382 See Pasqualucci (1996) 18 *Michigan Jnl of Intl Law* 1 at 17.

383 *Ibid.*

5.3 *The emerging Asian system*

No regional human rights system has evolved in Asia yet. Asia is also the region in which internationally accepted human rights instruments enjoy the lowest global ratification percentage.[384] Following the adoption of an African human rights instrument, the UN in 1982 convened a seminar in Colombo (Sri Lanka) to discuss the possibility of similar steps in Asia.[385] Government representatives from most Asian countries were not in favour of establishing a regional commission, expressing their preference for a global approach.[386]

On a sub-regional level, however, such efforts have been more fruitful. Given their commitment to human rights domestically, Australia and New Zealand have become the focal point of a sub-regional system in the Pacific Island region. Non-governmental initiatives to create such a sub-regional system were launched. Meetings were organised under the auspices of LAWASIA, an Asian NGO based in Australia.[387] A Pacific Island Human Rights Charter was drafted by NGOs in 1989. Governmental comment was invited. The proposal opted for implementation by means of a commission: "In proposing a Pacific Island human rights commission but not a court for the region, the drafters followed the African model".[388]

Some reasons for the failure of the emergence of systematic and institutional regional human rights protection in the Asian region are apparent from the following factors:

- A prerequisite for implementation of human rights norms on a regional level is the adherence to similar norms in domestic systems. Numerous Asian countries do not have a record of human rights protection, even on a formal level, and do not provide for constitutional protection of

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384 See eg Bayefsky in Henkin and Hargrove (eds) (1994) at 291, Table I, illustrating that Asia as a region has the lowest rate of ratification of all regions in the world. The Table shows that the Asian rate of ratification is consistently lower than that of Africa, the group with the second lowest ratification percentage.

385 Seminar on national, local and regional arrangements for the promotion and protection of human rights in the Asian region. See Leary in Welch and Leary (eds) (1990) 13 at 16-18.

386 Leary in Welch and Leary (eds) (1990) at 16, 24.

387 See Leary in Welch and Leary (eds) (1990) at 18-19.

388 See Leary in Welch and Leary (eds) (1990) at 19.

human rights. The existence of military and other forms of authoritarian government clearly impedes advances in this direction.

- "Asia" is hardly a homogenous single "region". It is geographically fragmented, consisting of more than 35 countries in the Indian sub-continent, South East Asia and the Pacific Islands. Religious and cultural differences abound. Some countries are strongly influenced by Islam, others by Hinduism, Buddhism, Confucianism and Christianity. Languages spoken include Hindu, Urdu, Tamil, Japanese, Thai, Mandarin and English. Ethnic driven groups, such as Malays, Chinese, Indians, Polynesians, Japanese and Afghanis co-exist in the region. Levels of economic development vary significantly: Highly industrialised countries (such as Japan, Singapore, South Korea) may be contrasted with developing countries where suffering and poverty is rife (the likes of Bangladesh, Indonesia and India). Governmental structures include "western" democracies (in Australia and India) and authoritarian regimes (in Bangladesh, Burma and China).

- Asian cultural traditions differ from those in the West. The concept of "human rights" is often regarded as alien.[389]

- No institution which can facilitate regional co-operation on a political level, exists. The other three regional human rights systems were all preceded by regional political organisations (the Council of Europe, the Organisation of American States and the Organisation of African Unity). However, there is a tendency that sub-regional structures are evolving. The Association of South-East Asian Nations ("ASEAN") and South Asian Association for Regional Co-operation ("SAARC") are examples of bodies for sub-regional economic and political co-operation.[390]

At least the first three of the four factors mentioned above would resonate in discussions about human rights protection on the African continent. In the light of this diversity one has to agree with

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389 From an Indian perspective, see Pannikar (1982) 120 *Diogenes* 75. More generally, see Kausikan (1993) 24 *Foreign Policy* 92.

390 Leary in Welch and Leary (eds) (1990) at 14-15.

Leary that the more preferable approach is "a sub-regional approach which attempts to build on the greater cultural homogeneity of a smaller area".[391]

5.4 *The Arab and Islamic world*

African states feature prominently among the members of the two major Arabic and Islamic organisations, the Arab League and the Organisation of Islamic Conference ("OIC"). The role of human rights under these two regimes is discussed briefly.

5.4.1 The Arab League

The League of Arab States was founded in terms of the Pact of the League of Arab States of 1945.[392] Its overriding aim is to strengthen unity among Arab states by designing closer links between its members.[393] The Pact emphasises the independence and sovereignty of the members. No mention is made in the founding document of either the contents or principles of human rights. The League institutions include the Council, the General Secretariat and an administrative tribunal, founded in 1964. Of the 22 member states of the League of Arab States in 1996, ten were from Africa.[394] They were Algeria, the Comoros, Djibouti, Egypt, Libya, Mauritania, Morocco, Somalia, Sudan and Tunisia.

At the international conference on human rights held in Teheran in 1968, some Arab states, with the assistance of the secretariat of the Arab League, managed to have the position of the Arabs in the territories occupied by Israel included in the agenda. This successful invocation of "human rights" issues, following a number of defeats at the hands of Israel in 1967, created an awareness of human rights among the Arab states. However, at the Teheran conference, and thereafter, the

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391 Leary in Welch and Leary (eds) (1990) at 16.

392 See MacDonald (1965).

393 See art 2 of the Pact of the League of Arab States.

394 See *Middle East and North Africa 1997* (1996) at 228.

commitment of the Arab League to human rights was primarily "a means of censuring Israel over its treatment of the inhabitants of the occupied territories".[395] Soon after the conference, in 1968, a regional conference on human rights was held in Beirut, where the Permanent Arab Commission on Human Rights was established. From its inception, this was a highly politicised body. The political nature of the commission is accentuated by the method of appointment. The commission does not consist of independent experts, as in many other international human rights bodies, but of government representatives. The Commission may only submit recommendations and suggestions to the League Council, another political body.[396]

In 1979, the Union of Arab Lawyers elaborated the Arab Convention on Human Rights. Its status remains unofficial.[397] The Arab human rights movement exerted pressure for the adoption of a more comprehensive and binding human rights instrument and at Syracuse the movement presented a draft covenant.[398] It provided for an individual complaints procedure and an Arab Court of Human Rights.[399] Almost surprisingly, and with very little fanfare, the Council of the Arab League adopted the Arab Convention (or "Covenant", or "Charter") of Human Rights at its 102nd meeting in 1994.[400] The Charter is not yet in force, as it must first be ratified by seven League member states.[401]

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395 Robertson and Merrills (1992) at 198.

396 Robertson and Merrils (1992) at 198 -199.

397 See Merrils and Robertson (1992) at 200.

398 Or "charter". In the literature available to me, the two terms are used interchangeably.

399 See Abu Se'Ada (1995) 1 *Huqooq Al Insaan* 28, and Robertson and Merrills (1992) at 200.

400 For the full text, see (1996) 56 *ICJ Review* 57. Rishwami (1996) 10 *Interights Bulletin* 8 at 10 is worth quoting in full: "During the Ordinary Session no 102, which took place in September 1994, resolution 5437 approving the Charter was adopted through a procedural manoeuvre. When this agenda-item was opened for discussion ... the then Jordanian Minister of Education, asked if there was any objection to approving the instrument. Kuwait asked to adjourn the discussion until the Council of Arab Ministers finalises the Arab Declaration on Human Rights. The Chairman put the Kuwaiti motion to the vote. ... The defeat of the motion was interpreted as an endorsement of the Charter". The Kuwaiti motion received only seven votes. None of these states were from Africa.

401 Arab Organisation of Human Rights (1995) *Human Rights Situation in the Arab World* deals with the adopted charter, at 1 - 6. By 1996, only one state, Iraq, has signed, but not ratified, the Charter (see Rishmawi (1996) 10 *Interights Bulletin* 8).

As far as substantive rights are concerned, the charter draws heavily on international documents, such as the CCPR and CESCR.[402] Unfortunately, these substantive rights have been rendered almost meaningless by the inclusion of articles 3 and 4 into the Convention. Article 3 states that the rights "contained within the constitutions and law of the member states shall not be restricted or overruled on the basis that they are not contained within the Covenant or that they are contradicted by it".[403] Article 4 allows for measures that would contradict the stipulations of the Covenant "in cases of public emergencies that threaten the existence of the nation".[404] Some internationally recognised human rights have been omitted from the Charter. Most striking among these omissions are the freedom from slavery and the right to change one's religion.

Not surprisingly, the Arab Convention did not follow proposals for an individual complaints procedure or for the creation of an Arab Court of Human Rights. The only supervising feature takes the form of a committee of human rights experts.[405] Seven experts in the field of human rights are elected from candidates proposed by member states to the Charter.[406] Committee members serve in their personal capacities. The only function provided for this committee is the examination of state reports.[407] States have to submit an initial report within a year of ratification.[408] Thereafter, reports are to be submitted every three years.

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402 The inclusion of the Cairo Declaration creates a contradiction, Rishwami (1996 (10) *Interights Bulletin* 8) argued.

403 As quoted by Abu Se'Ada (1995) 1 *Huqooq Al Insaan* 28 at 29. The full version of this article, which is quite difficult to follow, is as follows: "There will be no restriction of any basic human right which is recognised or existent in any State party to this Charter, by virtue of law, treaties or custom. Nor may [these rights] be derogated from under the pretext that they have not been recognised in this Charter, or recognised to a lesser degree".

404 *Ibid.* The relevance is highlighted in Arab League states: see the situation in Syria and Egypt, where states of emergency have been in force since the 1960s (1996) 10 *Interights Bulletin* 8 at 9.

405 See Rishmawi (1996) 10 *Interights Bulletin* 8 at 9 - 10.

406 Art 40(B) of the Arab Charter.

407 Art 41(1) of the Arab Charter.

408 *Ibid.*

One promising feature is the competence of the Committee to address queries to states parties, to which states must answer by submitting a report.[409] However, in all these cases the only follow-up provided for is that the Committee may address its comments to a political body, the Permanent Arab Commission on Human Rights. The Commission on Human Rights, in turn, reports to the League Council. Implementation under the Arab Charter on Human Rights is weak. The mechanisms established are inadequate. This regional system "offers little to the universal system and does little to advance human rights protection in the Arab World".[410]

The substantive weaknesses and lack of meaningful safeguards and implementation mechanisms invite the conclusion that the most recent instrument adopted under the auspices of the Arab League is little more than a declamatory statement intended to change international perceptions about human rights in Arab states. It is intended mainly for consumption on the level of international politics, to be used as a basis for criticism of Israeli human rights abuses. It has been pointed out that the Covenant had very little media exposure and subsequently "very little effect on Arab public opinion".[411] Clearly, the individual is not to be accorded any significant role within this framework. Only one member state of the League has as yet signed the Charter.[412] It seems unlikely that this regional instrument will enter into force soon.

For those states that are members of both the OAU and the Arab League, the African system provides a higher level of protection. Except for the African regional regime, international human rights regimes also provide for higher levels of protection for those states that have ratified such international instruments. Among these instruments, the CESCR, CCPR, the CRC and CEDAW have been ratified by a number of Arab League states. However, many of these states have entered far-reaching reservations at ratification, especially in the case of CEDAW.[413] The assumption that the African members of the Arab League take human rights obligations more seriously than other

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409 Art 41(2) of the Arab Charter.

410 See Rishwami (1996) 10 *Interights Bulletin* 8 at 10.

411 Arab Organisation for Human Rights (1995) at 3.

412 This country is Iraq: see (1996) 56 *ICJ Review* 57.

413 See ch 2.4.4 above.

League members is confirmed by the fact that the three League members who have, by 1994, adhered to the CCPR Optional Protocol, were all African.[414]

Two approaches to the evaluation of the Arab system are possible. One may regard its establishment as a positive development. Although it has certain deficiencies, it must be viewed as part of a gradual process. Seen from this perspective, it is better to have a weak system in place, than having nothing at all. One may, on the other hand, regard the system as meaningless and mere make-belief. Viewed from an African perspective, the argument for gradual evolution should find little favour, as Africa is at present moving beyond this phase to improve the effective functioning of its human rights system.

5.4.2 The Organisation of the Islamic Conference

The Organisation of Islamic Conference ("OIC") aims at the promotion of Islamic solidarity among member states. It works towards co-operation in the economic, cultural and political spheres. A Conference summit is held approximately every three years. Its institutions include the Conference of Ministers of Foreign Affairs, the secretariat and specialised commissions.[415] Of the 52 members in 1996, close to a majority (25 states) were African.[416] These states were: Algeria, Benin, Burkina Faso, Cameroon, Chad, Comoros,[417] Djibouti, Egypt, Gabon, Gambia, Guinea, Guinea-Bissau, Libya, Mali, Mauritania, Morocco, Mozambique, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Tunisia and Uganda. African countries generally perform better than other OIC states as far as ratification of international human rights instruments are concerned.[418]

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414 These states were Algeria, Libya and Somalia: see Arab Organisation of Human Rights (1995) at 2.

415 See *The Middle East and North Africa* (1997) at 235.

416 *The Middle East and North Africa* (1997) at 234.

417 See the preamble to the 1992 Constitution, which proclaims this state's commitment at the global level to the UN Charter, and at the regional level to the OAU Charter and the OIC Charter. This is a good illustration of the duality, but reconciliation of African and Islamic influences.

418 See the ratification chart (1996) 10 *Interights Bulletin* 42. Two OIC member states, Indonesia and Oman, have not ratified any international human rights instruments.

The major human rights document adopted under this framework is the Cairo Declaration on Human Rights in Islam.[419] It was adopted by members of the OIC at Cairo in 1990 and is clearly of a declamatory nature only. As its title indicates, and given the aims of the OIC, the declaration is based closely on the principles of the Shari'ah.[420] In a concluding provision, it is stipulated that all "rights and freedoms ... are subject to the Islam Shari'ah".[421]

Many rights are explicitly limited by the provisions of the Shari'ah. Examples are the right to life,[422] regulation of punishment[423] and the right to assume public office.[424] These deviations are extreme to the extent of threatening the international project to attain a core consensus on human rights across cultural barriers.

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419 UN doc A/45/421/5/21797 at 199.

420 In general, on human rights and Islam, see An-Na'im (1990) 3 *Harvard HR Jnl* 13.

421 Art 24 of the Cairo Declaration.

422 Art 2 of the Cairo Declaration.

423 Art 19(d) of the Cairo Declaration.

424 Art 23(b) of the Cairo Declaration.