PART A

PRESENT SYSTEMS OF MONITORING AND PROTECTING HUMAN RIGHTS

INTRODUCTION AND OVERVIEW

The post-1945 era saw a dynamic promotion of human rights and as a consequence of this, human rights instruments were codified at a scale never encountered before.[1] The newly established United Nations (UN), which was still trying to cope with the horrors of two world wars in general and the human rights atrocities committed by Nazi Germany during the second world war in particular, declared the promotion of human rights as one of its main objectives: Article 1 (3) of the UN Charter of 1945 stipulates as one explicit purpose, common to all Member States, the achievement of "international co-operation (…) in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[2] The adoption of the 1948 Universal Declaration of Human Rights[3] by the General Assembly is a reflection of this determination to protect human rights. With this instrument, the acknowledgment of human rights as an inseparable principle of international law was established. Soon it became apparent, however, that such declarations would not in themselves protect human rights, and that human rights would remain a difficult issue to enforce under international law. Consequently, a sophisticated UN system of monitoring, promoting and eventually protecting human rights developed under the various UN charter and treaty instruments.[4] This "backbone" of UN human rights protection is supplemented by other regional human rights protection systems.

Human rights protection today begins with the acknowledgment and subsequent codification of specific human rights and fundamental freedoms by the individual signatory state at the international and regional level. The next step is the necessary safeguarding of these rights which takes place through the monitoring of compliance by special organs – for example, the human rights commissions which were established under the various regional instruments (supplemented in their work by various Non Governmental Organizations (NGOs)). Three main procedures for this monitoring work are available: the examination of periodic state reports on their actual compliance, the reviewing of inter-state complaints and, finally as the

[1] See Cassese, *International Law*, (2004) 350, Dugard, *International Law – A South African Perspective*, (2005), 308-309.

[2] However limited in its scope; Article 2 (7) UN Charter stipulates "within the domestic jurisdiction" as a territorial limitation.

[3] G.A. Res. 217 A (III) Annex, adopted on 10 December 1948.

[4] The legal development of human rights protection in the UN followed essentially three doctrinal influences: the western doctrine in 1945 to the mid-50ies, the socialist doctrine in the mid-50ies to the mid-70ies and finally from the mid-70ies until today the doctrine of the developing countries, see Cassese, (n 1) 354-56.

most effective procedure, the individual complaint mechanism which resembles an already semi-judicial procedure of human rights protection.[5] The strongest procedure can be found in the availability of individual communications before the regional human rights courts that establish truly judicial review mechanisms of human rights protection. These human rights regimes create to an increasing extent state accountability for human rights violations with an increasing variety of remedies.

As a direct consequence, the move from merely monitoring and promoting human rights towards the creation of a system of actual accountability of states and, to a lesser extent, of individuals[6] for human rights violations became a reality in international law.

International human rights law ultimately means, in the words of the Inter-American Court of Human Rights, "the international protection of human rights" which "should not be confused with criminal justice. … The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible."[7]

State accountability imposes on the individual state the duty to protect human rights and enforce them domestically and (to a limited extent) internationally and finds its materialization in various political, legal, administrative and (to a lesser extent) financial sanctions for the offending state.

This part of the study describes the existing systems of human rights protection, as established by the UN with its seven treaty systems and supplemented by the three regional systems in Europe, the Americas and Africa. It focuses on the aspect of victim protection from human rights violations through protective means available under the different human rights regimes. The evolving approach to hold states and individuals directly accountable for gross human rights violations, via criminal or civil responsibility, is the subject of a further analysis in parts B and C.[8]

[5] *Id*. 363.
[6] An example of a quite effective system of individual accountability is the U.S. human rights litigation under the Alien Torts Claims Act and related acts. See Part B Chapter 2 for a discussion of the US human rights litigation.
[7] See the *Velasquez Rodriguez* decision of 1988, Ser. C, No. 4 in 9 *HRLJ* (1988) 212, para. 134.
[8] Chapter 3 includes a short *excursus* on civil remedies.

This part provides a brief overview and evaluation of the possibilities of human rights protection under the existing human rights protection regimes. After a short introduction to the different protection regimes, their efficiency will be discussed and the effects and impact of each system on the protection of human rights evaluated. Chapter 3 provides a brief outline of the nature of available remedies under the different human rights regimes.

CHAPTER 1

THE UN SYSTEM OF HUMAN RIGHTS PROTECTION

The UN Charter contains some explicit human rights provisions[9] without the means to actually enforce them. This is a consequence of the fact that the explicit protection of human rights was originally not regarded as a purpose fundamental to the newly created UN of 1945. The protection of human rights under the UN therefore developed as the consequence of a decade-long process of a gradual adoption of human rights instruments and protection measures.[10] As a consequence of this "seminal" development[11] of human rights protection, the present UN system of human rights promotion and protection is hybrid and diverse in its nature, taking place under various charter- and treaty-based institutions and their respective instruments.

The UN Commission on Human Rights and the UN High Commissioner of Human Rights as the two charter-based UN human rights organs are subjected to further analysis. The Human Rights Council replaced the now defunct UN Commission on Human Rights and will be briefly introduced. Out of the seven treaty-based monitoring committees,[12] the Human Rights Committee (HRC), the Committee Against Torture (CAT), the Committee on the Elimination of All Forms of Racial Discrimination (CERD) and the Committee on Migrant Workers (CMW) are part of this research.[13] And, ultimately, the role of the UN Security Council with its powers under Chapters VI and VII of the U.N. Charter in respect of the protection of human rights will be discussed.

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[9] See e.g. Articles 1, 13 (1) 55 and 56 UN Charter.

[10] With the Universal Declaration of Human Rights, adopted by General Assembly Resolution 217 A (III) of 10 December 1948, retrievable at http://www.un.org/Overview/rights.html, as an early manifestation of this process.

[11] See Malcolm N. Shaw, *International Law* (2003) 259.

[12] The Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Covenant on Economic, Social and Cultural Rights (CESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) have all their respective committees for monitoring and safeguarding compliance with the instruments in question and play an important role in the protection of human rights.

[13] This choice was made in order to concentrate on the main organs of (general) human rights protection and to keep the focus on the broader development of human rights and their protection mechanisms. A decisive factor in that choice was the existence of individual complaint procedures. Lacking such an individualised mechanism disqualified the respective human rights regime for an evaluation in this research. Examples of such omissions are e.g. the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which has so far not seen one individual complaint under its 1st OP, GA Res. 54/4 of 6 October 1999, entry into force on 22 February 2000.

1. THE (abolished) UN COMMISSION ON HUMAN RIGHTS

1.1. Overview

The UN Commission on Human Rights (CHR) was one of the two[14] functional commissions of the Economic and Social Council[15] (ECOSOC) and the main body for the protection of human rights. It was established in 1946 as a subsidiary organ of the ECOSOC by ECOSOC resolution 5 (I) of 16 February 1946. ECOSOC was responsible for selecting the Commission's 53 state members. The UN GA Summit on the UN Reform in New York decided in September 2005 to "dismantle the current Geneva-based Commission on Human Rights and establish a Human Rights Council during the coming year".[16] The CHR was eventually abolished as of 16 June 2006 by ECOSOC on 22 March 2006.[17] The decision requested the CHR to conclude its work at its sixty-second session. ECOSOC was confident that the new Human Rights Council would be able to replace the CHR in its mission to protect human rights globally.[18] The new organ, which was established as a subsidiary body of the General Assembly, inherited the work and the special mechanisms of the CHR.[19]

The CHR and its working procedures will be analysed in order to set out the functions of an institution that existed for sixty years and which contributed towards the protection of human rights by raising a global awareness of this important issue, by developing special procedures of human rights protection and by codifying major "universal" human rights instruments such as the Universal Declaration of Human Rights.[20]

1.2. The CHR and its Sub-Organs

The basic functions of the CHR were to monitor, debate and document human rights violations; it thus resembled a global forum for publicizing human rights violations through

[14] The other functional ECOSOC commission is the Commission on the Status of Women.
[15] ECOSOC plays an important role as one of the UN's principal organs under Chapter X of the UN Charter. One of its main functions lies in the making of "recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all." Article 62 of the UN Charter. This research does not explicitly evaluate this organ's contribution to the protection of human rights due to the fact that it is not a primary organ of human rights protection.
[16] General Assembly, GA/10385, Sixtieth General Assembly "World Leaders Pledge Wide-Ranging Steps On Poverty, Terrorism, Human Rights, UN Reform, As 2005 Summit Concludes In New York". UN Press Release of September 16th, 2005, retrievable at http://www.un.org/News/Press/docs/2005/ga10385.doc.htm.
[17] See decision of 22 March 2006, retrievable at http://www.un.org/News/Press/docs/2006/ecosoc6192.doc.htm
[18] See ECOSOC decision of 22 March 2006, retrievable at http://www.un.org/News/Press/docs/2006/ecosoc6192.doc.htm.
[19] See GA Resolution A/RES/60/251, para. 6. It is at this stage not clear to what extent the CHR's procedures and mechanisms will be replaced or abolished after a later review. This thesis will nevertheless discuss the major features and procedures of the CHR.
[20] UN GA Resolution 217 A (III).

public debate and denouncing offending states by means of resolutions.[21] Present human rights topics and issues were discussed during the Commission's annual meetings in Geneva. These meetings, where 3000 individuals representing 53 member states, NGOs, diplomats and other individual experts on human rights discussed human rights topics, constituted a "mega human rights conference",[22] and promoted human rights in a forum that was indeed unique in history.

The CHR utilized the work of the UN Sub-Commission on the Promotion and Protection of Human Rights with the following three means of human rights promotion/protection[23]: firstly, the "confidential" 1503 Procedure[24] under ECOSOC Resolution 1503 of 1970, secondly, the "public" 1235 Procedure[25] under ECOSOC Resolution 1235 of 1967, and, thirdly, the use of one of the two thematic mechanisms as a direct reaction to prior findings of human rights abuses, namely the designation of working groups[26] on certain specified topics or the appointment of Special Rapporteurs.[27]

Another, particularly important part of the CHR's work was the further development of human rights law by establishing working groups on certain human rights matters,[28] supervising their efforts and, finally, drafting and adopting new legal instruments of human rights law.[29]

The CHR was supported by some 50 national human rights commissions[30] which contributed through the submission of specific country reports, by applying additional pressure on the respective governments to ratify and to implement present instruments on human rights into

[21] Besides this function, another important function of the Commission was the drafting of human rights instruments. An important example for this drafting work is the Universal Declaration of Human Rights of 1948, where the CHR was tasked with the defining of human rights.
[22] Nowak, *Introduction to the International Human Rights Regime* (2003), 104.
[23] For more details and information on these procedures, see the following subparagraph "Shortcomings".
[24] Under the 1503-Procedure confidential petitions in relation to a consistent pattern of gross and reliably attested violations of human rights may be brought to the Commission's attention for consideration.
[25] The 1235-Procedure allows an annual public debate and the passing of resolutions on country-specific human rights situations.
[26] See e.g. the working group on Arbitrary Arrest and Detention.
[27] The CHR had appointed Special Rapporteurs for a wide range of human rights such as torture, extra-judicial summary executions, country specific human rights and violence against women. These Rapporteurs were often working closely together with other UN human rights organs, such as the Committee against Torture.
[28] See http://un.org//reports for an overview of the existing reports.
[29] See e. g. the *Basic Principles And Guidelines On The Right To A Remedy And Reparation For Victims Of Violations Of International Human Rights And Humanitarian Law*, UN Doc. E/CN.4/2000/62.
[30] Links can be found at http://www.nhri.net.

domestic law and finally by establishing human rights networks with other national human rights organizations and NGOs.[31]

The CHR was assisted in its work by the Sub-commission on the Promotion and Protection of Human Rights, a body consisting of 26 experts, established by the CHR in 1946 acting under ECOSOC resolution 9 (II) of 21 June 1946. The Sub-commission's original name "Sub-commission on Prevention of Discrimination and Protection of Minorities" was changed by ECOSOC decision 1999/256 of 27 July 1999.

The Sub-commission contributed to the work of the CHR through substantial "fact-finding" and field work and played an increasingly important role in the protection of human rights through the means of monitoring and investigating human rights abuses and developing human rights law further.

The confidential "1503" procedure dealt with country specific human rights violations brought to the attention of the CHR via communication lodged by the individual or a group of victims (or even non-victims) who had gained knowledge of the occurrence of such human rights violations. 1503 did not carry any sanctions with it as a possible consequence for human rights violations but served only as a "naming and shaming" procedure in cases of an apparent pattern of similar human rights violations. Two more Working Groups were designated[32] to accelerate the "1503" procedure: the Working Group on Communications, which screened the received communications at an annual meeting and the Working Group on Situations, which then examined particular human rights violation situations forwarded by the Working Group on Communications prior to the annual meeting of the CHR. This Working Group was tasked to refer admissible communications to the CHR.

The CHR's Working Group on Arbitrary Detention dealt with complaints of individual victims, their relatives, NGOs, governments and inter-governmental organizations concerning the arbitrary deprivation of liberty. It delivered opinions on a case by case basis, based on the response of the governments of the affected state to the Working Group's diplomatic requests for information/communication.[33] The Working Group's opinions and recommendations were

[31] Dickinson, "The Contribution of Human Rights Commissions to the Protection of Human Rights", in *Pub L* (2003) 277 *et seq*.
[32] See ECOSOC Res. 20073 of 16 June 2000.
[33] See www.ohchr.org/english/issues/detention/complaints.htm.

then forwarded as an annex to its annual report to the CHR. This Working Group's main objectives were therefore the monitoring and assessing of incidents of probable deprivation of liberty by the means of diplomacy with the final option of publicizing such human rights violations.

1.3. Evaluation

Since its establishment in 1946, the CHR had become a central international forum for publicizing and denouncing human rights violations. It thus resembled in theory one of the "nerve centres" of the UN human rights apparatus and the main coordinator of the multitude of existing UN human rights institutions and programs as well as the "principal UN forum for addressing possible human rights violations".[34] As such, the CHR's main contribution to the protection of human rights took place through its various mechanisms of denouncing and publicizing human rights violations: The UN CHR adopted 88 resolutions and delivered 28 decisions/opinions in 2004 alone.[35] Particularly, the work of its Special Rapporteurs interacted with the work of other human rights organs/ institutions and had a synergizing and supplementing effect on the latter.[36]

However, the eventual failure of this oldest organ of UN human rights protection was the consequence of a variety of shortcomings and deficiencies. This research addresses the more important ones and examines them within their human rights context.

The 1503 Procedure of the Sub-commission with its strict confidentiality principle as its inherent working precondition constituted more often an obstacle rather than a help for the promotion of human rights. This principle of confidentiality did, however, not apply to the author (-s) of the communication: anonymous communications were non-admissible. This fact alone endangered the safety of an author of a communication in an ongoing 1503 procedure.[37] Whether the revised 1503 procedure (as of June 2000), in terms of which no official information regarding the country under review was available until the public announcement

[34] Buergenthal, *International Human Rights In A Nutshell,* (1995) 81. See Dugard (n 1), 327.
[35] See Thiele and Gomez "A Review Of The Sixtieth Session Of The United Nations Commission On Human Rights" in 22.3 *NQHR,* (2004) 469-507.
[36] See e.g. the recent report of the Special Rapporteur on the question of torture, Nowak, of December 2005 on *Civil And Political Rights, Including the Questions of Torture And Detention,* UN Doc.E/CN.4/2006/6. SR Nowak outlines a detailed summary of his interactions with governments, NGOs, inter-governmental organizations and other human rights institutions.
[37] The ACHPR's complaint procedure suffers from the same lack of confidentiality: see Articles 55, 56 and 59 of the African Charter on Human and Peoples' Rights, see below chapter 2, 3.3.2.3.

through the chairperson of the Sub-Commission during its official session, changed this situation for the better, remains questionable.

Critics declared the 1503 procedure of human rights protection as unfit for its purpose: "confidentiality has not persuaded governments to cooperate with the United Nations" and the 1503 Procedure has "become truly dangerous to human rights [...] it offers a useful refuge to repressive regimes."[38] Other shortcomings were the length of the 1503 procedure, the fact that it addressed only general human rights situations in a state and excluded any remedying of individual cases due to a general lack of any "material" consequences.

The 1235 procedure, which allows for the addressing of special individual human rights issues in the context of country-specific human rights violation scenarios, has its own limitations: e. g. the lack of means of protection and enforcement, and the fact that the exposure of the individual human rights victim's identity may lead to his personal endangerment. However, this procedure could lead to a general discussion of the individual human rights violations during the annual debate of the CHR with the possibility that further steps such as the appointment of a Special Rapporteur for the monitoring of the situation could be employed.

In addition to these deficiencies, there were weaknesses apparent in the Commission's work which eventually impaired the overall performance of the Commission: the existing means of monitoring and publicizing human rights violations without further enforcement and sanction mechanisms were apparently insufficient for the purpose of efficient human rights protection. Silent diplomacy, public denouncing and peer pressure as the only available means and procedures under the existing CHR regime were by far not enough to respond to human rights violations or to create accountability and/or deterrence for human right violators.[39]

[38] Steiner and Alston, *International Human Rights In Context - Law, Politics, Morals*, (2000), 387.

[39] The example of the Bosnian town of Gorazde documents the inadequacy and ineffectiveness of today's weak human rights protection through the existing mechanisms which lack the necessary muscle to stop ongoing humanitarian disasters. The U.N. Security Council, SC, had this town, together with Sarajevo, Tuzla, Zepa and Bihac, declared as a so called "safe area". (See SC Resolution 824 (1994). Lightly armed UN "blue helmet" troops of UNPROFOR were tasked to protect theses enclaves with their inhabitants. They were unable to stop the ongoing human rights atrocities which were mainly committed by the Serb side. This humanitarian crisis became a frequent topic of the CHR. (See e.g. seventh periodic report of the Commission's Special Rapporteur, Tadeusz Mazowiecki, *Situation Of Human Rights In The Territory Of The Former Yugoslavia*, of 9 March 1994; retrievable at http://www1.umn.edu/humanrts/commission/country51/4.htm.)

Besides these apparent shortcomings in respect of available means and procedures, one of the key reasons for the CHR's failure was the nature of its composition: the number of 53 permanent members alone lead to a time-consuming and difficult process of decision-making. In addition, the political and ideological diversity of the states that make up its membership turned the Commission into a "highly politicized body ... [which] often can do nothing about serious human rights violations" because of apparently conflicting interests of its members.[40]

An overload of cases worsened the efficiency of the CHR further: e.g. the number of communications/applications with the CHR rose from 25,000 in the mid-1980s to around 300,000 in 1996[41] *per annum*.

The recent report of the Secretary General's High Level Panel on Threats, Challenges and Change[42] sums up the aforementioned shortcomings when it stated that the CHR's "capacity to perform […] has been undermined by eroding credibility and professionalism" by member states that "have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism", thus jeopardizing the UN Commission's work as "maintaining double standards in human rights concerns".[43]

The SG's report concluded its criticism of the CHR by proposing the creation of an additional 15-member-strong advisory council or panel as a permanent supportive organ to the Commission.[44]

The opinions of the High Level Panel were confirmed by the findings of another group of experts who undertook the Millennium Project on implementing the Millennium Action Plan. The latter proposals found their way into the final UN SG's report *In Larger Freedom: towards development, security and human rights for all*.[45] The SG's criticism of the present state of the CHR as being the reason for an eroding process of the UN's overall image[46] and

[40] See Dickinson, (n 31) 275. Joseph, Schultz and Castan, *The International Covenant On Civil And Political Rights - Cases, Materials And Commentary* (2005), 16.
[41] Dickinson, (n.31) 380.
[42] *A more secure world: Our shared responsibility*, UN Doc A/59/565 of 2 December 2004, par 283, SG's Panel report hereafter.
[43] The report proposes as possible solutions hereto the expansion of membership to universal and mandatory membership (para 285) and a redesign of the CHR's composition by designating prominent and experienced human rights figures as heads of the respective delegations.
[44] SG's Panel report (n 42) para.286.
[45] UN Doc.A/59/2005 of 21 March 2005, SG's report hereafter.
[46] *Id*. para 182.

his subsequent proposal to abandon the CHR[47] led to its eventual replacement by the permanent Human Rights Council in June 2006.

2. THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS

2.1. Overview

In 1994 the Geneva-based UN Office of the UN High Commissioner for Human Rights (OHCHR) was established under UN GA Resolution 48/141 on the recommendation of the Vienna World Human Rights Conference of 1993. One of the main reasons for establishing this new organ was the apparent wish to harmonize and merge the different human rights options available under the various charter and treaty-based instruments in order to create cohesion of the UN's efforts to protect human rights. The High Commissioner supplements in particular the work of the CHR's appointed Special Rapporteurs and other UN bodies with its work of investigating, documenting and monitoring of human rights violations worldwide. The work of the Committee against Torture is supported by the OHCHR by servicing its administrative affairs and granting assistance in respect to its two annual sessions. Besides this supportive work, the OHCHR participates actively in the UN's work of human rights protection by calling for concrete protective actions.[48] The SC has begun to involve the OHCHR more actively in the monitoring of present human rights conflict scenarios by inviting him to brief the SC and the GA on country-specific human rights scenarios.[49]

The OHCHR has become a major contributor to post-conflict peace-building efforts through its "field action" programmes, which strengthen the role of human rights in these post-conflict states by the providing means and assistance in developing human rights structures under so called "Technical Cooperation Agreements". In addition to these peace-building efforts, the OHCHR has increasingly opened "field offices" in the states in order to assist in, implement and supervise the ongoing efforts and programmes.[50]

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[47] *Id.* para 183. The SG opts further for the design of this organ as a principal organ of the UN but leaves the eventual decision with the UN member states.

[48] The UN High Commissioner urged, together with the Secretary General of the UN, Kofi Annan, the UN Security Council to refer the human rights crisis in Darfur, Sudan, to the Prosecutor of the International Criminal Court for further investigation. The UN Security Council followed this recommendation by adopting Resolution 1593 (2005) on 31st of March 2005. See on the multi-faceted work of the OHCHR its official mission statement, retrievable at http://www.ohchr.org/english/about/mission.htm.

[49] SG's Panel report (n 42) para 289 and SG's report (n 45) para 142.

[50] *Human Rights in action – Promoting and Protecting Rights Around the World*, brochure published by the OHCHR Geneva, 2003 for a detailed account on the OHCHR's activities.

2.2. Assessment

The OHCHR initially faced the difficulties of having ill-defined responsibilities and suffering chronic under-funding.[51] The OHCHR managed to overcome the first difficulty and has become the important protagonist of human rights protection under UN auspices. Amnesty International credits the High Commissioner as being "of vital importance for the protection of human rights throughout the world".[52] One of the possible reasons for this success is definitely the already proven swiftness in the OHCHR's decision-making process, which is not subjected to lengthy and ideologically dominated procedures as the work of the UN Human Rights Commission in its limited annual sessions. Consequently, it can be stated that the OHCHR has become the prime human rights protection organ of the UN. This importance is underlined by the request of the SG to entrust the OHCHR with an increased involvement in peacekeeping operations, tasking this office with the preparation of an annual report on human rights worldwide and granting an overall increased role in the protection of human rights.[53]

3. THE HUMAN RIGHTS COUNCIL

The newest UN human rights body, the Human Rights Council, was created on 15 March 2006 by GA Resolution A/RES/60/251.[54] The Council was established as a subsidiary organ of the UN General Assembly and consists of 47 members.[55] Its first meeting took place on 19 June 2006. The Human Rights Council takes over all of CHR's mandates and responsibilities, including its special mechanisms and procedures such as outlined above.[56] As a consequence of the establishment of the new organ, the CHR concluded its work and transferred all its work to the Human Rights Council on 27 March 2006.[57]

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[51] SG's Panel report (n 42) 454 para 290, which refers to the under funding as resembling "a clear contradiction between a regular budget allocation of 2 per cent […] and the obligation […] to make the promotion and protection of human rights one of the principal objectives […] .

[52] Amnesty International, **"**United Nations: Global human rights situation needs full-time High Commissioner", May 27 2003, AI Index: IOR 40/012/2003 (Public) at http://web.amnesty.org/library.

[53] SG's Panel report (n 42) paras 288-289 and SG's report (n 45) paras 142-144.

[54] The vote was 170 States in favour, 4 against it and 3 States abstaining, see http://www.un.org/News/Press/docs/2006/ga10449.doc.htm.

[55] The first members of the Human Rights Council were elected on 9 May 2006. The distribution of available seats is in accordance with equitable geographical representation with 13 members coming from the African States group, 13 from the Asian States group, 6 from the Eastern European States group, 8 from the Latin American and Caribbean States group and 7 from the Western European and Other States group; see GA Resolution on the Human Rights Council, UN Doc. A/60/L.48, para 5.

[56] See GA Resolution A/RES/60/251, para 6.

[57] The CHR was abolished as of 16 June 2006 by the ECOSOC on 23 March 2006, see http://www.un.org/News/Press/docs/2006/ecosoc6192.doc.htm

The USA voted against the establishment[58] of the new human rights organ because of the fact that the adopted resolution did not explicitly exclude human rights violator states from membership in the new UN body. However, the USA pledged its support and cooperation with other Member States to ensure the Human Rights Council's effectiveness.[59]

The new creation was hailed as a "major stride forward" for the UN human rights system[60] and as a new beginning for the UN's work on global human rights protection.[61] This confidence in the new organ is partly based on the following grounds: the new Human Rights Council as a subsidiary body of the UN General Assembly will have a higher status than the abolished CHR and its actions will therefore be accountable to the full membership of the United Nations. The UN General Assembly elected the members of the Council by an absolute majority vote in order to safeguard –in theory- that only states with the highest standards in the promotion and protection of human rights would become members of the new body.[62]

Unlike the CHR, the Human Rights Council is based as a permanent institution in Geneva and will hold at least three sessions per year in comparison to the single annual session of the CHR. There will also be the possibility to hold special sessions to deal with an *ad hoc* human rights crisis. [63]

Time will tell, whether the newest UN organ will live up to its expectations: It resembles after all yet another UN body for the promotion of human rights without explicit sanction and enforcement mechanisms: The only sanction available will be the possibility to suspend the membership of a State that keeps on violating human rights at a gross scale by a two-thirds majority vote by the UN General Assembly. History has shown that compliance with human rights provisions within the UN system won't be achieved by relying solely on the

[58] Together with Israel, the Marshall Islands and Palau.
[59] (n 54), p. 1. The fact that the USA did not take part in the elections for the body in May has already questioned its later commitment to cooperate with it and support the new UN body.
[60] See UN HCHR Ann Arbor's address to the CHR's last meeting on 27 March 2006, retrievable at http://www.unhchr.ch/huricane/huricane.nsf/view01/5A23A835EEF0F7F5C125713E00541659.opendocument.
[61] See statement of UN SG Kofi Annan on the adoption of the UNGA Resolution A/60/L.48 on 15 March 2006, retrievable at http://www.un.org/News/Press/docs/2006/sgsm10376.doc.htm
[62] In comparison hereto stands the election process of the members of the CHR, who were elected by the 53 members of the ECOSOC.
[63] The UN Human Rights Council adopted in its first special session on 6 July 2006 its first resolution (A/HRC/S-1/L.1/Rev.1), entitled "Human rights situation in the Occupied Palestinian Territory" and decided to dispatch an urgent fact-finding mission to the occupied Palestinian Territories, see http://www.ohchr.org/english/press/hrc/

cooperation and goodwill of the States in question without further explicit enforcement and sanction mechanisms.

4. TREATY-BASED HUMAN RIGHTS COMMITTEES

As mentioned above, [64] of the seven treaty-based monitoring committees, the Human Rights Committee, the Committee Against Torture, the Committee on the Elimination of All Forms of Racial Discrimination and the Committee on Migrant Workers[65] are the subject of this research. The fact that they are concerned with individual communications and that they address more recently developed human rights[66] underscores their importance.

4.1. THE HUMAN RIGHTS COMMITTEE

4.1.1. Overview

On 23 March 1976, the International Covenant on Civil and Political Rights of 1966[67] (ICCPR) entered into force. The Human Rights Committee (HRC) as its 18-member supervisory body was established under Article 28 of the ICCPR.

Key (first generation) human rights, granted under the ICCPR include the right to life under Article 6,[68] freedom from torture under Articles 7 and 10, freedom from arbitrary detention under Article 9 and right to a fair trial under Article 14 of the ICCPR.

The HRC's supervisory role was originally limited to the review of periodical country reports, submitted by the signatory states[69] and the issuing of legal opinions on ICCPR provisions.[70]

However, this monitoring role over ICCPR's 149 member states[71] changed when individual petitions became admissible under Articles 1 and 2 of the First Optional Protocol to the

[64] See above chapter 1 and (n 12).
[65] The order chosen in this research is not a chronological order of the respective treaty bodies but reflects the author's opinion on the relevance of the respective bodies for the promotion of human rights.
[66] Such as torture and gender-specific human rights.
[67] International Covenant on Civil and Political Rights, entered into force March 23, 1976. G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) 52, UN Doc. A/6316 (1966), 999 *UNTS* 171.
[68] With the execution of capital punishment as a judicially imposed sentence as an exception, see Article 6 (2) to 6 (6) and is subject to its eventual elimination under the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (OP 2), UN GA res 44/128 of 15 December 1989; UN Doc A-RES-44-128.: there are at present 57 states party to the 2nd OP.
[69] See Article 40 of the ICCPR.
[70] Joseph, Schultz and Castan, (n 40), 17.
[71] See Bayefsky (ed.), *The UN Human Rights Treaty System in the 21st Century*, (2000); Appendix 2, 452-8, and Joseph, Schultz and Castan, (n 40), 855-873. See for an update the *United Nations Treaties Database* at http://untreaty.un.org.

International Covenant on Civil and Political Rights[72] of 1976 ("OP 1") (in addition to the already existing possibility of inter-state communications[73] under Article 41 of the ICCPR, which hasn't been utilized to date),[74]transforming the HRC into one of the primary human rights organs within the UN human rights treaty system.

4.1.2. Evaluation

The effectiveness of the HRC, especially in respect of individual communications, is partly due to its composition. It consists of only 18 members, the majority of whom have a legal background. They are required to serve for a minimum period of four years. As a result, professionalism, experience and continuity are key elements of the HRC's work. The fact that the individual HRC member serves in his/her *personal capacity*, as stipulated in Article 28 (3) ICCPR, has led to less politicization of the organ's performance[75] than e.g. the former CHR's, whose lack of efficiency led to its eventual abolishment in June 2006.

With the availability of individual communications, the HRC assumed an important role as a protective organ of human rights. The relevance of this role is documented through the fact that the HRC in the first 15 years of its extended role has rendered decisions in some 1,171 individual complaint cases, of which 418 led to a decision on the merits by the HRC.[76]

However, this initial success of the individual complaint mechanism led to an increase in lodged applications, which eventually resulted in an enormous backlog of pending complaints. Moreover, given that acting on the HRC's findings is very difficult, the HRC's work had been severely immobilized for years. As a consequence, procedures with the HRC sometimes took than three years before bearing results.[77] Rule 91 of the revised Rules of Procedure[78] abandoned the old, two-phase division of the proceedings into one admissibility- and one merits stage by merging them into one unified stage with the only exception where

[72] "OP 1", UN GA res. 2200A (XXI) of 16 December 1966; UN Doc. A/6316(1966), 999 UNTS 302, entered into force March 23, 1976, with so far 104 states accepting the HRC's authority to receive Article 2 OP 1 communications

[73] The terminus communication was deliberately chosen over the terminus complaint, in order to acknowledge the affected states international sovereignty; see Tomuschat, *Human Rights-Between Idealism and Realism*, (2003) 159 *et seqitur*.

[74] 48 states have so far made the Article 41 Declaration, see Joseph, Schultz and Castan (n 40), 873-874.

[75] See Joseph, Schultz and Castan, (n 40), 16. A 2003 survey of the then current members did not reveal a single direct political connection with their respective government. *Id*.,17.

[76] Nowak, (n 22) 100. Up from a total of 800 individual complaints with 300 decisions on the merits in 2000; see *Bowes's Law of International Institutions*, edited by Sands and Klein, (2001), para 13-062 p.371 and Bayefsky Appendix 3 (n 71), 461-3. Joseph, Schultz and Castan, (n 40), 878-903 list 1142 decisions in total for that period.

[77] See *1997 Report of the Human Rights Committee*, GAOR Supp. No. 40 (A/51/40), Section VII (A).

[78] See Rule 91 of the 2001 Committee's Rules of Procedure, UN Doc CCPR/C/3/Rev.6.

one of the newly created Special Rapporteurs[79] requests a two-stage consideration.[80] Consequently, the average duration of a procedure was shortened considerably.[81]

The HRC convenes annually for three three-week sessions to consider the lodged complaints and render decisions, when possible; this scheme guarantees continuity and consistency of the HRC's work. The additional fact, that the newly created Special Rapporteurs continue their work on specific topics, increases this continuity in the HRC's work[82] and practically ends the original "part time"-nature of the HRC.

This favourable impact on the protection of human rights, however, is offset by the fact that the decisions of the HRC are not legally binding and do not constitute more than views or recommendations on a particular situation.[83]

This is disappointing when considering the fact that the basic prerequisite for any ruling of the Committee in individual complaint matters is the existence of the state's consent to the complaint procedure by having signed the Optional Protocol[84] prior to the proceedings.

However, with the introduction of follow-up procedures in 1989 and with the appointment of the "Special Rapporteur for Follow-Up on Views",[85] noncompliance became subject to increased attention and scrutiny by the HRC. Compliance of member states in respect to follow-up requests made by the HRC is still far from being satisfactory.[86]

Another shortcoming is the lack of effective means and procedures to gather evidence in a present and ongoing complaint procedure, e.g. by conducting field visits. If the respective member states do not cooperate and refuse to reply to direct requests for evidence by the HRC the outcome of the complaint has to be based solely on assumptions by the HRC and the often

[79] The Special Rapporteur positions were created in order to facilitate the HRC's proceedings by appointing individual members as Special Rapporteurs and tasking them with certain responsibilities such as the preparation of the examination of State Reports or individual communications, see Joseph, Schultz and Castan (n 40), 47 with further sources.
[80] Joseph, Schultz and Castan, (n 40), 25.
[81] *Id*., 901-902, with a duration of 18 months for an OP 1 communication as an average.
[82] Joseph, Schultz and Castan, (n 40), 16.
[83] Nowak (n 22) 100; Joseph, Schultz and Castan, (n 40), 25-27 on the lack of enforcement options for the HRC, even in urgent "Rule 86" (of the Committee's Rules of Procedure, UN Doc CCPR/C/3/Rev.6) requests where the HRC requests the maintaining of the *status quo* in ongoing OP 1 communications and which often aim at halting a probable execution of the author of a communication.
[84] See Article 1 OP.
[85] *HRC Annual Report* 1990, Vol. I, 144 *et seq.*, Vol. II, Appendix XI, UN Doc. A/45/40.
[86] See Steiner and Alston, (n 38) 550.

insufficient information provided by the complainant. This often results in "un-probed" evidence which could lead to "unbalanced" findings, which might eventually even affect the HRC's reputation[87] and therefore its eventual efficacy.

Finally, and apart from the individual complaint procedure, the quality of the state compliance reports of the ICCPR members, which have to be submitted periodically under Article 40 ICCPR, is often far from satisfactory. Even the introduction of more detailed "Reporting Guidelines" in 1981 could not improve the quality of the filed reports significantly.[88]

4.2. THE COMMITTEE AGAINST TORTURE (CAT)

The CAT is the monitoring body of the 1984 UN Convention Against Torture and Other Cruel, Inhuman Or Degrading Treatment or Punishment[89].

The Torture Convention aims at the eradication of all forms of torture worldwide by setting universally applicable standards for the protection of human rights in the context of torture and other cruel, inhuman or degrading treatment and/or punishment.[90] The Torture Convention serves as the principal and standard setting international legal instrument on the prohibition of torture and other, cruel, inhuman, or degrading treatment.[91]

The Torture Convention with CAT as its implementing body contributes to the protection of human rights through classical means of monitoring, reporting and the considering of individual complaints as well as through explicit criminal provisions.[92] Its main function, however, lies in the traditional human rights protection through ensuring the compliance of the member states with their human rights obligations under the Torture Convention.[93]

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[87] See the *Herrera Rubio v. Colombia* decision, where the HRC had to rely heavily on unprobed evidence because of Colombia's refusal to cooperate in the beginning. Communication No. 161/1983, Human Rights Committee, UN Doc. A/43/40 (1988), Supp. No. 40, 190, cit. in Steiner and Alston, (n 38) 539.

[88] See *General Comment (GC) No. 13* "Article 14" (1984) at 13 para 3.

[89] Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987. This research refers to it as "Torture Convention" instead of the UN abbreviation "CAT", which is used here solely as abbreviation referring to the Committee against Torture.

[90] See OHCHR, *The Committee against Torture- Fact Sheet No. 17*, retrievable at http://www.ohchr.org/english/about/publications/docs/fs17.pdf

[91] Other international instruments which outlaw these human rights violations are: the ICCPR of 1976, the European, Inter-American and the African human rights conventions, the Inter-American Convention to Prevent and Punish Torture of 1985 and the European Convention for the Prevention of Torture of 1987, see Dugard, (n 1) 325ff.

[92] See Articles 4ff of the Torture Convention.

[93] *Id.* Articles 10 ff.

The CAT[94] fulfils its role by considering individual complaints under the so-called "Article 22 mechanism",[95] state-to-state complaints,[96] examination of state reports and the active consideration of alleged violations by member states that have not exempted themselves from this measure.[97] The Committee can initiate such inquiries on its own initiative in cases where it has received reliable information of alleged systematic violations of the Convention on Torture.[98] Such an inquiry is, however, still depending on the goodwill of the State in question. The CAT holds two sessions a year and is assisted by the OHCHR. This interaction with the OHCHR leads to a high level presence of the CAT in the human rights community.

The Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[99] will, after entering into force, establish a Sub-committee[100] which will then carry out in-country inspections of detention facilities in close cooperation with local authorities.[101] This process might also strengthen the inquiry procedure under Article 20 CAT through the establishment of this permanent organ that is tasked with the monitoring of possible offending states.

The individual complaint procedure under Article 22 of the Torture Convention created, at least in theory, a *jus standi* for the individual victim of torture to lodge a complaint against the violations of his/her human rights.[102]

The fact, that over two-thirds of all UN members have ratified the Convention so far, and more than one-third of all parties to the Torture Convention accepted Article 22 mechanism,[103] has -at least in theory- internationally stigmatized and outlawed the use of torture. Even states such as e.g. the USA can not afford to ignore the obligations arising from the Convention: one of its core protective elements arises from its obligations having a

[94] *Id.* as established under Article 17.
[95] *Id.* Article 22. Presently, 57 states accept individual complaints under the Torture Convention. See http://www.unhchr.ch/pdf/report.pdf; Bayefsky, (n 71) Appendix 2, 451-58.
[96] Article 21 of the Torture Convention.
[97] *Id*., Articles 20 and 28 of the Torture Convention.
[98] *Id*., Article 20, para 1.
[99] G.A. res. A/RES/57/199, *adopted* Dec. 18, 2002, reprinted in 42 *ILM*. 26 (2003).
[100] *Id.*, Articles 2, 5ff.
[101] *Id.*, Article 4.
[102] The impact and importance of this procedure has to be proven with only 293 communications processed so far. See "Statistical survey of individual complaints dealt with by the Committee against Torture under the procedure governed by article 22 of the Convention against Torture and Other, Cruel, Inhuman or Degrading Treatment or Punishment" of 3 June 2006, retrievable at http http://www.ohchr.org/english/bodies/cat/stat3.htm.
[103] Bayefsky, (n 71) Appendix 2, 451-58.

decisive domestic impact[104]: the USA responded to the torture allegations in the context of "Guantanamo" and "Abu Ghraib" by submitting a detailed summary of its counteractions undertaken as response to these allegations, thus exemplifying the impact and importance of the Torture Convention.[105]

However, one weak point of the CAT is one that is inherent to all UN Treaty bodies: the lack of enforcement measures, sanctions and the general lack of a follow-up mechanism.[106]

4.3. THE COMMITTEE ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (CERD)

CERD is the safeguarding body of the 1965 UN International Convention on the Elimination of All Forms of Racial Discrimination[107] ("ICERD"). The work of the CERD consists in the examination of the obligatory member state reports, the consideration of individual communications ("Article 14 procedure") and state-to-state complaints.[108]

Of the 192 UN member states,[109] nearly 90 % are members to the ICERD,[110] of which 20% accepted the Article 14 procedure.[111] The effectiveness of CERD's work is undermined in general by the same shortcomings inherent to all UN systems: the lack of sanction and enforcement options and the absence of a follow-up mechanism. Another problem was the initial uncertainty and even ignorance[112] among the Member States towards the mechanisms and procedures available under ICERD.[113]

The importance and relevance of CERD was further weakened by the later shifting of focus of the UN's attention to other means of battling racism: in the mid-1970s the UN's focus shifted

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[104] Compare the States' obligations under part I of the Convention, namely the preventive actions according Articles 2 and 5, the duty to educate and train state security and other officials under Article 10 and finally, the duty to make domestic remedies available under Article 14.
[105] See 3rd addendum to its 2nd periodic report under Article 19 of the Convention, UN Doc. CAT/C/48/Add.2 of 6 May 2005, where the US provides a summary of its actions undertaken as e.g. the conducting of court martials, the granting of financial remedies through the Foreign Claims Act (FCA), 10 U.S.C. § 2734 and the training of its military and security personnel.
[106] See e.g. Bayefsky, *How to Complain to the UN Human Rights Treaty System*, (2003) 151.
[107] Adopted and opened for signature, ratification and accession by General Assembly resolution 2106 (XX) of 21 December 1965 entry into force 04 January 1969.
[108] Article 11 of the Convention.
[109] As of 28 June 2006, see http://www.un.org/overview/unmember.html
[110] Bayefsky, (n 71) Appendix 2, 451-8 and http://www.ohchr.org/english/countries/ratification/2.htm.
[111] Bayefksy, (n 71) 23.
[112] See UN's *Fact Sheet No. 12: The Committee on the Elimination of Racial Discrimination* retrievable at http://www.ohchr.org/english/about/publications/docs/fs12.htm.
[113] *Ibid.*

to the enforcement of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid[114] against then apartheid South Africa with its specially designed Group of Three panel as a key organ (as stipulated in Articles IX and X of the Apartheid Convention). Considering the listed difficulties and the mentioned change of focus, it does not surprise that the impact of CERD on the protection of human rights has remained at a low scale.[115]

4.4 THE COMMITTEE ON MIGRANT WORKERS (CMW)

The CMW, which held its first session in March 2004, is the second newest UN treaty body. It monitors the implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) of 18 December 1990.[116]

Migrant labour became an international human rights topic as the consequence of a post-1945 global phenomenon, where the increasing demand of the developing world for migrant workers from countries of the poorer, developing world became a global economic reality.

In the past, the legal status of these "migrant" workers was not clearly defined with the exception of only a few bi-national agreements.[117]

The ICRMW aims at the protection of migrant workers and their families by safeguarding certain "human rights standards" of the migrant workers during the whole migration progress.[118] The protection granted under the ICRMW distinguishes hereby between

[114]GA Resolution 3068 (XXVIII) of 30 November 1973.

[115] Only 882 country reports had been received during the first 20 years of the existence of this organ. That amounts to a total of 0.3 reports per State Party and year. See *Fact Sheet No. 12*, (n.112). The number of individual communications considered by the CERD within the first 30 years of its existence, was less than 33, see "Statistical survey of individual complaints considered under the procedure governed by article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination", retrievable at http://www.unhchr.ch/html/menu2/8/stat4.htm.

[116] Entered into force on 1 July 2003, UN Doc. A/RES/45/158.

[117] See e.g. „Vereinbarung über die Anwerbung türkischer Arbeitskräfte und der Türkei" (the German-Turkish Agreement on the Employment of Migrant Workers) of 1961 and the subsequent „Deutsch-türkisches Abkommen über die soziale Absicherung türkischer Arbeitnehmer: Sozialrechtliche Gleichstellung mit den deutschen Arbeitnehmern" (the German-Turkish Agreement on the Social Status of Turkish Migrant Workers), which stipulated the social equality between German and Turkish employees and granted *inter alia* the right to Turkish workers to enjoy benefits such as pension and health insurance even after their return to Turkey.

[118] Namely the preparation for migration, departure, transit and the entire period of stay and remunerated activity in the State of employment as well as return to the State of origin or the State of habitual residence, see Article 1 para 2 of the ICRMW.

"general" human rights applicable to all migrant workers[119] and further additional rights of documented workers only.[120]

The second category of these rights requires the equal treatment of the migrant worker and his family with citizens of the host state in regard to social rights, education and cultural rights.[121]

This wide scope of economic, social and cultural rights under the ICRMW, however, will eventually limit its impact as an international human rights treaty: the 34 States that signed and/or ratified the treaty are only countries of the developing world.[122] The apparent absence of economic powerful States, which are the main receivers of migrant workers, resembles therefore a crucial shortcoming of this international treaty. It is doubtful, whether the future will see an increase in terms of membership from the economically powerful states considering the fact that the ICRMW would "burden" these states with the obligation to grant a deterring scope of new rights to migrants.

The 10 members of the CMW monitor the implementation of the ICRMW by examining state reports on compliance with the ICRMW under Article 74, inter- state complaints can be considered under Article 76 and individual communications of migrant workers under Article 77 of the ICRMW.[123] So far the CMW has not received any declarations under Articles 76 and 77 ICRMW.[124]

The possibilities of the CMW in the case of individual communications remain limited to requesting a written explanation of the state on the issue and expressing its views afterwards.[125] Other more efficient remedies, as e.g. financial remedies or the right to force the respective State to comply, do not exist.

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[119] Stipulated in Articles 8-35 of the ICRMW and titled "Human Rights of All Migrant Workers and Members of their Families".

[120] As "Other Rights of Migrant Workers and Members of Their Families who are Documented or in a Regular Situation", see Articles 36-56 ICRMW.

[121] See e.g. Article 45 ICRMW.

[122] See ratification status as of 26 January 2006, retrievable at http://www.ohchr.org/english/countries/ratification/13.htm.

[123] Article 77 (1) ICRMW stipulates that "A State Party to the present Convention may at any time declare under the present article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim that their individual rights as established by the present Convention have been violated by that State Party".

[124] See OHCHR, *The International Convention on Migrant Workers and its Committee-Fact Sheet No. 24/ Rev.1* retrievable at http://www.ohchr.org/english/about/publications/docs/fs24rev1.pdf

[125] *Id*., para 7.

These limitations, and the limited number of Signatory States to the ICRMW, question today its later success in protecting human rights.

4.5. Conclusion

UN treaty based human rights protection developed in an evolutionary way since the 1970s. In 1970, there existed only one treaty organ for the protection of human rights (the CERD Committee), while some 30 years later this number had grown to seven treaty-based organs.[126]

This impressive proliferation of human rights protection organs led, however, to the existence of a multitude in number and degree of detail of standards, which make any control and enforcement nearly impossible; a multiplication of the above-mentioned shortcomings was a direct consequence of this process. Unless the UN and other authorities of international law[127] develop guidelines and mechanisms which merge the existent procedures and synergize their effects, the diversity of the existing treaty-based organs with their multitude of different mechanisms may be more of a curse than a blessing.[128]

5. THE UN SECURITY COUNCIL

5.1. Overview

The Security Council (SC) could play an important role in the protection of human rights on a global scale. With its authority to determine whether a threat to international peace and security exists and with the right to adopt the respective means as a consequence of this, the SC is one of the few international organs that is equipped with the necessary ways and means of enforcing human rights.[129] The SC can in theory respond to a present human rights crisis in the following ways:

[126] The Group of Three established under the Apartheid Convention was in some UN documents listed as the seventh treaty body (prior to the establishment of the CMW), see e.g. "Interim report on study on enhancing the long-term effectiveness of the United Nations human rights treaty regime" 26, reprinted in Bayefsky (n 71) 529. Another UN body that focused on SA's policy of racial discrimination ,"apartheid", was the HRC.
[127] Such as the International Labour Organization (ILO) and the International Law Commission (ILC).
[128] Evatt, "The Future of the Human Rights Treaty System: Forging Recommendations" in Bayefsky, (n 71) 287-97, criticises e.g. the existing treaty system as being badly planned, having grown haphazardly and in need of major reforms.
[129]SG's Panel report (n 42), para 247 refers to the UN SC as the body within the UN, which is "the most capable of organizing action and responding rapidly to new threats".

The first of these is through the authorization of the use of force[130] in order to stop ongoing gross human rights violations which may qualify in their scope as threats to international peace and security[131] and which have been determined as such by the SC.

Such an authorization of force can take place through missions of traditional peacekeeping[132] (which are often labelled "Chapter VI" missions and which involve the use of only lightly armed "blue helmet" contingents) and, afterwards, post-conflict peace-building through the employment of a combination of military, security, administrative and democracy-building means (whose nature combines Chapter VI and Chapter VII measures)[133] and in the form of peace enforcement measures through the actual use of military force (which would qualify as original Chapter VII means). Examples of the latter are the Korean War of 1950–1953, the bombing campaign of NATO in Bosnia-Herzegovina during the operation "Deny Flight" in 1994[134] and the "Desert Storm" war for the liberation of Kuwait in 1991. In connection to these enforcement actions, the idea of a humanitarian intervention as an exceptional way to of defending and protecting human rights was developed. NATO's bombing campaign against the Former Yugoslav Republic of Serbia and Montenegro in spring 1999 for the purpose of liberating the province of Kosovo is an example of such a humanitarian intervention. NATO's campaign against the Yugoslav Republic as an independent state was illegal under international law because it lacked prior SC authorization under Article 53 UN Charter[135] and as such it could only be legitimized afterwards as having appeared to be the only practicable

[130] Under Articles 39, 42 UN-Charter

[131] *Id*. Article 39. The SG's Panel report (n 42) regards the international crime of genocide as resembling a threat to international peace and security with the further consequence of the possibility of a UN authorized military response hereto, para 200. The report includes to such threats to the security of all, "large scale violations of international humanitarian law and large –scale ethnic cleansing as witnessed most recently in the Darfur region, Sudan. The SG urges consequently in his report (n 35), paras 125-126, the SC to define binding outlines for the future use of force in the context of humanitarian action. The Constitutive Act of the African Union provides already for a right of the AU to intervene with military force into one of its member states in case of ongoing war crimes, genocide and crimes against humanity, "humanitarian intervention clause", see Article 4 para h of the Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15, entered into force May 26, 2001. Recent humanitarian crisis scenarios in African states such as Zimbabwe, Sudan and the DRC question the actual impact of this "humanitarian intervention clause".

[132] Examples of such classical peacekeeping operations were UNOSOM I, II and UNTAF in Somalia in 1992/1995 and UNPROFOR I and II in Bosnia and Herzegovina in 1993/5. Cassese, (n 1) 300, gives an overview of the development of peacekeeping and accounts for 15 of such operations before 1988 and 40 after that; Nowak (n 22) 130, 331-35 for case studies of the major operations.

[133] See Eno, "United Nations peacekeeping operations and respect for human rights" in 24 *SAYIL* (1999) 77. Prominent examples of such peace-building efforts can be seen in the Balkans with UNPROFOR/SFOR (Bosnia and Herzegovina), KFOR (Kosovo) and CONCORDIA (Macedonia).

[134] Under SC Resolution 836 (1993).

[135] Article 53 UN Charter stipulates in (1) that the "The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority." clarifying that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, […]".

means of stopping the ongoing human rights atrocities.[136] Other opinions regard the campaign as having been an act qualifying as lawful, unlawful but justified, or unlawful but just.[137] It should be borne in mind, however, that the UN's SC Res 1244 (1999) of 10 June 1999, on the Kosovo crisis did not relate to the military operations of NATO in any way, but continued to refer to the situation in Kosovo as constituting "a threat to international peace and security".

The SG's Panel report quoted above clarifies the SG's position, whereas "both kinds of operations [that is peacekeeping and peace enforcement operations] need the authorization of the Security Council".[138] The existence of such an authorization remains the "litmus" of the legality of any use of force.

The second option of the SC to address a human rights crisis is through the means of imposing economic sanctions, acting under Article 41 of the UN Charter. SC-imposed sanctions resemble "a necessary middle ground between war and words"[139] and as such constitute a proportional tool of humanitarian action. Prominent examples of such UN-mandated economic sanctions are the sanctions[140] imposed against the old apartheid regime in South Africa from 1977 until 1994 and, more recently, against Iraq prior to the US invasion of May 2003.

Thirdly, the SC could refer a human rights crisis to the prosecutor of the newly established International Criminal Court for further criminal investigation under Article 13 (b) of the ICC Statute in cases where the state in which these human rights violations took place is not a party to the court. Prior to such a referral, the SC could have considered the establishment of international *ad hoc* tribunals as a reaction to a human rights crisis.[141]

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[136]Such a legalization might have been the case if there had been an established state practice on states resorting to the use of force in order to refrain other states from committing human rights violations; in absence of such a customary rule, the "humanitarian intervention" was an illegal act of aggression. Cassese, (n 1) 321, negates the existence of any customary rule on the use of humanitarian interventions and thus leaves it to the scholar's discretion to decide.

[137]For a comprehensive discussion, see "Editorial Comments: NATO's Kosovo Intervention" in 4 *AJIL* (1999) 93 *et seq.;* Nowak (n 22) 336 with reference to customary principles of international law permitting humanitarian interventions in cases of necessity.

[138] SG's Panel report (n 42), para 213.

[139] *Id.* para 178.

[140] Which were undertaken in enforcing the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973.

[141] Such as the International Criminal Tribunal for the former Yugoslavia, established by SC Res. 808 of 1993 and the International Criminal Tribunal for Rwanda, established by SC Res. 955 of 19994.

Such an action would take place as a Chapter VII means, thus requiring the support of all five permanent SC members.[142] On 31 March 2005 the UN SC adopted SC Resolution 1593 (2005), which referred the Darfur human rights crisis, Sudan, to the prosecutor of the ICC for further investigation. The USA overcame its notorious opposition to the ICC on this occasion and did not veto the resolution for the common sake of universal justice.[143]

5.2. The present composition of the SC as an obstacle to its efficiency

A more active role by the Security Council in promoting and protecting human rights is unlikely mainly because of its "cold war"-styled composition of still politically and ideologically dissenting members.

This diversity leads to stalemate situations whenever the "veto" right of the five permanent members is used. Recent history has shown that even after the end of the cold war in 1991 the unanimity of the five permanent members in voting is still a rare event, thus displaying patterns of historic and traditional strategic and economic considerations. As a consequence thereof the authority of the Security Council in delivering solutions to threats of peace has suffered in the recent years. NATO's unauthorized bombing war against the former Republic of Yugoslavia[144] (in order to stop widespread human rights violations by Serb security and police forces in the Serb province of Kosovo in 1999) and the more recent US/UK-war of 2003 against Iraq are two recent examples of actions taken without a clear mandate of the Security Council and exemplify this unfortunate situation.[145]

The SC needs a reform regarding its permanent members, which resemble today a selection of states that historically and politically are no longer representative of the United Nations in the 21st century.[146] The UN SG's report addresses these difficulties and calls for an enlargement of the UN SC by including representative states of all five regions, which "contribute most to

[142] Approval means that none of the permanent members vetoes the resolution; abstentions, however, are not blocking the adoption of such resolutions. Such support from all permanent members seems to be difficult to obtain, considering their politically diverse nature. See Article 27 of the UN Charter.
[143] The USA abstained from casting its vote and explicitly upheld its objections to the ICC. See below part B chapter 2.
[144] With Russia and China indicating that they would veto any SC authorization of force.
[145] Another obstacle to a modern role of the Security Council might be its general out of date composition, which still resembles the strategic situation of 1945. The two major global economic and political powers Germany and Japan are still not regarded as being worth to become permanent SC members.
[146] The present permanent members do not represent the African or American continent (with the USA hardly representing the Inter (Non-US) American Continent), nor the Arab region. Strong economies as Germany or Japan, which contribute significantly to the UN's budget are excluded from permanent membership to the UN SC. "Africa plays musical chairs with Security Council seats" in *Mail & Guardian* March 11 to 17 2005 p. 8 describes the present scramble for new permanent members of the UN SC.

the United Nations financially, militarily and diplomatically".[147] The UN GA's 60th plenary meeting on the implementation of this new UN development initiative in New York in September 2005 was unable to decide on the enlargement proposal. This inaptitude seriously impairs any future attempt to align an overcome design of the UN to new realities.[148]

5.3. The problematic mandate of peacekeeping

The lack of its own permanent UN troops[149] leads to the dependence of the UN on individual countries (and regional security organizations) for troop contribution and deployments. This dependency limits the roles of the UN Security Council and the UN Secretary General in protecting and promoting human rights via the use of force, as the Rwandese failure of UNAMIR showed in 1994. A further consequence may be the UN's vulnerability to attempts by states to apply pressure on the UN to further their own political aims through peacekeeping.[150]

And, further, there is the possibility that the UN will lose effective control over its missions in the process: the permanent demand for peacekeepers has already led to the outsourcing[151] of peacekeeping operations to poorer states as permanent troop senders[152] or even private military companies (PMCs), which leads to situations where the Security Council has to accept growing limitations in its actual influence on the missions. As a consequence, this outsourcing of operations of peacekeeping (and the later peace- and administration-building)

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[147] SG's Panel report (n 42), para 249. The SG's proposal featured two models for a redistribution of SC seats: Model A calls for six new permanent seats without veto right and three new two-year non-permanent seats. Model B calls for no new permanent seats but for the creation of eight four year-year renewable term seats and one two-year non renewable seat. See SG's Panel report (n 42), paras 252-253; SG's report (n 45) para 170.

[148] "Vereinte Nationen- Fischer kritisiert dürftige Ergebnisse des Uno-Gipfels", see *Spiegel Online* of September 16, 2005, at http://www.spiegel.de//politik/ausland/0,1518,374863,00.html. The German ministry of economic development ,"BMZ", regards the outcome of the summit as not satisfying, see official evaluation of the summit's results "Millenium+5-Gipfel der VN in New York ("Major Event")-Ergebnisbewertung" retrievable at hhtp://www.bmz.de/de/themen/MDG/Downloads/Ergebnisbewertung.pdf.

[149] Following the example of the UNEF (United Nations Emergency Force) which was established in 1956 to pacify the Suez Channel crisis, Cassese (n 1) 299. The SG's Panel report calls for an increased participation of member states in supporting the Department of Peacekeeping's (DPKO) effort of establishing "ad hoc" capabilities such as strategic deployment stockpiles and standby arrangements as detailed in the DPKO's outline (A/55/305/-S/2000/809), SG's Panel report (n 42) para 218; SG's report (n 45) Para 112.

[150] An example of such politics took place in 2003 when the USA threatened to withdraw its troops from the UN peace-building missions in Kosovo and Bosnia Herzegovina for the case that the UN did not grant immunity from criminal prosecutions to US troop detachments; the UN eventually gave in by exempting US personnel from jurisdiction of the permanent International Criminal Court, see para 1 UN S/RES/1487 (2003) in 42 *ILM* (2003) 1025.

[151] For a present description of this situation, see *Mail & Guardian*, "Hiring "thugs" to keep peace", (November 21 to 27 2003) 19. For the impact of PMCs on Africa, see Botha,"From mercenaries to "private military companies": the collapse of the African state and the outsourcing of state security" in 24 *SAYIL* (1999) 133-148.

[152] See the examples of Pakistan, Nigeria and increasingly states of the former Warzaw Pact as Bulgaria and Poland which utilize UN missions increasingly as means to finance their military budget.

and the nature of these operations as establishing a quasi-sovereignty of the UN in that respective territory will lead to an increased number of incidents, where the UN might be faced with human rights violations for acts of its forces that are taken to represent contradictions to international humanitarian law.[153] A possible solution might lie in the establishment of an intergovernmental Peacebuilding Commission with a UN liaising Peacebuilding Support Office within the UN Secretariat.[154] This proposal was accepted during the UN 2005 Summit,[155] which gives hope that UN peacekeeping will become more effective and as such a working tool of active human rights protection.

5.4. Sanctions as tools of human rights protection

The less forceful option for the SC would be an increased use of economic sanctions[156] as a means for human rights protection. But this option has its particular risks and shortcomings. The application of economic sanctions can result in quite unsuccessful and even contra-productive effects, as in the case against the former Apartheid South Africa before 1994,[157] where the sanctions led to the development of a "laager"[158] mentality among the white minority regime which abandoned any restrictions in dealing with internal opposition forces in the late 1970s and early 1980s.[159] A similar development was witnessed in the case of Saddam Hussein's pre-2003 Iraq and can presently be seen in Yong's North Korea.

General reasons for such a failure can be manifold: it starts with an unjust and uneven-handed imposition process that sees the pursuit of their own geopolitical, ideological and economic

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[153] For a summary of the present situation, see Megret and Hoffmann, "The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities" in 25.2 *HRQ* (2003) 314-342; McCormack about the atrocities committed in Somalia during the operation "Restore Hope" in "Their Atrocities and Our Misdemeanours: The Reticence of States to Try Their "Own Nationals" for International Crimes" in Lattimer and Sands, *Justice for Crimes Against Humanity*, (2003), 137 *et seq.*

[154] SG's report, (n 45) para 114.

[155] See General Assembly, GA/10385, (n 38).

[156] Since 1991, sanctions had been imposed on Iraq, the former Yugoslavia, Haiti, Somalia, Libya, Liberia, Angola, Rwanda and Sudan in comparison to only two occasions before, namely against the former Rhodesia in 1966 and South Africa 1977. See Segall, "Economic sanctions: legal and policy restraints" in 81 *IRRC* (1999) 763.

[157] Hefeker and Menck, "Wie wirkungsvoll sind Sanktionen? Das Beispiel Südafrika", HWWA-Report 220 (2002) 43 *et seq*. It is important in that context to note that the sanctions against SA became only powerful the moment major economic powers such as the USA supported the UN's stance towards apartheid in 1986. See e.g. *The Comprehensive Anti-Apartheid Act of 1986*; Pub L No 99-440; 1000 Sat 1086 (1986) as a strong domestic legislative response of the USA.

[158] The terminus "Laager" refers to the Battle of Blood River in South Africa where an outnumbered force of Afrikaners (Afrikaans speaking settlers of mostly German-Dutch descent) defeated a numerically superior force of native Zulu warriors on December 16th, 1838. In the above context the terminus is used to express an attitude of defiance to the international opinion by continuing the policy of *apartheid* which was universally stigmatized as an international crime.

[159] For a description of the most violent period of the South African civil war, see Mandela, *Long Walk to Freedom*, (2002), 617-23.

interests by the five permanent members of the SC and culminates later in the execution phase with the difficulties of monitoring compliance and enforcing the imposed sanctions.[160]

In a worst-case scenario, economic sanctions may even amount to human rights violations[161] themselves when these sanctions directly or indirectly inflict human suffering among the population of the state in question. The Sub-Commission on the Promotion and Protection of Human Rights of the UN Commission on Human Rights found in June 21, 2000, that the UN sanctions against Iraq were "unequivocally illegal" for such reasons under international law.[162]

5.5. Evaluating the SC's role in the protection of human rights

The Security Council's role in protecting human rights is limited for a variety of reasons, as outlined before. One key reason for the SC's limited role in the protection of human rights is, however, the persistent misconception that the SC itself resembles an organ which is authorized and designed with the explicit task of human rights protection.[163] This opinion might be based on more recent resolutions[164] of the Security Council that large-scale violations of human rights and international humanitarian law may qualify as a threat to international peace, with the consequence of possible measures under Chapters VII of the U.N. Charter, which created the hope that the SC may eventually play a stronger role in the protection human rights in the near future. There exists, however, no guarantee at present that the SC will become more active in the field of human rights protection[165] with some sort of automatic response mechanisms established in the near future.

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[160] See Strydom, "United Nations sanctions and Africa's wars of enrichment" in 26 *SAYIL* (2001) 57 with a focus on the more recent sanctions in Africa. The SG's Panel report calls subsequently for the establishment of routine monitoring and investigation capabilities, in order to close the implementation gap (n 42) para 180; SG's report (n 45) 110.

[161] A reason for concern that sanctions might violate international human rights and humanitarian law is rooted in the wording of Article 41 which does not explicitly limit the scope and extent of measures taken by the S.C. However, there are certain immanent "humanitarian exceptions" which forbid measures which contradict human rights and humanitarian law. See Segall, (n 156) 764 *et seq.*.

[162] See para 67 of the working paper *The Adverse Consequences of Economic Sanctions On The Enjoyment Of Human Rights*, UN. Doc. E/CN. 4/Sub. 2/2000/33.

[163] Steiner and Alston, (n 38) 355.

[164] See e. g. the UN SC Res. 794 (1992) on the civil war in Somalia, Res. 770 (1994) on Bosnia and Herzegovina and Res. 929 (1994) on the genocide in Rwanda. It should be noted, however, that a driving force behind these interventions were the U.S. under their democratic President Bill Clinton, which leads to the conclusion that such actions of the S.C. are more the exception than the rule.

[165] The horrifying example of Rwanda, where around 800.000 mostly ethnic Tutsi were killed within 100 days by ethnic Hutu in spring of 1994, while the UN and 600 peacekeepers in the country stood powerless by, demonstrates how much humanitarian suffering passivity, disinterest and pusillanimity among the respective decision making states had created.

6. Conclusion

The different organs, both charter- and treaty-based, of the UN have become acknowledged institutions for the promotion and – to some extent – protection of human rights. This cannot, however, distract from the fact that there is a perceived need for a central UN human rights protection body, which could direct and co-ordinate all human rights protection efforts. The UN SG's suggestion of establishing a Human Rights Council as a new principal organ of the UN[166] for the protection of human rights constitutes such a solution.

However, the UN's main achievement in the field of human rights protection lies in the development of a body of international law[167] over the last 60 years. Besides the drafting and passing of numerous conventions and declarations, the UN has sponsored over 500 multilateral agreements between various sates. All these efforts increased the recognition of human and social rights worldwide and provide today the international legal framework for various topics of international concern.[168] This success is to some extent due to the persistent and permanent work of international governmental (IGOs) and non-governmental organizations (NGOs), which contribute to the protection and monitoring of human rights with their research and fieldwork.[169] The International Committee of the Red Cross (ICRC) plays a particularly important role in the promotion of international human rights through its universally recognized work as independent monitor of human rights protection.[170]

The UN with its various bodies for the protection of human rights faces, however, some severe difficulties on its way to resemble an effective and recognized regime of human rights protection:

(1) The UN has to move forward from the present use of passive, non-intervening means such as monitoring and promotion of human rights towards a more active protection of human rights. This reluctance to enforce human rights more determinedly is still rooted in the UN's fear of a possible violation of the non-intervention principle of Article 2 (7) UN-Charter and

[166] SG's report, (n 35) para 183. The UN SG's proposal even advocates the total replacement of the UN Commission on Human Rights by this Human Rights Council at a later stage. The CHR was eventually abolished as of June 16 2006 by the ECOSOC, see decision of 22 March 2006, retrievable at http://www.un.org/News/Press/docs/2006/ecosoc6192.doc.htm

[167] Through conventions, treaties and setting of standards of universal reach.

[168] See http://un.org/about un/basicfact/inetlaw.htm.

[169] As a consequence of this importance, Amnesty International and Human Rights Watch had been granted observer status with the UN.

[170] The functions of the ICRC include the roles of protecting the different groups affected by armed conflict: the combatants, the prisoners of war and of non-international conflict and lastly the civilians.

the highly politicized nature of its composition. This reluctance and the (abovementioned) absence of peace enforcement assets such as own standby troop contingents could be witnessed in the various examples of the UN's incapability and helplessness in protecting human life (and therefore human rights) in the genocides of Bosnia-Herzegovina, Rwanda[171] and, more recently, the DRC.

(2) Peer pressure with the threat of negative publicity and further diplomatic pressure as a consequence to the findings and reports of different human rights organs may contribute in general to a promotion of human rights and even an improvement of the actual situation in that state. However, given the lack of further explicit accountability and means of enforcement, this and other related mechanisms[172] are not strong enough to guarantee compliance of the member states.

(3) The present UN human rights regime only attempts to establish a system of state accountability[173] for gross human rights violations which is severely limited through the strict compliance with the UN principles of state sovereignty and sovereign equality.[174]In addition, there is the present UN system's persistent reluctance to grant effective and enforceable remedies (such as financial[175] and factual restitution to the victim), means of correcting unjust court decisions on a national level, and further administrative measures prevent it from becoming an effective deterrent for human rights abuses.

(4) As long as there are no strict individual accountability[176] mechanisms for human rights abuses in place and established by the international human rights instruments, the UN and its organs will continue to resemble a human rights regime that "is a relatively strong

[171]The example of the enclave of Goradze, where up to 60,000 Muslims were hold hostage by Serb security forces and subject to daily shelling and sniping from 1993 to 1995, is such example of the UN's reluctance to intervene. In the case of Rwanda, the UN did effectively nothing to stop the ongoing carnage but even withdrew the few already deployed troops. See Eno, (n 86) 97.

[172] See in the African context the new Peer Review Mechanism (PRM) established under the New Partnership for Africa's Development (NEPAD) in 2002 which has still to prove its worth in regard to the protection of human rights.

[173] There are so far only few examples of holding states accountable for human rights atrocities per se through the judgments of the ICJ: see e.g. the application of the Convention on the Prevention and Punishment of the Crime of Genocide in the case *Bosnia and Hercegovina v. Yugo.* before the ICJ in 1993, see *ICJ Reports* (1993) 3.

[174] See Article 2 (1) and (7) UN Charter.

[175] See below part C chapter 1.

[176] The only exception are the cases of gross human rights atrocities such as genocide and crimes against humanity as so called "core crimes" which may establish criminal accountability before international ad hoc tribunals, domestic courts or, since July 2002, before the ICC. The next part will deal with the aspects of criminal prosecution of human rights violations.

promotional regime … which rarely goes beyond information exchange and voluntarily accepted international assistance for the national implementation of international norms."[177]

(5) Next, there exists a general difficulty in upholding impartiality[178] in cases where political and ideological pressure is applied within the different organs of the UN by the individual members. Consequently, there is the practical possibility that UN human rights instruments get misused by some member states for asserting their own ideological and/or political agendas.[179] These unfortunate realities do not strengthen the UN's overall impact on the promotion and protection of human rights. Only a strict system of internationalized human rights standards, enforceable before international and domestic courts, will end these problems.

(6) And, finally, there is a general financial restriction on the work of the various UN human rights organs which limits their efforts substantially. This gives rise to an urgent need for a substantial increase in funding.[180] This fact is especially disheartening considering that the world's wealthiest nations as members to the UN are not willing to guarantee its financial capacity. Given that this state of affairs is likely to last, the only possible solution might lie in a merging of the existing bodies of the seven treaty-based UN bodies into a smaller number of consolidated treaty bodies[181] which would be able to concentrate on the individual and inter-state communications in a more effective manner. Such a development can be witnessed in the existing European human rights regimes, which are presently being merged through interlinking and consolidation.[182]

[177] Donnelly, "International Human Rights: A Regime Analysis" in 40 *Int'l Org.* (1986) 613.
[178] See e. g. Cassese, *Human Rights In A Changing World*, (1990), 128.
[179] See *The Economist*, of 4 February, 1995, 24 in Steiner and Alston, (n 38) 434. See on the role of the CHR, SG' report (n 45) para. 182 and SG's Panel report (n 42) para. 283.
[180] See *The Vienna Declaration And Programme of Action*, Part II, Section A, in 32 *ILM*. (1993) 1674.
[181] Buergenthal, "A Court and Two Consolidated Treaty Bodies", in A.F. Bayefsky, (n 71) 299 and 302. Buergenthal refers to the 1998 declaration of the American Bar Association which supported the idea of consolidating UN's human rights bodies.
[182] See for a further analysis chapter 2. 1.

CHAPTER 2

THE PROTECTION OF HUMAN RIGHTS AT THE REGIONAL TREATY LEVEL

In addition to the international UN charter- and treaty-based systems of human rights protection, three regional systems of human rights protection developed. The necessity of the additional human rights protection regimes to supplement the international system lies in their relieving effect on the working procedures described above: the work of the Human Rights Committee of the ICCPR would face severe difficulties in coping with the present backlog of pending individual communications were it not for the emergence of regional human rights regimes (mainly the Inter-American and European systems), which further the task of human rights protection by their additional capacities.

At present, there are three regional human rights regimes in force, each system sporting its own set of individual human rights instruments and the respective implementing and monitoring bodies for the promotion, protection and, ultimately, enforcement of these rights.

The regional human rights systems in Africa, the Americas and Europe differ with respect to their effectiveness and, consequently, their impact on the protection of human rights. In addition to these three regional systems, there exists a dormant Arab human rights protection approach by the Council of the League of Arab States[183] with a defunct 7-member, permanent Arab Human Rights Committee. This committee was established in 1968 and has remained inactive to the present under the Arab Charter on Human Rights of 1994[184] and two additional Islamic Human Rights Documents, which have still not been ratified.[185]

This chapter will describe and evaluate the three presently functioning systems, starting with the European system as the oldest and most effective, then the OAS system of the Americas and concluding with the African system of the AU as the most recent.

1. THE PROTECTION OF HUMAN RIGHTS IN EUROPE

The protection of human rights in Europe takes place through three different, partly supplementary, protection regimes and mechanisms. Each of them consists of framework

[183] For a summary of the present human rights situation in the Arab world, see An-Na'im, "Human Rights in the Arab World: A Regional Perspective" in 23 *HRQ (*2001) 701-732.
[184] The non-ratified Arab Charter on Human Rights of 1994, reprinted in 18 *HRLJ* (1997) 151 and the Cairo Declaration on Human Rights in Islam of 1990, retrievable at http://www1.umn.edu/humanrts/instree/cairodeclaration.html.
[185] The Universal Islamic Declaration of Human Rights of 19 September 181 and the Cairo Declaration on Human Rights in Islam of 5 August 1990. See Nowak, (n 22) 254-56 for a summary.

instruments with their respective implementing and enforcement organs. The research describes the protection of human rights under the systems of the Council of Europe (CoE), the Organization for Security and Cooperation in Europe (OSCE) and, as a more recent development, the European Union (EU).

1.1. HUMAN RIGHTS PROTECTION UNDER THE COUNCIL OF EUROPE REGIME

1.1.1. Overview

The system of human rights protection under the authority of the Council of Europe (CoE) resembles one of the most effective and tested regional regimes[186] of human rights protection.

Its legal basis is the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950[187] (ECHR) with its two implementing and enforcement organs, the new single European Court of Human Rights (ECtHR) and the Commissioner for Human Rights, which have developed into globally acknowledged authorities of human rights protection.[188]

1.1.2. CoE human rights protection prior 1994

The history of human rights protection under the CoE regime has seen two important phases, namely before 1994 and after. The organs of the pre-1994 system of human rights protection under the ECHR had a tripartite structure. Firstly there was the European Commission of Human Rights (European Commission) with its different functions of promoting and protecting human rights[189] and its explicit filter function for the European Court. Next came the European Court of Human Rights with its role in passing judgements on cases which had

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[186] For a general overview of human rights and their protection through the European Council see http://europa.coe.int

[187] 213 UNTS 222, entered into force Sept. 3, 1953 and as amended by Protocols Nos. 3,5,8 and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.

[188] In addition to the human rights protection under the ECHR exists the explicit protection from torture as guaranteed under European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, E.T.S. 126, *entered into force* Feb. 1, 1989, retrievable at http://www1.umn.edu/humanrts/euro/z34eurotort.html This research regards this convention with its main body, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, as further protective annex to the ECHR as stipulated in its Preamble where explicit mention is made to Article 3 of the ECHR whereas "no one shall be subjected to torture or to inhuman or degrading treatment or punishment"; considering the further fact that individual applications are not featured by this instrument, the research does not further extend to it.

[189] See Articles 28ff of the ECHR (pre -Protocol 11 of 1998).

been referred to it by the European Commission and governments.[190] And, finally, there was the Committee of Ministers as the CoE's executive organ concerned with the execution of judgments and the delivery of decisions on cases not referred to the European Court.

This procedure, known as the "Strasbourg mechanisms", became increasingly successful in the protection of human rights. The increase in the number of communications to the European Commission documents this development: from 404 applications in 1981 up to more than 4,000 cases in 1997.[191] This success, however, led to the exposure of some weaknesses that are inherent to the system:

(1) The number of petitions and the growing complexity of the cases led to prolonged procedure times: it took up to five years for a single case to move through all parts of the system.

(2) A more and more obvious disparity of arms in respect to the individual complainant who had no direct standing before the European Court. Instead the complainant had to rely on the European Commission to argue his case.

(3) The increase in members from ten to 37 and later still more (45 in 2003) increased the reach and scope of the European Convention's jurisdiction to the point where it could no longer cope with the old "two-tier" system of the European Commission and the European Court as the respective protection organs.

1.1.3. CoE human rights protection after 1994

With the adoption of Protocol No. 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms[192] in May 1994 ("The Protocol"), some of these shortcomings were addressed and the existing system consequently further developed. The Protocol abandoned the European Commission of Human Rights in favour of the creation of a single European Court as a unitary "one-tier" mechanism. What later became known as the "European Protocol 11 model" was the merging of ECHR's two main organs, the European Commission and the European Court into one single, strong European Court of Human

[190] *Id*. Article 48.
[191] See Heyns, Strasser and Padilla, (Heyns hereafter), "A schematic comparison of regional human rights systems" in 79 *AHRLJ* (2003) 74 and Nowak (n 22) 165.
[192] Reprinted in 37 *YBECHR* (1994) 2.

Rights. This step became possible because the main purpose of the European Commission in monitoring state compliance and promoting human rights had become increasingly safeguarded by other emerging European human rights systems with their respective organs,[193] so that the focus of the European Convention system could shift to the protection of human rights before the new ECtHR.

Important features of the ECtHR are its designation as a permanent[194] judicial organ of the ECHR, the admissibility of individual complaints[195] and the binding force of its findings under Article 46 of the ECHR.[196]

The (new) ECtHR became the primary forum for the adjudication of human rights violations, accessible to 800 million individuals and with a jurisdiction that was binding to the 44 member states.

1.1.4. Evaluation of the CoE human rights protection

The admissibility of individual communications to the ECtHR is important for the ECHR as a leading human rights regime. This opinion is supported by the impressive number of decisions and judgements of the court: 9,351 decisions[197] and 888 judgements[198] were delivered in 2001 alone.[199] The total caseload in that period added up to 13,858 cases registered, which exceeds the total caseload of the last thirty years of the Court's existence by some 2,200 cases.[200] Consequently, this caseload creates the inherit danger that such an overload of cases may eventually affect the court's effectiveness due to the lengthy procedures.

One of the main reasons for the success of the European Convention human rights system is the fact that the ECtHR's judgments are enforced by the means of a well-established

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[193] See e.g. the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment under Article 1 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 1989, *E.T.S.* 126.
[194] Article 19 of the ECHR (1998)
[195] *Id.* Article 34, besides the hardly ever utilized inter-state complaint mechanism under Article 33.
[196] See for an account of the enforcement procedures of the court's findings below under 1.1.4.
[197] This number includes the decision on the admissibility, non-admissibility, respectively of applications.
[198] Compared with a total of 3,400 court judgments, that were delivered since 1959.
[199] See Heyns, (n 191) 79 and Nowak (n 22) 169. Shelton, *Remedies in International Human Rights Law* (2005), 198-199 for an update on the caseload of the ECtHR.
[200] *European Court of Human Rights, Survey of Activities 2001* at http://www.echr.coe.int/ENG/InfoNotesAndSurveys.htm. Note that these numbers account for the former two tier structure and as thus refer to the caseload of the ECHR alone.

enforcement mechanism. The court's decisions are binding for all signatory States concerned.[201] State compliance with the judgments is enforced by the Committee of Ministers of the European Council, which as an executive organ oversees the execution of the court's judgments.[202] Consequently, a member state's non-compliance with the court's verdicts and judgements may constitute a violation of this member state's duty under Article 3[203] of the Statute of the Council of Europe[204] and may eventually result in severe political sanctions against the non-complying state – for example, suspension or even expulsion of the state, as stipulated under Article 8[205] of the Statute.[206]

The sound financial position of the ECtHR is a further guarantee for its effectiveness. The financial budget of the court presently amounts to € 29,8 million p.a. – 17,6% of the overall annual budget of the CoE.[207] This amount is seven times the budgets of the Inter-American Commission and the Inter-American Court combined. This high budget seems to prove the importance of adequate funding as a requirement for any effective human rights protection.

But there are criticisms of the working procedures of the ECtHR as well: some critics refer to the work of the court as being too lengthy and sometimes too costly, especially when this involves *in situ* visits to alleged perpetrator-states.[208] Other criticism is based on the reluctance of the ECtHR to start in *popriu motu* actions in cases of the absence of an individual communication.[209] More critical to the effectiveness of the CoE's human rights regime seems the possibility of signatory states entering into reservations under Article 57 of

[201] Article 46 (1) of the European Convention (1998) whereas "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties."
[202] *Id.*, Article 46 (2) reads "the final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."
[203]Article 3 of the Statute of the Council of Europe requests that "every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I". Article 1 (b) lists, among other ways to realise these goals "the maintenance and further realisation of human rights and fundamental freedoms".
[204] Statute of the Council of Europe, (*ETS* No. 001), *entered into force* August 3, 1949, retrievable at http://www1.umn.edu/humanrts/euro/ets1.html
[205] Whereas "Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine."
[206] Robertson and Merrils, *Human Rights in Europe-a study of the European Convention on Human Rights*, (1993), 3.
[207] Heyns, (n 191) 84.
[208] See O'Boyle "Reflections on the Effectiveness of the European System for the Protection of Human Rights" in Bayefsky (n 71) 169-80, 179.
[209] *Id.* this criticism seems to be somehow farfetched, considering the already overwhelming case load of the court which seriously threatens its efficiency and the fact that individual applications under Article 35 can be brought by NGOs and other groups of individuals besides the individual victim.

the revised ECHR of 1998,[210] which essentially resembles a "claw-back clause"[211] as known to the African human rights system under the Banjul Charter.[212] These reservations might eventually lead to a lack of uniformity in the culture of human rights protection in Europe.

In addition, the establishment of the new post of Commissioner for Human Rights in 1999 in a supplementing role to the ECtHR with the tasks of promoting education, awareness and respect for human rights, may indicate that there is still the need for an organ that solely promotes human rights, such as the earlier European Commission, but on a smaller and more appropriate scale.

In conclusion, there are doubts that the European example of what is thus by far the most effective human rights protection regime does necessarily strengthen human rights on a global scale: the fact that human rights are acknowledged and enforced in Europe at a higher level than anywhere else in the world may even lead to a stagnation in the global human rights promotion process because of unbridgeable differences in respect of the different regions' perception of human rights and the necessary protection measures.

1.2. THE ORGANIZATION FOR SECURITY AND COOPERATION IN EUROPE AND HUMAN RIGHTS

1.2.1. Overview

The Organization for Security and Cooperation in Europe (OSCE) plays an increasingly important part in the protection of human rights through its multipartite mechanisms of discussion and consultation. The OSCE has developed a number of highly innovative human rights standards. The legal framework of the OSCE consists of the Helsinki Final Act of 1975, the Charter of Paris for a New Europe of 1990 and the Charter for European Security adopted in Istanbul in 1999.[213]

Originally designed as a sole security organization to foster peace talks in traditional fields of security-related topics such as disarmament, the then Conference on Security and Co-

[210] Article 57 ECHR stipulates that "Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provisions […]".
[211] See below under 3.2.2.2.
[212] African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 *ILM*. (1982) 58, *entered into force* Oct. 21, 1986, retrievable at http://www1.umn.edu/humanrts/instree/z1afchar.htm
[213] All documents can be retrieved at http://www.osce.org/odihr/documents.

operation in Europe (CSCE)[214] had from its inception the protection of human rights on its agenda. The "respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief" was acknowledged as one of the organization's guiding principles in its founding Act, the Helsinki Final Act of 1975.

Furthermore, the work of special CSCE-created human rights groups such as the Helsinki groups and Charter 77 helped to hasten the collapse of the communist Warsaw Pact in 1991. With the end of the East–West conflict, the focus of the CSCE's work shifted as well: the protection of human rights became the main focus of the organization's work, thus changing its original role as a guarantor of regional military security[215] into that of an active human rights protector.

Unlike other human rights regimes, the OSCE does not retain a permanent court-like institution. The protection of human rights takes place through regular consultation-meetings and so called human dimension mechanisms, the Vienna and the Moscow mechanisms that allow for questions to be asked and investigations to be started into specific human rights issues on an ad-hoc basis. This so called "conference" approach changed when the OSCE created permanent institutions for human rights protection: the OSCE Office for Democratic Institutions and Human Rights, which is situated in Warzaw, the OSCE High Commissioner on National Minorities based in The Hague and, finally, the OSCE Representative on Freedom of the Media, situated in Vienna, are examples of institutionalizing the OSCE and its mechanisms.

1.2.2. Evaluation of human rights protection under the OSCE

The OSCE with its legal framework, its governmental consultation process and its organs quite successfully sees to it that its member states comply with the organization's set standards of human rights, fundamental freedoms, democracy and the rule of law. Through its "diplomatic" approach to finding solutions for human rights violations and its image as an honest broker to all sides,[216] the OSCE can often achieve more than other human rights regimes with their more confrontational mechanisms.

[214] The CSCE became the OSCE in 1994.
[215] For a further comprehensive summary on the activities of the OSCE, *OSCE Human Dimension Commitments-A Reference Guide*, Warzaw (2001) at XIII ff. retrievable at http://www.osce.org/odihr/documents.
[216] A role that is comparable to the standing of the ICRC in respect of armed conflict and humanitarian law.

The basic requirement for any OSCE work is, however, that all participating states accept and follow its diplomatic procedures.[217] Because it lacks means of enforcement, its work can soon become ineffective. The role of the OSCE in Kosovo prior to the NATO campaign of 1999 is such an example of futile efforts when the OSCE monitors of the Kosovo Verification Mission became a pawn in the strategic power game between Serbia, the UCK[218] and NATO.

The OSCE plays an important part in any post-conflict environment as regards institution- and democracy-building and the promotion of human rights. However, examples thereof are the present lead role of the OSCE in Kosovo in the attempt to build democratic structures[219] and the involvement of the OSCE in the new two-part Commission on Human Rights in Bosnia and Herzegovina, where the OSCE appointed a Human Rights Ombudsman.[220] The fact that these undertakings are not always successful should not undermine their importance and impact on the protection of human rights.[221]

1.3. HUMAN RIGHTS AND THE EUROPEAN UNION

The European Union (EU), as the world's second-largest economy after the USA, plays an increasingly important role in the promotion of human rights. The original role of the EU as mainly an economic treaty organization has significantly changed with the European regional political and strategic "renaissance" after 1991 and the admitting of former "enemy" Warzaw Pact States as new members to the EU in 2004. The EU of today regards itself as a more politically active organization where questions of security and human rights having become a dominant part of the new EU agendas: this new understanding of the EU's mission can be witnessed in the successful definition of the EU' s Common Foreign and Security Policy (CFSP)[222] and the EU Charter of Fundamental Rights.

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[217] See, e. g. *Agreement on the OSCE KOSOVO VERIFICATION MISSION* in 38 *ILM* 24 (1999) between the Federal Republic of Yugoslavia and the OSCE as an initially promising example of finding a conflict solution.
[218] The (so called) Kosovo Liberation Army.
[219] Established on 1 July 1999 under UN Security Council Decision No. 305.
[220] See Dakin, "The Islamic Community in Bosnia and Herzegovina v. The Republika Srbska: Human Rights in a Multi-Ethnic Bosnia" in 15 *HHRJ* (2002) 248.
[221] See for an overview of the human rights situation in Kosovo after the mid-March 2004 riots, Nilsson "UNMIK And The Ombudsperson Institution In Kosovo: Human Rights Protection In A United Nations "Surrogate State" in 22.3 *NQHR*, (2004) 389-411.
[222] The CFSP coordinates the actions of the EU member states in respect of foreign and security policy in order to create an maximum output of the EU' s position. See "Foreign policy is peace policy" of the (German) Federal Foreign Office at http://auswaertiges-amt.de/www/en/aussenpolitik/friedenspolitik/index_html. A quite successful display of CFSP's capabilities was the joint EU military peacekeeping operation in Bunia, Burundi, in 2003.

The protection of human rights within the EU takes place in the following four ways:

Firstly, human rights are protected in the form of the so-called fundamental freedoms and social rights guaranteed to the individual citizens of the member states. As so-called "citizens' rights", these rights are protected under the provisions of the European Community Treaty, the EU Treaty.[223] Such citizens' rights are the equality of men and women,[224] the right to be free from discrimination based on sexual, racial, religious and other reasons.[225] Any violation of these rights would qualify as a violation of the EU Treaty and would thus be actionable before the Court of Justice of the European Union. The domestic implementation of EU legislative acts creates equality within the European Union, and the decisions of the Court are of a binding nature for all member states. And, finally, there is the opportunity for member states to take further appropriate actions against any non-complying member state like e. g. the imposing of diplomatic sanctions.[226]

The second way of protecting human rights takes place through a general commitment of the EU to the respect and protection of "universal" human rights, which are not limited to citizens of EU states. Article 6 (1) of the EU Treaty stresses the general "respect for human rights and fundamental freedoms",[227] as protected under the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, as expressed in Article 6 (2) of the EU Treaty.[228] The observance of this EU common policy is safeguarded in a twofold way: firstly, through the fact that state compliance with Article 6 (1) has become a requirement of accession to the European Union with Article 49 EU Treaty laying out this accession requirement.[229] The 10 new member states[230] of the European Union had to comply with this "compliance test" prior to their 2004 accession with the Slovak Republic under its President Meciar as an example of a state which had to change its internal politics in order to

[223] See http://europa.eu.int/treaties.
[224] Article 2 EU Treaty
[225] *Id.*, Article 13.
[226] *Id.*, Article 309, which allows the European Council to suspend certain membership rights of a member state that does not comply with the principles defined in the EU Treaty.
[227] Article 6 (1) EU Treaty reads "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms; and the rule of law, principles which are common to the Member States".
[228] For a description of the incorporation of human rights into EU legislation, see Nowak, *Menschenrechte als Grundlage der EU-Wertegemeinschaft-Artikel 6 und 7 EUV in der Fassung von Nizza*, Essay, Wien (2001).
[229] Whereas only a state "which respects the principles set out in Article 6 (1)" is eligible for membership in the Union.
[230] The European Union grew in 2004 from 15 to 25 member states. The admitted states were: Cyprus, the Czech republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia)

become eligible.[231] The second safeguard is through Article 7 EU Treaty, which allows for the imposing of political sanctions[232] against member states for "serious and persistent breach of the principles laid down in article 6 (1)" by the Council. Since the 2000 Treaty of Nice, this right of resorting to sanctions can be used for the prevention of human rights violations as well.[233]

A merger of these two approaches to the protection of human rights (citizen-specific and general human rights) took place in the codification of the new, not yet treaty-incorporated, Charter of Fundamental Rights,[234] where basic human and fundamental rights related to dignity, liberty, equality, solidarity, citizenship and justice had been codified in seven chapters and 54 articles. Despite its having been adopted as legally non-binding for organs and Member States of the EU, the Court of the European Union (ECJ) and domestic courts of several Member States are already referring in their findings to the EU Charter.[235]

Important in the context of human rights protection in the EU is its relationship to the ECHR system. Earlier considerations of the EU to accede to the ECHR regime were effectively halted by the ECJ's opinion of March 1996 that "the state of the community law" did not allow accession to the ECHR. The fact that the ECJ already applies the ECHR in its findings, together with the acknowledgment and further development of human rights in the EU, with the Charter of Fundamental Rights of the European Union of 2000 as a direct result of this development, seems to indicate that the European Union is determined to follow its own, independent way of human rights protection, which makes accession more unlikely than likely.

Thirdly, the European Union concludes multinational trade and development agreements containing explicit human rights policy provisions with developing states in order to

[231] The Slovak Republic was subject to explicit criticism by the EU for its maltreatment of the Sinti and Roma minority.
[232] Such sanctions allow for the suspension of certain political rights as e.g. voting of the violating state in question.
[233] The highly dubious imposition of diplomatic sanctions against Austria in February 2000 as a consequence to the appointment of an alleged right wing cabinet under the FPÖ party, would now fall under such preventive measures.
[234] "Charter of Fundamental Rights of the European Union", 2000 O.J. (C 364) 1, as entered into force Dec. 7, 2000.
[235] See Morijn, *Judicial Reference to the EU Fundamental Rights Charter-First experiences and possible prospects*, essay, retrievable at http://www.fd.uc.pt/hr/papers/john_morjin.pdf.

contribute to the global development of human rights.[236] Such human rights provisions find their way into bi-national agreements as well. This "annexing" of human rights to trade is a powerful way to contribute to the global proliferation of human rights, especially in respect of states of the developing world, which have more often than not a notorious human rights record. This EU trade approach is supplemented by actions undertaken under the CFSP[237] and consequently backed by the necessary "economic" muscle. The WTO is another example of an international organization which combines the global development of trade with the protection of human rights by means of so called "human rights" clauses in trade agreements.

Fourthly, and strongly linked to the trade approach on the protection of human rights, is the EU's European Commission's role in promoting human rights by financing heavily the work of non-governmental organizations and donating directly to the countries in question. The European Commission annually spends about €500 million in humanitarian aid and is therefore the largest single donor of humanitarian assistance in the world.[238] European direct aid amounts to about 25% of the annual global total and does not include the aid provided by individual member states. The task of directing these funds is mandated to the Directorate General for Humanitarian Aid – ECHO under the Humanitarian Aid Regulation of the Council of the European Union of 20 June 1996.[239]

1.4. Conclusion

The three different existing European systems of human rights protection and promotion have proved to be effective and even standard-setting for other regional systems of human rights protection. One of the reasons for this success might lie in the fact that these systems are financed and supported by the politically and economically most powerful nations[240] in the world.

This success seems to follow the example of the pyramid of basic needs of Abraham Maslow –where after having satisfied the most basic fundamental needs people and thus societies tend to develop further and concentrate on the development and improvement of further thoughts

[236] Nowak (n 22), 242-6. Reference is made here to the three Lomé (III, IV and IV/2) Conventions and the Cotonou Agreement of 2000 with associated African, Caribbean and Pacific (ACP) states, where programmes of development cooperation are directly linked to human rights clauses; see Articles 5 and 366a of Lomé IV and Article 9 (2) of the Cotonou Agreement.

[237] With the CFSP's common strategies of the European Council as a powerful statement of common determination, see Nowak (n 22) 245-6.

[238] See http://europa.eu.int/comm/echo.

[239] Council Regulation 1275/96.

[240] Reference is made to the EU states and the USA.

and ideas of improving the quality of life and position of the individual. The development of human rights as human rights of the first, second and third generation, which are each embedded in their own political and historical context,[241] seems to justify this comparison.

Having economically powerful states as the driving force behind the development of human rights is both reassuring and disillusioning in its consequences. Consequently it threatens the success of other regional projects in establishing effective human rights regimes (like in Africa) or improving existing ones (like in the Americas) that lack an economically powerful nation as a state sponsor[242] behind their mission and goals. Moreover, the lack of such support may eventually lead to the failure of such human rights regimes. The ongoing political and economic integration process proves that such processes are a prerequisite for the development of effective human rights protection.[243]

Furthermore, any comparison between the present human rights situation in Europe and that of other regions of the world must be avoided. Except for the recent example of the Yugoslavian bloodsheds of 1991 to 1999, Central Europe has enjoyed a state of near peace since 1945 due to the East–West conflict as a pacifying element.[244] As a consequence of this period of prolonged peace, Europe could prosper economically in a fashion unknown to any region in the world. Combining this economic prosperity with the pan-European legacy of state commitment to the protection of human rights as a consequence to the permanent bloodshed before 1945, unique requirements, necessary for the establishment of such a strong human rights regime, developed.

And finally, essential to the success of the European system of human rights protection is its unique multi-layer human rights protection system: the three different human rights regimes with their different mechanisms support and supplement each other without creating negative, concurrent protection mechanisms. A possible conflict between the ECtHR and the EU's

[241] See Nowak, (n 22) 76.
[242] Reflecting on the Inter-American human rights regime, this resume is especially disturbing, considering the fact that the USA are not only not party to the Inter-American Court Statute but also in open defiance of its finding; for more information on this topic see the next subparagraph.
[243] See Vasak and Alston, *The International Dimensions of Human Rights*, (1982) 455.
[244] The three major European conflicts until 1989 had been (internal) conflicts without a broader impact: the 1953 uprising in the German Democratic Republic, 1956 the revolution in Hungary and 1968 the Soviet invasion of the Czech-Slovak Republic.

Court of Justice is not likely because of the latter's explicit acknowledgment and recognition of the principles and judgments of the ECtHR.[245]

2. THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

2.1. Introduction

The Inter-American Human Rights System is a regional organization regime for the promotion and protection of human rights with two sets of fundamental human rights as laid down in the American Declaration on the Rights and Duties of Man[246] and in the American Convention on Human Rights ("American Convention")[247] The American Declaration is binding for all member states of the Organization of American States (OAS), whereas the American Convention is binding only upon states that have ratified it.[248]

Its two organs, the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights[249] (IACtHR), are the implementing organs that oversee state compliance with the American Convention.[250]

This part will first explain the functioning and interaction of the Inter-American system organs and then evaluate their contribution to and impact on the protection of human rights in that region.

2.2. THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

2.2.1. Overview

The birth of the Organization of the American States[251] in 1951 paved the way for the establishing[252] of the IACHR in 1959[253] as an organ of the organization that had been solely

[245] See preamble to the 1986 Single Act and Article 6 EU Treaty.
[246] O.A.S. Off. Rec. OEA/Ser.L/V/II. 82, doc.6, rev.1 at 17.
[247] O.A.S.T.S. No. 36, 1144 UNTS 123 entered into force July 18, 1978, OEA/Ser.L/V/II.82, doc.6 rev.1 at 25 (1992).
[248] As of November 2003 there were 35 states that had ratified the American Convention.
[249] Statute of the Inter-American Court on Human Rights, O.A.S. Res. 448 (IX-0/79), O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 98**.**
[250] See Chapter VI Article 33 of the American Convention.
[251] Charter of the Organization of American States, 119 UNTS 3, entered into force December 13, 1951 as last amended by Protocol of Managua, 1-F Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add.4 (SEPF), 33 *ILM*. 1009, entered into force January 29, 1996)
[252] Chapter XV, Art. 106 OAS Charter
[253] The Statute of the Commission was approved by the OAS Council in 1960.

"created to promote the observance and defence of human rights and to serve as consultative organ of the Organization in this matter."[254]

The IACHR promotes human rights through the investigation of individual complaints and the conducting of in loco visits. It is further authorized to make recommendations with regard to legal questions to governments, to assist in the drafting of protocols and conventions and to interpret the rules of the Inter-American System of Human Rights Protection.[255]

Finally, the IACHR submits cases to the IACtHR under Article 61 of the American Charter where it appears in contentious cases as a party itself.[256]

2.2.2. Shortcomings

2.2.2.1. Financial dependency

The IACHR's work is limited by its low annual budget and the fact that it does not have financial autonomy over its budget.[257] Considering the fact that in the annual budget of 4.1 million US-$,[258] other contributions and donations add up to 25%, the IACHR is highly dependent on political goodwill in the form of foreign contributions in order to carry out its mission.[259]

This fact limits the IACHR's capabilities and leads eventually to a downsizing of its handling of individual complaints because of their complexity and intensity.[260]

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[254] See Chapter 1 Article 1of the Statute of the Inter-American Commission on Human Rights. O.A.S. Res. 447 (IX-0/79), O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1, 88.

[255] The Commission has drafted the "Inter –American Convention to Prevent and Punish Torture" and the "Inter-American Convention on Forced Disappearance of Persons".

[256] See Article 58, American Charter. This standing in court procedures before the Inter-American Court has led in the past to tensions between these two organs, see *The Inter-American Commission on Human Rights*: *A Promise Unfulfilled*, Report of the Committee on International Human Rights of the Association of the Bar of the City of New York, cit. in Steiner and Alston (n 38) 648-649.

[257] The Inter-American Court in comparison enjoys a largely financial autonomy under Article 26 of its Statute.

[258] Budget for 2002, see Heyns, (n 191) 84.

[259] Note in this context the favourable role of the US: from 1977 until 1981 the work of the Inter-American Commission was considerably funded and supported by President Carter's Administration. See Donnelly, *What Are Human Rights?*, Essay, U.S. Department of State's Bureau of International Information Programs, retrievable at http://usinfo.state.gov/products/pubs/hrintro/donnelly.htm.

[260] Considering these limited resources, one is tempted to evaluate the American Commission's work differently, see Medina, "The Inter-American Commission on Human Rights And The Inter-American Court of Human Rights: Reflections On A Joint Venture", cit in Alston and Steiner (n 38) 648.

2.2.2.2. Lack of efficiency and enforcement measures

The IACHR has become a crucial protagonist for the protection of human rights in the region and this is one of the reasons for the present standstill in its work: the IACHR's efficiency is questionable when its backlog of 1000 cases pending in 2002 is taken into account.[261] At a present rate of deciding some 100 cases per year, this delay in making decisions could even jeopardize its mission. The establishing of a filter mechanism seems to be mandatory for the future success of the Commission.

Another shortcoming lies in the lack of effective measures for the IACHR by which it can enforce its findings: the IACHR can only request information on measures adoptable by the Member States but not force the respective states to comply with its findings or follow their recommendations. A charter-based adoption of an increased intervention mechanism for the OAS organs in order to guarantee compliance with the Inter-American Commission's findings shall be sought.[262]

2.2.2.3. Impartiality and rivalry

The IACHR's growing involvement in state affairs by giving legal advice to individual governments changed the role of the IACHR from a human rights-promoting organ into one which is becoming more and more entangled with state and diplomatic affairs. This new role could affect the IACHR's work of protecting human rights in the long run because of possible conflict-of-interest scenarios. This situation is most likely to occur in contentious court proceedings before the IACtHR where the IACHR may act in a dual function, both as the petitioner's advocate and the Inter-American system's impartial adjudicator.[263]

In addition hereto, or even as a consequence, is the observation that the IAHRC and the IACtHR understand their role towards each other not as collaborators but as competitors.

This dependency is additionally encouraged through the IACHR's insufficient financial budget and the dependency on the OAS General Assembly's willingness to approve the necessary funds.

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[261] Heyns, (n 191) 79.
[262] In addition to the existing Article 73 of the American Convention that refers only in general to sanctions.
[263] See Groo, "The Contentious Jurisdiction Mechanism of the Inter-American Human Rights System: Looking Toward The Future", The Human Rights Brief of the Washington College of Law, at http://www.wcl.american.edu/pub/humright/brief/v4i27groo42.htm.

2.3. THE INTER-AMERICAN COURT OF HUMAN RIGHTS

2.3.1. Overview

The Inter-American Court of Human Rights is in its nature part trial and part appellate court and has the authority to order compensation or remedial measures in cases of violations of the two American human rights instruments by member states.

The court's jurisdiction is both contentious and advisory. The court has provided some important judgments on human rights. More notable are the court's findings that individual victims of human rights violations have a right to financial compensation directly against the state itself that violated its human rights obligations: the IACtHR found in its 1988 *Velasquez-Rodriguez v. Honduras* case that "an illegal act which violates human rights and which is initially not directly imputable to a State […] can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required".[264] Following this *dictum*, the IACtHR awarded between 1987 and 2004 financial remedies for human rights violations in over 41 cases[265].

Due to its lengthy proceedings, which might be a possible cause of the abovementioned "rivalry" between the court and the IAHRC, the IACtHR's annual output in decisions remain at a low level.[266]

2.3.2. Shortcomings

2.3.2.1. Lack of an effective enforcement regime

Besides the "rivalry" between the IACtHR and the IAHRC, which has led to a reduction of the numbers of court decisions, the fact that the court lacks an effective enforcement mechanism for executing its findings is a serious shortcoming. Under Article 68 (1) of the American Charter "the State Parties undertake to comply with the judgement of the Court in any case to which they are parties." Besides this expression of "an undertaking" to comply, no enforcement regime comparable to the European Court's regime[267] exists. The introduction of a new, more powerful execution regime is, following the general position within the OAS

[264] See para 172 of the *Velasquez Rodriguez* case, Judgment on the merits of 29 July 1988, *Inter-American Court of Human Rights* (Series C), No. 4, 28 *ILM* 291 (1989) and 9 *HRLJ* 212.
[265] See for a detailed summary on the Inter-American Court's adjudication, Laplante "Bringing Effective Remedies Home: The Inter-American Human Rights System, Reparations, And The Duty Of Prevention" in 22.3 *NQHR* (2004) 347-89 and Shelton, (n 199) 468-477.
[266] See Heyns, (n 191) 78, who lists only 4 judgments and one advisory opinion as the total output for 2002.
[267] See above under 1.1.4.

towards state immunity, not intended.[268] This lack of an enforcement mechanism which is mandatory for any human rights protection through court rulings compromises the court's overall effectiveness. Additionally, there are severe reporting deficits with respect to state compliance with court rulings. These shortcomings apparently illustrate a general disinterest within the OAS to amend state sovereignty in order to allow the enforcement of court rulings. In conclusion, the need to adopt charter-based sanction mechanisms like the ability for the General Assembly to suspend the membership of a permanently non-complying state is apparent.

2.3.2.2. Principal deficits of the Inter-American contentious case mechanism

The contentious Inter-American jurisdiction system leads to the following shortcomings which are additional limitations to the IACtHR's ultimately successful role as a judicial guardian of human rights:

(1) The lack of the possibility of an individual complaint limits the IACtHR jurisdiction to an extent that is unacceptable under modern human rights regimes;[269]

(2) The further lack of direct representation of the victims of human rights violations in cases submitted by the IACHR under Article 61 of the American Charter;

(3) The lack of a mandatory submission rule for cases where states do not comply with the findings of the IACHR;

(4) The fact that the court is not allowed to use facts that had already been established in prior proceedings before the IACHR. This restriction leads to a "duplication of fact finding"[270] with substantial losses in time and money.

[268] It is significant in that respect that the Statute of the American Court as a more recent OAS instrument does not specify the enforcement of the judgements further.
[269] Compare the possibility of individual court access under Article 34 of the European Convention (as amended by protocol No. 11 in 1998) and, however, restricted admissibility of individuals under Articles 5 (3) and 34 (6) of the Protocol on the Establishment of an African Court on Human and Peoples' rights.
[270] For a comprehensive study of the present deficits, see *Human Rights Plan of Action for the Americas-A continental challenge, a collective undertaking*; report, retrievable at http://www.derechos.org/nizkor/la/doc/proposal.

2.3.2.3. Insufficient financing

The IACtHR has an annual budget of US $2.2 million.[271] This amount resembles less than 7 percent of the annual budget of the ECtHR. Without additional resources and considering the pending case load of some 1,000 cases, there seems to be little hope that the IACtHR's work will become quicker and therefore more effective.[272]

2.4. Evaluation of human rights protection under the Inter-American system

The following deficiencies undermine the Inter-American regime's impact on the protection of human rights in the region: the limited number of decisions of the court,[273] no right to direct access for the individual victim in court proceedings (see Article 61 of the American Convention), the absence of an enforcement mechanism to create compliance with the decisions and recommendations of the two bodies.

The following facts seem to support this view further: some OAS member states, among them the most important regional powers (the USA and Canada), have still not ratified the American Convention as the basic human rights treaty in the region and there is also a growing tendency of member states to withdraw from the Convention[274] in order to avoid possible accountability.

However, the Inter-American Human Rights regime has set global standards in respect to the evolving idea of civil liability for human rights violations: as early as 1988 with its decision *Velasquez Rodriguez v. Honduras*[275] the IACtHR set the precedent of holding states financially liable for human rights atrocities. The court has to date delivered over 41 judgments on state responsibility for human rights violations and ordered the respective states to pay reparations.[276] The court combined in its judgments pecuniary awards with non-pecuniary awards, thus redressing the individual suffering of the victim as well as sanctioning the breach of treaty human rights obligations by "perpetrator" states.[277]

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[271] Heyns, (n 191) 78.
[272] The present average duration of court procedures lies at 8 years. As e. g. in the *Velasques Rodriguez* Case, (n 7).
[273] The annual 4-6 verdicts should be compared to the ECtHR's near 10,000 judgements and decisions in 2001. Heyns, (n 191) 79.
[274] The states of Trinidad and Tobago withdrew with effect of May 26, 1999. See Amnesty International, *Unacceptably Limiting Human Rights Protection*, at http://web.amnesty.org/library.
[275] "Inter-American Court of Human Rights: Judgement in Velasquez Rodriguez Case" in 28 *ILM* 291 (1989) and 4 *Inter-Am. Ct. H.R. (ser. C)* (1988) and (n.7).
[276] See http://www.corteidh.or.cr/serie_c/index.html, Laplante (n 265) 351 and Shelton (n 199) 469-477.
[277] Shelton (n .199) 299ff and annex: remedies awarded by the Inter-American Court, *id.* 469-477.

Furthermore, both organs have delivered strong opinions on the illegality of domestic amnesties and the subsequent state obligation to annul or repeal such amnesties as otherwise violations of the ACHR.[278] These findings corroborate the present attempts of criminal courts, domestic and international, to end impunity for gross human rights offenders.[279]

Without this existing, even through weak, human rights protection under the Inter-American regime, the American continents would most probably face a human rights situation comparable to the one existing on the African continent.

The above shortcomings[280] and their impact on the efficiency of a regional human rights system further illustrate the need for having economically and politically strong states as promoters and supporters of human rights. The favourable example of Europe with its manifold human rights protection systems and its (in general) positive human rights record shows the role that strong economic and political power can play in the promotion of human rights. The deficit of lacking such promotion is even intensified by the often indifferent, if not hostile, stance of the USA.[281] A recent example of the US's continuing opposition to the Inter-American Human Rights system was the deliberate ignoring of the American Commission's findings on the unlawfulness of the Guantanamo Bay detentions by the US military.[282]

Apart from the financial difficulties, a possible solution for many of the shortcomings might be the establishment of a permanent Inter-American Court on Human Rights which would strengthen this system's resolve to protect human rights. This modification should, however, not follow the "one-tier" approach of the single European Court Protocol 11 model because of

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[278] See e.g. for findings of the IACHR: case 11.771 *Catalan Lincoleo v.* Chile, (2001), OEA/ser.L/V/II.111.doc.20 rev. and for IACtHR findings the *Barrios Altos* case (2001), 75 Inter-Am. Ct. H. R. (ser. C) paras 41-4. See Shelton, (n 199) 214-216 with more case law.

[279] See part B, chapter 2, 2.1.4. and chapter 3, 2.1.

[280] See for this evaluation Amnesty International, *Open Letter To The Organization of American States-30th Anniversary of the American Convention on Human Rights and 20th Anniversary of the Inter-American Court on Human Rights*, November 22, 1999, at http://web.amnesty.org/library.

[281] The example of the influence of the USA on the work of the Inter-American Commission of human rights documents this impact. The Commission's work was financially and logistically supported by the US-Administration under President Carter in 1977 and 1981 notwithstanding the fact that the USA was and is still refusing to ratify the American Convention of Human Rights. This favourable impact however ended with the new Reagan Administration and its Kirckpatrick-Doctrine, Which enshrined US support for anti-communist regimes in the region no matter what their human rights records were.

[282] See Strydom and Bachmann "The case of the Guantanamo Bay detainees in the United States (and other) courts" in 2 *TSAR* (2004) 294, 307.

the fact that in the Inter-American human rights context, the existence of an additional human rights body such as the Commission is still a necessity at present.

3. THE AFRICAN HUMAN RIGHTS SYSTEM

3.1. Introduction

The African human rights system consists of the two framework instruments, the African Charter on Human and Peoples' Rights[283] (African Charter), the so-called "Banjul Charter", and the Charter of the Organization of African Unity.[284] This legal framework is implemented by the African Commission on Human and Peoples' Rights (ACHPR) of 1987 and –in the future- by the (proposed) African Court on Human and Peoples' Rights (ACtHPR)

This subparagraph will first describe the African Charter with its inherent deficiencies and then focus on the shortcomings and other obstacles of its implementing bodies, the ACHPR and the proposed ACtHPR.

3.2. THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

3.2.1. Overview

The African Charter[285] protects all three presently recognized generations of human rights, namely civil and political rights; economic, social, and cultural rights and group and people's rights.[286] As a *novum* to already existing human rights protection instruments, it enshrines in its Articles 27-29 unenforceable duties of the individual towards family, society, the state and to the international community.[287] Such an inclusion of individual duties (in addition to individual rights) in Western human rights instruments could be a worthy supplement to the Western understanding of human rights.

Articles 19 to 24 of the Charter stipulate certain human rights, which are applicable not only to the individual but to a specific group as well, comparable to the "explicit minority protection provision" of Article 27 of the ICCPR. The consequent application of such "group rights" under Articles 19-24 of the Charter could therefore become a judicial bar to the

[283] African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, (1981) in 21 *ILM*. 58 (1982), *entered into force* Oct. 21, 1986, retrievable at http://www1.umn.edu/humanrts/instree/z1afchar.htm

[284] Charter of the Organization of African Unity, 47 UNTS 39, 2 *ILM*. at 766) (OAU Charter) of 1963 (in its revised version of 2000).

[285] The ACHR entered into force on October 21, 1986. It is noteworthy that all 53 member states of the OAU/AU have become parties to the African Charter.

[286] See Articles 1 to 24.

[287] As a comparison, under Article 32 (1) American Charter on Human Rights there are general responsibilities and limitations of the rights of the individual right bearer but no explicit duties.

discrimination of minorities in Africa, stipulate a right of self-determination and become eventually the legal basis of future transnational civil class actions.[288]

On 25 November 2005, the Protocol to The African Charter on Human and Peoples' Rights on the Rights of Women in Africa[289] entered into force, when Togo ratified the Protocol as the fifteenth State.[290] The Protocol recognizes and guarantees a wide range of women's civil, political, economic, social and cultural rights[291] and prohibits any discrimination of women in general.[292] The protection of women from harmful traditional practices as enshrined in Article 5[293] of the Protocol emanates from the present practice of female genital mutilation, which has been practised with impunity in over 28 African countries.[294]

The adoption of the Protocol by the AU serves as an explicit recognition of the important role women played and still play in the present African society in general and their contribution to the development of democratic structures in the African post-colonial history.[295]

3.2.2. Shortcomings

3.2.2.1. Rights v. duties

This imposition of duties on the individual human rights bearer, however, holds the potential for a normative weakness in the African Charter as well. With its language of duties as a way of incorporating African culture and customs in the African Charter it may also open the way for tolerating the restriction of the rights of others. A consequence might be the possible restriction of women's rights in African societies that are still male-dominated.[296] Such a restriction may be encompassed in the wording of Article 29 Paragraph 1 of the African

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[288] See N. Barney Pityana, "The Challenge of Culture for Human Rights in Africa: The African Charter in a Comparative Context" in Evans and Murray (eds.), *The African Charter On Human And Peoples' Rights-The System in Practice, 1986-2000*, 219-245.

[289] Adopted in Maputo, Mozambique on 11 July 2003, http://www.achpr.org/english/_info/women_en.html, "the Protocol" afterwards.

[290] As of March 2006, 38 States have signed the Protocol, see http:// http://www.achpr.org/english/_info/women_en.html.

[291] See Articles 3 to 24 of the Protocol.

[292] *Id.*, Article 2 on the "Elimination of Discrimination Against Women"

[293] Titled as "Elimination of Harmful Practices", which are directed against women and violate "international standards".

[294] See Amnesty International, *Female Genital Mutilation*, Report, retrievable at http://www.amnesty.org/ailib/intcam/femgen/fgm1.htm.

[295] Murray, *Human Rights in Africa-From the OAU to the African Union*, (2004), 134-162 on the protection of women within the AU human rights context.

[296] See Mutua, "The African Human Rights System-A Critical Evaluation" 10; retrievable at http://www.undp.org/hdro/papers/ backpapers/2000/MUTUA.pdf. The author discusses this aspect of a possible restriction and finally concludes that these fears are exaggerated but that there should be nevertheless a supplementary optional protocol to fully address women's rights issues.

Charter, providing for a duty "to preserve the harmonious development of the family and to work for the cohesion and respect of the family." This duty applies to every individual but, taking into account the present reality of modern African family life, the wording can be seen as solely applicable to the traditional role of women in African societies – viz. as being responsible for the wellbeing of the family – thus limiting female emancipation.

The duty under Article 29 Paragraph 3 "not to compromise the security of the State" holds the potential danger of denying basic fundamental rights in connection with the rule of law, access to courts and the safeguarding of personal safety. This broadly worded obligation has the potential of establishing an "Orwellian" duty of the individual towards the society not to question the actions of the state organs even when the individual is lawfully exercising his legitimate rights. The case of Zimbabwe suggests that this is a very real danger.[297]

3.2.2.2. Domestic limitations of the scope of human rights

Possibly the most severe normative weakness of the African Charter is its probable erosion through the inclusion of so-called "claw-back" clauses. They permeate the scope of the African Charter's human rights protection by allowing the restriction and limitation of these rights by authorizing member states to limit their scope through provisions in their domestic legal system.[298]

These limitations take place through phrases like "subject to law and order", "within the law etc."[299] A prominent example of such a clause is Article 6 of the Banjul Charter, where the right to liberty and security is subject to domestic legal limitations.

Generally, the use of such limitation clauses itself does not violate international law[300] as long as there is no apparent over-extensive use without proper justification. Considering the fact that the majority of African states still apply post-colonial law, which is mainly based on the oppressive colonial laws of France and England as the former main colonial powers in the region, the granting of fundamental human rights through the provisions of the African

[297] President Mugabe of Zimbabwe denies millions of his citizens basic human rights with the questionable justification of being forced to fight a permanent war against the (white) imperialist west as part of a still ongoing process of decolonization.
[298] See Mutua, "The African Human Rights System in a Comparative Perspective" in 3 *Rev. Afr. Comm. Hum. & Peoples' Rights* (1993) 7.
[299] Udombana, "Toward the African Court on Human and People's Rights: Better Late Than Never" in 3.45 *YHRDLJ* (2000) 60 for an detailed overview of the different limiting phrases used in the African Charter.
[300] See e.g. the *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, Annex, UN Doc. E/CN.4/1985/4 (1985)

Charter faces the danger of being domestically implemented under pre-1945 legal regimes. Consequently, doubts about whether these limitation clauses will not lead to a severe downsizing of the actual human rights protection under the African Charter seem to be well-founded and justified.

The "open-end" nature[301] of this limitation allows in principle any future curtailing of human rights by an oppressive regime, even after a longstanding period of membership to the African Charter. Consequently, any future rule of human rights law in the region is subject to the present ruling government's discretion, thus jeopardizing the key principle in international treaty law of *pacta sunt servanda.*

Interesting in this context is the further observation that the ACHPR raised its objection to the existence of such claw-back clauses and that it has so far quite successfully limited their application in its findings.[302]

3.2.2.3. A weak enforcement regime

There is no effective enforcement mechanism in place for the African Charter's stipulated human rights. Neither the Constitutive Act of the AU nor the African Charter establishes such obligations for its member states. In comparison, Article 3 of the Statute of the Council of Europe prescribes as one condition of membership that its member states recognize the need to maintain human rights and respect the rule of law.[303] This precondition for any membership to the CoE remains in force even after the state has become a full member. A violation of this obligation may eventually even lead to the suspension or expulsion of a member state under Article 8 of the Statute.[304] Thus, the European Convention itself became enforceable as a human rights instrument in principle.

[301] The reservation clause in the European human rights system under Article 57 (1) ECHR is limited to explicit reservations made by signatory states at the time of their accession to the convention, see Article 57 (2) "Any reservation made under this article shall contain a brief statement of the law concerned.

[302] See Naldi "Limitation of Rights Under the African Charter on Human and Peoples' Rights: The Contribution of the ACHPR on Human and Peoples' Rights" in 17 *SAJHR* (2001), 117.

[303] Article 3 of the Statute proclaims that "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council".

[304] For acts resembling serious violations of Article 3 obligations, see Article 8 of the Statute of the Council of Europe. See Robertson and Merrills, (n 206) 3.

By contrast, the idea of human rights protection in Africa is still subject to internationally outdated limitations such as the doctrine of non-interference in internal matters[305] and the notion that the observance of human rights protection standards falls under the sole discretion of each individual member state.

3.3. THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

3.3.1. Overview

The role of the ACHPR as the African Charter's implementing body, is to "promote human and peoples' rights and to ensure their protection in Africa".[306] In order to fulfil its role as "guardian" of human rights in Africa, the ACHPR has the duty to promote and protect human and peoples' rights in Africa in general, to interpret the African Charter[307] and to supervise the implementation of the Protocol.[308] The actual protection of human rights takes place through the examination of state reports,[309] the consideration of communications alleging human rights violations[310] and the interpretation of the African Charter. Apart from these functional rights there are no means of imposing further enforceable legal responsibilities on the member states.

3.3.2. Shortcomings

3.3.2.1. Questionable impartiality

The election process of the ACHPR's eleven members[311] already questions its impartiality. Its members are elected by the Assembly of Heads of State and Government from a list of candidates, who are nominated directly by the member states of the AU. The possibility of influencing directly the work of the ACHPR via the election process by nominating only candidates who are supportive of present suppressive African governments, and even by trading votes with other member states, is unfortunately a very real one.

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[305] See Article 3 Constitutive Act of the AU.
[306] See Articles 30, 45 African Charter.
[307] *Id.*, Article 45 paras 1 to 3.
[308] See Article 32 of the Protocol on the Rights of Women in Africa, whereas "pending the establishment of the African Court on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights shall be the seized with matters of interpretation arising from the application and implementation of this Protocol".
[309] *Id.* Article 62.
[310] Communications to the Commission are admissible either as inter –state communications under Article 47ff of the African Charter or as so called "other communications" under Articles 55ff of the African Charter, which may resemble individual communications as well.
[311] Taking place under Article 33 of the African Charter.

In comparison hereto stands the election process for the members of the European Commission of Human Rights[312] (under the pre-1998 ECHR), which prescribed the involvement of a third party in this process, namely the Bureau of the Consultative Assembly, to draw up independently a list of candidates who were then nominated by the High Contracting Parties of the Assembly.[313]

3.3.2.2. Lack of independence and conflict of interest scenarios

The ACHPR's independence is seriously questioned by the fact that there exists no mechanism on the separation of powers in respect of other posts held by its members at the same time. Under the rules of the African Charter there is no restriction in that regard, thus the danger of a possible conflict of interest is very real. It is thus not unlikely that one will find members serving on the Commission while simultaneously holding important ministerial posts under repressive regimes at the same time.[314]

In comparison, the European Commission on Human Rights, when faced with a similar conflict of interest situation, barred such "double capacity" scenarios by an addition to Article 23 of the pre-1998 ECHR[315] which forbade explicitly any additional activity of serving Commissioners that may be incompatible with their independence or impartiality.[316] As a consequence of this, and to prevent such examples of doubtful impartiality, the Protocol of the ACtHPR followed the idea of strict non-interference as a guarantee for independence when it qualified in its Article 18 such practice as an "activity that might interfere with the independence or impartiality" leading to the incompatibility of the judge's position as a consequence.

3.3.2.3. Lack of confidentiality

Under Articles 55 ff of the African Charter, individual victims and NGOs alike can file complaints with the Commission on a limited scale. Because of the requirement of Article 56

[312] The European Commission was disbanded in 1999 when it was merged with the existing European Court of Human Rights into the new European Court under Protocol 11 in 1998.
[313] Under Article 21 (1) ECHR the parties had the right to put forward up to three candidates with the option to nominate even non- nationals. Note that references made to the ECHR in this part always refer to the pre-Protocol 11 ECHR if not otherwise indicated.
[314] See Udombana, (n 299) 68, who provides two examples of such a questionable practice involving Commissioners of Botswana and Congo.
[315] Under Article 3 of Protocol No. 8 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. 118, entered into force Jan.1, 1990.
[316] The amendment to Article 23 reads as follows: "During their term of office they shall not hold any position which is incompatible with their independence and impartiality as members of the Commission or the demands of this office".

(1), the complainants are required to indicate their authorship even "if the latter requests anonymity".[317] This lack of confidentiality in cases of individual complaints erodes one of the premier human rights protection tools of the Commission. This fact is even more serious, considering the further procedure, whereby the Commission must only inform the member state named in the communication[318] and is further obliged to abstain from any further publication of the existence of such communication proceedings. The African Charter's confidentiality rule under Article 59 (1)[319] constitutes therefore a finely tuned filter that effectively protects the affected member states.

Comparing this situation with the pre-1998 Council of Europe regime, it appears that there was a similar shortcoming under Articles 25, 27 (a) of the ECHR whereby the European Commission could only deal with non-anonymous petitions. The crucial difference, however, is that in the prior procedure of admissibility of complaints or petitions under the old European Convention, such "communications" had to be addressed directly to the Secretary-General of the Council of Europe who then had the duty not only to transmit copies of those communications to the respective member states but to further publish copies of these petitions[320] with the direct consequence of creating public notoriety of the proceedings. Because of this publicity the petitioner became protected through public scrutiny. This publicity, combined with the fact that the Commission got involved with highly "cooperative" states,[321] established an effective safeguard against any act of intimidation against the individual complainant.

In contrast the African procedure does not offer any such safeguards for the individual complainant. With his identity being known to the offending state the complainant will not enjoy any form of protection from intimidation and even prosecution.

[317] In the latter case, only the Commission may request the complainant's personal details such as name, address, age and profession. See Gumedze, "Bringing communications before the ACHPR on Human and Peoples' Rights" in 3 *AHRLJ* (2003) 129.
[318] See Article 57, African Charter.
[319] An exception from this rule is the (rare) case that the complaint had been considered under the strict requirements of Article 56 which may lead to a formal investigation under Article 52. In that case the report of the findings would be communicated to the Assembly of State and Government.
[320] See Article 25 (1) and (3) ECHR
[321] This terminus refers to the fact that an enquiry by the Commission would only start under the requirement of Art. 25 (1) ECHR whereas the Member State "against which the complaint has been lodged has declared that it recognizes the competence of the Commission to receive such petitions".

Moreover, given that the Commission meets only twice a year, the lack of confidentiality, combined with the long and time consuming procedure, could be a strong deterrence for any prospective human rights victim to file complaints with the Commission.[322]

3.3.2.4. Confidentiality v. promotion of human rights

Related to this shortcoming is another normative weakness, namely the requirement of confidentiality under Article 59, whereby the ongoing procedure before the Commission has to be kept confidential unless the Assembly of Heads of States and Governments decides otherwise. Following Article 58, the restriction even applies in cases "of serious and massive violations of human and peoples' rights". This requirement seems to limit the scope and number of future communications to the ACHPR premeditatedly.[323]

This situation leads to the paradoxical situation that while the member state with a questionable human rights record enjoys protection under the confidentiality doctrine, the victim is denied proper protection by virtue of his not being granted anonymity in the procedure. This amounts to a highly unequal contest.

The confidential 1503 procedure of the UN-HRC should be used as a guideline for the AU of how to create more balanced structures of human rights monitoring and protection. Under the revised 1503 procedure (as of June 2000) no official information regarding the country under review is available until the public announcement through the chairperson of the Sub-Commission during its official session. Confidentiality in this regard serves as a procedural means to protect not only the state in question but the anonymity of the complainant as well.

3.3.2.5. A weak reporting system

Under Article 62 of the African Charter "each state party shall undertake to submit every two years a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed [by the African Charter]". Because of the lack of any further details concerning the evaluation of these reports, detailed reporting guidelines had been drafted by the ACHPR. Even with the existence of these guidelines, the majority of

[322] Even the use of NGOs as "best friend" in filing such complaints does not change the present danger for the alleged victim: the non-anonymity requirement of Article 56 remains applicable.
[323] See Article 45 (1-3) of the African Charter. Compare this restriction with Article 25 para. 3 ECHR prior 1998 where copies of the complaint had to be transmitted to the other member states and be published.

the AU states do not comply with the set standards and deliver highly inadequate reports, and this prevent any monitoring of the human rights situation.[324]

3.3.2.6. The absence of a mandatory amicable settlement option

Another shortcoming is the lack of a friendly settlement clause for human rights disputes between an individual complainant and a state.[325] An extension of the applicability of Article 48 of the African Charter on such cases is neither prescribed nor practised. In contrast, examples of such internationally prescribed settlement clauses can be found in Article 48 (1) (f) of the American Charter on Human Rights and Article 28 (b) of the pre-1998 ECHR. In the latter case the European Commission "shall place itself at the disposal of the parties concerned with a view to secure a friendly settlement of the matter on the basis of respect for Human Rights as defined in this Convention".[326] Such an individual settlement procedure is aimed at the protection of the individual's rights and forces the respective member states to comply with them.[327] Basic (human) rights and freedoms such as the right to a fair trial under Article 6 (1) ECHR[328] or the right to freedom of thought under Article 9 (1) ECHR[329], had been successfully protected and their violations acknowledged by the respective state through early financial settlements.

3.3.3. Evaluation of human rights protection by the ACHPR

The Nigerian scholar Nsongurua J. Udombana describes the ACHPR as "bark but no bite" and as a body that has so far not made "any significant contribution to human rights protection on the African continent".[330]

Besides the above outlined shortcomings, the most crucial obstacle for any future success of the ACHPR's human rights record remains the lack of an enforcement mechanism or a "recognition clause" comparable to Article 25 ECHR, where the single member state had in advance to declare "that it recognizes the competence of the Commission".[331] Thus the

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[324] See Mutua, (n 296) 21; Dugard, (n 1) 562, referring to the present situation as resembling a "poor record"
[325] See Articles 55 ff African Charter.
[326] Under the new ECHR of after 1998, Article 38 (1) places on the European Court of Human Rights the explicit duty to "place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights"
[327] See Robertson and Merrills, (n 206) 266.
[328] See the *Boekmans* Application 1727//62, in *Yearbook* VIII, 1965, p. 410.
[329] See the NV *Televizer* Application 2690/65, in *Yearbook* IX, 1966, p.512 and XI, 1968, p. 782.
[330] See Udombana, (n 299) 61.
[331] This recognition of the authority of the Commission does only affect the procedure of filing petitions. It is nevertheless relevant in respect of a comparison to the African Charter because it states as a pre-requirement for any action of the Commission that there is the recognition of its authority through the Member States.

member states are not under any obligation to comply with the actions and findings of the ACHPR, which as a consequence is thus unable firstly, to collect the information necessary to assess the human rights situation in the region and secondly, to establish any form of accountability for the perpetrating state. Cooperation and compliance with the ACHPR's work and findings remain solely at the discretion of the member states with no further enforcement options.[332]

This weakness seems to be calculated and is probably a further example of the AU's adherence to the principle of state sovereignty, which allows as little interference into domestic affairs as possible.[333]

This strong criticism of Africa's only international human rights organ at present might be too harsh and neglects the proven impact of the ACHPR for the interpreting and developing of the African Charter's (sometimes unique) provisions.[334]

In addition hereto, stand the ACHPR's increasing attempts to hold individual African governments accountable for various human rights issues:[335] The ACHPR's decision in *Social and Economic Rights Action Centre v Nigeria* utilised the above mentioned "group rights provisions" under Articles 19-23 for adjudicating the massive human rights violations suffered by the Ogoni people at the hands of the Nigerian security organs.[336] This decision is

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[332] See Dugard, (n 1) 564. The ACHPR's damning report on Zimbabwe dictator Robert Mugabe's coerced displacement of 700,000 people in 2005 was held back by the AU's Executive Council of Foreign Ministers during the AU summit of 2006 in Banjul, Gambia, in order not to disturb the diplomatic harmony of the summit, see Mail & Guardian, "Mugabe laughs last-Teflon Bob escapes criticism as AU foreign ministers ignore human rights report at the Banjul summit", July 7 to 13, p.14.

[333] See Article III (2) of the OAU Charter; Nsongurua Udombana, (n 299) 55.

[334] The ACHPR contributed significantly to the drafting of the above mentioned Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Ouguergouz, *The African Charter on Human and Peoples' Rights – A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (2003), 657-663, compares the present role of the ACHPR in the protection of human rights with that of the Inter-American Commission on Human Rights. She concludes that the ACHPR has assumed certain powers under the African Charter, which it originally did not possess, in order to address human rights violations.

[335] Nigeria e.g. was the subject of one field mission of the Commission in 1997 and a large number of communications concerning cases against this country were decided in the reporting period of November 1999 to May 2000, finding various human rights violation. See Murray, "Recent Decisions of the ACHPR on Human and Peoples' Rights" in 17 *SAJHR* (2001) 119-170 and Heyns (ed.), *Human Rights Law In Africa*, (2004), 433-463. Heyns provides international law scholars with the most comprehensive compilation and documentation on this topic.

[336] The "SERAC" case, Communication No. 155/96 retrievable at http://www.achpr.org. Nigeria was found liable for the commission of atrocities by its military, such as pillage, wanton destruction of property, harassment and maltreatment. Compare this decision with the *Commission Nationale des Droits de l'Homme v. Chad* (the so called "Chad massive violations case") case, Communication No. 74/92 retrievable at http://www.achpr.org., as an instance of state liability for the wrongful omission to prevent acts of killing, which were committed during the civil war.

of particular importance within the African context where the protection and eventual adjudication of "group rights" seem destined to become an increasingly important feature of human rights protection.[337]

Another important aspect of the ACHPR's mission for the protection of human rights in Africa is its synergizing and coordinating effect on other domestic human rights' players.[338]

Considering this, one has to pay credit to the Commission's work in protecting human rights in Africa so far and hope for an increased interest and financial support from the major AU states (and outside donors as well) for the further strengthening of the ACHPR.[339]

3.4. THE (future) AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

3.4.1. Overview

The ACtHPR, for whose creation thirty of the fifty-three member states of the OAU[340] had voted during the 34th Ordinary Session in Burkina Faso on 8 June 8 1998, is still not operational yet. For its establishment, the deposition of fifteen instruments of ratification of AU member states with the Interim Chairperson of the Commission was necessary. With Togo having ratified the Protocol as the fifteenth state, the Protocol entered into force on 25 January 2005. [341]

Under Article 3 of its Protocol,[342] the ACtHPR will have jurisdiction over disputes in regard to human and peoples' rights as defined in the African Charter, its Protocol and other ratified

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[337] See e.g. the suppression of the Ndebele people (who were regarded as a constant opposition to Mugabe's regime) and the eventual expulsion of some 200,000 white Zimbabweans by Mugabe's security organs as examples of such group rights violations.

[338] Heyns (n 335) 604-613, provides an overview of NGOs and national African Human Rights Institutions with an affiliate status with the African Commission. The process of obtaining an official observer status leads to the above mentioned effects due to its (semi-)official nature and character. *Id*., 775-836, for an overview of legal documents related to NGOs in Africa.

[339] Which has got presently a budget of less than 760 000 US $ per annum. See Heyns, (n 191) 84.

[340] The AU as the successor organization to the OAU has "inherited" the "Banjul" Charter and the Protocol for the African Court through Article 3 para. h of its Constitutive Act of July 11.See Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15.

[341] There had been 21 ratifications as of September 2005. See List Of Countries Which Have Signed, Ratified/Acceded To The Protocol To The African Charter On Human And Peoples' Rights On The Establishment Of An African Court On Human And Peoples' Rights; AU Doc CAB/LEG/66.5 at http://www.africa-union.org/home/welcome.htm under [treaties]. At present, 45 states out of a total of the 53 member states of the AU have signed the Protocol.

[342] The Protocol To The African Charter On Human And Peoples' Rights For The Establishment Of An African Court On Human And Peoples' Rights , the "Protocol" hereafter. The Protocol can be retrieved from http://www.africa-union.org/home/welcome.htm under [treaties].

human rights instruments. But the existence of various shortcomings has already created doubts about the court's future impact on the protection of human rights.

3.4.2. Shortcomings

3.4.2.1. Independence and funding

Any supervisory organ requires sufficient and consistent funding in order to enable it to work efficiently and impartial. The funding of the ACtHPR under Article 32 of the Protocol "shall be determined and borne" by the AU. This dependency on the (literal) goodwill of the AU's political leaders in respect of the funding in general and in determining the actual budget for the court does not create confidence in the ACtHPR's independence and creates an opportunity for politically motivated pressure through financial means. Considering the reality where the AU as the region's prime political body is facing severe financial difficulties to meet its annual budget of $ 129,6 million, there is little hope for a sufficient financial funding of the future court.[343]

In comparison, Article 50 of the ECHR (of 1998) determines without further limitations that "the expenditure of the Court shall be borne by the Council of Europe." The European Court enjoys therefore some sort of guaranteed financial "income" in respect of its expenses. This fact, combined with an adequate annual budget of nearly € 30 million,[344] is one of the reasons for the European Court's impressive record in delivering judgments.

An alternative might be the development of a funding scheme which ensures adequate funding of the ACtHPR by the entering into of funding agreements with strong international economic organizations like, for example, the G8 and/or the EU and individual donors. The past and present financial contributions of European states to the ACHPR's work appear to signal a general willingness to support the protection of human rights in Africa. The inclusion of explicit funding clauses for human rights regimes in major trade agreements like GATT could be a decisive future move towards the further strengthening of crucial mechanisms of human rights protection.

[343] See *Mail & Guardian*, "Cashing Up", July 7 to 13, 2006, p. 14.
[344] This sum resembles nearly 18 percent of the annual budget of the CoE, see Heyns, (n 191) 84.

3.4.2.2. Limited admissibility

The right of access to the ACtHPR, as governed under Article 5 of its Protocol, divides the complainants into two groups: the claimants with direct access to court[345] and the group with only optional access.[346] The individual victim of a human rights violation and an NGO fall under the optional admissibility jurisdiction of the ACtHPR: admissibility in such cases requires, in addition to the court's decision on the admissibility (which takes place on a case-by-case basis), the prior consent of the member state in question to recognize this extension of the ACtHPR's jurisdiction on the complaints of individuals and NGOs.[347]

Given the tradition and history of African states' reluctance to give up key competencies in areas such as sovereignty and immunity, this requirement could become a serious limitation of the ACtHPR's work and constitutes a serious limitation to the ACtHPR's jurisdiction. Under Article 34 of the ECHR (of 1998), the European Court, by contrast, permits "applications from any person, non-governmental organization or group of individuals"[348] and therefore extends its jurisdiction *ratione personae* to non-state party citizens who claim a violation of their human rights by actions or omissions of state parties.[349] With this wide scope of admissibility the original purpose of any human rights regime – the protection of the human rights of the individual human rights' bearer – is safeguarded.[350]

Even the reasoning that the ACHPR can obtain direct access to the ACtHPR[351] and therefore could overcome the problem of limited access to the Court does not convince. As shown above, the ACHPR's record in promoting and protecting human rights in Africa raises doubts about whether this organ will suddenly play a new role as a dynamic advocate acting *parens*

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[345] Under Article 5 (1) (a) to (e) of the Protocol.
[346] *Id*. Article 5 para. 3.
[347] *Id*. Article 34 para. 6 stipulates that: "At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5 (3) of this Protocol. The Court shall not receive any petition under article 5 (3) involving a State Party which has not made such a declaration".
[348] Protocol 11 requires prior ratification by the respective European states. One may ask why the Protocol of the African Court has not incorporated such a further accessing clause in its original version considering the fact that the African Court resembles a very recent creation.
[349] This broad admissibility of petitions to the ECtHR is a decisive element of safeguarding compliance with the ECHR by its member states towards non state party citizens, who fall only temporarily under the territorial jurisdiction of these states. The legal position of asylum seekers under the domestic provisions of "alien" law such as asylum statutes is therefore subject to the ECtHR's jurisdiction as well.
[350] Van der Mei argues *ad contrarium* in his recent article "The advisory jurisdiction of the African Court on Human and Peoples' Rights" 5 *AHRLJ* (2004) 27- 46, that individuals and NGOs were capable of accessing the ACtHPR via advisory opinions under article 4 of the Protocol. The author urges therefore the proposed court to adopt a very flexible approach in respect of admissibility of such requests. This fact alone questions the future practicability of this procedure.
[351] Under Article 5 (1) (a) of the Protocol

patriae in instituting human rights applications before the ACtHPR on behalf of the individual victim.

The African human rights regime has to avoid the example of the OAS, where petitions before the American Court are similarly restricted in respect of jurisdiction *ratione personae*.[352] With the American Commission's position of not being fully recognized in the OAS system as a main human rights organ, the role of the American Commission in instigating court cases remains in sum unsatisfactory.[353]

3.4.2.3. Enforcement of judgments

The enforcement of judgments will take place under Article 30 of the Protocol, in terms of which "the States parties … undertake to comply with the judgement … and to guarantee … its execution". This compliance of the member states with the findings of the ACtHPR will be the subject to a further scrutiny by the AU Council of Ministers.[354]

The African way of safeguarding compliance with the court's judgements is stronger than the OAS's by introducing an additional "shaming tactic"[355] to be used against non-complying member states[356] but this is weaker than the Council of Europe's system. The suspension of a non-complying member state as a consequence for serious breaches of state obligations[357] is not intended. The AU's suspension clause under Article 30 of its Constitutive Act, unlike Article 8 of the Statute of the Council of Europe,[358] does not apply to human rights violations and their enforcement.

Time will eventually tell whether the "peer pressure" model of the AU will be sufficient to enforce member states' compliance with ACtHPR's judgments.[359]

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[352] "Only the State Parties and the Commission shall have the right to submit a case to the Court", see Article 61 of the American Convention on Human Rights.
[353] See above under 2.3.2. on the shortcomings of the OAS system of human rights protection.
[354] See Article 29 (2) of the Protocol, which provides for a notification of the AU Council of Ministers of judgments of the ACtHPR and tasks it with the monitoring of its execution.
[355] See Mutua, (n 296) 30.
[356] See Article 31 of the Protocol where in an annual report to the AU the non-complying Member States will be named.
[357] As stipulated e. g. under Article 8 of the Statute of the Council of Europe, Article 46 (1) and (2) European Convention (1998).
[358] *ETS* 001, entered into force August 3, 1949.
[359] Taking the example of Zimbabwe, that preferred to quit the Commonwealth in order to counter further peer pressure tactics in December 2003, hope for the effectiveness of silent diplomacy seems to be rather slim.

3.4.2.4. The wide choice of applicable law and mechanisms may weaken the court's effectiveness

The diversity of possible applicable law[360] and the possibility of introducing even (human) rights which do not form part of the general African legal understanding and culture, combined with a lack of efficient and lawful domestic implementing legal systems, may lead to a loss of credibility of the future ACtHPR. Another risk lies in the creation of a system through the court's jurisdiction of legal positions and standards that are too diverse to make enforcement possible.

Additionally, there is the danger of a weakening of the future ACtHPR through an increased establishment of various other concurrent organs and institutions within the AU. An example of this is the idea of using the institutions of Africa's economic integration regimes such as NEPAD for the promotion of human rights.[361] This concurrence might become counterproductive for the protection of human rights due to the absence of an explicit statement on the ACtHPR's primacy. Consequently, if the ACtHPR cannot quickly establish itself as an effective forum for investigating and acting on human rights violations, its proposed role as a protector and guardian of human rights may soon become questionable.

But even while these lines are written, new developments in the AU question the future prospects of the ACtHPR: the Assembly of the African Union decided in July 2004 to merge the ACtHPR with the African Court of Justice into one judicial body. The human rights community[362] and the ACHPR itself[363] doubt whether this proposed undertaking will strengthen the protection of human rights in Africa, a region which is notorious for its inability to protect human rights.[364] The proposed draft[365] on a Merger of ACtHPR and

[360] See Article 7 of the Protocol.
[361] The two NEPAD proposals of creating an African Peer Review Mechanism (APRM) and a Post of Commissioner for Democracy, Human Rights and Good Governance are such examples. See Kindiki, "The Normative And Institutional Framework Of The African Union Relating To The Protection Of Human Rights And The Maintenance Of International Peace And Security: A Critical Appraisal" in 3 *AHRLJ* (2003) 104.
[362] See *Amnesty International*, Public Statement "African Union: The establishment of an independent and effective African Court on Human and Peoples' Rights must be a top priority - Amnesty International urges the African Union to review the Draft Protocol on the Merger of the African Court on Human and Peoples' Rights and the AU Court of Justice", AI Index: IOR 30/002/2005 (Public) News Service No: 022 of 28 January 2005, retrievable at http://web.amnesty.org/library/Index/ENGIOR300022005?open&of=ENG-375 for a summary of the present criticism.
[363] See African Commission on Human and Peoples' Rights, Resolution on the Establishment of an Effective African Court on Human and Peoples' Rights, adopted at the 37th session held from 27 April to 11 May 2005, retrievable from http://www.achpr.org/english/resolutions/resolution81_en.html.
[364] See Heyns, "A Human Rights Court for Africa" in 22.3 *NQHR* (2004) 327-29.
[365] See Assembly/AU/5 (V) "Decision on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union.

ACHR could resemble nothing short of an attempt to "state-control" a development which has already gone too far in the eyes of "traditional" African law-makers.

3.5. Evaluation of human rights protection under the African human rights system

The prospects of a successful African human rights regime appear not to be too bright given the outlined shortcomings of its legal framework and its organs. This assessment neglects the Banjul Charter's potential as an innovative human rights instrument. However, because it presently lacks the necessary enforcement mechanisms, the African Charter could remain another weak declaration of human rights with a still impaired implementing body (the ACHPR), and a vague proposal for an African Human Rights Court. Given the somehow ambiguous record of the ACHPR in protecting human rights to date,[366] the prospect of establishing another supervisory organ without addressing the apparent shortcomings, does not create optimism for a change for the better.

Other facts such as the chronic under-funding of human rights organs in this region,[367] the political focus on the creation of an (more prestigious) economic union and the AU's tolerance of African countries with a proven record of gross human rights violations may lead to the impression that the enforcement of human rights remains a neglected field of action within the AU.[368] Europe's resolve to protect human and citizens' rights after having suffered two world wars with enormous human rights atrocities stands in contrast to Africa's obvious dilemma of having still to struggle with defining and shaping its post-colonial identity. The protection of human rights in a consistent and effective way does obviously not rate high on the continent's priority list.[369]

Some legal scholars regard the creation of the ACtHPR as being premature. They reason that there should be more time for the ACHPR to overcome its existing shortcomings in order to grow and develop first into an effective human rights protection mechanism before adding

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[366] An average of 10 cases has been decided since 1988 with a further decreasing tendency in the last years. Source: Heyns, (n 191) 78. The ACHPR has, however, promoted human rights within the AU through its country specific resolutions. The ACHPR adopted e.g. three country specific resolutions on Nigeria in 1994, 1995 and 1998, which explicitly addressed state repression of the Ogoni people, see http://www.chr.up.ac.za/hr_docs/african/c_nigeria.html.

[367] See for an insightful research on the relation of human rights and poverty in the developing world, Monshipouri, "Promoting Universal Human Rights: Dilemmas of Integrating Developing Countries" in 4 *YHRDLJ* (2001) 25-70.

[368] This opinion, however, is challenged by the South African academic Viljoen in his article "Africa's contribution to the development of international human rights and humanitarian law" in 1 *AHRLJ* (2001) 18.

[369] See for a critical appraisal on the AU's attempts to restore peace and security (including human rights) on the African Continent, Strydom, "Peace and security under the African Union" in 28 *SAYIL* (2003) 58-81.

another expensive organ to the existing system of human rights protection. They opt instead for first ensuring the efficiency of the work of the ACHPR by improving its role in respect of the Assembly of the Heads of States and Government [370] before creating "another inefficient organ"[371] which could eventually dilute its already limited resources.[372]

Others warn that the ACtHPR may follow the example of the ACHPR with an overload of petitions creating an immense back-log (of at least three years).[373]

Time will prove the validity of these doubts. However, with these shortcomings apparent, it seems to be quite probable that Africa's 700 million people will continue to wait for the protection of their fundamental basic human rights on a continent that has a long history of serious human tragedies,[374] thus having become the "lost continent" of the world.

[370] See the example of the lack of follow-up communications under Article 58 African Charter.
[371] Note interview with the former Commissioner, Hon. Justice Mokama, cit. in Udombana, (n 299) 72. The criticism of the ACtHPR as an organ of a human rights regime, which shall first "learn to crawl before it can walk" is shared by a number of human rights academics, besides Udombana. O'Shea criticizes the prospect of the new ACtHPR in his article "A critical reflection on the proposed African Court on human and Peoples' Rights" in 1 *AHRLJ* (2001) 285 *et seq.* See Mutua "The African Human Rights Court: A two-legged stool?" in 21 *HRQ* (1999) 342 *et seq.*. For a more optimistic view, see Harrington, "The African Court on Human And Peoples' Rights" in Evans and Murray, (n 288), 305-334.
[372] See Murray, (n 295) 71.
[373] See e.g. Mutua, (n 296) 32.
[374] See e.g. Amnesty International, *Africa Update: Selected events in Africa from January to May 2000* at http://web.amnesty .org/library/eng-2f2/index. Martin Meredith, *The State of Africa – A History of Fifty Years of Independence*, (2005), 681 ff, who regards Africa's future prospects as being bleaker than after the end of western colonial domination.

CHAPTER 3

THE NATURE OF AVAILABLE REMEDIES

1. INDIVIDUAL COMPLAINTS

In accordance with the further development of human rights protection, the scope of remedies available under the international and regional human rights instruments discussed above has widened considerably in recent years.

Consequently, the further development of human rights protection regimes led to the explicit acknowledgment of the individual victim as bearer of rights: the nature of available remedies has changed accordingly towards more "individualized" mechanisms, whereas the individual victim has the right to address human rights violations directly through the means of individual complaints/communications.

This additional remedy, which is, however, only optionally available under the respective human rights instruments, is a powerful supplement to the already existing conservative ways of monitoring member states' compliance with the respective instruments through state reporting [375] and the option of lodging inter-state complaints.[376]

Consequently, under all of the international and regional human rights protection regimes discussed above, individual complaint mechanisms were developed. Individual complaints are admissible under Articles 1 and 2 of the first Optional Protocol to the ICCPR, Article 22 of the CAT, Article 14 of the CERD, Article 77 of the ICRMW,[377] Article 34 of Protocol No. 11 to ECHR, Article 44 of the ACHR and (on a limited scale) under Articles 55ff of the Banjul Charter.

The introduction of the individual complaint mechanisms thus far had far-reaching implications for the position of the individual victim of human rights violations on the one hand and for the efficiency of the relevant human rights instruments. The position of the individual changed from sole victim status to that of an applicant as rights bearer. Consequently, the role of the state changed from guardian of citizens' human rights and

[375] See Articles 40 ICCPR, 19 CAT, 9 CERD (all mandatory).
[376] See Articles 41, 42 ICCPR (optional) and 21 CAT (optional). Inter state complaints have played so far only a minor role in the protection of human rights.
[377] There are at present no declarations of States accepting the individual complaint procedure, see supra chapter 1, 4.4.

representative *parens patriae* in prior human rights procedures to that of an addressee of human rights actions as respondent in communications.

The importance of this individualization of remedies for the position of the individual victim becomes clear when one realizes that the victim has assumed a new autonomous standing in such human rights procedures, and this makes him an independent subject of international law.[378] The victim of human rights violations has, at least in theory, achieved the same procedural standing as the perpetrating state.

This process documents the change in human rights protection in the last decades with the evolving of the general understanding that the individual and not his home state shall be entitled to legal redress in cases of a violation of his rights.

After having established the general notion whereby the individual human rights victim has the option to start human rights complaints proceedings himself, the question arises as to the form the remedy shall take. Establishing the notion that violations of human rights by states effectively constitutes international wrongs which would otherwise establish inter-state civil liability,[379] the probable types of reparation for such wrongful state conduct could be: cessation of the human rights violation on an ad hoc basis, restitution,[380] compensation, assurance and guarantees of non-repetition, and satisfaction.[381] When evaluating these probable options, the respective human rights judicial or semi-judicial body has wide discretion in respect of what form of reparation should be used.

There are, however, two considerations which affect the available choice of remedies sought: firstly, human rights violations always resemble in their nature violations of the personal sphere of the victim, which can take place with varying intensity, make any restitution in the form of re-establishing the "status quo ante" impossible. The rationale behind the financial redressing of human rights violation is a general and specific acknowledgment of the victim's

[378] Tomuschat, (n 73) 160.
[379] See the 2001 *Draft articles on Responsibility of States for internationally wrongful acts* in *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), ch. IV E.1,* where Articles 1,2 establish state responsibility for international wrongful acts.
[380] See *Chorzow Factory* (Ger. v. Pol.) Jurisdiction, *1927 PCIJ (ser. A) No. 9* at 21 (July 26); on the nature of reparations, *Chorzow Factory* (Ger. v. Pol.) Indemnity, *1928 PCIJ (ser. A) No. 17* (Sept. 13) 29. The case was concerning an incident where Poland had unlawfully seized German property in the disputed region of Upper Silesia and thus breached the German-Polish Convention Concerning Upper Silesia of May 15, 1922.
[381] *Id.*, Articles 34-7.

suffering, the wrongfulness of the perpetrator's actions and the vague idea that such financial remedies might create deterrence.

Secondly, human rights violations resemble a form of state torts which command the utilizing of further, specific human rights measures such as the immediate cessation of the human rights violations, assurance of non-repetition and the obligation for the perpetrator state to investigate and punish.

In *Velasquez Rodriguez v. Honduras*,[382] the IACtHR found that the perpetrating "state has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim compensation." This finding led to the subsequent opinion whereas the individual victim should have an enforceable right to financial compensation against the state itself that violated its human rights obligations and established further a precedent on the "interaction between criminal and civil remedies" for certain serious human rights violations.[383]

Today's reality of redressing human rights violations still leaves the compliance with the "views and recommendations" of the respective human rights organs widely at the discretion of the member states in question. The development of financial remedies as a newly available remedy of choice for the victim could resemble an alternative way of human rights protection which would eventually improve the standing of the individual victim.

2. FINANCIAL REMEDIES

Following the rationale just stated, whereby human rights violations could consequently lead to financial compensation for such violations, the next passages will briefly summarize the legal situation of granting financial redress under the human rights instruments discussed. [384]

[382] *Velasquez Rodriguez* case, Judgment on the merits of 29 July 1988, *Inter-American Court of Human Rights* (Series C), No. 4, 28 *ILM* 291 (1989) and 9 *HRLJ* 212, see chapter 2, 2.3.
[383] Shelton (n 199) 214-215.
[384] Part C focuses on civil liability for human rights violations. The following pages provide only a short summary on this topic. See Part C for a more detailed account.

The "emancipation and individualization" of the victim's legal position under the selected human rights regimes was –in theory – supplemented by the additional acknowledgment of such general right to financial remedies as well.

The starting point of this excursus on civil remedies is the Universal Declaration of Human Rights as the earliest international declaration on human rights. There, Article 8 grants "everyone the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".

Article 2 (3) of the ICCPR can be used to grant financial remedies. Its wording: "To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy" is used by the HRC to grant financial redress in cases of violations of the covenant. Together with Article 9 (5), which grants financial compensation in cases of unlawful detention, there exists in theory the right to a financial compensation. With its view in the *Weismann* communication in 1980, the HRC started to use both provisions to recommend financial compensation.[385]

Article 14 of the UN Torture Convention of 1984 stipulates that "each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation … " So far, the relevance of this provision has been negligible.

In the ECHR context, Article 41 of the ECHR (Protocol No. 11)[386] grants in theory financial remedies for violations of the charter: "The Court shall, if necessary, afford just satisfaction to the injured party." The actual practice of the court to award civil remedies for human rights violations is low, which is remarkable considering the impressive number of overall judgments handed down by the court in the last years.[387] The prospect of granting financial relief to the individual victim of human rights has seen severe limitations in the ECtHR's 2002 decisions in *Al-Adsani v United Kingdom,*[388] *Fogarty v United Kingdom*[389] and

[385] *Ann Maria Garcia Lanza de Netto v. Uruguay*, Communication No. 8/1977, U.N. Doc. CCPR/C/OP/1 p 45 (1984) decided on 3 April 1980, also known as the *Weissmann* communication.
[386] Which amended former Article 50 ECHR.
[387] The court rendered 1,547 judgments in 2002 and 2004, see Shelton (n 199) 198.
[388] App. No. 35763/97 Judgment 1 Nov. 2001 in 34 *EHRR* (2002) 273 *et seq*.
[389] App. No. 37112/97 Judgment 21 Nov. 2001 in 34 *EHRR* (2002) 302 *et seq*.

McElhinney v Ireland[390] which effectively confirmed the principle of state sovereignty as a bar to civil jurisdiction and as such ruled out any redress able violation of the ECHR in that particular case.[391]

The IACtHR uses Article 63 (1) of the American Convention on Human Rights of 1969 whereby "fair compensation shall be paid to the injured party". The IACtHR has since its *Velasquez Rodriguez v. Honduras*[392] decision of 1988 granted such financial redress at a frequent rate: the court has to date delivered over 41 judgments on state responsibility for human rights violations and ordered the respective states to pay reparations.[393] The scope of compensation awards, rendered by the court, has increased in terms of generosity and quality and cover now pecuniary and moral damages as well as costs and attorney fees.[394]

The future ACtHPR could theoretically utilize Article 27 s. 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, "whereas the Court shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation", and thus follow the precedents of the ECtHR and the IACtHR.

The actual practice of the respective organs in granting such financial remedies remains inconsistent and has been subjected to the well-known and already discussed obstacles such as non-compliance, lengthy procedures and varying degrees of acceptance. Besides this, the fact that these financial remedies only apply to the actions, human rights treaty violations, respectively, of states but not of the individual perpetrator, constitutes a shortcoming which still prevents the concept of financial remedies from creating a deterring moment. Part C of this study gives a detailed account and evaluation of financial remedies, civil liability for human rights violations of states and individuals and their adjudication.

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[390] App. No. 31253/96 Judgment 21 Nov. 2001 in 34 *EHRR* (2002) 322 *et seq.*, all three decisions can be retrieved from the court's homepage at http://www.hudoc.echr.coe.int

[391] Such a violation could have consisted in a possible violation of the applicants' right to a fair trial as guaranteed under Article 6 (1) ECHR.

[392] "Inter-American Court of Human Rights: Judgment in Velasquez Rodriguez Case" in 28 *ILM* 291 (1989) and 4 *Inter-Am. Ct. H.R. (ser. C)* (1988).

[393] See http://www.corteidh.or.cr/serie_c/index.html, Laplante (n 265) 351 and Shelton (n 199) 469-477.

[394] Shelton (n 199) 299ff and annex: remedies awarded by the Inter-American Court, 469-477. The court combines in general pecuniary awards with non-pecuniary awards, thus addressing the individual suffering of the victim and the obligations, or breach of such, respectively, of the "perpetrator" states as well.

CONCLUSION PART A

The overall objective of establishing a workable regime for the global protection of human rights based only on the existing international and regional systems might not have been achieved, but the universal recognition and promotion of human rights has become an indisputable key element and focus of today's international policy. Consequently, the notion of state responsibility for human rights violations was developed, which led to an intra- and inter-state awareness of the existence of human rights and the need to protect them.

However, the existing forms of state accountability have failed to stop the commission of human rights violations, as the international community is witnessing on a daily basis. The main reasons for this failure are, firstly, that compliance with human rights obligation is still largely at the discretion of the respective state with the direct consequence that only states with a highly developed human rights law culture comply with these obligations; secondly, the lack of supplementing human rights provisions which establish individual and non-state actor responsibility exempt the actual perpetrators of human rights violations from accountability;[395] and, thirdly, that there is still no universal forum for addressing such violations in place as, for example, a Universal Human Rights Court as an additional body to the ICJ or as a new independent judicial organ.

The general awareness of the need to protect human rights, as documented in the various international and regional human rights instruments, might, hopefully, enhance the possibility that existing human rights conditions will be improved. The ongoing development of human rights protection regimes with their respective legal instruments provides the world with impressive guidelines and court authorities for use under an additional and supplementing regime of individual civil accountability.

Generally, the nature of conventions as international treaties leaves the future implementing of human rights solely to the discretion of the individual signatory states. "Opting out" and "claw-back" clauses and eventually the legal possibilities for states to suspend their membership or even withdraw totally from human rights treaties without any mandatory sanctions[396] are further reasons for non-compliance with existing human rights regimes.

[395] Nowak (n 22) 289.
[396] See the examples of the withdrawal from the American Convention of its member states Jamaica, Trinidad and Tobago from the American Convention in 2002 document.

The often weak enforcement mechanisms of the existing human rights regimes further reduce their already limited effectiveness.[397] An individual victim seeking redress for violations of his human rights (or an organization or NGO acting on his behalf) depends on the existence of such an effective system; the lack of it will ultimately deter not the human rights offender, but the one seeking protection from gross human rights atrocities.

Consequently, the establishment of an international judicial organ for human rights protection in the form of a permanent "Universal Human Rights Court", in addition to the International Court of Justice or as an integrated body to it, equipped with universal human rights jurisdiction and explicit enforcement means would improve the protection of human rights considerably.

In conclusion one can state that there are serious shortcomings and weaknesses in existing international and regional human rights monitoring and protection mechanisms. These mechanisms create only the opportunity to publicize human rights atrocities, organize support for the victims and their relatives and apply pressure on states and individuals through documenting and denouncing atrocities.[398] Safeguarding the actual protection of human rights, preventing human rights violations and, ultimately, deterring future human rights perpetrators are at present outside the actual capabilities of the existing human rights regimes.[399] The *Rwandan mass violations case*[400] before the ACHPR exemplifies this inherent weakness of the present human rights protection regimes. Even the prior documentation of serious human rights violations before an international forum could not prevent the commission of the later genocide in Rwanda in 1994.

[397] See the *Shaka Sankofa* case before the Inter-American Commission on Human Rights, Case 11.193 of August 11, 1993, as a drastic example for non compliance of a member state with a human rights' organ's request. The petitioner was executed by the US while his complaint was pending before the Commission and the US formally being requested to suspend the execution, Inter- American Commission on Human Rights, *Press Release No. 9/00*, June 28, 2000.
[398] Especially the latter is becoming more and more important in regard to later criminal and civil accountability.
[399] See Lattimer "Enforcing Human Rights through International Criminal Law" in Lattimer and Sands (n 153) 387, who identifies "a crisis in the international system of human rights protection".
[400] See the (joined) communication nos. 27/89, 46/91, 49/91 and 99/93 before the ACHPR, retrievable at http//www.achpr.org.